The EU Bill of Rights' Diagonal Application to Member States

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Comparative Perspectives of Europe's Human Rights Deficit

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Csongor István Nagy[*]

It is out of the question that nowadays the European competence to defend rule of law and human rights against Member States is one of the core issues of the 'European project'. In the last decade, the EU institutions have made several, benevolent but feeble, attempts to enforce rule of law and human rights requirements.[1] All of these showcased how little power the EU has when encountering recalcitrant Member States who are contemptuous of the EU's fundamental values. Of course, the reason why the EU has a human rights problem is neither local attitudes nor the fact that it lacks the power to effectively protect fundamental freedoms and rule of law against its Member States. The reason is that there is a significant tension between the federal values and certain local attitudes.

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1 *See e.g.* European Commission's Press Release of 6 July 2012 on Romania, expressing concerns 'about current developments in Romania, especially regarding actions that appear to reduce the effective powers of independent institutions like the Constitutional Court', available at: http://europa.eu/rapid/press-release_MEMO-12-529_en.htm; Speech of Neelie Kroes, vice president of the European Commission responsible for the Digital Agenda, on Hungary's new media law (SPEECH/11/6) delivered in the European Parliament (Brussels, 11 January 2011), available at: http://europa.eu/rapid/press-release_SPEECH-11-6_en.htm; Statement from the president of the European Commission and the secretary general of the Council of Europe on the vote by the Hungarian Parliament of the Fourth amendment to the Hungarian Fundamental Law (Brussels, 11 March 2013), available at: http://europa.eu/rapid/press-release_MEMO-13-201_en.htm; Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) (25 June 2013), Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Rui Tavares, available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN; Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law. COM/2014/0158 final; European Commission's Press release of 7 December 2017: Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law, available at: http://europa.eu/rapid/press-release_IP-17-5004_en.htm; European Commission's Press release of 20 December 2017: Rule of Law: European Commission acts to defend judicial independence in Poland, available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

The major source of the EU's human rights problem is that the current European system in relation to Member States, at least as it operates, combines the naivety of a preachment and the simplicity of a bludgeon. Article 2 of the Treaty on European Union (TEU) declares that the EU "is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Nonetheless, this remains an empty declaration as long as no effective legal mechanism is attached to actually compel Member States to respect fundamental rights and freedoms in general.

The EU Charter of Fundamental Rights has, in principle, no diagonal application: it is, in principle, addressed to EU institutions; it applies to Member States only when they act as the EU's agents (*i.e.* implement EU law).[2] The European Commission has been very creative in availing itself of its competences and used unconnected (*i.e.* non-human-rights-related) provisions of EU law to shelter fundamental rights (*e.g.* the free movement principles of the internal market to protect minority rights or the prohibition of discrimination based on age to protect the independence of the judiciary).[3] The recent proposal to make EU funding conditional on rule of law[4] may be a further example. Nonetheless, these sporadic successes could not provide a comprehensive solution.[5]

The political mechanism embedded in Article 7 TEU is meant to reinforce the elevated declaration of Article 2 TEU. Although it is cherished as a nuclear bomb, it is rather a security valve, which is found wanted on at least three points. First, it is unavailable in terms of practical feasibility, because of the requirement of unanimity. Second, it is ineffective in terms of legal remedy, because it offers no redress but merely a sanction on the delinquent Member State. While a remedy could reinforce the trust in the 'federal' government, a sanction on the Member States may actually have a counterproductive effect and fuel nationalist sentiments, especially in case of a country that carries out a mutiny against Brussels and European federalism. Third, it is summary and oversimplified: because of its political character and the general condemnation, it does not concentrate on the

2 Art. 51. *See e.g.* Jakab, András, Application of the EU Charter by National Courts in Purely Domestic Cases (October 21, 2014). András Jakab/Dimitry Kochenov (Eds.), The Enforcement of EU Law and Values: Ensuring Member States' Compliance (Oxford: Oxford University Press Forthcoming), available at: http://ssrn.com/abstract=2512865; Michael Dougan: Judicial review of Member State action under the general principles and the Charter: defining the 'Scope of Union Law', *Common Market Law Review*, Vol. 52, 2015, p. 1201.

3 C.I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's "Federal Bill of Rights" to Member States (October 15, 2017)', *Indiana International & Comparative Law Review*, Vol. 27, No. 1, 2017, pp. 9-11.

4 S. Gopalan, 'Linking EU Funds to "Rule of Law" Is Innovative – But Vague (7 May 2018)', available at: https://euobserver.com/opinion/141757. *See* G. Halmai, 'The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States', EUI Working Papers Law 2018/06, available at: http://cadmus.eui.eu/bitstream/handle/1814/51644/LAW_2018_06.pdf?sequence=1.

5 The EU's failure to protect fundamental rights in an effective manner has attracted a good deal of criticism. *See, e.g.*, G. Halmai, 'The Early Retirement Age of the Hungarian Judges', *in* Nicola Fernanda and Bill Davis (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, Cambridge University Press, 2017, pp. 471-488.

act but on the person, which may cause more harm than benefit. While the established metaphor for Article 7 TEU is nuclear (or atomic) bomb, in reality it is just a bludgeon.

Fortunately, comparative federalism provides an array of experiences, solutions and techniques, which help the European integration to grasp and address the diagonal human rights problem and to take stock of its solutions. The spectrum of federal patterns is wide, ranging from Canada, where the Charter of Rights and Freedoms applies equally to the federal government and the provinces and the bifurcation of the Bill of Rights was discarded,[6] to Australia, where there is no federal Bill of Rights at all. In between stands the United States, whose constitutional history appears to provide the closest parallelism to the EU. The current EU architecture clearly parallels the first century of US constitutional history: although today, due to the incorporation doctrine, most fundamental rights valid against the federal government can be invoked also against the states,[7] the first century of US constitutional law reveals a federal approach similar to Article 51 of the EU Charter of Fundamental Rights. Although the American Constitution sporadically established a couple of limits against states that may be regarded as human rights in nature,[8] the arsenal of human rights protection as enshrined in the US Constitution's first ten amendments (the federal Bill of Rights) did not apply to states until the adoption of the Fourteenth Amendment (after the Civil War); for a century, states were limited only by the rules of state constitutions.[9]

The parallelisms and similarities between the first one and a half centuries of US constitutional history and the current European architecture are manifold. In both systems, the federal Bill of Rights (the EU Charter of Fundamental Rights and the US Constitution's first ten amendments) has been the product of the same thinking (no public power may exist without human rights clogs) and was, initially, introduced to limit the federal government without any endeavour to introduce a federal human rights watchdog for the states. In Europe, the predecessors of the Charter had been the general principles of law, a concept developed by the Court of Justice of the European Union (CJEU), among others, to introduce human rights limits against the actions of the EU. The CJEU established very early that the EU has to respect human rights even if they are not explicitly provided for in EU law, simply because it is evidently natural that public power goes hand in hand with human rights limits.[10] These court-developed human rights requirements culminated in the Charter, which was likewise not intended

6 Section 32(1) of the Canadian Charter of Rights and Freedoms.

7 J.R. Kanovitz, *Constitutional Law 23*, 12th ed., 2010.

8 *See* Article I Section 10 of the US Constitution: "[n]o state shall (…) pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

9 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

10 *See* P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, Vol. 39, 2002, pp. 945, 958-969.

to be a general human rights 'watchdog' but a check on the EU's 'federal' government.[11] This approach informs the scope of the Charter as defined in Article 51.

The extension of the federal Bill of Rights to the states (an accomplished fact in the United States and a historical necessity in Europe) was and is inspired by a 'ground of divorce' type of thinking. The American Civil War proved that there are certain common core values which have to be respected throughout the Union and there are certain practices that violate, to use conflicts law phraseology, the Union's 'most basic notions of morality and justice'.[12] This recognition fuelled the adoption of the Fourteenth Amendment, which provided for the applicability of a few federal fundamental rights to states. Interestingly, the idea of a bifurcated fundamental rights protection was so deeply entrenched in the American constitutional thinking that US courts rejected the extension for half a century.[13] The constitutional experience that entailed a shift in this system was the recognition that if states did not agree with one another in upholding certain rights, the system would be unsustainable.

American constitutional history also provides a caveat for Europe. While this has not always been the case, at the end of the day the Fourteenth Amendment almost unified human rights law in the United States. Subsidiarity and state constitutional identities could have been given room in two ways: incorporating only part of the enumerated rights and interpreting the incorporated rights in a more flexible manner to afford states a certain margin of appreciation to display local values and idea. After a period of balking, both of these were rejected. Although

11 *See* F. Fontanelli, 'The implementation of European Union law by Member States under Article 5 1(1) of the Charter of Fundamental Rights', *Columbia Journal of European Law*, Vol. 20, No. 2, 2014, pp. 193, 197-198.

12 *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de L'lndustrie du Papier (RAKTA)*, 508 F. 2d 969, 974 (2d Cir. 1974).

13 In *United States v. Cruikshank*, the Supreme Court held that the right to assembly (as enshrined in the First Amendment) "was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone, (…) for their protection in its enjoyment (…) the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). In 1897, the Supreme Court in *Chicago, Burlington & Quincy Railroad Co. v. Chicago* used the Fourteenth Amendment to enforce 'property protection' on states in the name of 'substantive due process'. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). The breakthrough was brought along in 1925, with *Gitlow v. New York*, where the Supreme Court explicitly announced the doctrine of incorporation (in this case with express reference to the First Amendment). *Gitlow v. New York*, 268 U.S. 652 (1925). As to *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, it could be plausibly argued that the purview of the Fourteenth Amendment was not extended, since the Court granted protection to something expressly listed in the Fourteenth Amendment (*i.e.* 'property'). However, in *Gitlow v. New York* the ambit of the Fourteenth Amendment was extended to something not expressly enumerated and the Court made it clear that it was incorporating the First Amendment into the Fourteenth Amendment. Cf. Stanley Morrisona, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 140, 152 (1949) ("The assertion of th[e] [substantive due process] doctrine, incidentally, gave to the Fourteenth Amendment an importance vastly greater than it was supposed to have in 1868. But the development of substantive due process is a story far removed from the question of incorporation of the Bill of Rights."). This was followed by numerous cases extending the application of the federal Bill of Rights to states.

the Supreme Court was, for long, wavering between total and selective incorporation, at the end, it incorporated the vast majority of the rights listed in the first ten amendments.[14] It is true that some of the liberties of the federal Bill of Rights are not incorporated, but they are very few. For the time being, most fundamental rights valid against the federal government can also be invoked against states under the incorporation doctrine.[15] States are, of course, free to have a more generous rights catalogue; however, they may not depart from the national liberties applied via the Fourteenth Amendment.[16] Furthermore, the doctrines of margin of appreciation, subsidiarity and constitutional identity are alien to the Supreme Court's Bill of Rights case law.[17]

This volume presents and examines the current European approach to the application of the federal Bill of Rights to states from a comparative perspective and explores the constitutional and jurisprudential patterns addressing the question of inquiry in a multilevel constitutional architecture. It endeavours to contribute to the current European debate with a new comparative perspective and to foster EU constitutional development with structural patterns worthy of consideration.

The volume is divided into three sections. The first deals with the current status of the diagonal application of EU human rights law to Member States. The second section deals with the more general problems of national constitutional identities and margin of appreciation in multilayered constitutionalism, in particular in the case law of the European Court of Human Rights (ECtHR). The third section consists of six comparative articles and, using the inventory of comparative federalism, aims to take stock of the experiences of Australian and US constitutional law in the diagonal application of the federal Bill of Rights to states.

The EU's current human rights predicament is addressed by three articles (Section 1). The article of Professor Gábor Halmai, titled 'The Application of European Constitutional Values in EU Member States: The Case of the Fundamental Law of Hungary', demonstrates the EU's human rights problem through the case of Hungary. It presents the backsliding of liberal democracy in Hungary, after 2010, and the EU institutions' incapability to compel compliance with the EU's core values.

Professor Marie-Pierre Granger's contribution ('Federalization through Rights in the EU: A Legal Opportunities Approach') explains the dynamics of inte-

14 O.H. Stephens and J.M. Scheb II, *American Constitutional Law*. *Volume II: Civil Rights and Liberties*, Cengage Learning, 2008, pp. 23-25.

15 Kanovitz, 2010.

16 Federal Bill of Rights case-law establishes that the first ten amendments constitute only a baseline and states are free to place further restrictions on their actions to provide a higher level of protection. The federal judicial interpretation of the federal constitution sets a 'minimum' level of rights protection but states are entirely free to provide greater protection under their own constitutions. For example, no affirmative right to education is secured under the federal constitution but many state constitutions secure that right, states are free to allow 16-year-olds to vote etc.

17 S.G. Calabresi & L.D. Bickford, 'Federalism and Subsidiarity: Perspectives From U.S. Constitutional Law', *in* J.E. Fleming & J.T. Levy (Eds.), *Federalism and Subsidiarity*, NYU Press, 2014, pp. 123, 172-175.

gration-through-rights in the EU, proposing an explanatory framework inspired by a legal opportunities approach. The article argues that the weaker the domestic legal opportunities for human rights protection are, the greater the federalizing pressure is.

The article of Professor Filippo Fontanelli and Professor Amedeo Arena, titled 'The Harmonization Potential of the Charter of Fundamental Rights of the European Union', discusses two underrated and connected aspects that determine the applicability of the EU Charter on Fundamental Rights to Member State actions: first, the Charter is a standard of review for domestic measures only when they are covered but not precluded by EU law; second, because the scope of application of EU law and that of the Charter are identical, the latter suffers from the same uncertainties as the former.

The place and role of national constitutional identities and the doctrine of margin of appreciation in multilayered constitutionalism are addressed by two articles (Section 2).

Professor Koen Lemmens, in his article entitled 'The Margin of Appreciation in the ECtHR's Case Law: A European Version of the Levels of Scrutiny Doctrine?' analyses the European concept of margin of appreciation in comparison with the American doctrine of levels of scrutiny. He argues that due to the institutional framework the differences between the two doctrines are notable and the social consequences may even be radically opposed.

Professor Renáta Uitz and Professor András Sajó ('The Sovereign Strikes Back: A Judicial Perspective on Multi-Layered Constitutionalism in Europe') examine the supranational web of public law emerging in a globalized world with global markets. The question addressed by the authors is whether it is possible to guarantee freedom, rule of law and efficiency in a multilayered era where it is difficult to pinpoint the centre of authority.

The perspectives of comparative federalism are presented by six articles from two continents.

Professor Kenneth R. Stevens, in his article titled 'Perspectives on Comparative Federalism: The American Experience in the Pre-incorporation Era', presents the pre-Civil-War era. Why no Bill of Rights was included into the US Constitution at the constitutional convention and how subsequently the recognition that the Constitution's ratification could fail without the inclusion of a Bill of Rights led to the adoption of the first ten amendments in 1791.

Professor Lee J. Strang's article ('Incorporation Doctrine's Federalism Costs: A Cautionary Note for the European Union') presents how the US Supreme Court incorporated the federal Bill of Rights against the states and argues that this has come with significant costs to federalism, providing a cautionary note for the EU. The author identifies options for the development of EU law.

The article of Professor Howard Schweber ('The Architecture of American Rights Protections: Texts, Concepts and Institutions') presents the architecture of American rights protections in three senses: textual, conceptual and institutional. Through the development of these three architectures of rights, the author demonstrates the dimensions of the strengths, limitations and distinctive character of the American rights protections in theory and in practice.

Professor Barry Sullivan ('Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens: Searching for the Golden Mean in US Constitutional Law') examines the standards of review in cases where government action is challenged on equal protection grounds.

The article of Professor Brett G. Scharffs, titled 'Trinity Lutheran and Its Implications for Federalism in the United States', analyses the 'tire scrap' playground case, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, decided by the US Supreme Court in the summer of 2017, and its implications for federalism in the United States.

Professor Nicholas Aroney and Professor James Stellios, in their article titled 'Rights in the Australian Federation', present the unique Australian constitutional system, which has been a very stable federal democracy, maintaining high levels of personal freedom, political rights, civil liberties and the rule of law, without containing an entrenched Bill of Rights.

The Application of European Constitutional Values in EU Member States

The Case of the Fundamental Law of Hungary

Gábor Halmai[*]

A Introduction

This article deals with recent deviations from the shared values of rule of law and democracy – the 'basic structure' of Europe – in Hungary. The starting point of the deviation is Article 2 of the Treaty of the European Union (TEU), which demands "respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities". The principles of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still had to overcome authoritarian traditions. The TEU sets out the conditions, in Article 49, and principles, in Article 6(1), to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy, rule of law, protection of human rights, and respect for, and protection of, minorities. This was the main instrument governing the greatest enlargement in EU history: starting in 2004 with ten new Member States, mostly former socialist countries, followed by the accession of Romania and Bulgaria in 2007 and concluded by the admission of Croatia in 2013.[1] As Dimitry Kochenov argues, the assessment of democracy and the rule-of-law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgment that the Copenhagen political criteria had been met.[2] It happened only after Croatia's accession that the European

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1 The Croatian enlargement was somewhat special, as it was part of the EU's Stabilization and Association Policy, and the conditionality too was different. Inter alia, it included the collaboration with the ICTY. I am grateful to Elizabeth van Rijckevorsel for pointing this out.

2 D. Kochenov, 'Behind the Copenhagen façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', *European Integration Online Papers (EIoP)*, Vol. 8, No. 10, 2004, available at: http://eiop.or.at/eiop/pdf/2004-010.pdf (last accessed 28 April 2017).

Commission suggested various adjustments to the negotiation procedure.[3] However, not only were the conditionality requirements not taken seriously, but their maintenance was also missing after accession.[4] The only case where the EU expressed some doubts and extended the validity of pre-accession values-promotion in the form of a post-accession monitoring was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members.[5] (During the 2012 Romanian constitutional crisis, the Commission successfully used the circumstance that the mechanism had been expected to be discontinued as leverage.[6])

The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which might be one of the reasons for non-compliance after accession in some of the new Member States. The other reason is certainly the authoritarian past of the new democracies. Even though the immediate cause might have been the Austrian 'Haider affair'[7], as Wojciech Sadurski rightly argues, the history of the Central and Eastern European candidate countries was the main reason why Article 7 TEU was revised in the Treaty of Nice. This new provision made it possible not only to react to a Member State's serious and persistent breach of principles mentioned in then-Article 6(1) TEU, but also to intervene in case there is a 'clear risk' thereof.[8]

The weakening of liberal constitutional democracy in Hungary started after the landslide victory of the centre-right Fidesz party in the 2010 parliamentary elections. This article presents how this process evolved and how little EU law and EU institutions could do to obviate the dismantling of liberal constitutional democracy in a Member State.

3 *See* C. Hillion, 'Enlarging the European Union and Deepening Its Fundamental Rights Protection', *European Policy Analysis*, June Issue, 2013, p. 6.

4 About the so-called 'Copenhagen dilemma' *see* C. Closa, 'Reinforcing EU Monitoring of the Rule of Law', *in* C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, p. 15-35.

5 M. Vachudova & A. Spendzharova, 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession', *SIEPS European Policy Analysis*, Vol. 1, 2012.

6 *See* Á. Bátori, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration*, Vol. 94, No. 3, 2016.

7 In 2000, the far-right Freedom Party, headed by Jörg Haider, became the coalition partner of the centre-right government, which led to unilateral measures by the Member States against Austria. But this action has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. As the 'report of the three wise men' mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments. For a detailed analysis of the genesis of Art. 7 *see* F. Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?', *in* A. von Bogdandy & P. Sonnevend, *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, London, Hart Publishing, 2015, p. 202-205.

8 W. Sadurski, 'Adding a Bite to the Bark? A Story of Article 7, EU Enlargement, and Jörg Haider', *Columbia Journal of European Law*, Vol. 16, 2010, p. 394.

B The 'Constitutional Counter-Revolution' after 2010

Hungary was one of the first and most thorough political transitions, which provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably model, case of constitutional backsliding from a full-fledged liberal democratic system to an illiberal one with strong authoritarian elements.

The seriousness of the core values of the EU can be examined through Hungary's deliberate non-compliance with the principles of constitutional democracy, because it has not yet received significant external sanctions or substantial internal opposition. Therefore, the case has broader implications for Europe, and it even has resonance in some other, especially former communist, countries of the region.

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a market economy and a democratic structure all together.[9] Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a 'rule of law' constitution were delineated in the National Roundtable Talks of 1989 by participants in the Opposition Roundtable and representatives of the state party. Later, the illegitimate Parliament only rubber-stamped the comprehensive amendment to the Constitution, which came into effect on 23 October 1990, the anniversary of the 1956 revolution. This was the basic document of the 'constitutional revolution' until 1 January 2012.

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.[10] Fidesz fed these sentiments by claiming that there had been no real transitions in 1989-1990, and that the previous 'nomenklatura' had merely converted its lost political power into economic influence, pointing to the previous two prime ministers of the Socialist Party, both of whom became rich after the transition owing to privatization. The populism of the Fidesz party was directed against all elites, including the elites who designed the 1989 constitutional system (in which Fidesz had also participated), claiming that it was time for a new revolution. That is why Viktor Orbán, the head of Fidesz, characterized the results of the 2010 elections as a "revolution of the ballot boxes". His intention with this revolution was to eliminate all kinds of checks and balances and even the parliamentary rotation of governing parties. In September 2009 Orbán made a speech in which he predicted that there was "a real chance that politics in

9 The terms 'single' and 'dual' transitions are used in A. Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*, 1991. Later, Claus Offe broadened the scope of this debate by arguing that post-communist societies actually faced a triple transition, since many post-communist states were new or renewed nation-states. *See* C. Offe, *Varieties of Transition: The East European and East German Experience*, New York, MIT Press, 1997.

10 In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and 23% in the Czech Republic reported worsening conditions, and 70% and 75%, respectively, perceived improvement.) Eurobarometer, 2009.

Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the centre of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests". Orbán's vision for a new constitutional order – one in which his political party occupies the centre stage of Hungarian political life and puts an end to debates over values – has now been entrenched in a new constitution, which entered into force in April 2011.[11]

In its opinion, approved at its plenary session of 17-18 June 2011, the Council of Europe's Venice Commission expressed its concerns about the document, which was drawn up in a process that excluded the political opposition and professional and other civic organizations.[12]

Before 1 January 2012, when the new Constitution came into effect, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These legal regulations affect the rights on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, functioning of the Constitutional Court and elections to the Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it came into effect. These new regulations had detrimental effects on the political independence of state institutions, for the transparency of lawmaking and the future of human rights in Hungary.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 Constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. Requests were rebuffed by the European Union (EU), the Council of Europe and the US government urging the government to seek the opinion of the Venice Commission before bring-

11 In an interview on Hungarian public radio on 5 July 2013, elected Prime Minister Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal Constitution. He said: "In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle, or should it create a balance between the rights and duties of the individual? According to my recollection, more than 80% of the people responded by saying that they wanted to live in a world where freedom existed but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason, the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there." *See* A. Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, 5 July 2013. Kossuth Rádió.

12 *See* www.venice.coe.int/webforms/documents/CDL-AD(2011)016-E.aspx (last accessed 28 April 2017). Fidesz's counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

ing the amendment into force. The most alarming change concerning the Constitutional Court was that the amendment annulled the precedential value of all court decisions prior to the Fundamental Law's entry into force. On the one hand, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the terminology of the old and new constitutions were substantially the same, prior decisions would still be valid and could still be used as precedents. In cases where the new Constitution substantially diverged from the old one, earlier decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – accordingly, as a matter of practice, the Fourth Amendment annuls primarily the decisions that defined and protected constitutional rights and harmonized domestic rights protection with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

In April 2014, Fidesz, with 44.5% of the party-list votes, won the elections again, and owing to 'undue advantages' for the governing party provided by the amendment to the electoral system,[13] it acquired a two-thirds majority in the Parliament. In early 2015, Fidesz lost its two-thirds majority as a consequence of mid-term elections in two constituencies. However, the far-right Jobbik received 20.5% of the party-list votes, so opponents of liberal democratic values still enjoy the support of the overwhelming majority of voters, who are not concerned about the backsliding of constitutionalism.

C The EU's Failed Efforts to Protect European Values

Despite the fact that the EU has direct legal authority to protect the values of constitutionalism in the Member States, it preferred to use indirect means of pressure, largely dependent on EU economic competences.[14] Until 2013, when the Fourth Amendment to the Fundamental Law was enacted, the EU did not use any of its capacities. In March 2013, after the Fourth Amendment was introduced to the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safe-

13 "A number of amendments negatively affected the election process, including important checks and balances…The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media" – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report. *See* Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentary Elections, 6 April 2014.

14 *See* M. Dawson & E. Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law', *German Law Journal*, Vol. 14. No. 10, 2013.

guard the fundamental values of the EU, secure compliance, and for the Commission to take an increased role in it. Later, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impact of the Fourth Amendment to the Fundamental Law of Hungary.[15] The report is named after Rui Tavares, a Portuguese Member of the European Parliament (MEP) at that time, who was the rapporteur of this detailed study of Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.

With its acceptance of the Tavares Report, the European Parliament has created a new framework for enforcing the principles of Article 2 TEU. The report called on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report but rather an outright rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on 'the equal treatment due to Hungary'. The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report and creating institutions that violate Hungary's sovereignty as guaranteed by TEU. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government's reduction of the energy costs of families. This Hungarian policy could allegedly undermine the interests of numerous European companies, which have gained, for years, extra profits abusing their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government "not to cede to the pressure of the EU, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families".[16] These words very much reflect the Orbán government's view on the liberty of the state (or the nation) to determine its own laws: "This is why we are

15 www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN (last accessed 28 April 2017).

16 On the very day that the resolution of the Hungarian Parliament was announced, Hannes Swoboda (Austria), the leader of the S&D Group at the European Parliament, said in a press release that the resolution was an *'insult to the European Parliament'* and demonstrated that Hungary's Prime Minister, Viktor Orbán, does not yet understand the values of the EU. *See* Hungarian Parliament rejects Tavares report. Brussels, 5 July 2013, Agence Europe.

writing our own constitution…And we don't want any unsolicited help from strangers who are keen to guide us…Hungary must turn on its own axis."[17]

Encouraged by the Tavares report, Commission President Barroso also proposed a robust European mechanism to be "activated as in situations where there is a serious, systemic risk to the Rule of Law".[18] Commission Vice-President Reding, too, announced that the Commission would present a new policy communication.[19]

Owing to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address the concerns set out by the European Parliament. The changes left in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian Parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.[20] The government's reasoning states that the amendment aims to "finish the constitutional debates at international forum" (meaning with the EU – G.H.). A statement from the Prime Minister's Office stated: "[t]he government wants to do away with those… problems which have served as an excuse for attacks on Hungary." But this minor political concession does not really mean that the Hungarian government ever respected at least the formal rule of law, as some commentators claim.[21]

As none of the suggested elements have worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States.[22] This framework is complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation

17 For the original, Hungarian-language text of Orbán's speech, entitled Nem leszünk gyarmat! [We won't be a colony anymore!] The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, *see, e.g.*, Financial Times: Brussels Blog, 16 March 2012, available at: http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC (last accessed 28 April 2017).

18 J.M.D. Barroso, 'State of the Union address 2013', Plenary session of the European Parliament (Strasbourg: 1 September, 2013) SPEECH/13/684. http://europa.eu/rapid/press-releaseSPEECH-13-684en.htm.

19 V. Reding, '*The EU and the Rule of Law – What Next?*', Centre for European Policy Studies (Brussels: 4 September, 2013) SPEECH/13/677. http://europa.eu/rapid/pressreleaseSPEECH-13-677es.htm. Last visited on 28 April 2017.

20 Both the foreign and the Hungarian Human Rights NGOs said that the "amendments show the government is not serious about fixing human rights and rule of law problems in the constitution". *See* the assessment of Human Rights Watch: www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short (last visited on 28 April, 2017) and the joint opinion of three Hungarian NGOs: http://helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-avege (last accessed 28 April 2017).

21 *See* A. von Bogdandy, 'How to Protect European Values in the Polish Constitutional Crisis', *verfassungsblog.de*, 31 March 2016.

22 Communication from the Commission to the European Parliament and the Council of 11 March 2014, A new EU Framework to strengthen the Rule of Law, Brussels, 19 March 2014 COM(2014) 158 final/2 http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf (last accessed 28 April 2017).

of EU law. As the Hungarian case has shown, infringement procedures are usually too narrow to address the structural problems entailed by persistently non-compliant Member States. This happened when Hungary suddenly lowered the retirement age of judges and dismissed the most senior 10 percent of the judiciary, including a lot of court presidents, and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The Court of Justice of the European Union (CJEU) in *Commission v. Hungary* established the violation of EU law.[23] However, unfortunately, the decision was not able to reinstate the dismissed judges in their original positions and to stop the Hungarian government from keeping on relentlessly undermining the independence of the judiciary and weakening other checks and balances with its constitutional reforms. Apparently, the CJEU wanted to stay away from Hungarian internal politics, merely enforcing the existing EU law rather than evaluating the constitutional framework of a Member State politically.[24] This was the reason that Kim Lane Scheppele suggested reframing the ordinary infringement procedure to enforce the basic values of Article 2 through a systematic infringement action.[25]

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to rule of law. This new framework can best be described as a 'pre-Article 7 procedure', since it establishes an early warning tool to tackle threats to rule of law and allows the Commission to enter into a dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 will be used. The framework process is designed as a three-step procedure. First, the Commission assesses the situation in the Member State, collecting information and evaluating whether there is a systemic threat to rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations about how to resolve the issue. Third, the Commission monitors the response and the follow-up of the Commission's recommendations.

In June 2015, the European Parliament passed a resolution condemning Viktor Orbán's statement on the reintroduction of the death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure against Hungary.[26] But the Commission ultimately refused to launch the procedure on the argument that though the sit-

23 ECJ, 6 November 2012, Case C-286/12.

24 For the detailed facts of the case and the assessment of the ECJ judgement, *see* G. Halmai, 'The Case of the Retirement Age of Hungarian Judges', *in* F. Nicola & B. Davies (Eds.), *EU Law Stories*, Cambridge, Cambridge University Press, 2016.

25 *See* K.L. Scheppele, 'Enforcing the Basic Principle of EU Law through Systemic Infringement Procedures', *in* C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, p. 105-132.

26 www.europarl.europa.eu/news/en/news-room/20150605IPR63112/hungary-meps-condemn-orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey (last accessed 28 April 2017).

uation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights.[27]

In December 2015, after the Hungarian Parliament enacted a series of anti-European and anti-rule-of-law immigration laws[28] as a reaction to the refugee crisis, the European Parliament, again, voted on a resolution calling on the European Commission to launch the Rule of Law Framework. The Commission continued to use the usual method of infringement actions, finding the Hungarian legislation in some instances to be incompatible with EU law, in particular, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive

27 Hungary: no systemic threat to democracy, says Commission, but concerns remain, Press Release, 2 December 2015.

28 *See* G. Halmai, 'Hungary's Anti-European Immigration Laws', *Tr@nsit Online*, 4 November, 2015, available at: www.iwm.at/read-listen-watch/transit-online/hungarys-anti-european-immigration-laws (last accessed 28 April 2017).

2010/64/EU).[29] This was the first time that the Commission has alleged a violation of the Charter of Fundamental Rights in an infringement action.[30]

D The Hungarian Reaction: National Constitutional Identity

After the aforementioned legislative measures, the Hungarian government started a campaign against the EU's migration policy. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer a single referendum question: "Do you want to allow the EU to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?" Though 92% of those who cast votes and 98 of all the valid votes agreed with the government, answering 'no' (6% were spoiled bal-

29 Regarding the asylum procedures, the Commission was concerned that there was no possibility to refer to new facts and circumstances in the context of appeals and that Hungary was not automatically suspending decisions in case of appeals – effectively forcing applicants to leave the territory before the time limit for lodging an appeal expired or before an appeal has been heard. Regarding rights to translation and interpretation, the Commission was concerned that he Hungarian law fast-tracked criminal proceedings for irregular border crossings, which did not respect provisions of the Directive on the right to interpretation and translation in criminal proceedings, which ensures that every suspect or accused person who does not understand the language of the proceedings is provided with a written translation of all essential documents, including any judgments. Also, the Commission expressed its concerns about the fundamental right to an effective remedy and a fair trial under Art. 47 of the Charter of Fundamental Rights of the EU. There were concerns about the fact that under the new Hungarian law dealing with the judicial review of decisions, in the event that an asylum application is rejected, a personal hearing of the applicant is optional. The fact that judicial decisions are taken by court secretaries (a sub-judicial level) that lack judicial independence also seems to be in breach of the Asylum Procedures Directive and Art. 47 of the Charter. http://europa.eu/rapid/press-release_IP-15-6228_en.htm (last accessed 28 April 2017).

30 *See* this option as one of three scenarios using the Charter as a treaty obligation in Hoffmeister, 2015, p. 201. (According to Hoffmeister, in the first scenario, a Charter right is further specified by EU secondary law. For example, Art. 8 Charter on the protection of personal data lies at the heart of Directive 95/46/EC, which largely harmonizes the rules on data protection in Europe. In the second scenario, the Charter right is not underpinned by specific EU legislation. That is the case, for example, with Art. 10(1) of the Charter on the freedom of thought, conscience and religion.) According to Armin von Bogdandy and his colleagues, national courts could also bring grave violations of Charter rights, such as freedom of the media in Art. 11, to the attention of the CJEU by invoking a breach of the fundamental status of Union citizenship in conjunction with core human rights protected under Art. 2 TEU. The idea behind this proposal is that the EU and Member States can have an interest in protecting EU citizens within a given member state. *See* A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei & M. Smrkolj, 'Reverse Solange. Protecting European Media Freedom Against EU Member States', *Common Market Law Review*, Vol. 49, No. 2, 2012. The proposal was released for public debate by the German-English language public law portal *verfassungsblog.de* in February 2012 (*see* A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei & M. Smrkolj, 'A Rescue Package for EU Fundamental Rights – Illustrated with Reference to the Example of Media Freedom', *Verfassungsblog*, 15 February 2012, available at: http://verfassungsblog.de/ein-rettungsschirm-fr-europische-grundrechte/Last visited on 28 April, 2017. The debate initiated by the editors (http://verfassungsblog.de/category/schwerpunkte/rescue-english (last accessed 28 April 2017) featured comments by M. Hailbronner, D. Halberstam, D. Kochenov, M. Kumm, P. Lindseth, A. Katharina Mangold, D. Thym, W. Sadurski, P. Sonnevend, R. Uitz & A. Wiener.

lots), as the turnout was only around 40%, the referendum was invalid. This was an own goal made by the Orbán government, which – after successfully using a popular referendum to overthrow its predecessor – made it more difficult to initiate a valid referendum. While the previous law required only 25% of the voters to cast a vote, the new law requires at least 50%, failing which the referendum is invalid. According to the old law, all but one of the six referendums held since 1989 have been valid.

The referendum was announced by Prime Minister Viktor Orbán at the end of February 2016 to ask Hungarian voters whether to accept the September 2015 decision of the Council of the European Union on the mandatory quotas for relocating a total of 160,000 migrants over 2 years, of which Hungary would be obliged to take 1,294 altogether. In his announcement, Orbán said, "It is no secret that the Hungarian government refuses migrant quotas" and will be campaigning for 'no' votes. Orbán argued the quota system would "redraw Hungary's and Europe's ethnic, cultural and religious identity, which no EU organ has the right to do". Hungary's Foreign Minister added: "[w]e are challenging the quota decision at the European Court of Justice and we firmly believe that that decision was made with a disregard to EU rules."

The referendum question was legally challenged before the National Election Committee, which was authorized to approve the question. The challenge was based on Article 8(2) of the Fundamental Law, which states that "[n]ational referendums may be held about any matter falling within the functions and powers of the National Assembly." The petitioners stressed that since the Parliament had no jurisdiction over the European Council's binding decision on quotas, the question also violated the requirement of certainty regarding a question to be answered by referendum; notably, neither the voters nor the legislation will be aware of the legal consequences of the referendum. However, the Election Committee, the majority of which consisted of government appointees, approved the question, and so did the Supreme Court (*Kúria*) following an appeal. The Parliament officially approved the referendum with votes of the governing party, and the extreme right-wing opposition Jobbik party, while the left-wing opposition boycotted the plenary session. The Constitutional Court rejected the appeals against plans to hold the referendum, and, finally, the President of Hungary, a former Fidesz party member, set 2 October 2016 as the date for the plebiscite.

During the campaign the government aggressively promoted the 'no' votes, spending 15 billion forints or €48.6 million on the campaign, 7.3 times more than the cost of the Brexit campaigns. In early September, the government spent 4.1 million Euros on full-colour, B4-sized booklets to Hungarians at home and abroad making the government's case for why Hungarians should vote 'no'. "Let's send a message to Brussels so they can understand too! We must stop Brussels! We can send a clear and unequivocal message to Brussels with the referendum. We must achieve that it withdraws the dangerous proposal."

The government did not even shy away from violating laws. For instance, the Supreme Court, in a case overturning a decision of the National Election Committee related to Hungarians living abroad, ruled that "campaign letters sent on

behalf of the government to ethnic Hungarians abroad violated the principles of equal opportunity and citizens' entitlement to exercise their rights in a bona fide way". Also, ministry officials were making phone calls on behalf of Fidesz during working hours to voters in rural districts, encouraging them to vote 'no'. Prime Minister Orbán, in a speech at the plenary session of the Parliament, hinted that the globalist opposition planned to strike a deal with Brussels and resettle thousands of migrants in municipalities controlled by the fake left-wing parties. Hence, opposition-headed municipalities would have to take responsibility for not producing enough 'no' votes in the form of having to take in more refugees than other municipalities in the country. The chief of the Prime Minister's Office confirmed that the compulsory distribution of migrants to Hungary would result in cuts in social benefits – the recipients of which are, in many cases, Roma. This has been interpreted as a thinly veiled message to increase voter turnout among the Roma electorate. But the highlight of the hate-filled campaign was the announcement by the deputy chair of the parliamentary commission for national security that it would pursue a national security screening of 22 non-governmental organizations (NGOs) that were protesting against the inhumane politics of the Hungarian government against refugees and calling for the public to invalidate the referendum.

Despite all the immoral and unlawful efforts of the government to influence the Hungarian voters, the majority of them did not cast votes, rendering the referendum invalid. Disregarding this result, on the night of the referendum, Prime Minister Orbán announced an amendment of the Constitution "in order to give a form to the will of the people" and tried to push Brussels by claiming that "in an EU Member State today 92 % of the participants said that they do not agree with the EU proposal; can Brussels force the quotas on us after this?"

Despite the fact that at the time of the referendum the idea of a constitutional amendment was not on the table, arguing with the 3.3 million Hungarians who voted in favour of the anti-EU referendum, Prime Minister Orbán introduced the Seventh Amendment to defend Hungarian constitutional identity to get an exemption from EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause in the Foundation part, and two provisions in the part on Freedoms and Responsibilities.

Following the sentence "[w]e honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation," the following sentence was to be inserted into the National Avowal: "[w]e hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state."

Paragraph 2 of the Europe clause (Article E) of the Fundamental Law was planned to be amended to read:

> Hungary, as a Member State of the European Union and in accordance with the international treaty, will act sufficiently in accordance with the rights and responsibilities granted by the founding treaty, in conjunction with powers granted to it under the Fundamental Law together with other Member States

and European Union institutions. *The powers referred to in this paragraph must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not place restrictions on the Hungarian territory, its population, or the state and its alienable rights*.

The following new paragraph 4 would have been added to Article R: "(4) It is the responsibility of every state institution to defend Hungary's constitutional identity."

Paragraphs 1-4 of Article XIV were planned to be replaced with the following text.

1 No foreign population can be settled into Hungary. Foreign citizens, not including the citizens of countries in the European Economic Area, in accordance with the procedures established by the National Assembly for Hungarian territory, may have their documentation individually evaluated by Hungarian authorities.
2 Hungarian citizens on Hungarian territory cannot be deported from Hungarian territory, and those outside the country may return whenever they so choose. Foreigners residing on Hungarian territory may only be deported by means of legal proclamation. It is forbidden to perform mass deportations.
3 No person can be deported to a state, nor can any person be extradited to any state, where they are in danger, discriminated against, subject to persecution, or where they are at risk of any other form of inhumane treatment or penalty.
4 Hungary will provide asylum to non-Hungarian citizens if the person's country of origin or other countries do not provide protection, and also for those who, in their homeland or place of residence, are persecuted for their race, ethnicity, social standing, religion, or political convictions, or if their fear of persecution is well-founded.

All 131 National Assembly representatives from the Fidesz-KDNP governing coalition voted in favour of the proposed amendment, while all 69 opposition representatives either did not vote (66 representatives) or voted against the amendment (3 representatives). The proposed amendment thus fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law. Although Jobbik, in principle, supported the proposed Seventh Amendment, the party's MPs did not participate in the vote because the government had failed to satisfy Jobbik's demand that the Hungarian Investment Immigration Program, which grants permanent residency in Hungary to citizens of foreign countries who invest 300,000 Euros in government 'residency bonds', be abolished.[31]

After the failed constitutional amendment, the Constitutional Court appears to have come to rescue Orbán's constitutional identity defence of its policies, in particular as to migration. The Court carved out an abandoned petition of the Commissioner for Fundamental Rights, filed a year earlier, before the referendum

31 During the vote on the amendment, Jobbik MPs displayed a sign referring to the programme reading "He [or she] Is a Traitor Who Lets Terrorists in for Money!"

was initiated. In his motion the ombudsman asked the Court to deliver an abstract constitutional interpretation of certain provisions of the Fundamental Law in connection with European Council decision 2015/1601 of 22 September 2015. He submitted the following four questions:

1 Whether the prohibition of expulsion from Hungary in Article XIV(1) of the Fundamental Law forbids only this kind of action by the Hungarian authorities, or if it also covers actions by Hungarian authorities which they use to promote the prohibited expulsion implemented by other states.
2 Whether under Article E(2), state bodies, agencies and institutions are entitled or obliged to implement EU legal acts that conflict with fundamental rights stipulated by the Fundamental Law. If they are not, which state organ can establish that fact?
3 Whether under Article E(2) the exercise of powers bound to the extent necessary may restrict the implementation of the *ultra vires* act. If state bodies, agencies and institutions are not entitled or obliged to implement *ultra vires* EU legislation, which state organ can establish that fact?
4 Whether Article XIV(1) and Article E can be interpreted in a way that authorizes or restricts Hungarian state bodies, agencies and institutions, within the legal framework of the EU, to facilitate the relocation of a large group of foreigners legally staying in one of the Members States without their expressed or implied consent and without personalized and objective criteria applied during their selection.

The Court in its decision 22/2016 (XII. 5.) AB[32] rendered the petition admissible and decided to answer the first question related to the interpretation of Article XIV of the Fundamental Law in a separate judgment. Answering questions 2-4, the Court, relying on the German Federal Constitutional Court's methods of constitutional review of EU law, developed a fundamental rights review and an *ultra vires* review, the latter composed of a sovereignty review and an identity review.[33]

The fundamental rights review is based on Articles E(2) and I(1) of the Fundamental Law. The latter provision declares that "[t]he inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights." Having these rules in mind, and after referring to the *Solange* decisions of the German Federal Constitutional Court, and explicitly to *Solange III* of 15 December 2015 (2 BvR 2735/14), and the need for cooperation in the EU and the primacy of EU law, the Court stated that it cannot

32 The English language translation of the decision is available at the home page of the Hungarian Constitutional Court, available at: http://hunconcourt.hu/letoltesek/en_22_2016.pdf (last accessed 28 April 2017).

33 The German Federal Constitutional Court frequently referred to constitutional identity, but the ECJ has never acknowledged constitutional pluralism. Most recently, in the so-called OMT decision (Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*), the Luxembourg Court stridently defended the supremacy of EU law over national law. In those very rare cases when the ECJ acknowledges a Member State's constitutional identity, it is out of respect for a national legal institution, which was established at the moment of the state's foundation. (This happened in the Fürstin von Sayn-Wittgenstein judgment. Case C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien* [2011] E.T.M.R.12.)

renounce the *ultima ratio* defence of human dignity and other fundamental rights. It further held that as the state is bound by fundamental rights, this binding force of the rights is also applicable to cases where public power, under Article E, is exercised together with EU institutions or other Member States.

Regarding the *ultra vires* review, the Court held that, under Article E(2), there are two main limits on conferred or jointly exercised competences: it can infringe neither the sovereignty of Hungary (sovereignty review) nor its constitutional identity (identity review). The constitutional foundation of the sovereignty review is Article B(1) of the Fundamental Law, which states that "Hungary shall be an independent, democratic rule-of-law State." Paragraphs (3) and (4) contain the standard sovereignty principle: "[t]he source of public power shall be the people," "[t]he power shall be exercised by the people through elected representatives or, in exceptional cases, directly." The Court warned that "Article E(2) should not empty Art B", and it reserved the "presumption of maintained sovereignty"[34] in relation to judging the common exercise of other competences that have already been conferred on the EU.

The identity test, the Court argued, was based on Article 4(2) TEU and on continuous cooperation, mutual respect and equality. Even if it sounds tautological, the Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's "self-identity."[35] Its content is to be determined by the Constitutional Court on a case-by-case basis based on an interpretation of the Fundamental Law as a whole and its provision in accordance with Article R(3), which states that "the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution."

The Court held that

> the constitutional self-identity of Hungary is not a list of static and closed values, but many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical 17 constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.[36]

The Constitutional Court further established that

> the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an

34 Decision 22/2016. (XII. 5.) AB. [81].
35 *Ibid*. [64].
36 *Ibid*. [65].

> international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity have several common points, thus their control should be performed with due regard to each other in specific cases.[37]

Based on the foregoing, the Hungarian justices ruled that the Court itself can examine whether the EU's exercise of power violates first, human dignity or any other fundamental right, second, Hungary's sovereignty or, third, Hungary's constitutional identity rooted in its historical Constitution, and based on this examination, it has the power to override EU law in the name of constitutional identity.

Viktor Orbán's first jubilant reaction shows how enthusiastic he was that the Court has helped the government's ideals to come true by making up for the failed referendum and the Seventh Amendment: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty", adding that the Court's decision is good news for "all those who do not want to see the country occupied." In the same interview, given to the Hungarian Public Radio, Orbán pointed out the next subject of national constitutional identity, referring to the latest EU plan to terminate Hungarian state regulation of public utility prices. He said that the European Commission incorrectly argued that competition in the energy sector leads to lower prices. "Therefore Hungary insists on reducing utility rate cuts and we shall defend it in 2017. Although this will be a very tough battle, we have a chance of success."[38]

The next sign of this battle regarding asylum seekers was another speech that Viktor Orbán delivered in February 2017, in which he stated: "I find the preservation of ethnic homogeneity very important."[39] On 5 March, the same year, a newspaper reported on Hungary's shameful treatment of asylum seekers, including severe beatings with batons and the use of attack dogs.[40] Two days after the report was published, on March 7, the Hungarian Parliament passed an amendment to the Asylum Act that forces all asylum seekers into guarded detention camps.[41] While their cases are being decided, asylum seekers, including women

37 *Ibid*. [67].

38 http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel (last accessed 28 April 2017).

39 Speech delivered on 28 February 2017 at the annual gathering of the Hungarian Chamber of Commerce. *See* É.S. Balogh, 'Viktor Orbán's 'ethnically homogenious Hungary', *The Hungarian Spectrum*, 3 March 2017, available at: http://hungarianspectrum.org/2017/03/01/viktor-orbans-ethnically-homogeneous-hungary/.

40 The report from Belgrade was published in the Swedish newspaper Aftonblader, available at: www.aftonbladet.se/nyheter/a/noLbn/flyktingarna-den-ungerska-polisen-misshandlar-och-torterar-oss.

41 www.upi.com/Top_News/World-News/2017/03/07/UN-Hungary-plan-for-refugee-camps-illegal-harmful-to-children/4631488910166.

and children over the age of 14, will be herded into shipping containers surrounded by a high razor-fence on the Hungarian side of the border.[42]

E The Latest European Responses

On 14 March 2017, the European Court of Human Rights (ECtHR) found that the detention of two Bangladeshi asylum seekers for more than three weeks in a guarded compound without any formal, reasoned decision and without appropriate judicial review had amounted to a de facto deprivation of their liberty (Art. 5 of the Convention) and right to effective remedy (Art. 13). The Court also found a violation of Article 3 on account of the applicants' expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment.[43] It should be taken into account that this unlawful detention of the applicants in the transit zone was based on the less restrictive rules enacted in 2015.

On 26 April 2017, the European Parliament held a debate on Hungary. In his opening remarks First Vice-President Frans Timmermans said that the Commission shares the worries and concerns of many people within and outside the EU regarding recent developments in Hungary and about the compatibility of certain actions of Hungarian authorities with EU law and with the shared European values. This was the reason, Timmermans explained, that the College discussed the overall situation in Hungary first in its 12 April meeting,[44] and again a couple of hours before the parliamentary debate. At this latter meeting, the College decided to start an Article 258 infringement action on the recent amendment to the Hungarian Higher Education Law, which aims at closing down the Central European University in Budapest. According to the Commission's statement,[45] the law is not compatible with the fundamental freedoms of the internal market, notably the freedom to provide services and the freedom of establishment. However, the Commission also invoked the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union, as well as the Union's legal obligations under international trade law. The Commission sent a Letter of Formal Notice to the Hungarian Government on this issue giving one month to respond to these legal concerns. As Timmermans reported, the draft legislation on the governmental

42 On the very same day that the Parliament voted for the bill, Viktor Orbán delivered a speech at the swearing-in-ceremony of 462 new 'border hunters'. In the speech Orbán described "migration as a Trojan horse of terrorism", and he also dismissed criticism of the new law as "charming human rights nonsense". *See* É.S. Balogh, 'The Hungarian Government's Shameful Treatment of Asylum Seekers', *The Hungarian Spectrum*, 10 March 2017, available at: http://hungarianspectrum.org/2017/03/09/the-hungarian-governments-shameful-treatment-of-asylum-seekers.

43 Judgment of 14 March 2017 in the case of *Ilias and Ahmed v. Hungary* (Application no. 47287/15).

44 http://europa.eu/rapid/press-release_SPEECH-17966_en.htm?utm_source=dlvr.it&utm_medium=twitter.

45 http://europa.eu/rapid/press-release_MEX-17-1116_en.htm.

oversight of the so-called 'foreign' non-governmental organizations, a law that bears very close resemblance to President Putin's 'foreign agents' act, is also on the Commission's radar screen together with the new asylum law adopted at the end of March.

Apparently, the Commission did not want to impose an infringement action regarding the asylum regulation, because there was already a pending procedure on Hungarian asylum law. (In December 2015, after – as a reaction to the refugee crisis – the Hungarian Parliament enacted a series of anti-European and anti-rule-of law immigration laws in July and September,[46] the European Parliament adopted a resolution calling on the European Commission to launch the Rule of Law Framework introduced in 2014. The Commission continued to use the usual method of infringement actions, finding the Hungarian legislation in some instances to be incompatible with EU law, specifically, the recast Asylum Procedures Directive and the Directive on the right to interpretation and translation in criminal proceedings. This was the first time that the Commission has alleged a violation of the Charter of Fundamental Rights in an infringement action.) In the current debate the First Vice-President also promised that the Commission continues to be attentive to the situation of the Roma in Hungary, especially to the discrimination against Roma children in education, which has also been the subject of a pending infringement procedure since May 2016. In his speech Timmermans also announced the Commission's response to the Hungarian government's 'Stop Brussels' consultation, in order to correct false claims and allegations made in the consultation.[47]

Prime Minister Viktor Orbán in his speech, on the one hand, called the debate on the Central European University (CEU) 'absurd', and based on falsehoods, but, on the other hand, claimed that George Soros and 'his NGOs' are attacking Hungary and want to transport one million migrants to the EU per year.[48] Many MEPs in the debate, including Manfred Weber, the president of the European People's Party (EPP), where the Hungarian governing party, Fidesz, belongs, harshly criticized the Lex CEU, Guy Verhofstadt, the chairperson of the ALDE-group even asking Orbán whether the next step will be burning books on the square in front of the Hungarian Parliament.[49] Verhofstadt, together with Frank Engel, MEP of the EPP-group from Luxembourg, accused the Hungarian prime minister of wanting to continue taking the EU's money but not its values.[50]

Therefore, for many of Hungary's critics, the obvious solution of the problem would be either a voluntary exit of the non-complying Member State from the EU altogether or imposition of financial sanctions by the EU. Orbán made it clear in his speech that he does not want to leave, but rather to reform the EU according to his illiberal liking. Serious financial sanctions, like the substantial curtailment

46 *See* Halmai, 2015.

47 http://en.euractiv.eu/wp-content/uploads/sites/2/2017/04/Commission-answers-Stop-Brussels-Consultation_EN.pdf.

48 www.miniszterelnok.hu/prime-minister-viktor-orbans-speech-in-the-european-parliament.

49 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20170426+ITEM-014+DOC+XML+V0//EN&language=en&query=INTERV&detail=1-041-000.

50 www.zeit.de/politik/2017-04/verfahren-ungarn-eu-frank-engel-interview.

of the structural funds, are only possible as a consequence of an Article 7 procedure, which – in 2015 after Hungary's cruel treatment of the refugees – was tabled by the ALDE-group, but finally rejected mostly because of the EPP's rejection. This means that the key issue regarding any EU move in the case of Hungary is whether the EPP is still protecting its member party, Fidesz. The recent parliamentary debate has also shown that there is a growing uneasiness within the group towards Orbán.[51]

The EPP's statement also proves that the group is not ready to go for serious measures against the Hungarian government. But even in the event of a willingness to trigger Article 7, there is another obstacle, which became clear after the failed rule of law procedure against Poland. At that moment European Commission President Jean-Claude Juncker told Belgian newspaper *Le Soir* that the so-called Article 7 procedure would lead to nothing "because some [EU] member states are already saying they will refuse to invoke it… This a priori refusal de facto invalidates Article 7".[52] Juncker was referring to Hungary's veto in the case of Poland, but the same can be expected vice versa. This was the reason for Kim Scheppele's suggestion to start a joint Article 7 procedure against Poland and Hungary.[53] According to Scheppele, this would be the only chance to avoid the two illiberal Member States' veto regarding the sanction against the other, because in her view a Member State, which is also warned under Article 7(1), cannot possibly veto the decision in the case of its 'fellow-traveller'. The legal question of whether such an exclusion can be derived from Article 7 TEU or from Article 354 TFEU could only be answered if the political decision on starting an Article 7 procedure were made in the first place.

Before triggering the Article 7 procedure, the Commission could also have started a Rule of Law Framework procedure against Hungary. In June 2015, the European Parliament passed a resolution condemning Viktor Orbán's statement on the reintroduction of death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure.[54] However, the Commission ultimately refused to launch the procedure on the ground that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights.[55] Finally, the first step to use the Rule of Law Framework was taken by the European Commission against Poland in early January 2016. But the framework proved to be useless in the Polish case because the Polish government refused to comply with either of the two recommendations submitted by the Commission.

51 www.politico.eu/article/viktor-orban-europe-meps-increasingly-back-kicking-out-of-epp.

52 http://en.europeonline-magazine.eu/juncker-eu-powerless-against-authoritarian-slide-in-poland-hungary_493513.html.

53 *See* K.L. Scheppele, 'EU Can Still Block Hungary's Veto on Polish Sanctions', *politico.eu*, 11 January 2016.

54 www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey.

55 Hungary: no systemic threat to democracy, says Commission, but concerns remain, Press Release, 2 December 2015.

Therefore, the pre-Article 7 procedure does not seem to be promising in the case of Hungary either.

With the infringement procedure regarding the CEU, the Commission chose the easier legal path, which is less promising to change the Hungarian government's authoritarian attitude not only because – as we saw in the asylum and the Roma segregation case – it may not even reach the CJEU, but also because – as another Hungarian case in 2012 has shown – infringement actions are usually too narrow to address the structural problem entailed by persistently non-compliant Member States. This happened in *Commission v. Hungary*, which was previously examined.[56] The case was a source of inspiration for Kim Scheppele to suggest reframing the ordinary infringement procedure to enforce the basic values of Article 2 TFEU through a systemic infringement action.[57]

As the infringement action concerning the CEU mentions the violation of three different provisions of the Charter, the Commission could also have referred either to Article 2 TFEU or, for that matter, to the sincere cooperation requirement embedded in Article 4(3) TEU and test the CJEU's readiness to consider the systemic nature of the violations. But it is very unlikely that even a strong CJEU judgment could save the CEU and the Hungarian NGOs, because by the time any decision is made it will be too late for them. In other words, the legal solution will not ease the threat.

Nonetheless, 3 days after the debate, the possibility of a political solution arose, when the Hungarian prime minister was summoned to the Presidency of the EPP. According to the press release, "the EPP wants the CEU to remain open, deadlines suspended and dialogue with the US to begin." (Just a reminder: the Lex CEU requests a new international treaty with the 'American government', albeit that the federal government has no jurisdiction for such negotiations.) The EPP also stressed that "NGOs are an integral part of any healthy democracy, that they represent the civil society and that they must be respected."[58] Despite the Venice Commission's preliminary opinion regarding the Lex NGO[59] on 13 June 2017 the Hungarian Parliament adopted the law with certain cosmetic amendments, therefore, the Venice Commission, in its final opinion, concluded that the law "will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination".[60]

56 ECJ, 6 November 2012, Case C-286/12.

57 *See* Scheppele, 2016, p. 105-132.

58 www.epp.eu/press-releases/prime-minister-orban-to-comply-with-eu-laws-and-epp-values-following-meeting-with-epp-presidency.

59 www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)002-e.

60 Para 68. www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e.

F Present and Future of Constitutionalism in Hungary

The current Hungarian constitutional system constitutes a new, hybrid type of regime, between the ideal of a full-fledged democracy and a totalitarian regime.[61] Even if there is a formal written constitution, an autocracy is not a constitutional system.[62] Therefore, China, Vietnam, Cuba, Belorussia, the former Soviet Union and former communist countries cannot be considered constitutional systems, even though, as William J. Dobson argues, "today's dictators and authoritarians are far more sophisticated, savvy, and nimble than they once were."[63] What happened in Hungary is certainly less than a total breakdown of constitutional democracy but also more than just a transformation of the way the liberal constitutional system is functioning. Hungary became an illiberal and undemocratic system,[64] which was the openly stated intention of Orbán.[65] The Hungarian system represents an atypical form of hybrid regimes, because, as opposed to such approaches in Latin America, the former Soviet republics or Africa, where the basis is a presidential constitution, in Hungary the formal parliamentary system remained in place with the decisive role of the Prime Minister.

61 For the classic differentiation between totalitarian (dictatorial) and authoritarian systems, *see* J. Linz, *Totalitarian and Authoritarian Regimes*, 1975.

62 About totalitarian systems with written constitutions, *see* J. Balkin & S. Levinson, 'Constitutional Dictatorship', *Yale Law School*, 2010.

63 W. Dobson, 'The Dictator's Learning Curve. Inside the Global Battle for Democracy', *Doubleday*, 2012, p. 4.

64 As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries but democracy itself. Hence, instead of calling them 'illiberal democracies' we should describe them as illiberal and 'undemocratic' regimes. *See* J.-W. Müller, 'The Problem with "Illiberal Democracy"', *Project Syndicate*, 21 January 2016.

65 In a speech delivered on 26 July 2014 before an ethnic Hungarian audience in neighbouring Romania, Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature." Citing as models he added: "We have abandon[ed] liberal methods and principles of organizing society, as well as the liberal way to look at the world… Today, the stars of international analyses are Singapore, China, India, Turkey, Russia. … and if we think back on what we did in the last four years, and what we are going to do in the following four years, th[e]n it really can be interpreted from this angle. We are … parting ways with Western European dogmas, making ourselves independent from them …If we look at civil organizations in Hungary, …we have to deal with paid political activists here…[T]hey would like to exercise influence … on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians…opposing us, but political activists attempting to promote foreign interests. …This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests." *See* the full text of Viktor Orbán's speech, available at: http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592 (last accessed 28 April 2017).

The backsliding has happened through the use of 'abusive constitutional' tools: constitutional amendments and replacement.[66] The case of Hungary has shown that both the internal and the external democratic defence mechanisms against this abusive use of constitutional tools have failed so far. The internal ones (constitutional courts, judiciary) failed because the new regimes managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly owing to the lack of a joint political will to use them.

In this illiberal system the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their powers are severely limited. Also, as in many illiberal regimes, fundamental rights are listed in the constitutions, but the institutional guarantees of these rights are endangered through the lack of an independent judiciary and Constitutional Court. To make it clear, competences of the constitutional courts, originally very strong at the beginning of the transition, can be weakened provided that they can still fulfil their function as checks and balances to the governmental power, or provided other control mechanisms exist.

As many scholars have noted, there is an incredible range of non-democratic, non-authoritarian regimes, and their relationship with each other and democracy is often imperfect and unclear. Countries in this 'grey zone' inspired a lot of concepts, which were created to capture the mixed nature of these regimes. Steven Levitsky and Lucas A. Way introduced the term 'competitive authoritarianism' for a distinctive type of 'hybrid' civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents' abuse of the state places them at a significant advantage vis-à-vis their opponents.[67]

The hybridity of Hungarian constitutionalism differs from the authoritarian character of Putin's Russia, where on account of failing competing parties and candidates the results of parliamentary and presidential elections are uncertain. Therefore, the Russian regime can be considered authoritarian, while the Hungarian one is still democratic, even if illiberal.

66 The category of 'abusive constitutionalism' was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. *See* D. Landau, 'Abusive Constitutionalism', *UC Davis Law Review*, Vol. 47, 2013, p. 189-260. Abusive constitutional tools are known from the very beginning of constitutionalism. The recent story of the Polish Constitutional Tribunal reminds one of the events in the years after the election of Jefferson as the first anti-federalist President of the United States. On 2 March 1801, the second last day of his presidency, President Adams appointed judges, most of whom were federalists. The federalist Senate confirmed them the next day. In response, Jefferson, after taking office, convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. About the election of 1800 and its aftermath *see* B. Ackerman, *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy*, Cambridge, Harvard University Press, 2007.

67 *See* S. Levitsky & L. Way, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, Cambridge, Cambridge University Press, 2010, p. 5.

The case of Hungary proves that democracy and liberalism do not necessarily go hand in hand. Besides liberal democratic (or democratic and rule-of-law-oriented, 'rechsstaatlich') constitutions and political systems, there are non-liberal democratic ones (radical democracies without a bill of rights, such as most of the Commonwealth constitutions until very recently, or constitutions based on popular sovereignty giving little weight to the people's interest in the day-to-day politics, such as the constitutions of Latin American countries) and also liberal but non-democratic constitutions (such as the ones in France after 1815, or the constitutional system of the Austro-Hungarian Monarchy), and, finally, neither liberal nor democratic socialist constitutions (as the former and current communist countries).[68]

The problem with the Hungarian illiberal constitutional system is that the country is currently a member of the EU, which considers itself to be a union based on the principles of liberal democratic constitutionalism. Of course, the citizens of Hungary, as any other citizens of a democratic nation-state, have the right to oppose joint European measures, for instance on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process. There are still a significant number of people who either consider themselves supporters of liberal democracy or at least represent views that are in line with liberal democracy. If Hungarians ultimately opt for a non-liberal democracy, they must accept certain consequences, including parting from the EU and the wider community of liberal democracies.

G Conclusion

The described democratic backsliding in Hungary demonstrates that an institutional framework is a necessary but not sufficient element of a successful democratization. Behavioural elements, among them a political and constitutional culture, are as important as institutions. The other lesson of this case study is, on the one hand, that the very definition of democracy is changing, and it is not necessarily liberal. On the other hand, the borders between democratic, authoritarian or dictatorial regimes are blurred, and there are a lot of different hybrid systems,

68 Almost this same typology of constitutions and governance systems are used by the constitutional scholar Dieter Grimm, and the sociologists Iván Szelényi and Tamás Csillag. *See* D. Grimm, 'Types of Constitutions', *in* M. Rosenfeld & A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p. 98-132; I. Szelényi & T. Csillag, 'Drifting Liberal Democracy: Traditionalist/Neo-conservative Ideology of Managed Illiberal Democratic Capitalism in Post-communist Europe', *Intersections, EEJSP*, Vol. 1, No. 1, 2015, p. 18-48. Besides the four joint categories, Grimm adds a fifth type of constitution to his typology, namely the social or welfare state constitutions (such as the Indian, the Brazilian, the Japanese, the South Korean or the South African), which are not liberal regarding social and economic rights.

such as the current Hungarian regime.[69] Another important aspect of these developments is that emerging democracies, for instance the one in Tunisia, are not influenced exclusively by the liberal democratic West any more.[70] Some economists claim that the real question is not why there are fewer and fewer liberal democracies, but why liberal democracies still exist.[71] Others search for 'post-liberalism'[72] in the wake of the financial crisis and after Brexit.[73]

The behaviour of the Hungarian government, supported by the other three Visegrád countries, during the refugee crisis, has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of the liberal democracy and that membership in the EU is not a guarantee for having liberal democratic regimes in all Member States. Unfortunately, an outsize fear of threats, lately (*e.g.* the refugee crisis and the Syrian conflict), strengthened illiberal systems, such as Turkey, and authoritarian regimes, such as Russia, all over Europe, and in the case of Hungary even inside the EU,[74] not to mention Trump's presidency in the US. There is a growing gap between the old and the new Member States, and the support of populist parties has been strengthened even in the old Member States.[75] EU institutions have so far proven incapable of enforcing compliance with core European values. After coming to the conclusion that the traditional mechanism of infringement procedures does not work, and in the fear from the unanimity requirement embedded in Article 7(2)

69 Asking the question whether liberal democracy is at risk, Ivan Krastev responds that the big difference compared to the 1930s is that even extremist parties do not contest the democratic aspect of the liberal democratic consensus. Instead, they have a problem with the liberal part of it. *See* I. Krastev, 'Europe in Crisis: Is Liberal Democracy at Risk?', *in Democracy in Precipice*, Council of Europe Democracy Debates 2011-2012. Council of Europe Publishing, 2012, p. 67-73.

70 *See* R. Youngs, 'Exploring "Non-Western" Democracy', *Journal of Democracy*, Vol. 26, No. 4, 2015.

71 S. Mukand & D. Rodrik, 'The Political Economy of Liberal Democracy', Institute of Advance Study, Princeton, 2015. Joschka Fischer, former German foreign minister and vice-chancellor, gave an interesting explanation of what might have caused the decline of liberal democracy: "How did we get here? Looking back 26 years, we should admit that the disintegration of the Soviet Union – and with it, the end of the Cold War – was not the end of history, but rather the beginning of the Western liberal order's denouement. In losing its existential enemy, the West lost the foil against which it declared its own moral superiority." J. Fischer, 'Europe's Last Chance', *Project Syndicate*, 29 August 2016, available at: https://www.project-syndicate.org/commentary/europe-needs-bold-leaders-by-joschka-fischer-2016-08 (last accessed 28 April 2017).

72 *See* J. Milbank & A. Pabst, *The Politics of Virtue, Post-Liberalism and the Human Future*, Lanham, Rowman and Littlefield, 2016.

73 M. Kettle, 'Brexit Was a Revolt Against Liberalism, We Have Entered a New Political Era', *The Guardian*, 15 September, 2016.

74 At a conference in the Polish town Krynica, in mid-September 2016, Orbán and Kaczyński proclaimed a 'cultural counter-revolution' aimed at turning the EU into an illiberal project. A week later, at the Bratislava EU summit, the prime ministers of the Visegrád 4 countries demanded a structural change of the EU in favour of the nation states. Slawomir Sierakowski even speaks about an 'illiberal international'. S. Sierakowski, 'The Illiberal International', *Social Europe*, 13 September 2016.

75 Regarding the constitutional crisis of the EU, Michael Wilkinson draws attention to the dangers of 'authoritarian liberalism'. *See* M. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', *German Law Review*, Vol. 14, 2013, p. 527.

for sanctioning, the Commission duplicated the preventive mechanism of Article 7(1) by introducing the rule of law mechanism. Owing to political considerations, it was not used against Hungary at all, and in the case of Poland, despite the very strongly worded Commission recommendations and their disregard by the Polish government, nothing really happened. This considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of oversight. The fear from Hungary's veto concerning Poland indicates that the desired oversight for the effective use of Article 7 TEU would require a treaty amendment. Unfortunately, the scenarios set out in the European Commission's White Paper on the Future of Europe[76] published on 1 March 2017 does not advocate treaty changes and does not seem to provide institutional guarantees against populism and illiberal states within the EU. As we could see in the last two years, Poland led by Jaroslaw Kaczynski's PiS party, has been following the illiberal course of Viktor Orbán's Fidesz party. One may only hope that the EU will be able to protect the joint European constitutional values in all of its Member States.

76 White Paper on the Future of Europe. Reflections and Scenarios for the EU27 bz 2025. European Commission COM (2017) 2025 of 1 March 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

Federalization through Rights in the EU

A Legal Opportunities Approach

Marie-Pierre Granger[*]

A Introduction

> [T]here is hardly anything that has greater potential to foster integration than a common bill of rights, as the constitutional history of the United States has proven.[1]

In the European Union (EU), the protection of fundamental rights came about as the result of interactions between EU and national courts. The principle of respect for fundamental rights, as well as the standards and purview of human rights protection have, eventually, been codified in the EU treaties and the EU Charter of Fundamental Rights (the Charter). Under the current regime, unlike other federal-type polity, the protection of fundamental rights is only partially federalized, as the scope of application of EU fundamental rights provisions is qualified. Indeed, the Charter applies to Member States only when they 'implement' EU law. This implies that federal (*i.e.* EU) institutions and national courts as ordinary courts for the application of EU law can control Member States' respect for the Charter only when these act within the scope of EU law. Outside this, merely political mechanisms are available to protect human rights against Member States, which have proven, so far, largely ineffective. The scope of application of the EU federal 'Bill of Rights' is defined differently by political and judicial actors at both the EU and the national levels and is widely debated in academic circles. Still, we know relatively little about the dynamics that impact on policy and judicial actors' positions on the scope of the Charter. This article, informed by legal analyses and drawing on socio-legal and political science scholarship, proposes a conceptual framework for understanding variations in the scope and pace of 'federalization through rights' in the EU, based on interactions between legal opportunities at the EU and national levels. It suggests that, provided certain conditions are met, the weaker the legal opportunities for fundamental rights protection are at the domestic level, the greater the federalizing pressure is.

* Associate Professor, Central European University, Budapest. The development of the conceptual framework proposed in this article was inspired by empirical studies on France and Hungary carried out within the EU-funded project 'bEUcitizen: barriers towards EU Citizenship' under the FP7 programme (Grant agreement 320294). This volume (The EU Bill of Rights' Diagonal Application to Member States. Ed. Csongor István Nagy) was published as part of the research project of the HAS-Szeged Federal Markets `Momentum' Research Group.

1 M. Cappelletti, *The Judicial Process in Comparative Perspective*, Wotton-under-Edge, Clarendon, 1998, p. 395.

The article, first, summarizes the evolution of the EU system of fundamental rights protection and identifies gaps in the scholarly understanding of what determines federalization through rights in the EU. It then proposes and exposes a conceptual framework based on interactions between EU and national legal opportunities, which can help explain the pace and scope of the EU's fundamental rights supervision over Member States' actions. Outlining key aspects of EU legal opportunities, it develops a general argument as to the main dynamics of federalization through rights, before calling for more comparative empirical analyses of national legal and judicial structures and attitudes, as well as Charter-based litigation patterns.

B The Evolution of the EU System of Fundamental Rights Protection and Federalization through Rights in the EU

The EU system of fundamental rights protection, which has become a core element of European integration, has generated a wealth of legal analyses. These focus merely on judicial developments at the EU level, offering assessments ranging from criticism to praise.[2] The scope and desirability of federalization through rights in the EU are among the most discussed and contested issues.[3]

2 For key contributions, *see* Ph. Alston & J.H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', *European Journal of International Law*, Vol. 9, No. 4, 1998, p. 658-723; J. Coppel & A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', *Legal Studies*, Vol. 12, No. 2, 1992, p. 227-239; J.H.H. Weiler & N.J.S. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence-Part 1', *Common Market Law Review*, Vol. 32, 1995, p. 51; A. von Bogdandy, 'The European Union as a Human Rights Organization-Human Rights and the Core of the European Union', *Common Market Law Review*, Vol. 37, 2000, p. 1307; A. Williams, *EU Human Rights Policies: A Study in Irony*, Oxford, Oxford University Press, 2004. Moreover, dedicated chapters on EU human rights are now a standard feature of EU law textbooks, such as P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed., Oxford, Oxford University Press, 2015.

3 *See*, notably, P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, Vol. 39, 2002, p. 945; K. Lenaerts & J. A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' *Common Market Law Review*, Vol. 47, 2010, p. 1629; A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', *Common Market Law Review*, Vol. 42, 2005, p. 367; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights'. *European Constitutional Law Review*, Vol. 8, No. 3, 2012, p. 375-403; D. Sarmiento, 'Who's Afraid of the Charter; The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', *Common Market Law Review*, Vol. 50, 2013, p. 1267; A. Ward, 'Article 51 – Field of Application', *in* S. Peers, T. Hervey, J. Kenner & A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, Baden-Baden, Nomos, p. 1456-1497; A. von Bogdandy, M. Kottmann, C. Antpohler & J. Dickschen, 'Reverse Solange-Protecting the Essence of Fundamental Rights against EU Member States', *Common Market Law Review*, Vol. 49, 2012, p. 489; E. Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU', *in* M. Dougan & S. Currie (Eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford, Hart Publishing, 2009; D. Thym, 'Separation versus Fusion–or: How to Accommodate National Autonomy and the Charter? Diverging visions of the German Constitutional Court and the European Court of Justice', *European Constitutional Law Review*, Vol. 9, No. 3, 2013, p. 391-419.

I From 'the Missing' to a Core EU Value

The protection of fundamental rights featured prominently in early post-WWII European ideals. However, the failure of the more ambitious political integration projects and the low-key functional approach pursued in the 1950s within the European Communities, focused on sectoral and market integration, left fundamental rights guarantees aside. Member States were entrusted with ensuring respect for fundamental rights, under the supervision of the Council of Europe's institutions, notably the Strasbourg-based European Court of Human Rights (ECtHR), which was to enforce the minimum standards laid down in the European Convention on Human Rights (ECHR).[4]

However, soon enough, pressure mounted on what is now the Court of Justice of the European Union (CJEU) to ensure that EU institutions, and Member States when they act as the long-arm of the EU, respect human rights. Eventually, the CJEU established that EU institutions, as well as Member States, when acting within the scope of EU law, should respect fundamental rights as a general principle of law.[5] Over the years, it developed a substantial judge-made catalogue of EU fundamental rights.

The EU political actors followed suit. Successive Treaty revisions, starting with Maastricht (1992), strengthened the principle of respect for fundamental rights in the EU (Art. 6 TEU) and upgraded it to the status of a core EU value (Art. 2 TEU). They confirmed it as a condition of accession (Art. 49 TEU) and empowered the EU political institutions to intervene and impose sanctions on Member States for systemic violations of human rights (Art. 7 TEU).[6]

The judge-made EU law doctrine of fundamental rights protection as a general principle of law was codified into the EU Charter of Fundamental Rights, drafted by a special convention in 2000.[7] First adopted only as a political declaration, owing to the notorious resistance of one Member State, it finally obtained primary status and became legally binding with the coming into force of the Treaty of Lisbon in 2009 (Art. 6(1) TEU). Its scope of application is, nonetheless, strictly limited. It is applicable to EU institutions and bodies and to Member States 'only when they implement' EU law (Art. 51(1) of the Charter), and it cannot expand EU competences (Art. 51(2) of the Charter).

4 *See* G. de Búrca, 'The Evolution of EU Human Rights Law', *in* P. Craig & G. De Búrca, *The Evolution of EU law*, 2nd edn., Oxford, Oxford University Press, 2011, p. 465-498.

5 Case 29/69, Erich Stauder *v. Stadt Ulm, ECLI:*EU:C:1969:57; 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI:*EU:C:1970:114; Case 4/73, J. Nold, *Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, ECLI:*EU:C:1975:114; Case *5/88*, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, ECLI:*EU:C:1989:321; Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi Etairia* (ERT *AE*), ECLI:EU:C:1991:254; Case C-309/96 *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio, ECLI*:EU: *C*:1997:631.

6 The Treaty also requires the EU to accede to the ECHR, *see* Art. 6(2) TEU. However, the draft agreement was ruled as incompatible with EU law by the CJEU in 2014, which stalled the process of accession Opinion 2/13 18 December 2014, ECLI:EU:C:2014:2454.

7 G. de Búrca, 'The Drafting of the EU Charter of Fundamental Rights', *European Law Review*, Vol. 26, No. 2, 2001, p. 126-138.

Despite the growing prominence of the principle of respect for fundamental rights in the EU legal framework, and its increased political relevance in the process of European integration, the CJEU, for long, displayed a marked reluctance to invalidate EU measures, in particular legislative acts, on human rights grounds.[8] In recent years, in particular since the Charter has become legally binding, the CJEU has started to exercise a more robust scrutiny over compliance by the EU legislators and executives with fundamental rights, especially in the fields of non-discrimination, and the protection of civil liberties, such as due process and privacy, notably in the sensitive context of the fight against terrorism.[9] However, in this article, which is concerned with federalization through rights, we focus on the scope and intensity of EU judicial control over Member States' compliance with the rights laid down in the Charter.

II Federalization through Rights in the EU: A 'Work in Progress'

Federalization through rights has both institutional and substantive dimensions. In the EU context, its institutional dimension consists in the process through which supervision over the EU and Member States' respect for human rights is increasingly exercised by federal-level institutions, that is the EU's judicial organ (the CJEU) and, to a lesser extent, the EU's central political organs (essentially the European Commission, but also the European Parliament, Council of Ministers and European Council). Given the limited effectiveness of existing political control mechanisms, the article de facto focuses on the judicial aspects of 'institutional federalization', and centres around the role of the CJEU and European Commission. The substantive dimension relates to the process through which control over the respect for fundamental rights is increasingly based on federal standards, *i.e.* those laid down in the Charter, general principles of law and dedicated EU legislation. At the current stage of development, the degree of federalism around rights achieved in the EU is more limited than in other federal-type systems, such as the United States or Germany.[10]

In the EU, where a situation is characterized as one in which a Member State is implementing EU law, the applicable standards are the Charter and general principles of EU law (Art. 6(1) TEU, Art. 51 of the Charter). The bulk of the respect for EU human rights norms is entrusted to national courts, in the context of domestic litigation against public or private measures violating those norms (decentralized enforcement). These are supported by the CJEU, which can, through preliminary rulings mechanism, confirm that Member States' authorities

8 *See, e.g.* Weiler & Lockhart, 1995, p. 51; Williams, 2004.

9 For an overview on recent developments, *see* Craig & De Burca 2011, Chap. 11; in relation to surveillance and data protection, *see* M.-P. Granger & K. Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling off the EU Legislator and Teaching a Lesson in Privacy and Data Protection', *European Law Review*, Vol. 39, No. 4, 2014, p. 835-850.

10 However, the process through which federalization around rights is shaping in the EU evokes parallels with American historical developments, *see* Cs. I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States', *Indiana International and Comparative Law Review*, Vol. 27, No. 1, 2017, pp. 1-13

acted in violation of EU norms and clarify the implications. Alternatively, the European Commission can launch infringement proceedings under Article 258 TFEU (centralized enforcement), against Member States' acts that fall foul of EU human rights.

When Member States are not implementing EU law, though, the applicable standards are determined by national constitutions, subject to the minimum requirements of the ECHR. They are enforced through national courts, with a possibility for individuals to 'take their case to Strasbourg', once domestic remedies have been exhausted. Outside the scope of EU law, when Member States fail to live up to their human rights commitments, the EU institutions have only limited tools. The central formal mechanism is Article 7 TEU introduced by the Treaty of Amsterdam, and further developed following the Austrian 'Haider affair'.[11] This enables EU institutions to intervene preventively in case of a 'clear risk of serious breach' of Article 2 TEU values, as well as to determine the existence of a 'serious and persistent breach' and impose sanctions, such as the withdrawal of voting rights, on deviant Member States. However, it can be triggered only in case of systemic problems, and it is not apt to tackle individual violations of human rights. Moreover, the high political thresholds required to activate sanctions against a Member State seriously undermine its effectiveness.[12]

The salience of the problem became more pronounced over recent years, as a number of Member States, notably Hungary and Poland, are backsliding into 'illiberal democracies', thereby calling into question their commitments to Article 2 TEU values. In this context, the issue of the EU's capacity to enforce fundamental rights on recalcitrant Member States has gained prominence among scholars[13] and has brought the question of federalization through rights back to the fore.

The issue is also on the policymakers' table. To address the shortcomings of the current treaty framework, the Commission, in 2014, developed a new informal 'Rule of Law' Mechanism, to be deployed in case of threats to rule of law, including systemic disregard of human rights, in a Member State.[14] This new mechanism was activated against Poland in 2016 over concerns concerning, nota-

11 *See* M. Merlingen, C. Mudde & U. Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria', *Journal of Common Market Studies*, Vol. 39, 2001, p. 59-77; W. Sadurski, 'Adding a Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider', *Columbia Journal of European Law*, Vol. 16, 2009, p. 385.

12 For a recent analysis, *see* L. Besselink, 'The Bite, the Bark and the Howl – Article 7 TEU and the Rule of Law Initiative', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 128-144.

13 *See* contributions in C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016; L. Pech & D. Kochenov (Eds), 'The Great Rule of Law Debate in the EU', *Journal of Common Market Studies*, Vol. 54, No. 5, 2016, pp. 1043-1104; P. Bárd, S. Carrera, E. Guild & D. Kochenov, 'An EU mechanism on Democracy, the Rule of Law and Fundamental Rights', *CEPS Paper in Liberty and Security No 91*, 2016; A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017.

14 European Commission, Communication on a 'A new EU Framework to strengthen the Rule of Law', 11 March 2014, COM(2014) 158 final.

bly, judicial independence, but produced little effects.[15] Members of the European Parliament also initiated enquiries, issued reports and supported studies and measures aimed at exposing breaches of EU values by certain Member States and pressuring them to conform to European norms, while the Council opted for a more cautious approach.[16] These have proved largely ineffective so far. Eventually, on 20 December 2017, having exhausted the dialogue possibilities, the Commission resigned itself to initiating an Article 7 procedure against Poland.[17] However, Hungary's support for Poland means that the procedure is unlikely to result in any sanction.

In this context of political paralysis, pressure is mounting on courts to 'do something' to ensure respect for human rights in the Member States. While there are many questions concerning the desirability and effectiveness of an increased (EU) judicial control over Member States' actions that affect human rights,[18] there is less academic engagement with the factors and dynamics of federalization around rights.

C The Mysterious Dynamics of Federalization through Rights in the EU

While the dynamics of 'integration-through-law' have been subject to intense scrutiny and offered a fertile playground for competing theoretical explanations, we know relatively little about what determines 'integration-through-rights' in

15 *See, e.g., Z. Szente*, 'Challenging the Basic Values – the Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017; M.-P. Granger, O. Salat & A. Śle dzińska-Simon, 'Securing respect for civil rights by EU member states, within and beyond the scope of application of EUlaw', *in* H. de Waele, M.-P. Granger & S. de Vries (Eds.), *Civil Rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Sphere. Interdisciplinary Perspectives on EU Citizenship Series*, Vol. 6, Cheltenham, Edward Elgar (forthcoming).

16 For an assessment of the robustness and effectiveness of these various 'Rule of Law' initiatives, *see* the contributions in Pech & Kochenov, 2016, p. 1043-1104.

17 European Commission, Rule of Law: The Commission acts to defend judicial independence in Poland, 20 December 2017, press release, available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

18 For academic calls in that direction, *see* A. von Bogdandy, M. Kottmann, C. Antpohler & J. Dickschen, 'Reverse Solange-Protecting the Essence of Fundamental Rights against EU Member States', *Common Market Law Review*, Vol. 49, 2012, p. 489; K.L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', *in* C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, p. 105-132; D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool', *Hague Journal on the Rule of Law*, Vol. 7, No. 2, 2016, p. 153-174; A. Jakab, 'The Application of the Charter of Fundamental Rights by National Courts', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, pp. 252-262. On the risks the 'judicialization' of rule of law protection may raise, *see* M. Blauberger & D. Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU', *Journal of European Public Policy*, Vol. 24, No. 3, 2017, p. 321-336.

the EU, that is, the extent to which the EU and national courts uphold Charter rights against Member States.

I Legal Scholarship on the Development of the EU System of Fundamental Rights – Forgetting the Litigants

Legal scholars who study the evolution of EU human rights law tend to focus on the critical analysis of legal texts and reasoning or normative arguments. Their works, nonetheless, regularly refer to broader contextual factors that influence the development of the EU fundamental rights framework. They have described how the CJEU's doctrines of supremacy and direct effect, combined with the use of the preliminary reference procedure (Art. 267 TFEU) as an EU law enforcement device,[19] triggered constitutional courts' resistance, which, in turn, exerted pressure on the CJEU to review EU measures against human rights' standards. Indeed, the German constitutional court, in particular, which had received a strong constitutional mandate to ensure the protection of fundamental rights, refused to surrender to the unconditional authority of EU law, so long as the EU did not provide for suitable fundamental rights protection (the so-called *Solange* doctrine).[20] Consequently, the CJEU confirmed that the EU upheld fundamental rights as general principles of EU law and checked EU measures against them. Eventually, national (constitutional) courts came to acknowledge that the EU system of fundamental rights protection had developed significantly, to a level equivalent to that offered by national constitutions, and agreed to relinquish the daily monitoring of the compatibility of EU measures and national implementing acts with fundamental rights, entrusting it to the CJEU.[21] They, however, retained the option to resume control, when national fundamental rights would be under threat, in particular if they form part of the national constitutional

19 Case 6/64, *Flaminio Costa v. ENEL*, ECLI:EU:C:1964:66; Case 106/77, *Amministrazione delle Finanze dello Stato v.* Simmenthal *SpA* (Simmenthal *II*), ECLI:EU:C:1978:49; Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratis der Belastingen, ECLI:*EU:C:1963:1. For seminal 'law-in-context' accounts of this constitutionalization process, *see* J.H.H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, Vol. 100, No. 8, 1991, p. 2403-2483; J.H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies*, Vol. 26, No. 4, 1994, p. 510-534; G.F. Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review*, Vol. 26, 1989, p. 595; E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75, No. 1, 1981, p. 1-27.

20 *See, e.g.*, Solange I (Internationale Handelsgesellschaft) (Case 2 BvL 52/71) [1974].

21 *See, e.g.*, Solange II (Wünsche Handelsgesellschaft), Decision of 22 October 1986, BVerfGE 73, 339.

identity (by reference to Art. 4(2) TEU), or where an EU act or CJEU decision is *ultra vires*.[22]

More recent developments, including the Court's initial reluctance to refer to the Charter and its contemporary use of it, at times timorous and at other times more daring, to sanction both EU and Member States' violations of fundamental rights, though well documented and criticized, have not generated much systematic investigation.[23] Speculations abound as to the motives of the Court's inconsistent jurisprudence. For example, in 2013, the Court went for a relatively expansive interpretation of the scope of Article 51(1) of the Charter in the ruling.[24] The German constitutional court promptly reacted and contested the potentially far-reaching implications of *Akerberg Fransson* for national autonomy.[25] The Luxembourg's judges' more cautious and circumscribed approach in later cases could be attributed to a Court's desire to appease their Karlsruhe colleagues.[26] Studies that go beyond legal analysis to include contextual factors highlight the EU and national courts as the key protagonists.[27] It is, nonetheless, widely accepted, thanks to political science and socio(legal) scholarship, that public and private litigants, be they individuals or organizations, and law-

22 *See* BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 – paras. (1-421), available at: www.bverfg.de/e/es20090630_2bve000208en.html. For an overview of the relationship between the CJEU and the German Constitutional Court, *see* F. Mayer, 'Defiance by a Constitutional Court – Germany', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 403-421. For a recent analysis of the evolving attitude of national constitutional courts towards EU law in the context of the protection of fundamental rights and compliance, *see* D. Piqani, 'The Role of National Constitutional Courts in Issues of Compliance', *in* M. Cremona (Ed.), *Compliance and the Enforcement of EU Law*, Oxford, Oxford University Press, p. 132-156.

23 But see, for an attempt at conceptualizing it, M. Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"', *Common Market Law Review*, Vol.52, No. 5, 2015, p. 1201-1245.

24 Case C-617/10, *Hans Åkerberg Fransson*, ECLI:EU:C:2013:280.

25 FCC, judgment of 24 April 2013, 1 BvR 1215/07, *Counter-Terrorism Database*. *See* Thym, 2013, p. 391-419.

26 *See, e.g.* C-198/13, *Víctor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante)*, ECLI:EU:C:2014:691.

27 On the role of national courts in the application of the Charter, *see* L. Burgorgue-Larsen (Ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe*, Paris, Pedone, 2017.

yers, have played a key role in the process of legal integration in Europe,[28] and their role in the development of EU fundamental rights case law therefore deserves some investigation.

II Political Sciences and the Scope of Application of the Charter – The Rule of Law Turn (Away)

Existing legal accounts of the development of the EU system of fundamental rights' protection, focused on an analysis of the Charter and CJEU case law and legal reasoning, do not engage in systematic assessments of the contextual factors that trigger Charter-based litigation before national and EU courts and thus influence legal developments of EU law. Social and political scientists are, by training, inclined to ask 'why' questions, what leads them naturally to investigate the social and political dynamics of particular case-law developments. They have, over the years, put forward elaborate explanations for the 'constitutionalization' of the EU legal order, and the federalization process that ensues. However, they have not yet investigated the specific dynamics of integration-through-rights in the EU.

Political science works that sought to explain the CJEU's adoption and domestic reception of the principles of supremacy or direct effect acknowledge the relevance of legal factors (*e.g.* the nature of EU law, litigation patterns, the role of precedent and legal reasoning) but emphasize the importance of 'socio-political' variables, such as institutional preferences, the dynamics of the EU political decision-making processes, the nature of interactions between courts and socialization patterns as factors that impact on integration-through-law and judicialized governance in the EU.[29] They have, however, not (yet) offered sys-

28 On the role of private litigants in the process of European integration, *see* W. Mattli & A.-M. Slaughter, *Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts No. 6*, Jean Monnet Chair, 1996; A.S. Sweet & T. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review*, Vol. 92, 1998, p. 63. On the role of the Commission lawyers, *see* E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75, No. 1, 1981, p. 1-27; M. Rasmussen, '*Revolutionizing European Law: A History of the Van Gend en Loos Judgment*', International Journal of Constitutional Law, Vol. 12, No.1, 2014, p. 136-163. On the prominent role played by a particular activist lawyer in the development of EU non-discrimination law, *see* R. Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy', *in* A.S. Sweet, W. Sandholtz & N. Fligstein (Eds.), *The Institutionalization of Europe*, Oxford, Oxford University Press, 2001, p. 117. On the role of civil society and interest groups in the legal mobilization of EU law, *see* C. Harlow & R. Rawlings, *Pressure through law*, London, Routledge, 2013.

29 *See*, notably, A.-M. Slaughter, A.S. Sweet & J.H.H Weiler (Eds.), *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in Its Social Context*, Oxford, Hart Publishing, 1998; K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001. For reviews of political sciences' analyses of the dynamics of legal integration, *see* A.S. Sweet, 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews in European Governance*, Vol. 5, No. 2, 2010, p. 14-22; *see also* C. Carrubba & M. Gabel, 'International Courts: A Theoretical Assessment', *Annual Review of Political Sciences*, Vol. 20, 2017, p. 55-73; R. Daniel Kelemen & S. K. Schmidt, 'Introduction – The European Court of Justice and Legal Integration: Perpetual Momentum?', *Journal of European Public Policy*, 2012 , Vol. 19, No. 1, p. 1-7.

tematic explanations of EU and national courts' positions on the application of EU human rights standards to Member States. The political science literature has generated important insights into the dynamics of compliance with EU law, which stress the essential role played by legal and political mobilization of societal actors but have not closely studied the application and interpretation of EU law by national courts, included in cases involving fundamental rights.[30] Recent EU Rule of Law scholarship is, for its part, concerned more with exposing the nature of the threats to the rule of law and democracy, and explaining the (in)action of political actors, and their effects, than with addressing the integrative aspects of rights' protection in the EU.[31]

Political sciences analyses bear relevance in explaining federalization through rights in the EU, but the distinctive features of the European fundamental rights landscape (*e.g.* overlapping and competing human rights frameworks) and changing socio-political contexts (*e.g.* the rise of anti-elitism, populism and anti-European sentiment) call for a more specific assessment and possible adjustments of existing theoretical frameworks.

D A Legal Opportunities Perspective – Going to the Roots of Federalization through Rights

The 'opportunity' framework, originally developed by the social movements literature to explain policy changes, has been adapted by socio-legal scholars to explore the dynamics of court-driven policy reform.[32] As briefly exposed earlier, the process of federalization through rights in the EU remains largely a court-driven process. But, courts are reactive institutions. They respond to disputes brought before them by litigants and their legal counsels. Therefore, an approach that emphasizes the opportunities for mobilizing courts to ensure Member States' compliance with EU fundamental rights appears particularly suited to explaining the development of human rights protection in the EU and its federalizing dimension.

30 For a similar observation, *see* L. Conant, 'Compliance and What EU Member States Make of It', *in* M. Cremona (Ed.), *Compliance and the Enforcement of EU Law*, Oxford, Oxford University Press, 2012, p. 1-30.

31 *See, e.g.*, A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration*, Vol. 94, No. 3, 2016, p. 685-699; U. Sedelmeier, 'Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure', *Journal of European Public Policy*, Vol. 24, No. 3, 2017, p. 337-351.

32 *See* E.A. Andersen, *Out of the Closet and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*, Ann Harbor, University of Michigan Press, 2005. For application in the EU context, *see* C. Hilson, 'New Social Movement: The Role of Legal Opportunity', *Journal of European Public Policy*, Vol. 9, 2002, p. 238-255; R. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Cambridge, Cambridge University Press, 2007; R.E. Case & T.E. Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive', *Journal of Common Market Studies*, Vol. 48, No. 2, 2010, p. 221-241; L. Vanhala, 'The Paradox of Legal Mobilization by the UK Environmental Movement', *Law and Society review*, Vol. 47, No. 3, 2012, p. 523-556.

I Legal Opportunities Components

Legal opportunities include various components: substantive aspects, procedural and institutional dimensions, material conditions and, finally, institutional receptiveness.[33] Substantive aspects concern primarily legal standards. In our case, the key variable is the degree of protection respectively afforded by EU and national human rights standards.[34] Where the EU provides for stronger protection for rights, in general, or for a particular right, individuals, activist lawyers and civil society actors who work to promote that right are more tempted to invoke EU law instead of national law, and to bring matters within the scope of EU law, thereby pushing for greater federalization through rights.[35] Conversely, where national law offers better protection, litigants are likely to stay within the confines of the national legal system, thereby not causing much federalizing pressure.[36] In the specific context of the EU human rights regime, one can identify another key 'contingent' element: the interpretation of the scope of EU law. Indeed, as exposed above, it determines whether the EU Charter applies or not, and thus whether the EU institutions (notably the CJEU and the Commission) have jurisdiction to ensure Member States' respect for fundamental rights. The CJEU, the Commission and national courts have adopted different and varying interpretations on this.[37]

The procedural and institutional dimensions relate mainly to the accessibility and suitability of the judicial systems at the national and EU levels. They include issues such as standing to challenge particular measures and other conditions of

33 Hilson 2002, Case & Givens 2010, p. 221-241.

34 For a comparative study on the range of civil rights that receive protection across selected EU Member States and where there are 'deficiencies', *see* H. Van Eijken & S. de Vries 'The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1)', *Barriers Towards EU Citizenship* (2015), available at: https://zenodo.org/record/16530/files/Deliverable_7.1_final.pdf, and M.-P. Granger & O. Salat, *Report Exploring the Mechanisms for Enforcing Civil Rights with a View to Identifying the Barriers*, 2016, Barriers Towards EU Citizenship, doi:10.5281/zenodo.46835.

35 For an illustration in the context of the promotion of LGBT rights through activation of EU citizenship free movement rules, *see* U. Belavusau & D. Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU', *in* K. Slootmaeckers, H. Touquet & P. Vermeersch (Eds.), *The EU Enlargement and Gay Politics*: *The Impact of Eastern Enlargement on Rights, Active and Prejudice*, Basingstoke, UK Palgrave McMillan, 2016, p. 69-96.

36 Art. 53 of the Charter of Fundamental Rights suggests that Member States can afford higher standards. However, lower EU standards must prevail when their application would undermine the supremacy, effectiveness and autonomy of EU law. *See* Case C-202/04, *Stefano Macrino and Claudia Capodarte v. Roberto Meloni*, ECLI:EU:C:2013:107.

37 On the recent interpretation of the scope by the CJEU (and the Commission), *see* B. van Bockel & P. Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson', *European Law Review*, Vol. 38, 2013, p. 866-883; E. Hancox, 'Meaning of Implementing EU Law under Article 51(1) of the Charter: Akerberg Fransson', *Common Market Law Review*, Vol. 50, 2013, p. 1411-1432; E. Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures', Project Report. European Parliament, 2016, Brussels, available at: www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf; Dougan, 2015, p. 1201-1245. On the interpretation of Art. 51(1) CFR by national courts, *see* Burgorgue-Larsen 2017.

admissibility (time limits, the definition of justiciable acts, etc.), the range of judicial or non-judicial remedies available and the conditions under which these are granted, the capacity of the judicial system to process claims rapidly and effectively and so on.[38] The possibility of class actions and the legal capacity of non-governmental organizations (NGOs) to litigate human rights issues where individuals are unable or unwilling to litigate are also important.[39]

The material dimension is about resources – not only financial means but also human and organizational ones. In order to see policy change through, litigants must engage and sustain litigation over time.[40] Concerned individuals or NGOs fighting for human rights must garner organizational support for strategic litigation. They also need to have access to strong legal expertise, either in-house or through hired lawyers, which requires financial resources, recruitment capacity and professional connections. Legal training and the organization of the legal profession must also be 'fit for purpose'. Where human rights lawyers, or lawyers to whom victims of human rights violations or NGOs turn to for support, have little familiarity with EU law or the Charter, they are unlikely to 'spot' potential EU cases, and thus to mount Charter-based suits. The EU itself can play a role in offering or supporting awareness raising or training programmes to lawyers to encourage Charter-based litigation.[41] Legal aid schemes, as well as *pro bono* programmes and other forms of support to public interest or human rights litigation,[42] can support aggrieved individuals, engaged citizens or NGOs who lack sufficient resources.

Finally, the structural opportunities listed above are unlikely to trigger legal or policy change if institutional actors, and notably courts, at both the EU and the national levels, are not receptive to Charter-based arguments.[43]

II The Added Value of a Legal Opportunities Framework for Understanding Federalization through Rights

Studying the evolving interactions between EU and national legal opportunities can help explain pressure towards federalization through rights (even if federalization does not eventually occur). The logic suggests that when legal opportunities for the protection of fundamental rights are (more) limited at the domestic

38 For a comparative study of judicial mechanisms available to enforce and protect civil rights in the EU, *see* Granger & Salat 2016.

39 *See, e.g.*, Case & Givens 2010, p. 221-241.

40 M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review*, Vol. 9, No. 1, 1974, p. 95-160.

41 *See, e.g.*, FRA publication, 'How is the Charter of Fundamental Rights Used at National Level', 2016, available at: http://fra.europa.eu/en/publication/2016/how-eu-charter-fundamental-rights-used-national-level. *See also* the various sites of human rights legal training on the Charter, such as the European Inter-University Center for human rights and democratization (EUIC), available at: https://eiuc.org/education/training-seminars/eu-charter-of-fundamental-rights/training.html, Academy of European Law (ERA), The Charter of Fundamental Rights of the EU in practice, available at: https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=126152.

42 *See* the activities of the Public Interest Law Initiative (PILNET), available at: www.pilnet.org.

43 Hilson 2002, p. 243.

level, litigants are attracted by, or pushed towards, EU standards and mechanisms, thus creating dynamics of centralization (federalization) of human rights' protection. Charter-based litigation, would be expected to increase, provided that certain conditions are fulfilled (*e.g.* minimum of awareness and familiarity with the EU legal system and its operation among litigants, human rights NGOs and legal professionals, accessibility of judicial review procedures, national courts' receptiveness to Charter-based claims and their willingness to refer matters to the CJEU). Where national judicial systems no longer 'perform' in this way, for example when judicial independence is under threat, individuals and NGOs may turn to EU institutions as a last resort. This further engages institutional federalization, as the European Commission, in particular, will be under pressure to initiate proceedings against non-compliant Member States (Art. 260 TFEU). Faced with the 'appeal' to EU norms and mechanisms, EU institutions may respond positively, thereby increasing the scope and intensity of EU control over the respect for fundamental rights by Member States and further opening legal opportunities at the EU level, which should, in turn, trigger further centralizing litigation. The EU institutions may also resist this push and limit the scope and intensity of EU human rights oversight over national measures and thereby temper federalization trends.[44] In contrast, where there are strong legal opportunities at the national level for (certain) rights litigation, there is little incentive for litigants to activate EU norms and processes; consequently, in practice, as well as in law, the federalizing impact of the Charter will be more limited.

The evolving EU legal opportunities, and the pull-and-push effect they exert on EU-law-based human rights litigation against Member States, are summarily presented, before calling for comparative empirical studies on national rights pro-

44 *See* Spaventa 2016, A. Jakab, 'Application of the EU Charter in National Courts in Purely Domestic Cases', *in* A. Jakab and D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 252-262.

tection systems and Charter-based litigation patterns, aimed at testing these assumptions.[45]

E Ambivalent EU Legal Opportunities and Their Impact on Federalization through Rights

Legal opportunities at the EU level for human rights litigation have remained ambivalent, with some aspects creating incentives for Charter-based litigation and others sending more negative signals.

I EU Standards – Not Always the Panacea, but Sometimes Better than Home Rules

Gradually, through its case law on general principles of law and later on the Charter, the CJEU has fleshed out what EU human rights standards are. Informed by a comparative approach, taking into account the traditions of the ECHR and national constitutional laws,[46] and building on existing EU legislation, its case law goes neither for a maximalist nor for a minimalist protection, but for 'best fit', in light of the EU framework and objectives.[47] Broadly speaking, the Court seems to offer particularly generous interpretations of the right to family life (in particular

45 As this article focuses on providing and developing a conceptual framework to understand the dynamics of federalization through rights in the EU, and not on subjecting it to a thorough empirical test, it engages with empirical materials in a very limited and superficial manner. This framework was, however, developed in an interactive process when carrying out empirical research on the national application of EU citizenship and EU civil rights in the context of the bEUcitizen project on Hungary and France. *See*, in particular, M.-P. Granger & O. Salat, 'Report on France', 2015a and 'Report on Hungary', 2015b, Annex to van Eijken & de Vries, 2015, p. 190-325; O. Salat, 'Report on Hungary', Annex I, *in* M.-P. Granger & O. Salat (Eds.), *Report Exploring the Mechanisms for Enforcing Civil Rights with a View to Identifying the Barriers*, 2016, p. 85-93; M.-P. Granger, 'Report on France', Annex I, *in* M.-P. Granger & O. Salat (Eds.), *Report Exploring the Mechanisms for Enforcing Civil Rights with a View to Identifying the Barriers*, 2016, p. 118-172. The 'impressions' generated from the studies appear corroborated by comparative studies on the national courts' application of the Charter, such as the contributions in Burgorgue-Larsen 2017, as well as other analyses of the national courts' engagement with the Charter (*e.g.*, Commission's annual report on the application of the Charter, 18 May 2017, COM (2017, 739, Section 3, p. 9; Report of the Fundamental Rights Agency, Fundamental Rights Report, 2017, Section 1(1), p. 38, available at: http://fra.europa.eu/en/publication/2017/fundamental-rights-report-2017, and case law and FRA materials in Charterpedia on Article 51, available at: http://fra.europa.eu/en/charterpedia/article/51-field-application). *See also* the analysis of the Charter-related petitions to the European Parliament, Spaventa 2016, p. 26-31.

46 *See* Case 4/73, *Nold*, Case 11/70, Internationale Handelsgesellschaft.

47 For a relatively comprehensive study of general principles in the pre-Charter era, *see* T. Tridimas, *The General Principles of EC Law*, Oxford, Oxford University Press, 1999.

in the immigration context),[48] the right to the protection of personal data,[49] and the right to effective (domestic) remedies,[50] in comparison with a number of national constitutional systems. It therefore comes as no surprise that, in the field of justice and home affairs, the Charter provisions most litigated before national courts are the right to the respect of private and family life (Art. 7), the right to the protection of personal data (Art. 8) and the right to an effective remedy or a fair trial (Art. 47).[51] Sometimes, however, national law provides for higher standards.[52]

II The Charter's Scope of Application – A Moving (Away) Target

As already noted, Article 51(1) of the Charter and the CJEU case law provide that the scope of application of the Charter corresponds to the scope of application of EU law.[53] Inevitably, the scope of application of EU fundamental rights has expanded together with the expansion of EU competences,[54] but the Charter cannot be used to expand EU competences (Art. 6(1) TEU and Art. 52(2) of the Charter). The determination of what is considered to be 'implementing' EU law for the purpose of the Charter's application is far from straightforward, and the CJEU case law on the matter has done little to dissipate confusion and frustration. In order to invoke the Charter against Member States, litigants need to expose some sufficient 'connection' with EU law, so that the national measure can qualify as an 'implementing' measure. In *Åkerberg Fransson*, the Court considered that national measures regulating sanctions for tax fraud fell within the scope of application of

48 Notably through the combined effect of free movement, EU citizenship and fundamental rights rules; *see, e.g.*, Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department, ECLI*:EU:C:1992:296; Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department, ECLI*:EU:C:2002:434; Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform, ECLI*:EU:C:2008:449; Case C-34/09, *Ruiz Zambrano, ECLI*:EU:C:2011:124.

49 *See* Cases C-131/12, *Google Spain and Google, ECLI*:EU:C:2014:317; Case C-293/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*, ECLI:EU:C:2014:238; Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650.

50 *See, e.g.*, Art. 19(1) TEU; Case C-222/86, *Unectef v. Heylens and Others, ECLI*:EU:C:1987:442; Case C-432/05, Unibet *(London) Ltd and* Unibet *(International) Ltd v. Justitiekanslern, ECLI*:EU:C:2007:163; Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschlan, ECLI*:EU:C:2010:811. For an overview, *see* K. Lenaerts, 'Effective Judicial Protection in the EU', 2013, available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenaerts.pdf.

51 *See* EU Fundamental Rights Agency, Fundamental Rights Report, 2017, p. 40; European Commission, 2015 Annual report on the Application of the EU Charter of Fundamental Rights 19 May 2016, p. 28.

52 A typical example concerns the Spanish constitutional protection against the right to be tried in absentia, as illustrated in the *Melloni* case (C-399/11, ECLI:EU:C:2013:107).

53 Case C-617/10, *Hans Åkerberg Fransson*.

54 Originally confined to the internal market and a few common policies (*e.g.*, competition, agriculture), they now include the economic and monetary union, and cooperation in matters related to justice and home affairs, foreign and security policy. Still, EU competences are limited to the powers that have been conferred, *see* Arts. 4(1) and 5 TEU, which may be exclusive, shared or supportive EU competences.

EU law (and thus that of the Charter), as they sanctioned violations of EU VAT Directive obligations.[55] But in *Hernandez*, it clarified that it was not enough that the national measures fell within an EU competence: applicants had to show that the Member State was implementing a specific EU law obligation.[56] Beyond obvious candidates such as EU non-discrimination or data protection legislation, the EU citizenship treaty provisions and legislation seemed to offer a promising avenue for litigants wishing to invoke the Charter to secure higher EU protection standards. Indeed, following the *ERT* logic, national measures that restrict EU citizenship rights, such as the right to move and reside in another Member State, would fall within the scope of EU law and should comply with the Charter.[57] EU citizenship, furthermore, can also be invoked, in some circumstances, in the absence of cross-border movement. Indeed, as the 'the fundamental status' of all EU citizens,[58] it has been interpreted by the CJEU as prohibiting Member States from adopting measures that deprive EU citizens from the 'genuine enjoyment of the substance of the rights attached to their status as EU citizens.'[59] The Court nonetheless curtailed the federalizing potential of the – EU citizenship – Charter combined application, by later clarifying that the substance of EU citizenship does not include the Charter rights, but only a right not to be forced to leave the EU territory.[60] So far the Court has been careful of the Charter's overreach through an easy activation based on EU citizenship. It refrained from referring to, or relying on, the Charter in cases involving EU citizenship,[61] or found it inapplicable.[62] The Court has, moreover, considered that the Charter was not applicable to actions by Member States outside of the Treaty framework, such as Euro-crisis measures.[63] The Court's restrictive interpretation of the scope of the Charter, including cases where the rights of (mobile) EU citizens are at stake, and the general sense of confusion that the inconsistent case law produces, may well discourage litigants from starting Charter-based litigation.

55 Case C-617/10, *Hans Åkerberg Fransson*.

56 Case C-198/13, *Hernández*.

57 For a confirmation of this logic in relation to the Charter, *see* C-390/12, *Pfleger and Others*, ECLI:EU:C:2014:281, para. 35.

58 Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, para. 31.

59 Case C-34/09, *Zambrano*, para. 42.

60 Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, ECLI:EU:C:2011:734, para. 66.

61 *See, e.g.*, Case C-34/09, *Zambrano*; Case C-256/11, *Dereci*. *See* E. Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures', Project Report. European Parliament, 2016, Brussels, available at: www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf.

62 *See, e.g.*, Case C-*333/13, Elisabeta* Dano *and Florin* Dano *v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

63 The Court considered that the creation of the European Stability Mechanism fell outside the scope of EU law and the Charter (Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756, para. 180). It also ruled that national austerity measures fall outside the scope of the Charter, in the absence of evidence that these implemented EU obligations (Case C-128/12, *Sindicato dos Bancários do Norte and Others, ECLI*:EU:C:2013:149).

III Procedural Hurdles in Accessing EU Courts

A significant limitation to activating EU procedural opportunities is that individuals do not have direct access to EU courts to challenge national measures that infringe upon their Charter rights. They can only complain to the European Commission, which may decide to follow up with infringement proceedings,[64] or bring litigation before domestic courts and seek a reference for a preliminary ruling to the CJEU.

Violations of EU fundamental rights by states can be addressed through the EU infringement procedure, which can lead to the imposition of financial penalties on the recalcitrant Member State (Arts. 258-260 TFEU). This procedure can be initiated by other Member States (Art. 259 TFEU), but these have, historically, refrained from bringing each other before the Court (save in a handful of salient bilateral disputes)[65] and have left it to the Commission to monitor compliance with EU obligations. It is thus unlikely that they would bring another Member State before the CJEU for a violation of the Charter.[66]

Victims of human rights violation, and NGOs, can complain to the European Commission. The Commission has discretion in launching infringement proceedings. For strategic reasons and owing to resource constraints, the Commission is selective and does not pursue every single violation.[67] It has, on occasion, deployed some creativity to bring what were broader threats on the rule of law and civil rights within the scope of application of EU law, so as to be able to start infringement proceedings. For example, the Commission brought Hungary before the Court for the adoption of measures imposing early retirement of judges, widely perceived as an attempt to pack courts with judges loyal to the Fidesz government, and a threat to the independence of the judiciary, with arguments based on a violation of EU non-discrimination legislation.[68] But where it cannot argue a direct violation of EU treaties or legislation, the Commission is cautious.[69] It has, so far, refrained from starting infringement proceedings against a Member State based solely on a violation of the Charter (possibly in combination with Art. 20 TFEU on EU citizenship or Arts. 2 TEU and 7 TEU).[70] It invokes the Charter against national measures only where these have a sufficient connection with EU law, for example because they (also) breach other primary or secondary EU

64 They may also petition the European Parliament, which can pressure the Commission to act.

65 Case C-364/10, *Hungary v. Slovakia*, ECLI:EU:C:2012:630.

66 As suggested by D. Kochenov, 'Biting Intergovernmentalism: The Case for a Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool?', *The Hague Journal of the Rule of Law*, Vol. 7, 2015, p. 153.

67 *See* European Commission, 2016, *Annual Report on the Application of EU Law*, Section II Enforcement in priority areas, COM(2017) 370 final, p. 4.

68 Case C-286/12, *Commission v. Hungary*, EU:C:2012:687.

69 *See* A. Lazowski, 'Decoding the Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings', *ERA Forum*, Vol. 14, 2013, p. 573.

70 As suggested by A. Jakab, 'The Application of the Charter of Fundamental Rights by National Courts', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 252-262, Nagy 2017, p. 1-13.

rules.[71] For instance, following political and social mobilization in support of the Central European University, a private American university located in Budapest, threatened with closure as a result of an amendment to the Higher Education Act, the Commission built its case around both the violation of internal market rules and that of rights protected by the Charter, such as academic freedom, the right to education and the freedom to conduct a business, although without clearly and openly elucidating the 'relation' between the two sets of norms.[72] These cases suggest that the Commission is, in certain cases, willing to embark the Court in a process of pushing the boundaries of EU law to ensure federal control over Member States' respect of fundamental rights, by finding loose 'connections' with EU law.

Where the Commission decides not to act upon complaints, individuals and NGOs can use the 'indirect route', which consists in bringing litigation against Member States before domestic courts, and seeking a preliminary reference to the CJEU (Art. 267 TFEU). Although designed to ensure the uniform interpretation of EU law, the procedure is widely used to challenge domestic measures that are not in line with EU law, under the guise of interpretation.[73] However, parties before domestic courts cannot 'request' a preliminary ruling. They can only 'ask' the national courts to submit such a request to the CJEU. National courts have discretion as to whether to refer or not, except for courts against which there is no remedy, which have a duty to refer. However, these are released from this duty when the interpretation of EU law is sufficiently clear (*acte clair* doctrine), a possibility that they sometimes abuse to avoid referring issues to Luxembourg.[74] In any case, except in emergency procedures, it takes an average of 15 months to get a preliminary ruling,[75] during which the principal (national) procedure is pending. This delay may put litigants off activating this 'indirect remedy'.

Moreover, the possibility to direct Charter-based claims against Member States to the CJEU via preliminary ruling proceedings is also constrained by the

71 *For example*, on the challenges facing the Commission in handling threats on media freedom in Hungary, *see* Nagy 2017, p. 6.

72 European Commission, 'Commission Refers Hungary to the Court of Justice of the European Union over Higher Education Law', Press Release, 7 December 2017, available at: http://europa.eu/rapid/press-release_IP-17-5004_en.htm.

73 For an analysis of how to use the preliminary reference procedure to ensure compliance with EU law, *see* M. Broberg, 'Preliminary References as a Means for Enforcing EU Law', *in* C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, p. 9-111.

74 Case 283/81, *CILFIT v. Ministero della Sanita*, ECLI :EU:C:1982:335. *For example*, the United Kingdom's Supreme Court did not refer questions to the CJEU concerning the interpretation of EU citizenship rights, brought by British citizens who, because they had been imprisoned, could not vote in European elections (*Chester v. Secretary of State for Justice; McGeoch v. The Lord President of the Council & Anor* [2013] UKSC 63) or because they had been living abroad, were not allowed to vote in the UK referendum on Brexit *Shindler & Anor v. Chancellor of the Duchy of Lancaster & Anor* [2016] EWHC 957). The German constitutional court also refused to refer a question to the CJEU in the Anti-terror database case in which it challenged the CJEU's wide interpretation of the scope of application of the Charter in *Akerberg Fransson* (FCC BvR 1215/07).

75 CJEU, *Annual Report 2016 Judicial Activity*, 2017, p. 100, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf.

restrictive terms of Article 51(1) of the Charter.[76] Comparative studies reveal that national courts do not all have the same understanding of the scope of application of the Charter, and therefore of when they should refer questions concerning its interpretation and application.[77] This results in variation in the preliminary references rates related to the Charter across Member States and policy areas.

These characteristics play into the federalizing effect of the Charter. Where (lower) national judges are willing to refer a wide range of Charter-based claims, the preliminary reference procedure offers certain advantages, which can be appealing to litigants, in particular in the case of fundamental rights violations that result from legislative measures. Indeed, if the CJEU finds that the Charter (or EU law more generally) prohibits legislative provisions of the sort, the national court must set them aside, even if it does not have judicial review power under domestic law. While such power derives from EU law without the need for a preliminary reference,[78] national courts that are subject to 'political pressure' may feel more confident striking down domestic legislation if they have been 'asked' to do so by the CJEU.

Appealing to the CJEU via the preliminary reference procedure, or a Commission-led infringement action, can thus offer 'remedies' that are potentially more effective than those available under domestic law (in particular in countries in which judicial independence is under threat), as a result of the authority of EU law and the potential economic and political leverage of EU institutions. Moreover, unlike applications to the ECtHR, there is no need to exhaust domestic remedies before asking for a preliminary reference to the CJEU.

IV The Costs of EU Legal Opportunities

Involving EU legal opportunities does not come at a prohibitive cost. Complaining to the Commission takes little resources. Some knowledge of EU (human rights) law is, nonetheless, useful to make a strong 'case' that would compel the Commission to 'investigate'. When the Commission is willing to intervene, it can mobilize its own resources to build a strong case. The costs of litigating before domestic courts are aligned with those applicable in the country in which litigation is started. These costs are augmented by the need for one additional procedural step (preliminary reference), costs resulting from time delays, and access to legal professionals with expertise in EU law, and EU human rights law, which in some countries can be challenging for less resourceful or connected individuals or organizations.

V Judicial Receptiveness in Question

The CJEU does not appear to have fully endorsed its 'new' (post-Charter) human rights mandate.[79] Some of its members are keen to recall that it is 'not a human

76 Spaventa 2016, p. 13.

77 Van Eijken & de Vries, 2015; Granger & Salat 2016; Burgorgue-Larsen, 2017.

78 Case 106/77, *Simmenthal II*.

79 G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 2, 2013, p. 168-184.

rights court'.[80] The receptiveness of the Court to Charter-based claims against Member States, in particular those that are on the 'edge' of EU competence, is a strong determinant of federalization through rights. So far, no clear trend emerges that suggests either a move towards federalization or to the contrary, a pushback.

While the previously broad interpretation of the scope of application of EU general principles for the protection of fundamental rights created an incentive to appeal to EU law, in particular where EU human rights norms were (potentially) more protective than national law, or where EU remedies appeared more effective, and shifted control over human rights violation by Member States from national courts to the CJEU, the recent narrowing by the CJEU of the scope of application of the Charter, as well as its minimalist interpretations of certain rights, limits incentives to involve the Charter and the Court in human rights litigation against Member States. In Spaventa's words, 'the Court has placed the fundamental rights ball back in the national courtyard, potentially at the expense of the protection of citizens' fundamental rights.'[81]

F Conclusions – Exploring National Legal Opportunities

Save for a few rights, for which the EU provides better standards and remedies, and to which the CJEU appears more receptive (*i.e.* non-discrimination, data protection, the right to family life, due process and right to effective remedies), EU legal opportunities for human rights litigation remain limited and therefore do not create a strong federalizing pull.

The attractiveness of the EU legal framework is, nonetheless, relative and must be compared to, and contrasted with, national legal opportunities. The EU legal opportunities may, for the time being, not be a panacea, but as the general human rights situation deteriorates in some Member States, and there are deficiencies in almost every Member State, EU law may still hold some appeal, at least for desperate litigants and NGOs defending human rights causes. Moreover, EU institutions may feel pressured to do something to counter democratic and Rule of Law backsliding in some Member States such as Hungary and Poland and may choose to 'open up' EU legal opportunities, by expanding the Charter's scope of application.

The conceptual framework suggests that the weaker the protection of human rights at the domestic level is, the greater the pressure for further federalization around rights and centralization of human rights protection grows, under the conditions that litigants have access to resources, legal practitioners have EU law

80 V. Skouris, 'Opening Remarks', *FIDE 2014 Conference Copenhagen*, May 2014.
81 Spaventa 2016, p. 22.

expertise, and EU institutions and national courts are receptive to Charter-based claims in disputes against Member States.[82]

Preliminary comparative data suggest that in countries, such as Hungary, where national legal opportunities for human rights litigation are closing, litigants are trying to engage EU instruments and institutions to get around domestic limitations on judicial remedies.[83] The number of preliminary references coming from Hungary invoking the Charter have increased significantly in 2013-2014,[84] which corresponds to the introduction of limitations on constitutional review and increased political influence on courts.[85] Most were rejected by the CJEU, which considered that they fell outside the scope of EU law,[86] but one managed to capitalize on the *Akerberg Fransson* ruling, to challenge national tax penalty procedures in the light of the right to privacy and a fair trial as embedded in the Charter.[87]

In contrast, in states in which national legal opportunities for judicial protection of fundamental rights improved, for example in France with the introduction of the *Question Prioritaire de Constitutionalité*, litigation invoking EU law and preliminary references invoking fundamental rights has decreased, despite the coming into force of the Charter.[88] A more detailed analysis of the roots of EU and national litigation concerning the Charter, as well as complaints to the Commission, is necessary to test these assumptions and to tease out the complex dynamics at play.

If the logic is true, though, those governments that are most critical of the EU liberal influence on rights matters (*e.g.*, the Hungarian Fidesz government) and most concerned about the expansive reach of the EU human rights supervision may well 'inadvertently' contribute to further federalization through rights when they curtail legal opportunities for human rights protection.

82 On the willingness of national judges to take on Charter-based claims, *see* A. Jakab, 'Application of the EU Charter in National Courts in Purely Domestic Cases', *in* A. Jakab & D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 252-262.

83 *See* A. Berkes 'Hungary', *in* Burgorgue-Larsen (Ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe*, Paris, Pedone, 2017, p. 425-464; Nagy 2017, p. 1-13.

84 *See* Berkes 2017, p. 425-464, 457.

85 For an overview of the closure of remedies for human rights violations, *see* Granger & Salat 2015b.

86 *See* Berkes 2017, p. 425-464; C.I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States', *Indiana International and Comparative Law Review*, Vol. 27, No.1, 2017, p. 1-13.

87 Case C-419/14, *WebMindLicences*, ECLI:EU:C:2015:832.

88 *See* Granger & Salat, 2015a; Granger, 2015, *see also* E. Dubout, P. Simon & L. Xenou, 'France', *in* Burgorgue-Larsen (Ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe*, Paris, Pedone, 2017, p. 327-336.

The Harmonization Potential of the Charter of Fundamental Rights of the European Union

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A Introduction

The Charter of Fundamental Rights of the European Union (the Charter) binds EU institutions and Member States when they are implementing EU law.[1] Thus, it does not apply to State measures *outside the scope* of application of EU law, including those *beyond the reach* of the EU rules on free movement. The Twitter version of this article, therefore, would read: "the Charter neither restricts nor enlarges the application to domestic measures of EU law rules, including the rules on the market freedoms." There is, in other words, no direct harmonization effect in the application of the Charter.

Nevertheless, it is worth observing how this symbiotic relation between the Charter and EU law – the *Fransson*-equivalence, as it were[2] – works out in practice. Notably, when the scope of application of EU law has imprecise boundaries, so has the Charter, and this happens frequently when the EU law at stake is the law of the common market and of EU citizenship. Whereas the uncertainty mostly resolves itself (domestic measures are either prohibited by EU law or are not, regardless of whether they are allowed or just not contemplated), in certain cases it has consequential effects: these are the cases of non-preclusion.

One of the central points of this article is the underrated importance of non-precluded measures. More precisely, it is argued that State measures that are not precluded by EU law are the springboard of the Charter's indirect harmonization

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1 Art. 51(1) of the Charter. *See also* C.I. Nagy, 'Est-ce que l'Union européenne devrait avoir le pouvoir de forcer les états membres à respecter les droits de l'homme? Une analyse prospective relative à l'application de la charte des droits fondamentaux aux états membres', *Revue de Droit International et de Droit Comparé*, Vol. 94, No. 3, 2017, p. 510.

2 The *Fransson* equivalence dictates that the scope of application of EU law and the Charter to State measures is the same, *ratione materiae*. Whereas (then) President Skouris praised the *Fransson*-equivalence, it arguably creates more problems than it solves. *See*, respectively, V. Skouris, 'Développements Récents de la Protection des Droits Fondamentaux dans l'Union Européenne: Les Arrêts Melloni et Åkerberg Fransson', *Il Diritto dell'Unione Europea*, 2013, No. 2, p. 229-243 and F. Fontanelli, 'Implementation of European Union Law by Member States under Article 51 (1) of the Charter of Fundamental Rights', *Columbia Journal of European Law*, Vol. 20, 2013, p. 193-247.

effects. It is important to delineate the category of non-precluded measures accurately, before expanding on its implications.[3] To assess the impact of the Charter, it is indispensable to observe the application of EU law to domestic measures at large, as the application of the Charter and that of EU law go hand in hand. This alignment carries within it a simplification (the Charter's application overlaps with the application of EU law) and a complication (the scope of application of EU law is uncertain).

The question of State acts' compliance with EU law is normally fashioned as a binary determination. Either a State act breaches EU law, and is therefore unlawful, or it does not and is therefore lawful. For instance, Article 34 TFEU prohibits national measures that restrict the imports of goods from other Member States. These measures are therefore unlawful: domestic courts are required to put them aside.[4] Conversely, Article 34 TFEU does not preclude quantitative restrictions on imports justified on grounds of public security,[5] nor does it prohibit measures that do not entail a quantitative restriction. These measures are therefore lawful, as a matter of EU law, and will apply.

However, the dichotomy is somewhat simplistic because it obfuscates a further distinction. A prohibition of doorstep selling of jewellery, which does not restrict cross-border trade in goods, is simply *not covered* by Article 34 TFEU.[6] On the contrary, a ban on equipment increasing the power of mopeds, which seeks to protect human health is covered, but *not precluded*, by Article 34 TFEU insofar as it can be justified under Article 36 TFEU.[7] The former measure lies outside the scope of EU law altogether, while the latter falls within the scope of EU law but does not breach it. The two categories of non-covered and non-precluded measures must be examined separately.

This article observes, in succession, the received knowledge regarding State measures that fall outside the scope of EU law and State measures that fall under EU law but are not precluded by it. It then maps the blurred division between such categories, to identify the problems that, in turn, affect the reach of EU law and the Charter at once. One of the striking effects of this theoretical blur is that, ultimately, State authorities might choose to follow the Charter just out of precaution, accelerating its unintended harmonization effects.

Our main conclusion is that this theoretical uncertainty is regrettable and that one of the unintended effects of the Charter's growing application is that the Court of Justice of the European Union (CJEU; the Court), has gradually come under enormous pressure to address the long-ignored problem of the precise application of EU law to domestic measures.

3 The importance of non-precluded measures under the Charter is discussed in F Fontanelli, 'Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and 'Non-preclusion' Troubles Loom Large', *European Law Review*, Vol. 39, No. 5, 2014, p. 682-700.

4 Art. 34 TFEU.

5 Art. 36 TFEU.

6 Case C-441/04, *A-Punkt Schmuckhandels GmbH v. Claudia Schmidt*, EU:C:2006:141, para. 30.

7 Case C-142/09, *Criminal Proceedings against Vincent Willy Lahousse and Lavichy BVBA*, EU:C:2010:694, paras. 43-48.

B Non-Covered Measures and the Application of EU Law

Non-covered measures are those measures that do not breach EU law because they do not fall under its reach in the first place. Their identification implicates knowing the contours of the application of EU law. However, whether EU law applies to a specific State measure is a question that often cannot be answered with certainty.[8]

The scope of application of EU law is certainly related to the reach of EU competences. However, whether the EU has competence over certain matters is a poor predictor of whether a certain matter falls under the scope of EU law. First, the exact boundaries of the competences listed in Articles 3-6 TFEU are difficult to draw *in abstracto*.[9] The 'internal market', for instance, is more of a goal than a specific subject-matter. Second, a measure may fall in an area where the EU has a non-exclusive competence, but it has not yet enacted EU legislation in that matter or the relevant EU acts are no longer in force.[10] In such a scenario, unless the national measure is in breach of obligations laid down in the Treaties, the *existence* of EU competences does not warrant the inference that the measure falls within the scope of EU law.[11] Third, and conversely, the *absence* of EU competences in the area regulated by the national measure is no guarantee that such a measure lies beyond the reach of EU law. While, in principle, Member States are free to legislate in areas where the Treaties have not conferred competences upon

8 *See* C-203/15, *Tele2 Sverige*, EU:C:2016:970. The judgment grapples with the apparent contradiction between Arts. 1(3) and 15(1) of the e-privacy Directive 2002/58. Whereas the first provision seems to exclude public security measures from the Directive's application, the latter seems to authorize them. In other words, it is not clear whether certain national measures are not-covered or not-precluded by the Directive. The Court opted for the latter view, *see* paras. 75-79. *See also* the General Opinion of Advocate General Saugmandsgaard Øe EU:C:2016:572, paras. 92-97.

9 For instance, legal commentators have highlighted the difficulty in determining the exact boundaries of the EU exclusive competence in the area of the "establish[ment] of the competition rules necessary for the functioning of the internal market" as per Art. 3(1)(b) TFEU. *See*, for instance, A. Dashwood, 'The relationship between the Member States and the European Union/ European Community', *Common Market Law Review*, Vol. 41, No. 2, 2004, p. 371 (Arguing that such definition is inaccurate.); R Mastroianni, 'Le competenze dell"Unione', *Il Diritto dell"Unione Europea*, 2005, p. 398 (Noting that the above definition adopts the pre-Lisbon teleological approach to the vertical division of powers.); R Schütze, 'Lisbon and the Federal Order of Competences: a Prospective Analysis', *European Law Review*, Vol. 33, 2008, p. 717. (Arguing that the drafters have fallen victim to an "ontological fallacy" insofar as the category of "rules necessary for the functioning of the internal market" does "not, by definition, require the exclusion of all national action within their scope.")

10 In *Tele2 Sverige*, for instance, at stake was the regulatory gap left by the annulment of the Data Retention Directive and whether its implementing regulations could fall under Art. 15(1) of the e-privacy Directive 2002/58.

11 *See* Case C-198/13, *Víctor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante) and Other*, EU:C:2014:2055, para. 36. ("[T]he mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law.") *See also* Joined Cases C-483/09 and C-1/10, *Gueye and Salmerón Sánchez*, EU:C:2011:583, paras. 55, 69 & 70 and Case C-370/12, *Pringle*, EU:C:2012:756, paras. 104-105 & 180-181.

the Union, they still cannot exercise those competences in a manner inconsistent with EU law.[12]

The latter scenario arises regularly in the operation of the market freedoms. Whereas EU legislation promotes positive integration of the common market through the approximation of domestic laws, the market freedoms as protected in the Treaties reflect a model of negative integration. Under the Treaty provisions on the four freedoms, States are not asked to adopt specific conduct but are enjoined from raising trade obstacles, irrespective of what matter they might be regulating. The principle of conferral, which delineates the outer limits of EU competence, thus cannot constrain the reach of the EU market freedoms *ratione materiae*.

To determine whether a certain domestic measure falls under the TFEU free movement provisions, the Court established, among others, a test that does not rely on the attribution of competences but on the factual matrix of the situation at hand.[13] This is the "purely internal situation" test. It relates to the practical coordinates of the case (the conduct, the nationality of the persons affected, the location of the interests involved). It is not a sophisticated legal test but is founded on a plausible assumption: when a factual scenario has no transborder ele-

12 *See* Case C-348/96, *Criminal Proceedings against Donatella Calfa*, EU:C:1999:6, para. 17. ("Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law.") *See also* Case 186/87, *Ian William Cowan v. Trésor public*, EU:C:1989:47, para. 19; Case 203/80, *Criminal Proceedings against Guerrino Casati*, EU:C:1981:261, para. 27. More recently, in a case relating to the right to residence of EU citizens and third country citizens, *see* the reasoning of the Court in Case C-165/14, *Alfredo Rendón Marín*, ECLI:EU:C:2016:675, para. 75: "although [these situations] are governed by legislation which falls, a priori, within the competence of the Member States, namely legislation on the right of entry and residence of third-country nationals outside the scope of provisions of secondary legislation which provide for the grant of such a right under certain conditions, they nonetheless have an intrinsic connection with the freedom of movement and residence of a Union citizen, which prevents the right of entry and residence being refused to those nationals in the Member State of residence of that citizen, in order not to interfere with that freedom."

13 That test is firmly grounded in the wording of several TFEU provisions in the area of internal market: Arts. 30 and 34 TFEU prohibit custom duties and quantitative restrictions in trade 'between Member States'; Art. 45(1) TFEU, concerning the free movement of workers, expressly refers to 'nationality'; Art. 49 TFEU, prohibiting restrictions on establishment "by citizens of a Member States in the territory of another Member State"; Art. 56 TFEU, in turn, prohibits restrictions on the freedom to provide services "in respect of national of Member States who are established in a Member State other than that of the person for whom the services are intended"; finally, Art. 69 TFEU prohibits restrictions on the movement of capital "between Member States, as well as between Member States and third countries".

ment, it can be presumed that EU law does not apply to it.[14] The same remarks apply, in essence, to the exercise of citizenship rights – a field where the 'purely internal situation' test has often been the only relatively reliable device to police the interplay between EU and domestic law.

Cases like *Rottman*,[15] *Viking*,[16] *Wittgenstein*[17] and *Pfleger*[18] illustrate very well the grasp of EU market freedoms and citizenship rights over matters where the Treaties did not confer any competence on the EU. These cases arose in the application of rules governing the withdrawal of German citizenship, the UK regime of strike rights, the Austrian rules prohibiting the use of nobility titles and Austrian criminal law punishing the use of unlicensed gambling machines. All these measures have at least one crucial aspect in common: they governed matters that, according to the principle of conferral, should rest with the Member States. Nonetheless, all these measures had an impact on the exercise of a market freedom or an EU citizenship right. As a result, these measures *fell under the scope of EU law*, and some of them were ultimately *in breach thereof*. In all these cases the existence of a transborder element (Mr Rottman's previous Austrian citizenship, the transborder operation of the Finnish ferry company, Ms Wittgenstein's dealings with a non-Austrian administration, the criminal prosecution of Czech individuals in Austrian courts) was a better predictor of the application of EU law than the principle of conferral. As Advocate General Spuznar put it, "… it is precisely when they are exercising their powers that the Member States must take care to ensure that EU law is not deprived of its effectiveness".[19]

It might be tempting, then, to seek guidance as to the scope of EU law by looking at the boundaries of the jurisdiction of the Court of Justice in the context of the preliminary ruling procedure.[20] Indeed, the Court has repeatedly held that its task is not to give advisory opinions 'on general or hypothetical questions'[21]

14 *See* A. Arena, 'I limiti della competenza pregiudiziale della Corte di giustizia in presenza di situazioni puramente interne: la sentenza Sbarigia', *Diritto dell'Unione Europea*, Vol. 1, 2011, p. 207. (Noting that the Court's 'traditional' approach to purely internal situations implies that the existence of a cross-border element in the case's factual matrix entails the presumption that the national measure has an impact on cross-border trade.). *See also* A. Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years', *in* C. Barnard & O. Odudu (Eds.), *The Outer Limits of European Union Law*, Oxford and Portland, Hart Publishing, 2009, p. 200. ("Under this approach … if the goods that are involved in the facts have remained confined within the territory of one and the same Member State, the situation immediately qualifies as purely internal and this signifies the end of the enquiry as to a possible violation of Article 28 EC.")

15 Case C-135/08, *Janko Rottmann*, EU:C:2010:104.

16 Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union*, EU:C:2007:772.

17 Case C-208/09, *Sayn-Wittgenstein*, EU:C:2010:806.

18 Case C-390/12, *Pfleger and others*, EU:C:2014:281.

19 Opinion in Case C-165/14, *Rendón Marín*, EU:C:2016:75, para. 113.

20 *See* Case C-281/15, *Sahyouni*, EU:C:2016:343, para. 23: "[i]t follows therefrom that neither the provisions of Regulation No. 1259/2010, referred to by the referring court, nor those of Regulation No. 2201/2003, nor any other legal act of the European Union applies to the dispute in the main proceedings."

21 Case C-212/04, *Adeneler and others*, EU:C:2006:443, para. 42.

and, in particular, that it may refuse to provide a preliminary ruling if "the interpretation of European Union law sought bears no relation to the actual facts of the main action".[22]

However, that approach is theoretically flawed because, in the context of the preliminary ruling procedure, the Court's task is to rule on the interpretation (or validity) of EU law, not on its applicability in the main proceedings. It is thus no wonder that, according to settled case-law, the Court leaves it to the referring court to determine "both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court".[23]

Moreover, such a 'jurisdictional' criterion may yield false positives, *i.e.* situations where the Court provides a preliminary ruling although the situation at hand lies beyond the scope of EU law. In the context of the internal market, the Court has on several occasions provided preliminary rulings on a provision of EU law that did not apply to the main proceedings, because they concerned purely internal situations. For instance, in *Dzodzi* the Court ruled on the interpretation of EU provisions that were 'made applicable' in the main proceedings by way of a reference contained in national provisions. The Court considered that it was "manifestly in the interest of the Community legal order that, in order to forestall future differences of interpretation, every Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied".[24] Likewise, in *Guimont*, the Court provided guidance on Article 34 TFEU even if the main proceedings concerned a purely internal situation, holding that a preliminary ruling can be useful when national law requires that a national producer enjoy the same rights as those enjoyed under EU law by a producer of another Member State in the same situation.[25]

By the same token, the criterion in question may yield false negatives, *i.e.* situations where the Court declines its jurisdiction to give a preliminary ruling in circumstances falling within the scope of EU law. For instance, the Court may refuse to answer a preliminary question if the referring court fails to define the factual and legislative context of the questions: in *Z.Ś. and Others*, the Court ruled that the request for a preliminary ruling on the interpretation of Article 8 of Regulation No. 561/2006 on road transport was inadmissible because the referring court did not specify what paragraph was the subject of its question and how the interpretation sought was necessary to resolve the dispute in the main proceedings.[26]

22 Case C-238/05, *Asnef-Equifax and Administración del Estado*, EU:C:2006:734, para. 17.
23 *See*, for instance, Case C-571/10, *Kamberaj*, EU:C:2012:233, para. 40.
24 Cases C-297/88 and C-197/89, *Dzodzi*, EU:C:1990:36, para. 37.
25 Case C-448/98, *Guimont*, EU:C:2000:663, para. 23.
26 Case C-325/15, *Z.Ś. and Others*, EU:C:2016:107, paras. 32-33.

C Non-Precluded Measures

Non-precluded measures are Member State measures that fall under the scope of EU law and are in line with the applicable EU provisions. They can arise under different circumstances, which are not mutually exclusive. A few examples can be mentioned.

At the outset, the internal market fundamental freedoms envisage a number of express and implied derogations. National measures in accordance with those derogations fall within the scope of EU law but are not precluded by it. Article 52(1) TFEU, for instance, provides that the right of establishment is no bar to national provisions granting special treatment for foreign nationals on grounds of public policy, public security or public health.[27] Moreover, the Court recognized a number of overriding reasons relating to the public interest that can serve as a justification for the introduction of indistinctly applicable restrictions at the national level.[28] Likewise, under Article 15(1) of the e-privacy Directive, States can restrict the Internet users' rights granted by the Directive to pursue public security goals. By the same token, the Court acknowledged that Member States can take measures to prevent the abuse of the free movement provisions set out in the TFEU.[29]

Furthermore, positive integration provisions laid down in EU legislation may also envisage areas of permissible national action falling within the scope of EU law. EU legislation may require the adoption of certain measures at the national level. Directives are an obvious example, although also certain provisions laid

27 *See also* the express derogations laid down in Arts. 36, 45(3), 62, and 65 TFEU.

28 For a non-exhaustive list, *see* Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, EU:C:1991:323, para. 14: "the overriding reasons relating to the public interest which the Court has already recognized include professional rules intended to protect recipients of the service (Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35, paragraph 28); protection of intellectual property (Case 62/79 *Coditel* [1980] ECR 881); the protection of workers (Case 279/80 *Webb* [1981] ECR 3305, paragraph 19; Joined Cases 62/81 and 63/81 *Seco v. EVI* [1982] ECR 223, paragraph 14; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 18); consumer protection (Case 220/83 *Commission v. France* [1986] ECR 3663, paragraph 20; Case 252/83 *Commission v. Denmark* [1986] ECR 3713, paragraph 20; Case 205/84 *Commission v. Germany* [1986] ECR 3755, paragraph 30; Case 206/84 *Commission v. Ireland* [1986] ECR 3817, paragraph 20; *Commission v. Italy*, cited above, paragraph 20; and *Commission v. Greece*, cited above, paragraph 21), the conservation of the national historic and artistic heritage (*Commission v. Italy*, cited above, paragraph 20); turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country (*Commission v. France*, cited above, paragraph 17, and *Commission v. Greece*, cited above, paragraph 21)."

29 *See*, for instance, Case 33/74, *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, EU:C:1974:131, para. 13; Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, EU:C:2006:544, para. 35; Case C-212/97, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, EU:C:1999:126, para. 24.

down in regulations may envisage implementation at the national level.[30] In *SGS Belgium*, for instance, the Court ruled that States, by setting administrative penalties on the economic operators identified in Regulation No. 2988/95 to protect EU's financial interests, were implementing that regulation.[31]

EU legislation may, within its scope of application, expressly authorize certain categories of national measures.[32] A case in point is that of minimum harmonization clauses, enabling Member States to enact 'stricter or more detailed' requirements, relative to the 'floor' set by the EU legislature, as long as they do not exceed the 'ceiling' set by EU primary law.[33] Another example is that of EU legislation affording Member States different options: under the old version of the 'Dublin' regulation,[34] for instance, Member States could process an asylum request instead of returning the applicant back to the Member State of entry;[35] similarly, under the Audiovisual media services directive, each Member State can decide either to prohibit product placement or to authorize it subject to a number of requirements set out in that directive.[36]

Moreover, EU legislation may harmonize a certain matter only partially, thus enabling Member States to regulate other aspects of the same matter.[37] For instance, in *De Agostini*,[38] the Court ruled that although the Television Without Frontiers directive had harmonized national provisions on television advertising and sponsorship, it had done so 'only partially'.[39] Accordingly, it could not be

30 Case C-403/98, *Azienda Agricola Monte Arcosu Srl v. Regione Autonoma della Sardegna*, EU:C:2001:6, para. 26. ("[A]lthough [...] the provisions of [...] regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States.")

31 Case C-367/09, *Belgisch Interventie- en Restitutiebureau v. SGS Belgium NV and Others*, EU:C:2010:648, paras. 34-35.

32 *See, generally*, A. Arena, 'Exercise of EU Competences and Pre-emption of Member States' Powers in the Internal and the External Sphere: Towards "Grand Unification"?', *Yearbook of European Law*, Vol. 35, No. 1, 2016, p. 28-105.

33 *See, generally*, F. de Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights', *Common Market Law Review*, Vol. 43, 2006, p. 9-30; P. Rott, 'Minimum Harmonisation for the Completion of the Internal Market? The Example of Consumer Sales Law', *Common Market Law Review*, Vol. 40, 2003, p. 1107-1130.

34 Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

35 Joined Cases C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865. On the new version of this provision (Art. 17(1) of the Dublin III Regulation), *see* Case C-578/16 PPU, *C. K., H. F., A. S. v. Republika Slovenija*, ECLI:EU:C:2017:127, para. 54.

36 Art. 11 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

37 *See* R. Schütze, 'From Dual to Cooperative Federalism: The Changing Structure of European Law', Oxford, Oxford University Press, 2009, p. 195: "[w]here European law does not harmonize all aspects within a policy area, Community terminology speaks of partial harmonization."

38 Joined cases C-34/95, C-35/95, and C-36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB* (C-34/95) and *TV-Shop i Sverige AB* (C-35/95 and C-36/95), EU:C:1997:344.

39 *Ibid*., para. 32.

regarded as "excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes",[40] nor as precluding "the application of national rules with the general aim of consumer protection",[41] such as the Swedish ban on misleading advertising that applied also, but not only, to television advertising.[42]

This category of rules probes the blurry line between non-preclusion and non-application: whereas a matter is regulated by EU law, some specific aspects of it are not. In the practice, it might be difficult to argue conclusively that national measures relating to the latter specific issues are allowed by EU law, instead of them being irrelevant for EU law. Sometimes, the characterization is a matter of convention or, worse, convenience. Some cases will now be discussed, to show the ambiguity of this category of rules.

D The Blurred Line between Non-Preclusion and Non-Application

It is now necessary to explain why the difference between non-preclusion and non-application is fundamental. It might be argued that the difference does not really come with a practical consequence: whether a domestic measure is not covered or not prohibited by EU law, it will simply be lawful under EU law. The case-law of the Court of Justice, indeed, has often reflected this nonchalant approach to the issue.

For instance, the blurring is visible in the decisions of the Court regarding non-discriminatory measures regulating the opening hours of shops. In line with the *Keck* doctrine,[43] the Court has regularly found that rules on shops' opening times are selling arrangements (as opposed to product requirements) and therefore do not breach Article 34 TFEU. In *Turnhout*,[44] a 2014 case, the Court confidently noted that, as observed "on a number of occasions", Articles 34-36 TFEU "*do not apply* to national rules concerning the closure of shops" which are indistinctly applicable.[45] To take but one example, consider how the Court addressed the same kind of measures in *B&Q*,[46] a case of 1992:

> [...] the legislation at issue pursued an aim *which was justified* under Community law. National rules restricting the opening of shops on Sundays reflected certain choices relating to particular national or regional socio-cultural characteristics. It was for the Member States to make those choices *in compliance with the requirements of Community law*, in particular the principle of proportionality.[47]

40 *Ibid*., para. 33.
41 *Ibid*., para. 34.
42 *Ibid*., para. 38.
43 Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, EU:C:1993:905.
44 Case C-483/12, *Pelckmans Turnhout*, ECLI:EU:C:2014:304.
45 *Ibid*., para. 24, emphasis added.
46 Case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q Plc*, EU:C:1992:519.
47 *Ibid*., para. 11.

It is clear in this case that the Court, which confirmed the measure's compliance with EU law requirements, hinted at non-preclusion, rather than non-application. However, the conclusion in the same case, which abruptly used the language of non-application, reveals that, in essence, the Court used non-application and non-preclusion interchangeably:

> [...] Article [34 TFEU] is to be interpreted as meaning that the prohibition which it lays down *does not apply* to national legislation prohibiting retailers from opening their premises on Sundays.[48]

Indeed, in these cases the distinction would not come with a practical difference, and the Court's conceptual oscillation is without consequence. However, there is at least one vital distinction that should call for a more rigorous separation between non-precluded and non-covered State measures: general principles of EU law and the Charter only apply to non-precluded measures.[49]

Let us observe *Karner*, another case referring to a selling arrangement (a rule on advertising, prohibiting certain misleading statements made to sell goods bought at judicial auctions) that falls in time roughly halfway (2004) between *B&Q* and *Turnhout*. In this case, the Court took pains "first of all, to determine whether [the domestic measure] falls within the scope of application of Article [34 TFEU]".[50] After recalling the *Keck* doctrine on selling arrangements, the Court noted that the measure was not discriminatory and therefore was "*not caught by the prohibition in Article* [34 TFEU]".[51] This was, in other words, a measure that fell under EU law but was not precluded (unlike the selling arrangements in *Turnhout*, which escaped EU regulation altogether). The Court then proceeded to review the measure's compliance with Article 10 of the European Convention on Human Rights (freedom to impart information). The domestic measure was indeed considered to constitute an interference, albeit proportionate and justifiable, with the corresponding general principle of EU law.

Like general principles, the Charter applies only to State measures that implement EU law.[52] In other words, a State measure can be reviewed against the Charter only if it falls under the scope of EU law. When a measure does not fall under EU law, the Charter is irrelevant. When a measure is prohibited by EU law,[53] the Charter has no added value in the review of EU-legality: the measure must be disapplied regardless of whether it respects the Charter or not. Consequently, the Charter only matters as a standard of review when it applies to – and prohibits – non-precluded measures. In other words, the added value of the Charter as a

48 *Ibid*., para. 17.
49 *See, for instance*, the orders in Case C-328/15, *Târşia*, EU:C:2016:273; Case C-520/15, *Aiudapds*, EU:C:2016:124.
50 *See* Case C-71/02, *Karner*, EU:C:2004:181, para. 35.
51 *Ibid*., para. 43.
52 Art. 51(1) of the Charter.
53 Other than the Charter, of course.

binding source is the possibility that it sanction the illegality of State measures that are governed, but not precluded, by EU law.[54]

The *Fransson* case provides a good illustration of the application of the Charter to non-precluded measures.[55] The Swedish measure (providing for the criminal prosecution of tax wrongdoing) was found to implement EU law, because it sought to discourage and punish tax evasion, including VAT evasion, in line with Article 325 TFEU. Therefore, the Swedish measure fell under the scope of EU law and did not raise issues of compliance with the implemented norms. However, the application of EU law triggered the application of the Charter too. As a result, the Charter could be used as an additional standard of review of the domestic measure. Whereas in that case the Court found no obvious breach of the Charter,[56] it is only a matter of time before a non-precluded measure is declared EU-illegal for breach of the Charter. Two cases can be described, briefly, in which this scenario almost came into being. One deals with market freedoms, the other with the rights of EU citizens. In neither case did the Court sanction the EU-illegality of a non-precluded norm for a breach of the Charter – this scenario has never materialized so far. Nonetheless, a short discussion of the legal and factual matrix of these disputes will show that this outcome should not be ruled out: future cases might warrant it and expose the doctrinal intricacies that underpin it.

The first case is *Sky Italia*.[57] Italian law regulates the broadcasting of advertising, setting different limits for free-tv and pay-tv operators. Pay-tv channels are granted a lower quota of advertising broadcast time. The measure was challenged by Sky in domestic courts, for constituting an obstacle to the cross-border provision of services. The Court, asked for a preliminary ruling, confirmed that the Italian measure fell under the scope of application of Article 56 TFEU, as it could indeed result in a market barrier. Nevertheless, the Court accepted Italy's explanation that the regulation of advertising was necessary to protect consumers against invasive advertising practices. In essence, the measure fell under EU law but was not precluded by it. Since EU law applied, the Charter applied too, and the issue of these measures' compliance with the Charter was raised. Sky argued that the limitation on advertising was in breach of the Charter's right of freedom of information and freedom of expression: the rules constrained the company's right to freely determine their broadcasting programming. The Court dismissed the claim without even looking into it, referring to the evidentiary shortcomings of Sky's position. It noticed that the file did not contain a sufficient explanation of how the domestic rule on competition could harm media pluralism.[58] The

54 Of course, the Charter also applies to the acts of EU institution and has already proved to be an important touchstone of their legality. *See*, for instance, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and others*, ECLI:EU:C:2014:238; Case C-236/09, *Association Belge des Consommateurs Test-Achats and others*, ECLI:EU:C:2011:100; Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

55 Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

56 Namely, it concluded that the cumulating of criminal and administrative sanctions did not necessarily breach the principle of *ne bis in idem* protected in Art. 50 of the Charter.

57 Case C-234/12, *Sky Italia srl v. Autorità per le Garanzie nelle Comunicazioni*, EU:C:2013:496.

58 *Ibid*., paras. 23-24.

claim, therefore, failed on the evidence but was plausible on the law. The Court conveniently stopped short of entering the review on the merits of the autonomous Charter-based claim, even if the basic matrix of the case (certain television broadcasters were subject to discriminatory constraints) might have sufficed for the Court to instruct the domestic judge about the possible breach of Article 11(2) of the Charter.

A more recent example is the case *Commission v. UK*.[59] In infringement proceedings the Commission argued that the UK breached EU law by making child benefits for EU citizens conditional upon a requirement of lawful residence. More precisely, the Commission argued that the UK was in breach of Regulation 883/2004,[60] since the concept of 'habitual residence' therein[61] – an element that States can use to allocate benefits – is a matter of fact and cannot be equated to the right to residence under Directive 2004/38 (where residence can be made conditional to economic activity). The Court conceded to the Commission that the requirement of lawful residence is indirectly discriminatory. However, it noted that justifications are available when they pursue a legitimate interest and are proportionate and necessary:

> [...] it is clear from the Court's case-law that the need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active, as such grant could have consequences for the overall level of assistance which may be accorded by that State.[62]

Therefore, the UK measure was non-precluded by EU law. Whereas the Commission's claim did not concern any possible breach of the Charter, UK judges might review the measure upon application, and set it aside each time it entails an unjustified restriction of the Charter's rights. For instance, there might be cases where, in fact, the State's failure to pay child benefit might cause a severe harm to the applicant's right to private and family life.[63] In those circumstances, which are difficult to anticipate but can arise in the practice, the Charter will cause the disapplication of otherwise EU-compliant measures.

Neither case discussed above resulted eventually in a national measure being struck down for breach of the Charter (despite compliance with EU law at large). This scenario had not arisen until recently. These cases are helpful because only for circumstantial reasons (Sky's under-substantiated claim under the Charter; the Commission's lack of interest in Charter-based review) did the Charter not matter to the outcome. With slightly changed circumstances, cases can arise when

59 Case C-308/14, *Commission v. United Kingdom*, EU:C:2016:436.
60 Regulation (EC) No. 883/2004 of 29 April 2004 on the coordination of social security systems.
61 Art. 1, let (j).
62 Case C-308/14, *Commission v. United Kingdom*, EU:C:2016:436, para. 80.
63 *See* Art. 7 of the Charter.

non-precluded measures are declared incompatible with the Charter, showing the added value of the latter source in a way that has so far been dormant.

Such a scenario has finally arisen in the *Tele2 Sverige* case: national measures falling under the scope of EU law (Directive 2002/58) were found to breach the Charter's rights. However, the case is, at a close look, a hybrid case where the review of national legislation was effectively predetermined by the review of EU secondary law. Indeed, the case arose after the annulment of the Data Retention Directive for breach of the Charter and regarded the surviving domestic implementing measures. The determination of Charter-incompatibility was just the logical prosecution of the *Digital Rights Ireland* case;[64] the human rights-inconsistency was not owed to the choices of the domestic legislature, but was primarily caused by EU law.[65]

E The Scope of Application of EU Law in the Common Market

The expansive force of EU law, and of the Charter with it, is evident in the field of the fundamental freedoms. Any measure capable of raising an obstacle to free movement is subject to EU law. Consider the *Pfleger* case, intimated above: Austrian law sanctioned the use of gambling machines without licence. This was considered an obstacle to the freedom of provision of services, and the measure hence fell under EU law. Automatically, the Charter's provisions protecting property and business rights applied too.[66]

To be true, cases like this make the added relevance of the Charter hard to discern. Since the measure fell under Article 56 TFEU, the applicable Charter standards on freedom of business and right to property were essentially redundant (that is, the same test for breach would refer to either Art. 56 TFEU or Arts. 15-17 of the Charter). However, it is worth noting how a putatively internal matter, i.e. the establishment of criminal conduct and the applicable sanctions, was attracted under the umbrella of EU law, even without breaching it.

At this point, it is easy to understand a basic issue: if the difference between non-application and non-preclusion is blurry, it follows by necessity that the difference between application and non-application of EU law is equally blurry. This difficulty can be observed in some recent opinions of the Advocate Generals of the Court.

One case in point is *C*.[67] The preliminary reference questioned the compatibility with EU law of the Finnish regime of additional taxes on retirement pensions. The relevant standard was the prohibition of discrimination on grounds of

64 Case C-293/12 and 594/12, ECLI:EU:C:2014:238.

65 Formally, the Charter-incompatible elements of the Data Retention Directive did not require MS to breach the Charter upon implementation, *see* Fontanelli 2016. However, insofar as the Court determined the unlawfulness of the Directive, the similar conclusion about the implementing measures could only follow, in particular when the MS did not bother to limit the interferences upon fundamental rights at the domestic level.

66 *See* Arts. 15-17 of the Charter.

67 Case C-122/15, *Proceedings brought by C*, EU:C:2016:391.

age. Advocate General Kokott, before turning to the application of the non-discrimination principle, examined whether the measure fell under the scope of EU law at all:

> 62. According to the judgment in *Pfleger*, situations governed by EU law also include those in which national legislation is such as to restrict the fundamental freedoms guaranteed by the Treaty. A Member State can justify such a restriction only if, at the same time, it observes the fundamental rights provided for in the Charter.
>
> 63. In the present case, the taxation of the taxpayer's retirement pension might constitute a restriction of a fundamental freedom and thus fall within the scope of the Charter. After all, the pension received by the taxpayer in 2013 derives at least in part from an activity that he previously carried on in a Member State other than the Republic of Finland. To that extent, the fact that pension is taxed in Finland may constitute a restriction of the taxpayer's freedom of movement as a worker.[68]

These reflections, which incidentally noted that the situation at hand is not purely internal, seemed to point to a finding of application of EU law: the tax might indeed constitute a restriction of a market freedom.

However, the Advocate General Kokott noted that in the *specific* case at issue the Finnish measure did not, in practice, create any restriction on the freedom of movement of workers.[69] She therefore concluded that the measure did not fall under the scope of EU law at all (which is different from saying it is not precluded by it, as the build-up seemed to suggest).[70] This conclusion clearly treats breaches of the fundamental freedom and the application of EU law as coterminous. When there is no breach of the fundamental freedom, EU law does not apply (nor does the Charter). Only when a breach arises the whole system of EU law *cum* Charter comes into play. This idea is convenient because it simplifies the set of possibilities, apparently ruling out the possibility of non-preclusion: when application and breach go hand in hand, there is no place for application without breach.

The scrapping of the non-preclusion scenario might be, after all, the Columbus' egg in the field of market freedoms. Because in this area the application of EU law depends on the negative effects of domestic measures (rather than the attribution of competences), there is no such thing as a non-precluded measure: if a measure does not breach a fundamental freedom it is virtually irrelevant under the applicable Treaty provisions. The Court, for its part, preferred to ignore altogether the transnational aspect and limited itself to noting that pensions (and taxes thereon) fall outside the scope of the equality framework Directive

68 *Ibid*., footnotes omitted.

69 *Ibid*., paras. 65-66.

70 The judgment of the Court did not address the claim under Art. 45 TFEU and only found that Directive 2000/78, the framework directive on non-discrimination in the workplace, did not apply to the circumstances of the case.

2000/78.[71] As a result, the national measures fell outside the scope of EU law, the Charter did not apply and the discrimination element was not examined.

Kokott's simplification, moreover, does not appear to enjoy consensus among her colleagues. Consider the wording of another recent Opinion of Advocate General Wathelet[72] concerning a citizenship case[73]:

> If a Treaty provision *does not preclude* a Member State from refusing a right of residence subject to compliance with certain conditions, *it follows by definition that the situation in question falls within the scope of that provision*. If that were not the case, the Court would have to decline jurisdiction to answer the question referred.[74]

The main proceedings concerned a *Zambrano*-like dispute. A Pakistani woman who had been married to a German citizen and resided with him in the UK wished to remain there after he moved to Pakistan. She had two kids, who were German citizens. The question was whether she had a right to reside in the UK, whether derived from the ex-husband or the children.[75] Wathelet referred to the situation in which a State, after ascertaining that neither the conditions of Directive 2004/38 nor the *Zambrano-Alopka* exception applies, refuses the right to residence to a third country national.

In so doing, the Advocate General essentially considered this double test (making sure the applicant enjoyed no rights either under Directive 2004/38 or the exceptions) as an EU law-based precondition for the refusal. He therefore clearly ascribed such measure to the category of non-precluded measures, which are covered by EU law precisely because they are not prohibited by the Treaties. The reasoning is circular: the ascertainment that EU law does not apply cannot, *per se*, lead to the conclusion that EU law applies to the circumstance.[76] In this case, this approach would attract under EU law all national immigration policies, even those falling outside the scope of EU law. The consequence, of course, would

71 Case C-122/15, *C*, ECLI:EU:C:2016:391, paras. 23-30.

72 Case C-115/15, *NA*, ECLI:EU:C:2016:487.

73 As previously explained, citizenship rights and market freedoms share their negative normative value and sit uneasily with the non-preclusion category. This is why cases on citizenship and cases on fundamental freedoms, for the purpose of this article, can be studied together.

74 *Ibid*., para. 122, emphasis added.

75 Interestingly, the case was almost hypothetical, as she had been granted residence by the UK under the ECHR.

76 The reasoning is not transparent. In one passage, the Advocate General acknowledges the accessory nature of the Charter, *see* para. 126: "[i]t is European citizenship as provided for in Art. 20 TFEU that triggers the protection afforded by the fundamental rights (more specifically, in this instance, Art. 7 of the Charter), not the other way round." In another passage, however, he seemed to posit that the question regarding *whether* Art. 20 TFEU applies is already one within the ambit of EU law (*see* para. 123).

be that the Charter would also apply, *in lieu* of the sole ECHR.[77] The confusion is partly due to the language of Article 21 TFEU on the right to residence, which is granted "subject to the limitations and conditions laid down" in primary and secondary EU law. The language, which perhaps signalled the limits of EU law's application, is formally one of non-preclusion/authorization.

It can be appreciated how, within a few months, Wathelet and Kokott came to apparently opposite conclusions regarding the possibility that measures that do not breach fundamental freedoms or citizenship rights can nevertheless be covered by EU law – and the Charter. Advocate General Spuznar had already expressed his view on whether EU law applies to measures engaging with (but not necessarily precluded by) Article 20 TFEU in his Opinion to *Rendón Marín*,[78]

> [...] as citizens of the Union, those children have the right to move and reside freely throughout the territory of the European Union and any restriction of that right *falls within the ambit of EU law*.[79]

It is nevertheless possible to re-characterize Spuznar's dictum and Wathelet's opinion in *NA*, reading them as a mere rephrasing of the *ERT* doctrine[80] (measures that derogate from EU law fall under its scope). It would be possible to reconcile the views of Kokott, Spuznar and Wathelet in this light. Whereas only measures that *actually* restrict fundamental freedoms or citizenship rights fall under the scope of EU law, there will be some restrictive measures that are justified under EU law. These will be allowed measures (not simply non-precluded) and will fall under EU law, whereas all non-restrictive measures will lie outside its scope. This construction would be consistent with Kokott's view (no *actual* restriction means no application of EU law) and with Spuznar and Wathelet's (an *actual* restriction means that EU law applies, but the restriction might be allowed by EU law).

Similar uncertainties affect national measures concerning areas subject to harmonization at the EU level. The Court has consistently held that Member States' stricter measures adopted pursuant to minimum harmonization clauses

77 *See* the reasoning in C-256/11, *Dereci and others*, EU:C:2011:734, para. 72: "if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Art. 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Art. 8(1) of the ECHR."

78 Opinion in Case C-165/14, *Rendón Marín*, EU:C:2016:75.

79 *Ibid*., para. 120, emphasis added.

80 Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, EU:C:1991:254. On this case, *see* P. Cruz Villalón, '"All the guidance", ERT and Wachauf', *in* M. Poiares Maduro & L. Azoulai (Eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, Hart Publishing, 2010, p. 162-169.

must comply with other provisions of EU law,[81] notably those concerning fundamental rights. Yet in *Hernandez*, the Court took the view that Article 11 of Directive 2008/94, stating that Member States had the option to introduce laws more favourable to employees than those laid down in that directive, did not grant Member States "an option of legislating by virtue of EU law," but merely recognized a "power which the Member States enjoy under national law".[82] Hence, national measures providing additional protection could not "be regarded as implementing EU law within the meaning of Article 51(1) of the Charter" and, accordingly, "be examined in the light of the guarantees of the Charter".[83]

By the same token, in *Safe Interenvios*, the Court took the view that, in providing that the Member States may adopt 'stricter provisions' in the field covered by the Money Laundering Directive, Article 5 of that directive did not grant the Member States "a power or obligation to legislate by virtue of EU law", but simply recognized a "power which the Member States enjoy under national law to provide for such stricter provisions outside the framework of the regime established by the directive".[84] Yet the Court added that that power had to be exercised "in compliance with EU law, in particular the fundamental freedoms guaranteed by the Treaties" and noted that, since stricter national provisions could restrict the provision of money transfer management services,[85] they could only be regarded as permissible "if they are compatible with the fundamental rights the observance of which is ensured by the Court" and protected by the Charter.[86] In sum, although the Charter was held inapplicable owing to the lack of an implementation link between EU legislation and the relevant national provisions, the latter's impact on cross-border trade put EU law and fundamental rights back into play.

F An Unintended Harmonization Effect

Whereas the Charter only applies to domestic measures implementing EU law, it is possible to observe, or at least speculate over, its spillover onto non-EU matters. In *Fransson*, it was made clear that a measure could find itself within the

81 *See, e.g.*, Case C-389/96, *Aher-Waggon GmbH v. Bundesrepublik Deutschland*, EU:C:1998:357, para. 16: "it is necessary to consider whether a Member State which, like the Federal Republic of Germany, has introduced stricter noise limits has, in exercising that power, infringed other provisions of Community law, in particular Article 30 of the Treaty"; Case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH*, EU:C:1999:532, para. 42: "the attainment of the objective of Directive 89/552 […] is not affected in any way if Member States impose stricter rules on advertising […] on condition, however, that those rules are compatible with other relevant provisions of Community law."

82 Case C-198/13, *Víctor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante) and Other*, EU:C:2014:2055, para. 44.

83 *Ibid*., para. 48.

84 Case C-235/14, *Safe Interenvios, SA v. Liberbank, SA and Others*, EU:C:2016:154, para. 79.

85 *Ibid*., para. 99.

86 *Ibid*., para. 109.

scope of EU law objectively, that is, irrespective of whether it was passed with the intention of implementing EU law.[87]

The unintended implementation of EU law, combined with the attraction mechanism previously described (EU law attracts under its scope any measure that breaches it), makes it very hard to know *a priori* whether a specific measure will ever engage with EU law, and possibly enter into conflict with the Charter.

A case in point is the dispute *WebmindLicenses*.[88] At stake was the practice of Hungarian authorities, which transmitted information obtained secretly in pending criminal proceedings to the authorities in charge of the parallel tax assessment. In the main proceedings, the case was made that the use of this evidence in the tax proceedings breached the principles on procedural fairness protected under Articles 41, 47 and 48 of the Charter, in particular the right to defence and the right to privacy in Articles 7 and 7 of the Charter. In ascertaining first the applicability of EU law, the Advocate General Wathelet was very swift: tax assessment proceedings concern, in part, crimes involving VAT. In line with the *Fransson* judgment, domestic measures regulating VAT collection fall under the scope of EU law. As a result, the domestic measures and practice at stake in *WebmindLicenses* are likewise covered by EU, and Article 51 of the Charter is triggered as a consequence. The Court agreed and introduced the review of the measures at stake against the Charter with a paragraph that encapsulates the subject of this article:

> It follows that EU law does not *preclude* the tax authorities from being able in the context of an administrative procedure, in order to establish the existence of an abusive practice concerning VAT, to use evidence obtained in the context of a parallel criminal procedure that has not yet been concluded, *provided that the rights guaranteed by EU law, especially by the Charter, are observed*.[89]

It is fair to assume that the State rules on the collection and use of evidence in criminal and tax proceedings, and on the exchange of information between the respective authorities, were drafted without the intention to implement EU law, or the awareness that EU law could be engaged unintendedly. Advocate General Wathelet's finding leads to the conclusion that these rules, which were never intended to relate to EU law, must comply with the Charter or might be set aside in specific circumstances, when the domestic courts find that a breach of the Charter occurred. The consequences of this scenario are disruptive: when decisive evidence was obtained illegally or the individual could not challenge it in fair proceedings, the ensuing decision must he held null and void. The same result follows when the domestic courts are unable to perform this check of Charter-compliance:

87 The *Fransson* case in this respect is paradigmatic, as it concerns Swedish measures passed before Sweden's accession to the EU.

88 Case C-419/14, *WebMindLicenses*, EU:C:2015:832.

89 *Ibid*., para. 68, emphasis added.

> [domestic courts] must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.[90]

The only wise option available to a rational legislator to avoid these unexpected challenges, it seems, is to ensure already at the drafting stage that all pieces of legislation comply with the Charter, irrespective of any expected link with the implementation of EU law. This concern should also affect the action of executive and police authorities.

In other words, it is to be expected that State authorities, which cannot predict all the factual and legal scenarios that might entail a link between EU law and domestic legislation, comply with the EU Charter as a matter of convenience, rather than obligation. This was, for instance, the choice of the Swedish legislature, after *Fransson*. Whereas the Court's judgment identified the implementation of EU law only with respect to the VAT-portion of the domestic tax assessment proceedings, it was much easier to reform the whole system (VAT and non-VAT) to achieve compliance with EU law. Indeed, the Supreme Court applied the principles stated in *Fransson* and found that domestic law breached EU obligations. It also established a new principle whereby individuals who received a tax surcharge and were prosecuted as a result of the same tax offence were entitled to a new trial.[91] Clearly, the reform did encompass both EU-related and non-EU-related tax assessments and thus resulted in a voluntary (but inevitable) Charter-ization of this field of Swedish law. In other jurisdictions, where the legislature has not carried out such adjustments, non-VAT fiscal assessments fall outside the scope of EU law, and individuals derive no benefit from the *Fransson* precedent, for instance, in the case of combined administrative and criminal sanctions for evasion of income tax.[92]

This instance is not surprising and is possibly a common occurrence. A rational lawmaker might indulge in spontaneous harmonization, subscribing to the Charter's obligations even when it is not supposed to, for at least two reasons: to anticipate EU-related problems that are difficult to predict in theory and to maintain uniformity in the law, where a change relating only to the EU-related details would cause unnecessary fragmentation.

90 *Ibid*., para. 98.

91 On the reception of *Fransson* in Swedish law, *see* J. Nergelius, 'The Nordic States and the European Convention on Human Rights', *in* R. Arnold (Ed.), *The Convergence of the Fundamental Rights Protection in Europe*, Dordrecht, Springer, 2016, p. 97-98.

92 *See* C-497/14, *Stefano Burzio*, ECLI:EU:C:2015:251, paras. 29-30.

G Conclusions

Any inquiry into the scope of application of the Charter to Member States inevitably opens a can of doctrinal worms. The reasons are obvious: in *Fransson* and some following cases, the Court trumpeted the perfect alignment between the Charter's application and the application of EU law. Knowing when the Charter applies to State measures would therefore require knowing when EU law applies to them – a Sisyphean task if there is one, especially in the field of market freedoms and citizenship rights.

As previously explained, there is no reliable test to exclude a given domestic situation from the application of the Treaty rules on the fundamental freedoms. The most used indicators, that is, the principle of conferral and the 'purely internal situation' test, are imperfect and can yield false negatives. This is a problem in itself, which has so far been studied predominantly thinking of *preclusive* situations. When EU law has a prohibitive force, it should be known in advance to which domestic measures it applies.

Less attention has been paid to the non-preclusion scenario, but more troubles are well under way. The applicability of the Charter in non-preclusion cases creates another scenario of great legal uncertainty. Measures that raise no issue of compliance with (other rules of) EU law might in fact be prohibited under the Charter. A recurring problem is the characterization of those State measures that deny EU rights (*e.g.* asylum and residence requests): whereas the State would argue that the refusal stemmed precisely from the non-application of the EU norms conferring those rights, it could as well be said that, since the conditions for such refusal must be reviewed against EU norms, such measures fall under EU law's scope.[93]

The Court gives domestic judges little guidance to make this determination, and for law-makers and State authorities at large it is virtually impossible to anticipate with certainty whether their measures and acts will ever be scrutinized under the Charter.

A possible outcome of this state of affairs is that States behave pragmatically and 'incorporate' the Charter among the touchstones of lawfulness for all their

93 *See, for instance*, the distinction that Advocate General Mengozzi sketches in his Opinion to Case C-638/16 PPU, *X, X v. Belgium*, ECLI:EU:C:2017:93. On the one hand (para. 57), in certain cases "the Court held that the situation of the applicants in the main proceedings which were the subject of those cases was not governed by EU law and had no connection with that law". On the other hand, in the case at stake (para. 59), "the applicants in the main proceedings lodged applications for short-stay visas under an EU regulation which harmonises the procedures and conditions for issuing those visas and which *is applicable to them*. Their situation is indeed covered by the Visa Code both *ratione personae* and *ratione materiae*". The Court disagreed and opted decidedly for non-application. *See* C-638/16 PPU, *X, X v. Belgium*, ECLI:EU:C:2017:173, paras. 42-43: "the applicants in the main proceedings submitted applications for visas on humanitarian grounds, based on Article 25 of the Visa Code [ ] In accordance with Article 1 of the Visa Code, such applications, even if formally submitted on the basis of Article 25 of that code, fall outside the scope of that code, in particular Article 25(1)(a) thereof, the interpretation of which is sought by the referring court in connection with the concept of 'international obligations' mentioned in that provision."

acts. However, this unintended harmonization potential of the Charter,[94] which derives from the impossibility to determine with precision its scope of application, goes against the spirit of the several safeguards contained in Article 51(2) of the Charter and Article 6(1) TEU ("the Charter does not extend the scope of application of EU law"). States find themselves in a double bind: if they do not overcomply with the Charter they might face unexpected Charter-based review of their acts. In any event, the trade-off between autonomy and compliance is one that should not be required by reason of conceptual sloppiness: it is the Court's responsibility to bring clarity in this area of law.

Whereas the really hard cases might lie at the borderline between non-application and non-preclusion, the state of uncertainty reaches further. National courts are confused by the Chinese boxes of the interlocking scopes of application of fundamental rights and EU law. See, for instance, how a Dutch judge phrased a question for preliminary ruling.[95] The question refers to the compliance with EU law of a concession regarding the tax deduction of studying costs, which might raise issues of discrimination on grounds of age. After asking the Court whether Directive 2000/78 would apply to the domestic measure (*i.e.* whether EU law applies at all), the judge asked:

> [If the Directive does not apply, *m]ust the principle of non-discrimination on the grounds of age, as a general principle of EU law, be applied* to a tax concession on the basis of which training expenditure is only deductible under certain circumstances, *even when that concession falls outside the material scope of Directive 2000/78/EC and when that arrangement does not implement EU law?*[96]

The phrasing is striking because the judge lists in the question the exact reasons why the answer is no: if the measure fall outside the scope of the Directive and does not implement EU law otherwise, EU fundamental principles (whether as general principles or as Charter provisions) cannot apply.

One can wonder whether this incredible confusion is the result of the much maligned reasoning of the Court in *Mangold/Kücükdeveci*,[97] but one thing is certain: fundamental rights and the Charter are routinely treated, whether deliberately (see the choice of the Swedish authorities after *Fransson*) or mistakenly (see the preliminary question above), as an EU source of law that applies to Member States without restrictions *ratione materiae*. The combined effect of this trend

94 Please note that this 'spontaneous harmonization' effect is not restricted to the Charter but extends to other areas of EU law. For instance, the prospect of creating reverse discrimination against their nationals induced Member States to amend or repeal their laws as a whole, whereas EU law only required to disapply them *vis-à-vis* nationals of other Member States. A case in point is the Italian legislation on pasta products, which the ECJ only declared inapplicable to producers from other Member States (Case 407/85, *Drei Glocken*, EU:C:1988:401, para. 25) but which was eventually struck down as a whole by the Italian Constitutional Court in Judgment No. 443 of 1997.

95 Case C-548/15, *de Lange*.

96 Emphasis added.

97 Respectively, Case C-144/04, *Mangold*, EU:C:2005:709; Case C-555/07, *Kücükdeveci*, EU:C:2010:21.

with the inherently expansive application of the four freedoms will certainly continue to challenge the tolerance of Member States.

The Margin of Appreciation in the ECtHR's Case Law

A European Version of the Levels of Scrutiny Doctrine?

Koen Lemmens[*]

A Introduction

Since fundamental rights and human rights are often understood as counter-majoritarian devices, human rights adjudication has, by its nature, a political dimension. What judges will be asked to do is, in fact, to review legislation against either constitutionally protected freedoms or human rights as protected in international human rights treaties. This boils down to balancing fundamental rights against other fundamental rights or, even more frequently, against state interests.[1] Judges may, in such circumstances, be reluctant to push their analysis too far, out of respect for the separation of powers. Deferential adjudication is a means of respecting separation of powers and shying away from all too political judicial decision-making. However, in federal states and in international human rights systems, there is a second reason why deferential adjudications can be applied: accommodation of '(cultural) diversity'.[2]

In the U.S. legal system, the doctrine of various levels of scrutiny has been developed. Within the mechanism of the European Convention of Human Rights, the concept of margin of appreciation has been created. In the literature, both the levels of scrutiny doctrine and the margin of appreciation are often compared.[3] Each of them is seen as an instance of deferential judicial decision-making. However, this article argues that although similarities exist, there are important dif-

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1 A. Ostrovsky, 'What's So Funny About Peace, Love and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals', *Hanse Law Review*, Vol. 1, 2015, 2015, p. 60.

2 In the context of the European system, Buanamano enumerates the leading justifications of the margin of appreciation: 'democratic legitimation' and 'lack of European consensus'. R. Buanamano, 'The Hermeuneutics of Deference in Strasbourg Jurisprudence: Normative Principles and Procedural Rationality', *European Journal of Human Rights*, No. 4, 2017, p. 323-327.

3 D. Donoho, 'Autonomy, Self-Governance and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights', *Emory International Law Review*, Vol. 15, 2001, p. 398, J. Westerfield, 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate', *American Journal of Comparative Law*, Vol. 54, 2006, p. 673. More implicitly: J. Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 29, 2011, p. 353.

ferences as well. The margin of appreciation is indeed used by the ECtHR in much more distinct situations than the U.S. Supreme Court uses the level of scrutiny cases. I will explain that this difference is due to the specific position of the ECtHR as an international human rights court.

The literature of both the levels of scrutiny and margin of appreciation is extensive. Moreover, many authors have already compared levels of scrutiny to the way the ECtHR deals with cases brought before it. Strikingly enough, two kinds of comparison appear. On the one hand, some authors link the levels of scrutiny with the concept of proportionality. An illustrative example here is offered by A. Sweet Stone and J. Mathews.[4] They hold that "proportionality balancing is an analytical procedure akin to 'strict scrutiny' in the United States."[5] However, I am not fully convinced of the appropriateness of the comparison, as I will explain in this contribution.

On the other hand, comparisons are drawn between the 'levels of scrutiny' and 'the margin of appreciation'.[6] In this article, I focus on the second cluster of comparisons, since I believe they correspond better to the underlying analytical rationale, i.e. the operation of *deferential judicial decision-making*. I subscribe to Mattias Kumm's observation that the incremental use of the human rights (or constitutional rights) vocabulary to frame legal problems has considerably narrowed the field for political decision-making. Kumm refers in this respect to the problem of 'human rights inflation' as an instance of 'Juristocracy'.[7] Then he goes on:

> The perennial issue here is that of the appropriate degree of deference: What level of deference, "standard of review", what "margin of appreciation" should a human rights judiciary concede to national political institutions and the democratic process when it applies the proportionality test and assesses the reasons put forward by the parties?[8]

If one accepts this perspective, it becomes clear that the margin of appreciation and the levels of scrutiny are, or should conceptually be, 'prior steps'[9] in the rights adjudication. In a way, they constitute a *Vorfrage*: first, courts have to decide how intensive their review – if any at all – will have to be and, conse-

4 *See also* P. Yowell, 'Proportionality in United States Constitutional Law', *in* L. Lazarus, C. McCrudden & N. Bowles (Eds.), *Reasoning Rights: Comparative Judicial Engagement*, London, Hart Publishing, 2014, p. 87-114.

5 A. Stone Sweet & J. Mathews, 'Proportionality Balancing and Global Constitutionalism', 2008, p. 1, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569344.

6 D. Beatty, 'Law and Politics', *American Journal of Comparative Law*, Vol. 44, 1996, p. 134-135. (Explicitly holds that 'margin of appreciation' and levels of scrutiny are about deference to 'elected branches of government').

7 M. Kumm, 'Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution', *in* V. Jackson & M. Tushnet (Eds.), *Proportionality. New Frontiers, New Challenges*. Cambridge, Cambridge University Press, 2017, p. 68.

8 Kumm, 2017, p. 68-69.

9 M. Saul, 'Structuring evaluation of parliamentary processes by the European Court of Human Rights', *The International Journal of Human Rights*, Vol. 20, 2016, p. 1078.

quently, they can proceed to the review as such.[10] Applying proportionality, as I understand it, would then be a matter of the review as such. Admittedly, this is an idealistic comment that does not necessarily correspond to what courts are, in fact, doing.

In this short contribution, I begin by closely examining the two fundamental concepts (Section B). Then, under Section C, I briefly explain why the levels of scrutiny doctrine and the margin of appreciation, notwithstanding evident commonalities, differ considerably.

B Having a Closer Look at the Dyad

I The Levels of Scrutiny

The 'levels of scrutiny' is a well-known and much discussed doctrine in American constitutional law scholarship.[11] Its origins date back to the seminal U.S. Supreme Court's case *Carolene Products Co*.[12] In this case, the Supreme Court was asked to review legislation that prohibited the shipment of 'filled milk' in interstate commerce. Obviously, the aim of the Filled Milk Act was to protect the consumer. Yet the appellee argued that the Act infringed the Fifth Amendment (more precisely, due process). The Supreme Court, however, dismissed the claim, holding that the Act and its prohibition had a 'rational basis'.

In stating this, the Supreme Court created the first tier of what was going to be a three-tiered system of scrutiny. The basic level of scrutiny is indeed the 'rational basis' test. When the Court applies this test, it will stick to a minimum level of scrutiny, focusing on the question whether the legislation under review respects the (minimal) standard of rationality. What is scrutinized is whether there is a rational link between a rule or measure and the legitimate aims pursued.[13] The concept of 'reasonable justification' brings both conditions quite accurately together.[14] Specifically in economic affairs (including trade) and social welfare (including workplace) this test is applied.[15]

However, Carolene Products entered into history because of Footnote 4.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." (...)

10 *Ibid*., with reference to: J. Gerards & H. Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights', *International Journal of Constitutional Law*, Vol. 7, 2009, p. 651.

11 This analysis relies essentially on Yowell, 2014, p. 94 *et seq*.

12 *United States v. Carolene Products Co*, 304 U.S. 144 (1938).

13 A. Belzer, 'Putting the Review Back in Rational Basis Review', *Western State University Law Review*, Vol. 41, 2014, p. 344; Yowell, 2014, p. 95.

14 Belzer, 2014, p. 340.

15 J. Nowak & R. Rotunda, *Constitutional Law* (Hornbook Series), Saint Paul, West, 2010, p. 483.

> [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (…)

In other words, the Supreme Court indicated that there can be circumstances in which a stricter scrutiny must be applied. The judges did not, however, explain how in economic matters the judicial deference had to be conceived; neither did they explain how intense the review in more 'sensitive' cases had to be.[16]

The case law of the Supreme Court then gradually developed, giving more indications on how the levels of scrutiny system should be understood. At present, and notwithstanding criticism on the framework, three levels of scrutiny are usually underscored. It should be noted, though, that some authors go further and discern more levels: Kelso defends the idea that there are up to 7 levels of scrutiny.[17]

As indicated, the first, basic level is the rational basis test. Applied in economic and social welfare cases, and in "most regulation not affecting an enumerated or fundamental right,"[18] the test gives great deference to the public authorities. In fact, as long as a law has a reasonable justification, it will not be held unconstitutional. There is, in other words, a strong 'presumption of validity',[19] even reinforced by the fact that it is up to the applicants to prove that the law they challenge has no rational basis.[20]

However, things are more complicated whenever fundamental constitutional rights are at stake. Should governmental actions infringe on fundamental constitutional rights, the Supreme Court will follow a strict scrutiny analysis. Under due process, it will look for a 'compelling state interest' that has to be 'narrowly tailored'.[21] If interferences with fundamental constitutional rights are not 'narrowly tailored' and if they do not respond to a compelling state interest, they will fail to pass the test. In equal protection cases, a similar approach will be taken, albeit that the legal questions will be focused on two kinds of situations.[22] First, strict scrutiny will be applied whenever legislation or governmental action makes a distinction between persons based on a suspect status (*i.e.* a criterion that triggers the specific attention of the Court since it would be prone to arbitrary use).[23] Sus-

16 *Ibid.*

17 R. Kelso, 'Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The Base Plus Six Model and Modern Supreme Court Practice', *University of Pennsylvania Journal of Constitutional Law*, Vol. 4, 2002, p. 225-259.

18 Yowel, 2014, p. 95.

19 Nowak & Rotunda, 2010, p. 487.

20 Belzer, 2014, p. 340.

21 Yowell, 2014, p. 95; R. Rotunda & J. Nowak, *Principles of Constitutional Law* (Concise Hornbooks), Saint-Paul, West, 2016, p. 427

22 Nowak & Rotunda, 2010, p. 750

23 *Ibid.*, p. 750. However, as Baker notes, there does not seem to be a clear criterion to determine which are suspect criteria and which are not. A. Baker, 'Proportional, Not Strict Scrutiny: Against a U.S. Suspect Classifications Model under Article 14 ECHR in the U.K.', *American Journal of Comparative Law*, Vol. 56, 2008, p. 878-879.

pect qualifications are: alienage,[24] race[25] and national origin.[26] Second, whenever policies burden the enjoyment of fundamental rights, the strict scrutiny test will be applied.[27] Laws will be a burden to fundamental rights whenever they have an impact on the fundamental guarantees of the Bill of Rights and on some other, limited category of rights.[28]

Finally, in between 'strict scrutiny' and 'rational basis', there is a third level of scrutiny. This review is used whenever, in equality protection cases, distinctions (*i.e.* qualifications) are made, based on 'quasi-suspect' criteria.[29] In this context 'quasi-suspect' refers to groups of people who are not politically voiceless, but who nevertheless lack 'substantial political power'.[30] These groups include people classified on the basis of gender[31] and illegitimacy.[32] In order to pass the constitutional threshold, it must be proven that a law 'substantially' pursues an 'important state interest'.[33] In some free speech cases, intermediate scrutiny is equally applied by the Court.[34]

In his contextual analysis of what he calls the 'Footnote 4 jurisprudence', Mark Tushnet observes an interesting evolution, however.[35] Indeed, the *original* idea seemed to be that through the mechanism of Footnote 4, a certain *marge de manoeuvre* was left to legislatures to adopt specific socio-economic legislation, therefore finding 'New Deal' kind of legislation in line with the Constitution. This was seen, at that time, as a progressive or liberal approach.[36] However, as Tushnet notes, the exceptions where stricter scrutiny was suggested by the footnote – and that the author links to the protection of African-Americans and the protection of freedom of speech in the aftermath of World War I – have gradually been used, by the end of the twentieth century, to challenge legislation in any field, since it would infringe upon personal autonomy.[37] The argument is that it is not difficult, once one accepts that political democracy is a game of interest groups, to understand that what constitutes 'a discrete and insular minority' may quite well be the result of successful lobbying. Perhaps other groups are entitled to a similar protection as well. So unless one wanted to get rid of the whole idea of judicial scrutiny (thus extending the deference in social-economic questions to everything), the alternative was to diversify and include all kinds of groups suffering

24 *Graham v. Richardson*, 403 U.S. 365 (1971).
25 *Korematsu v. United States*, 323 U.S. 214 (1944).
26 Yowell, 2014, p. 96.
27 Baker, 2008, p. 68.
28 Nowak & Rotunda, 2010, p. 502.
29 Baker, 2008, p. 869.
30 https://www.law.cornell.edu/wex/equal_protection (last accessed 17 January 2018). *See as well*, Baker, at note 22008, p. 892.
31 *Craig v. Boren*, 429 U.S. 190 (1976).
32 *Weber v. Aetna Casualty & Surety Co*, 406 U.S. 164 (1972).
33 Nowak and Rotunda, 2016, p. 428.
34 *See* Yowell, 2014, p. 96-97 for some examples.
35 M. Tushnet, *The Constitution of the United States of America*, Oxford, Hart Publishing, 2009, p. 205 *et seq*.
36 *Ibid*., p. 205.
37 *Ibid*., p. 207-208.

from similar forms of political disadvantage as the groups initially intended by the qualification 'discrete and insular minority'.[38] Ultimately, Tushnet argues, personal autonomy has become the dominant constitutional lens through which legislation is analysed.[39]

Interestingly, the American constitutionalist analyses this evolution as libertarian values pairing with, if not overturning, traditional liberalism.[40] As a result, the very idea of society as a shared, common good has vanished.[41] Tushnet's point is fascinating since it highlights an evolution that can be observed in Europe as well. Authors such as Laurent Bouvet[42] or Marcel Gauchet[43] in France have also underlined how the traditional leftish political parties have gradually 'shifted' their focus from 'the people' ('le peuple') towards disempowered minorities. An influential leftist think tank, Terra Nova, suggested the French PS to move in that direction, since it has (definitely) lost its working class constituency.[44] In recent times, debates on religious accommodation in Europe lay bare a similar tendency: the risk to focus so much on individual rights that social cohesion is completely overlooked.[45]

II The Margin of Appreciation

Few topics in the law of the European Convention on Human Rights (ECHR) have fuelled such a living debate and consequently bolstered so much criticism as the margin of appreciation. It would be impossible to include a general overview of the vast literature in the field. In this contribution my focus is on the concept and its origins and the circumstances in which it plays a role.

1 The Origins

The term 'margin of appreciation' or 'margin of discretion' was already present in the debates in earlier cases,[46] but the ECtHR developed it in the seminal *Handyside*-case. In the words of the Court – and a longer excerpt is justified:

> 48. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights

38 *Ibid*., p. 205.
39 *Ibid*., p. 211 *et seq*.
40 *Ibid*., p. 210.
41 *Ibid*., p. 234-235.
42 *See*, *e.g.*, L. Bouvet, 'Le sens du peuple', *Le débat*, 2011, p. 136-143.
43 M. Gauchet, *Comprendre le malheur français*, Paris, Stock, 2016.
44 http://tnova.fr/rapports/gauche-quelle-majorite-electorale-pour-2012 (last accessed 17 January 2018).
45 On this, K. Lemmens, 'Religare, Believers and Non-Believers: But Where Is the Citizen?', *in* M.-C. Foblets, K. Alidadi, J.S. Nielsen & Z. Yanasmayan (Eds.), *Belief, Law and Politics: What Future for a Secular Europe*. Surrey, Ashgate, 2014, p. 237-244.
46 On the first cases: Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, Intersentia, 2002, p. 5-7. *See as well*: O. Gross & F. Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights', *Human Rights Quarterly*, Vol. 23, 2001, p. 630 *et seq*.

> (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 35, para. 10 in fine). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (...).
>
> These observations apply, notably, to Article 10 para. 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force...
>
> 49. Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.[47]

Since 1976, the margin of appreciation has become an essential part of the Court's case law. This did not, however, go unnoticed. The literature has been paying a lot of – critical – attention to the margin of appreciation. But even judges proved to be very critical. Most famous are Judge De Meyer's words:

> I believe that it is high time for the Court to banish that concept from its reasoning. It has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies.[48]

De Meyer believed indeed that the margin of appreciation was only a smokescreen behind which "the States may do anything the Court does not consider incompatible with human rights."[49]

47 ECtHR, *Handyside v. UK*, 7 December 1976, §§ 48-49.
48 ECtHR, *Z v. Finland*, 25 February 1997, Judge De Meyer (partly dissenting).
49 *Ibid*.

However, instead of disappearing from the stage, the margin of appreciation made a spectacular reappearance in recent times. In the last decade, the Court was severely criticized, as is commonly known, for its dynamic interpretation of the Convention, often to the detriment of local diversity.[50] One way for the Court to tackle this criticism was to stress its 'subsidiary role' in the mechanism of human rights protection, thereby underlining the fact that national authorities have a primary duty to protect human rights under the Convention. This gentle way of taking into consideration the criticism of the contenders has perhaps been best expressed in the *Taxquet* case on the Belgian lay jury system, where the Court clearly indicated:

> The jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture; variations may concern the number of jurors, the qualifications they require, the way in which they are appointed and whether or not any forms of appeal lie against their decisions (...). This is just one example among others of the variety of legal systems existing in Europe, and it is not the Court's task to standardise them. A State's choice of a particular criminal-justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention (...).[51]

Politicians, debating on the reform and the future of the Court, have realized the potential of the margin of appreciation. They highlighted that the margin of appreciation could serve as a very useful tool to appease the tensions between the Court and the States. As a result, Protocol no. 15, which is open for ratification, aims, among other things, to incorporate the margin of appreciation in the Preamble of the Convention.[52] The proposed recital reads:

> Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

One could wonder what the extra value is of the 'textual consecration' of a judge-made creation. The answer has both a symbolic and a more legal dimension. Symbolically, the 'conventionalization' of the margin of appreciation confirms its central role as a diversity accommodating device. Legally, notwithstanding the fact that the margin is going to be only part of the Preamble and not of the Conven-

50 For an overview of the discussion, *see* P. Popelier, S. Lambrecht & K. Lemmens (Eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, Cambridge, Intersentia, 2016.

51 ECtHR (GC), *Taxquet v. Belgium*, 16 November 2010, § 83.

52 www.echr.coe.int/Documents/Protocol_15_ENG.pdf (last accessed 17 January 2018).

tion, the message sent to the Court is clear. The Preamble serves as an interpretative tool (*see* Art. 31 Vienna Convention of the Law of Treaties), and by including the margin of appreciation, it imposes on the Court the duty to interpret the Convention in the light of the margin of appreciation. In other words, however unlikely this may seem, at the time of Judge De Meyer, the Court could have done away with the margin of appreciation. When it is integrated in the Preamble, that option will no longer be available.

2 The Concept and Its Application

In an extensive overview of the Court's case law involving the use of the margin of appreciation, Jan Kratochvíl draws a hard conclusion. He saw 'much inconsistency and adhockery', an 'eclectic case-by-case analysis' of the doctrine, with no specific underlying theory.[53] Within the limited scope of this contribution, it will not be my aim to give a comprehensive overview of all the situations in which the Court uses the margin of appreciation. For the purpose of this article, a general presentation of the margin of appreciation can suffice.

Two questions are important here. The first relates to domains where the ECtHR uses the margin of appreciation. The second pertains to the width of the margin.

a) Areas in Which the Margin of Appreciation Is Applied

As an expert on the conceptual design of the ECHR, Letsas developed the idea of the existence of two distinct forms of margin of appreciation: a substantive one and a structural one.[54] The former relates to the balancing of the protected rights, that is the 'relationship between individual freedoms and collective goals', whereas the latter is concerned with the review process by the Strasbourg Court as such. By distinguishing both conceptions, Letsas enables us to understand that 'deference' under the Strasbourg system can mean (at least) two different things. It can refer to classic issues of horizontal separation of powers (the deference to the 'elected branches of government'[55]), but it can also refer to the national authorities in the framework of a discussion on vertical separation of powers.

These two dimensions appear as well, albeit perhaps in a slightly altered form, in the work of other scholars. In a recent contribution, Arnardóttir underscores a similar dyad. The author distinguishes a 'systemic' component concerning the relation between the Strasbourg Court and the domestic authorities and a 'normative dimension' relating to the conventionally protected rights per se. In the latter case, the focus is on the strength and the boundaries of rights and the way the Court deals with these questions.[56]

Obviously, both dimensions can and will overlap. It will not always be possible to ascribe a case in which the Court applies the margin of appreciation to

53 Kratochvíl, 2011, p. 351.

54 G. Letsas, A Theory of Interpretation of the European Convention on Human Rights, Oxford, Oxford University Press, 2007, p. 80-81.

55 Beatty, 1996, p. 132.

56 O. Arnardóttir, 'Rethinking the Two Margins of Appreciation', European Constitutional Law Review, Vol. 12, 2016, p. 41-43. On this see Buanamano, 2017, p. 323-324.

either dimension. Often both dimensions are intertwined.[57] This is because the margin of appreciation's rationale, as expressed in Handyside, is the 'better placement'[58] idea. It goes without saying that this justification operates in both ways: the Court may find that national authorities are better placed than an international Court as it may find that 'elected bodies of government' (Beatty) are more suited to decide than judges. Both considerations are not mutually exclusive.

Browsing through the case law on the margin of appreciation, we can distinguish some prominent categories of situations in which the Court typically refers to the margin. Once again, this classification is not comprehensive: the 'adhockery' (Kratochvíl) at stake explains why a vast 'rest category' would be appropriate.[59] Combining approaches of Kratochvíl[60] and Smet[61], I focus on three important categories: discussions on the law, discussions on the facts and concerns about positive obligations.

Discussions on the (Non)-Existence of a Specific Law

A first category of hypothesis in which the margin of appreciation plays a key role concerns cases where the very existence – or absence – of a legal prescript is called into question. An emblematic case in this respect is *S.A.S v. France* on concealing the face in public (the so-called burqa ban).[62] The question, in that case, was whether the ban on concealing the face in public places, which obviously has (also) an impact on some Islamic women wearing niqabs or burka's, would constitute a violation of Article 9 ECHR (protecting freedom of religion and consciousness).

The Court eventually did not find a violation of the Convention. A key factor in that finding was the 'margin of appreciation'. The Court recalled indeed that States have a wide margin of appreciation when it comes to establishing rules on religion/state relations.[63] More precisely, and in more general terms, the Court observed:

> that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.[64]

What is at stake in cases of this kind is, in other words, both the horizontal separation of powers and the vertical one. Indeed, when the Court refers to 'policy-maker' it underlines the function of the 'elected branches of government'. But

57 Buanamano, 2017, p. 323.
58 I take the term from Buanamano, 2017, p. 324.
59 On this rest category, see Kratochvíl, 2011, p. 334 et seq.
60 Kratochvíl, 2011, p. 329-353.
61 S. Smet, 'When Human Rights Clash in "the Age of Subsidiarity". What Role for the Margin of Appreciation?', *in* P. Agha (Ed.), Human Rights Between Law and Politics. The Margin of Appreciation in Post-National, Oxford, Hart Publishing, 2017, p. 59 et seq.
62 ECtHR (GC), *S.A.S. v. France*, 1 July 2014.
63 ECtHR (GC), *S.A.S. v. France*, 1 July 2014, § 129.
64 *Ibid.*

where it stresses 'domestic', it is clear that the Court leaves room for 'local' diversity.

It may not come as a surprise that whenever legal norms concern issues that are related to public morals, ethics, religion and traditions, the Court will refer to the margin of appreciation. Hence, in cases such as *S.H. and other v. Austria*[65] (on medically assisted procreation) or *Garib v. the Netherlands*[66] (on restrictions on the right to choose one's residence) the discussion on the margin of appreciation played an important role. The Court will pay special attention to the quality of the legislative process, implying that it will evaluate whether the legislature has struck a fair balance, taking into account all interests at stake.[67] Not so much the use, but the width of the margin will be the object of the discussion.

In these cases, the Court's functioning could be compared to that of a Constitutional Court. The review is indeed rather[68] abstract in its nature. What the Court does is set a 'conventional floor'. States must meet that minimum level of human rights protection, but once this threshold is reached, the Court will refrain from intervening.[69]

Discussions about the Relation between Legal Norms and Facts

A second category of cases pertains to the discussion of the applications of the norm to the facts. What is at stake is not so much the very existence (or absence) of the legal rule but rather the way the rule is connected to the facts of the case. Kratochvíl calls this the cases of 'norm application'.[70]

Typical of cases of this kind is that the norms as such are not contested, but their application (to the facts) is. It is not surprising that in this kind of cases, the Court does give leeway to the domestic authorities since the Court is not a fourth instance. Fact-finding and applying the law to the facts is essentially a task for the domestic authorities. The role of the Court in this respect is to assess, from a distance, whether the application of the law fits within the Conventional framework.

In doing this, the Court's action comes close to what a supreme court of the French *Cour de cassation* type or *Conseil d'Etat* would do. The term margin of appreciation indeed derives from French administrative law, where, since the 1960s, it has been accepted that the administrative authorities enjoy a wide discretionary power, which will be scrutinized by the administrative judges and sanctioned in case of an 'erreur manifeste d'appréciation'.[71] However, it should be

65 ECtHR, *S.H. and Others vs Austria*, 3 November 2011, § 97 and § 115.

66 ECtHR (GC), *Garib v. Netherlands*, 6 November 2017, § 138.

67 On this question *see* Saul, 2016, p. 1077-1096.

68 *See* ECtHR, *J.M. and Others v. Austria*, 1 June 2017, § 117, where the Court points out that its task is not to do an abstract review of the legislation but to link its review to the 'issues' raised before it.

69 For the idea of a 'Conventional floor', *see* F. Fabbrini, *Fundamental Rights in Europe. Challenges and Transformations in Comparative Perspective*, Oxford, Oxford University Press, 2014, p. 38-39.

70 Kratochvíl, 2011, p. 329.

71 P. Serrand, *Droit administratif. Tome 2. Les obligations administratives*, Paris, Presses Universitaires de France, 2015, p. 117 ; P.-L. Frier & J. Petit, *Droit administratif*, Paris, LGDJ, 2013, p. 547; Arai-Takahashi, 2002, p. 2.

borne in mind, as Arai-Takahashi notes, that the concept is known in the administrative law of most civil law jurisdiction, such as the German concepts of *Beurteilungsspielraum* and *Ermessensspielraum*.[72]

As indicated earlier, it will not always be easy to distinguish the Court's 'supreme court's approach' and its 'constitutional function'. This is in part due to the standing of victims in Strasbourg. Save exceptions, applicants will have to show that they suffered a substantial disadvantage. This excludes as a rule potential victims. Although, in exceptional circumstances, also potential victims can successfully file a complaint. In that case, the debate will indeed focus on the mere existence of the norm. In other cases, the application of the law will always play, albeit perhaps very timidly, a role. However, this does not mean that we cannot distinguish cases where the discussion concerns more the existence of a norm from those where the discussion pertains to the application. Yet, the distinction is not a watershed.

A recent example illustrates how both dimensions can be very much intertwined. Previously, I indicated how the French 'burqa ban' gave rise to the S.A.S. judgment, where the Court had to assess the law against the Convention. In Belgium, a similar ban was passed, and, unsurprisingly, this led to a case in Strasbourg.[73] It was expected that the Court would uphold its earlier findings, which it eventually did. Nevertheless, there is a difference between the two cases. The concurring opinion of Judge Spano (joined by Judge Karakaş) in the *Belcacemi and Oussar* case against Belgium in this respect is essential. Both judges recognize that the cases concerning Belgium implied an 'abstract scrutiny' of the legislation. However, they indicate as well that, in their view, there would be a problem in terms of the proportionality of the sanctions had an applicant complained of the sanctions imposed on him or her.[74] Had there been sanctions, the question would definitely be whether, applied to the facts at hand, they would have fallen within the margin of appreciation of the national authorities.

Concerns on Positive Obligations

The third category of cases pertains to positive obligations. It is well known that the ECtHR has developed an important doctrine of positive obligations. Although these obligations are usually connected with second generation rights, the Court has applied them extensively to the ECHR.[75] The positive duties thus imposed on

72 Arai-Takahashi, 2002, p. 2-3. On Beurteilungsspielraum and Ermessensspielraum, *see* J. Ipsen, *Allgemeines Verwaltungsrecht*, München, Verlag Franz Vahlen, 2017, p. 122-137; D. Ehlers, 'Verwaltungsgerichtliche Anfechtungsklage', *in* D. Ehklers & F. Schoch (Eds.), *Rechtsschutz im Öffentlichen Recht*, Berlin, De Gruyter Recht, 2009, p. 631-364.

73 In fact, two judgments were delivered. One case concerned a local, municipal ban, the other the federal ban. The outcome in both cases, handed down on the same day, is obviously similar, and so are the concurring opinions of judges Spano and Karakaş. ECtHR, *Dakir v. Belgium*, 11 July 2017 (municipal ban) and ECtHR, *Belcacemi and Oussar v. Belgium*, 11 July 2017 (federal ban).

74 Para. 12 of the concurring opinion.

75 In his book on the Convention, C. Grabenwarter was able to refer to positive obligations in the context of most of the rights protected by the Convention. C. Grabenwarter, *European Convention on Human Rights*, Munich/Oxford/Baden-Baden, Beck/Hart/Nomos, 2014.

States force them to undertake actions. This may include investigations (e.g. in case of police violence), legal actions (e.g. against the persons responsible for the violation) or the design of a legal framework (which can prevent, for instance, some violations of the Convention from occurring).

It follows, in other words, that States are bound to act. However, these positive obligations as created by the Court should not conflict with the very idea of the separation of powers. Thence, whenever States are under the Conventional obligation to intervene and develop a 'policy', they will enjoy some leeway. This is what is understood by the idea of 'choice of means'. The Court will grant, indeed, a margin of appreciation to allow States to design a policy. A similar reasoning applies to discussions on Article 46 ECHR on the execution of the Strasbourg Court's judgments. In order to respect the separation of powers, the Court will leave States a margin to choose the way they deem most appropriate to comply with their obligations under the Convention.

However, pushing the argument a little further, it may become clear that whenever positive obligations are accepted, clashes of rights may become frequent. The obligations to protect one right may indeed collide with the obligations under another conventional right. States will have to strike, in this respect, a fair balance between the conflicting obligations. This is typically so in cases where, e.g., protection of privacy needs to be balanced against the protection of freedom of expression. States may find themselves in such cases in a very difficult position. Protecting one right may indeed bring about the underprotection of another.

The Court has recognized that in these fields of 'clashes of rights' (Smet) the margin of appreciation has a role to play.[76] This follows from cases such as *Evans*[77], *Fretté*[78] and *Odièvre*[79], which Smet considers to be the landmark cases in the field.[80] Smet is clearly right, however, when he indicates that there is no consistent theory on the side of the Court on the use of the margin in these situations.[81] He quite rightly argues that the Court's approach fails to explain the reasons why it uses the margin of appreciation in these circumstances as well as its width.

However, he argues that there is a way the Court can meaningfully apply the margin of appreciation in cases of clashing rights. This can be done by taking the 'better placed' rationale seriously.[82] In this interpretation, the Court can grant domestic authorities some leeway when it comes to solving human rights clashes – for these domestic authorities may have more means to circumvent the clash, they can understand better which right should prevail in the given context – but, Smet insists, the mere fact that a margin is conceded should not be conflated with

76 *See*, *e.g.*, ECtHR (GC), *Axel Springer v. Germany*, paras. 85-88.
77 ECtHR (GC), *Evans v. UK*, 10 April 2007.
78 ECtHR, *Fretté v. France*, 26 February 2002.
79 ECtHR, *Odièvre v. France*, 13 February 2003.
80 Smet, 2017, p. 62.
81 *Ibid*., p. 61
82 *Ibid*., p. 65 *et seq*.

its breadth.[83] In other words, the author does not accept the view that granting a margin of appreciation therefore automatically implies that a very loose control is exercised. He would argue that the traditional factors used by the Court to determine the width of the margin of appreciation should still be applied. In other words, the mere fact that in case of clashes of fundamental rights, the Court is using a marginal control kind of review should not mean that there cannot be different levels of scrutiny *within* the field of marginal review.[84] The question about the breadth of the margin of appreciation is therefore fundamental.

b) Width of the Margin

A second important question concerns the width of the margin. It is indeed one thing to identify the kind of cases in which the Court usually grants States a margin of appreciation, and another thing to decide how wide this margin will be. This part can therefore be particularly usefully compared to the levels of scrutiny in the United States. However, once again, it should be borne in mind that the Court, lacking a clear systematic approach of the margin of appreciation, often does not say anything on the width of the margin explicitly.[85] The most basic divide that can be made is, therefore, the distinction between a wide and a narrow margin of appreciation.

Traditionally, some criteria have been put forward to determine the scope of the margin of appreciation. Among the factors that would lead to a rather wide margin of appreciation we find the 'European consensus'. This means that whenever there is (legal, moral, cultural…) divergence in the European States, the ECtHR will recognize that European States dispose of a wide margin of appreciation to regulate a behaviour.[86] It does not follow, however, that when there is a consensus on a given topic in European States, there will not be place for a margin of appreciation. This is fairly well illustrated by the case *A. B. and C. v. Ireland* on abortion. The Court explicitly found:

> even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention (…).[87]

83 *Ibid*., p. 69.

84 *Ibid*.

85 Kratochvíl, 2011, 347.

86 F.J. Mena-Parras, 'Democracy, Diversity and the Margin of Appreciation: A Theoretical Analysis From the Perspective of the International and Constitutional Functions of the European Court of Human Rights', p. 11. www.reei.org/index.php/revista/num29/…/Nota_MENA_FJ.pdf (last accessed 18 January 2018).

87 ECtHR (GC), *A.B. and C. v. Ireland*, 16 December 2010, § 237.

Next, as the A, B and C cases also illustrates, the margin of appreciation may be wide when it comes to culturally, morally or religiously sensitive issues. In recent times, relations between religion and law (state) have led to heated debates in many European countries and to difficult, controversial judgments by the Strasbourg Court. But whether the matter at stake was the display of crucifixes in Italian public schools[88] or restrictions on concealing the face in the public sphere (the so-called burqa ban),[89] the Strasbourg Court left a rather wide margin of appreciation. A wide margin of appreciation is equally granted, to Smet's dislike, in cases where private and public interests compete or Convention rights conflict.[90]

Other factors may lead to a restriction of the margin of appreciation. A strong European consensus in non-sensitive issues will rather lead to a restricted margin of appreciation. This can be illustrated, for instance, by the Court's conception of freedom of the press. Given the "essential role of the press in ensuring the proper functioning of political democracy (...). The margin of appreciation to be accorded to the State in the present context is, in principle, a narrow one."[91] The margin will be narrow as well whenever the restricted right at stake concerns a "particularly important facet of an individual's existence or identity."[92] This is typically so in cases on private life issues, such as same-sex marriages, transgenderism and adoption. However, these considerations can be overruled by the factors previously referred to as being elements in favour of a wide margin.

C Explaining Similarities and Differences

From a very general point of view, it is not hard to see that both 'levels of scrutiny' and 'margin of appreciation' are concepts that aim at restricting the potential impact of the judiciary on decisions taken by lawmakers. They confirm, in other words, leeway to political decision-making. In this respect, they are perfectly comparable.

Yet apart from these very general observations concerning the commonalities of both concepts, the differences seem to be much more revealing. First, it is striking that the U.S. levels of scrutiny doctrine appear to be much more conceptualized than the European margin of appreciation doctrine. Compared with the European approach, which Janneke Gerards called 'a sliding scale',[93] the U.S. levels of scrutiny doctrine is much stricter, generally leading to more predictable outcomes. Under the U.S. three-tier test, there seems to be indeed a much stricter categorical use of the levels of scrutiny than is the case in the ECtHR's case law.

88 ECtHR (GC), *Lautsi and Others v. Italy*, 18 March 2011.

89 *See* ECtHR (GC), *S.A.S. v. France*, 1 July 2014; ECtHR, *Dakir v. Belgium*, 11 July 2017 and ECtHR, *Belcacemi and Oussar v. Belgium*, 11 July 2017.

90 ECtHR (GC), *Paradiso and Campanelli v. Italy*, 24 January 2017, § 182.

91 ECtHR, *Redaktsiya Gazety Zemlyaki v. Russia*, 21 November 2017, § 39 and 35. *See as well*: ECtHR (GC), *Animal Defenders International v. UK*, 22 April 2013, § 102.

92 ECtHR, *Orlandi and others v. Italy*, 14 December 2017, § 203.

93 J. Gerards, 'Intensity 'Intensity of Judicial Review in Equal Treatment Cases', *Netherlands International Law Review*, Vol. 51, 2004, p. 152.

This 'rigidity' is expressed in two ways. On the one hand, as Gerards[94] has shown, the choice of a level almost immediately determines the outcome of the case. The rational basis test will hardly lead to a violation of the Constitution, whereas strict scrutiny will much more often than not result in finding one.[95] On the other, as Gerards[96] equally pointed out (albeit in the context of equal treatment), only a 'limited number' of fields are subject to the intermediate or strict scrutiny. This implies that a great deal of the legislation will be subject only to the rational basis test.

Second, there is an important difference as to the 'default' position. The American standards of review imply that the default position is the less strict test. When there are weighty reasons, however, stricter or even, exceptionally, strict review will be applied. The European test, precisely because of the adhockery of the case law, cannot be described in these terms of a 'default position'. The ECtHR is simply too imprecise in the use of margin of appreciation, sometimes qualified by the judges as a 'wide' margin of appreciation or a 'narrow' one, but sometimes as 'a certain'[97] margin of appreciation.

The question then is why this would be so. The answers to that may seem obvious but are worth recalling.[98] The Supreme Court of the United States is a national court, whereas the ECtHR is an international court. In terms of judicial deference, this means that the debate on judicial deference concerns more the tension between the political sphere and the legal one (horizontal separation of powers), but not issues of sovereignty. Within the European system, on the contrary, this aspect is very important. Obviously, every judge may be challenged in terms of whether or not he or she is overstepping the boundaries of the judiciary, thus entering the political sphere, but few will have to question whether they are not overstepping *their subsidiary role*. Whereas the U.S. Supreme Court is the keystone of the U.S. judiciary, the role of the ECtHR is completely different.

The ECtHR indeed has only a subsidiary mission. It functions on the premises that the domestic authorities, therefore including the domestic courts, are the most important actors in upholding human rights. Only where those national actors fail, the Court has a role to play. So from an institutional point of view, the system is based on a dialogue rather than on a mere opposition, between domestic authorities and the Court. Whenever the Court refers to the margin of appreciation, it is not jeopardizing the Conventional system. Rather, it is giving more voice to the national authorities in the dialogue. It should be noted, however, that this kind of 'tuning' is not unrestricted, since, as the Court itself indicated, the

94 Gerards, 2004, p. 151.

95 Gerards, 2004, p. 149. However, and in spite of a popular quote ("Strict scrutiny is strict in theory, fatal in fact", going back to the work of Gerald Gunther), empirical research indicates that 30% of the cases survived the test). *See* Yowell, 2014, p. 96, 98.

96 Gerards, 2004, p. 150.

97 On this, *see* Kratochvíl, 2011, p. 340-342.

98 *See also* D. Tsarapatsanis, 'The Margin of Appreciation as an Underenforcement Doctrine', *in* P. Agha (Ed.), *Human Rights between Law and Politics. The Margin of Appreciation in Post-National*, Oxford, Hart Publishing, 2017, p. 84 *et seq*.

conferral of a margin of appreciation goes hand in hand with European supervision.[99]

Obviously, the way the ECtHR can decide which party to the dialogue may have the 'louder voice' is closely related to the issue of legitimacy as well. In American constitutional law, the Constitution is the supreme law of the land. If this supreme law established (Art. III, Section 1) a Supreme Court, the normative legitimacy of this institution is solid. The legitimacy of the ECtHR (and the Convention as such) is, however more debated. There is a difference in terms of democratic legitimacy between domestic courts, acting upon the Constitution, and an international Court, functioning on the basis of an international treaty. The legitimacy issue is a complex one, but suffice it here to stress that one of the arguments that was recently quite often expressed in the debate on the ECtHR, was that 'foreign' judges should not interfere (too much) with local choices.[100]

The aspect of 'local diversity' distinguishes a federal state like the United States from the international framework of the Council of Europe. Obviously, this is not to say that there are no differences between the states in the United States, but in terms of language, religion, culture, politics, media and so on, the differences between the Member States of the Council of Europe are important. This is why in so many 'sensitive issues' the Court has to acknowledge that there is no European consensus. In times like ours, where the idea of 'taking back control' and neo-sovereignism have conquered the hearts and minds of many European citizens, the use of the margin of appreciation is a way for the Court to value local diversity.[101]

Now, if this holds true and if Mark Tushnet's analysis of the Footnote 4 case law is correct, then we are facing an interesting paradox. The levels of scrutiny case law would have led, in the United States, to a generalized preference for individual rights to the detriment of the 'common good'. Although I am not saying that a similar trend cannot be underscored in Europe – in fact, the dynamic interpretation of Article 8 of the Convention contributed considerably to the increased protection of individual autonomy – the margin of appreciation cannot be blamed for that. Quite the contrary. In fact, whenever the Court accepts that States can act within the boundaries of the margin on appreciation, the outcome of the case is that the interference complained of will not be found to be in violation of the Convention. So the use of the margin of appreciation, that is insofar as it demarcates a zone in which domestic authorities are free to adopt policies, is a way to bring in public good considerations in the debate on human rights.

99 *See* the quote from *Handyside*, *supra* note 47.

100 For instance for the Netherlands, *see* J. Gerards, 'The Netherlands: Political Dynamics, Institutional Robustness', *in* P. Popelier, S. Lambrecht & K. Lemmens (Eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, Cambridge, Intersentia, 2016, p. 328-329 and the numerous references.

101 K. Lemmens, 'Criticising the European Court of Human Rights or Misunderstanding the Dynamics of Human Rights Protection?', *in* P. Popelier, S. Lambrecht & K. Lemmens (Eds.), *Criticism of the European Court of Human Rights. Shifting the Convention System: Counter-Dynamics at the National and EU Level*, Cambridge, Intersentia, 2016, p. 24.

At this point I am not turning a blind eye to the risk of majoritarianism[102] or even the danger highlighted by De Meyer that States would be entitled to do anything they like as long as the Court does not consider a violation of human rights. However, it is clear that a coherent theory about the margin of appreciation can contribute to finding a fair balance between the protection of human rights and the protection of public interests. This would be completely in line with the general philosophy of the ECHR, which clearly takes into account the fact that citizens live in 'a democratic society'.[103] As McCrea notes, the European model of society is 'liberal' not 'libertarian'.[104]

D Conclusion

Judicial review will always raise questions in terms of deference. Both in the United States and in the ECHR system ways have been found to deter judges from going too far into the sphere of the 'elected branches of government'. In the European context, the specific position of the ECtHR as an *international* court, whose power is vested in it by an international treaty – which in itself confers upon the States the primary duty to respect human rights – adds additional elements to the deference debate.

Levels of scrutiny doctrine and margin of appreciation are ways to implement judicial deference. However, there are important differences between the two concepts. The levels of scrutiny, however contested it may be, is a fairly strict doctrine, leading to rather predictable outcomes.[105] The underpinning idea, even if practice may be more complex, is that cases fall into categories and that subsequently they are subject to the scrutiny that comes with the given category (rational basis, intermediate or strict scrutiny).

The margin of appreciation, in turn, is a much more fluid doctrine, determined by so many factors that it becomes very difficult to decide when exactly the Court will use it and, more precisely, to what kind of review it will lead. In very broad terms, it could be said that the margin of appreciation is the device that allows the Court to let States pursue public interests, albeit under European supervision.

This could be framed in particular negative terms, as a way of preferring the State's interests over individual rights. However, from a more positive perspective, it could be argued that the margin of appreciation has the potential to contribute to finding a social balance, thereby avoiding the interpretation and use of human rights in such a way that the common good or the social fabric is seriously endangered owing to an all too solipsistic interpretation of human rights.

102 Indicated by Judges Spano and Karakaş in their concurring opinion (para. 7) referred to (note 73).

103 Term that is explicitly mentioned in the second paragraphs of Arts. 8-11 ECHR.

104 R. McCrea, 'The Ban on the Veil and European Law', *Human Rights Law Review*, Vol. 13, 2013, p. 86.

105 Gerards, 2004, p. 148.

The Sovereign Strikes Back

A Judicial Perspective on Multi-Layered Constitutionalism in Europe

Renáta Uitz & András Sajó[*]

A Introduction

The supranational web of public law is often described as a new constitutionalism. It emerged in a globalized world together with global markets. It is best described as an intricate web of interactions between traditional constitutional actors (such as nation States and their governments) and supranational actors that do not necessarily have formal, organizational existence or democratic legitimacy. It manifests in supranational legal instruments (*e.g.* regional human rights treaties) that, at times, impose legal obligations on individuals directly, *i.e.* without the mediation of the national State. Whatever virtues this unorthodox arrangement of public powers promised and provided, it became the culprit of governance dysfunctions at a moment of reinvigorated nationalism. Sadly, the insulation of supranational actors from local sensitivities and consequences turned into a rallying cry when the time came for backlash.

Traditional, nation-State-based constitutionalism relied on separation of powers and various forms of democratic control over the branches of power within the sovereign State. A multilayered constitution promises protection against the whims of the sovereign State through mobilizing forces that surpass the level of national politics. It is intuitively attractive to trust faraway entities with constitutional control functions: allegedly, they are beyond the influence of national power holders and hence not subject to local bias and majoritarian intolerance. The price is this: decisions being taken by people with little knowledge or respect for local conditions and cherished national taboos and biases. The multilayered constitutional venture is premised on mutual trust between constitutional actors and is held together by the intricate interdependence of governments and supranational constitutional actors bordering hypocrisy, and common beliefs that have a family resemblance to wishful thinking.

Whatever virtues national constitutions have in the multilayered reality, there seem to be new layers of constitutionally relevant decision-making that were not part of the picture when the classic constitutional techniques on limiting governmental powers emerged on the domestic level (such as separation of

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powers, checks and balances or federalism). Irrespective of the empirical truth or the validity of the normative assumption of an emerging global or transnational constitutionalism, and assuming for the sake of argument that the multilayered network intends to provide the benefits of constitutionalism, it is undeniable that traditional constitutional arrangements do not capture the constitutional realities of supranational interdependencies. When supranationally developed regulations become the law, bypassing national parliamentary control, the constitutional guarantees of lawmaking disappear. Furthermore, elected officials of national governments and also their civil servants participate in supranational law- and decision-making processes without meaningfully defined mandates. Nonetheless, they are comfortable to take (or refuse) particular negotiating positions, decisions that are outside the purview of constitutional accountability mechanisms.

In the course of the multilayered constitutional experiment, the old, national constitutional framework has lost its ability to deliver on the key features associated with constitutionalism: limiting the exercise of political powers and preventing the arbitrary exercise thereof. The remaining constraints on executive powers are further weakened where the executive continues to act through international institutions without legislative oversight or political accountability on the national level. International defence cooperation has opened up a new terrain for the exercise of unchecked discretionary powers, triggering additional spending on the national level: troops and equipment on a North Atlantic Treaty Organization (NATO) mission are still funded by national taxpayers at the end of the day.[1]

Not even the much-cherished protection of fundamental rights will be effective where special networks (like trade regimes) operate as sheltered worlds with little concern about the human rights network. In an ideal case, regional and international standards, *e.g.* on human rights, would be generated by a political community and its institutions that are held together by shared values and shared constitutional traditions, bypassing borders. This assumption is reinforced by the sense that nation States join international organizations knowingly limiting their own sovereignty in order to pursue common political or economic objectives. Despite such noble commitments, in practice regional or international standards drawn in political and judicial processes often correspond to a *minimum* that is acceptable to Member States in light of (and not in spite of) their national differences on a given issue.

New formats and layers of decision-making result in further increase of unchecked government power. While new variants of distribution of power appear to be at play, classic constitutional constraints on political powers are becoming less relevant. For Jürgen Habermas a constitution remains highly relevant for post-national Europe, provided that it results from a democratic process that legitimizes it. In such a context, the centre of democratic legitimacy is not the State, but a political community (a people) that is not defined along national borders. Such a political community is based on the workings of transnational

1 To the extent lawmaking on the supranational level involves negotiation with private actors, the multilayered network offers little control over the process; private deals become public law.

mass media, NGOs, and popular political movements that translate the concerns (if not the will) of the people and impose constraints on the holders of political powers beyond the boundaries of nation States.

In search of a force to hold this construction together, Habermas offers cosmopolitan solidarity rooted in the moral universalism of human rights.[2] Alternatives include conceptions of constitutional identity[3] and constitutional patriotism[4] that transcend the confines of nation States and national constitutions. The common thread of such concepts is that they envision a political community as a diverse society with a shared commitment to the basic premises of constitutionalism and universal human rights. The common challenge for such theories has been to account for the disagreement and discord evidently resulting from diversity in such communities. The trouble is that for the time being there seems to be no European demos, and linguistic differences remain a formidable barrier to forming any (and especially a political) community. At best, conflicts that are generated (and often frozen) at the national level can be diffused, or at least managed, at the supranational level.[5]

In the age of rising populism, anti-liberal, anti-constitutionalist and anti-European sentiments, objections against the multilayered constitutional adventure are phrased in terms of defending national constitutional identity. In Europe, cries defending national constitutional identity are hard to (mis)take for claims for exceptions on lesser issues of little consequence any more. When a national government in the European Union (EU) argues that "we have the right to decide who we wish to live together with in our country", that national government challenges the common European political and constitutional venture at its core, using the oldest and most potent of weapons in its rhetorical arsenal: the defence of national sovereignty. The source of this tension appears to be a design feature of the European multilayered constitutional experiment: Article 4(2) of the Treaty on European Union (TEU) expressly provides that the

> Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

In short, in the multilayered era it has become difficult to pinpoint the centre of authority. Ultimately, someone needs to govern, if not for other reasons, at least to avoid chaos. The question is how (national) sovereign power is exercised in this new reality, assuming that there remains a sovereign with authority. Is it possible to have the guarantees of freedom, rule of law and efficiency that a constitutional

2 J. Habermas, 'The Postnational Constellation and the Future of Democracy', *in* J. Habermas, *The Postnational Constellation. Political Essays*, M. Pensky, trans. ed., 2001, p. 102-103, 108.

3 Prominently M. Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture and Community*, London, Routledge, 2010.

4 Especially J.W. Müller, *Constitutional Patriotism*, Princeton, Princeton University Press, 2007.

5 Ch. Joerges, 'Constitutionalism in Postnational Constellations. Contrasting Social Regulation in the EU and in the WTO', *in* C. Joerges & E.-U. Petersmann (Eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, London, Hart Publishing, 2006, p. 494.

democracy seems to provide in a system where there is no sovereign with authority?

This article first explores the origins of the multilayered constitutional experiment together with the fundamental dilemmas it poses for constitutionalism (Part I). Part II accounts for the forces that are commonly associated with the daily operations of the multilayered constitution, while Part III takes a closer look at the dynamics that are usually associated with global constitutional convergence. Instead of convergence, disagreement and a spirit of national exceptionalism appear to dominate the picture. Part IV focuses on the terrain of nation States: the enforcement of supranational obligations. This is a zone where the unfinished multilayered experiment is most forcefully shattered by claims of national sovereignty, dressed in the fancy robes of constitutional identity claims. The return of the sovereign appears to have shaken the multilayered constitution construct built on high hopes and allegedly shared values, the construct that was meant to be held together by mutual trust. The trouble is not only that Europe (or at least a European way of life) may have little future left without European States relying on each other's cooperation much more than ever before, but also that the multilayered constitutional experiment got a bad name for its very foundation: old-fashioned constitutionalism.

B Multi-Layered Constitutionalism: Origins and Dilemmas

I Troubled Beginnings

In post-authoritarian settings, whether in Latin America or in Italy,[6] constitutions were in search of a new, democratic identity that was not easily available domestically. Hence there was a willingness to conform to an (partly imaginary) international normative order as a source not only of inspiration but also of control. In the 1990s the opening of a constitutional system to supranational influences reflected a certain optimism that prevailed after the collapse of authoritarian regimes. By then, democratic constitutionalism had not only been spreading of its own, but it was internationally endorsed and seemed to become the new 'global normal'. The hope was that national and supranational players committed to the rule of law, democracy and a strong human rights agenda would form a community in the emerging global order.

The supranational web has become especially complex in the past decades in Europe as a result of the expansion of the EU and the gradual expansion of the European Court of Human Rights' (ECtHR) jurisprudence. The daily routines of European institutions create the impression of linear progress towards an aspira-

6 G. Martinico, 'Constitutionalism, Resistance and Openness. Comparative Reflections on Constitutionalism in Postnational Governance', *Yearbook of European Law*, 2016, p. 10-13.

tional 'ever closer' union. The web woven by supranational networks may be complex, but in practice it is pretty loose.[7]

While the dilution of State sovereignty started several decades ago, multilayered constitutionalism as an intellectual problem emerged in Germany in the 1990s. When it became obvious that under the new EU Treaty decision-making in the EU could prevent the domestic branches from exercising their constitutional powers, the German Constitutional Court rushed to reaffirm national sovereignty in the *Maastricht* decision of 1993.[8] The Court was supportive of Germany's EU membership. However, it reaffirmed the subsidiarity principle as a limitation on EU competences and reinforced prior parliamentary scrutiny over the national government's participation in EU decision-making mechanisms.

In response to the *Maastricht* judgment, some German scholars urged the conceptualization of this new form of regional constitutional interaction and its reconciliation with the needs and institutions of representative government on the national level (*Verfassungsverbund* or 'multilevel constitutionalism').[9] In the words of the President of the German Constitutional Court, Andreas Vosskuhle:

> The concept of Verbund helps to describe the operation of a complex multilevel system without determining the exact techniques of the interplay. ... it opens up the possibility of a differentiated description on the basis of different systematic aspects such as unity, difference and diversity, homogeneity and plurality, delimitation, interplay and involvement. The idea of Verbund equally contains autonomy, consideration and ability to act jointly.[10]

In this approach, alternative centres of authority add a new quality to the national constitutional order by replacing a familiar pattern of hierarchical imposition of supranational rules with a continuing interaction between the intertwined levels of transnational politics. However, for critics, this expansion inevitably results in the fragmentation of international law, a consequence that was dutifully reported by responsible scholars on the International Law Commission to the UN's General Assembly.[11] Fragmentation is bad news, and it does not help

7 "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection." Charter of the Fundamental Rights of the European Union, Art. 52(3).

8 BVerfGE 89, 12 (1993).

9 *See* I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam. European Constitution-Making Revisited?' *Common Market Law Review*, Vol. 36, 1999, p. 703. The counter-concept is *Staatenverbund* referring to a composite of states. As discussed in N. Walker, 'Multilevel Constitutionalism. Looking Beyond the German Debate', *in* K. Tuori & S. Sankari (Eds.), *The Many Constitutions of Europe*, 2010, p. 143.

10 A. Vosskuhle, Multilevel Cooperation of the European Constitutional Courts. Der Europäische Verfassungsgerichtsverbund, *European Constitutional Law Review*, Vol. 6, 2010, p. 183-184.

11 Report of the International Law Commission, Finalized by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006.

much that the force that is expected to counter it is 'constitutionalization' of international law (yet to happen).[12]

To be fair, multilayered constitutionalism was enabled by the openness of some national constitutions. In the Netherlands (Constitution, Article 120) and in some Latin American countries, constitutional openness was a conscious design choice when international human rights treaties were made part of the national constitution (forming an imaginary constitutional block).[13] In other countries, international obligations were imported as enforceable constitutional provisions or principles by domestic courts.[14] Whether courts embrace supranational norms to expand their own jurisdiction or to protect the constitution from being dismantled by an incumbent government for its own selfish purposes is secondary. The result is multilayered constitutional engagement – as controlled by courts.[15] Where higher courts do not wish to see lower courts engage with supranational legal norms, they easily put an end to it.[16]

II From Dilemmas to Backlash

The dilution of State sovereignty started in the economic sphere. It was at the meetings of regional and global economic cooperation (such as the World Bank, the International Monetary Fund or the International Nuclear Regulatory Agency) that the production of 'global law without states' had begun.[17] Supranational economic regulatory mechanisms brought new ways of asserting political power. To do what the World Bank has approved is convenient, and it looks legitimate, even if such adherence brings previously unseen constraints on national policy options. Even though litigation is not central to the operation of global power networks, the emerging multilayered system had a litigation component. With courts in the picture, the vocabulary of constitutionalism appeared suitable for discussing these strange new developments. While a select few cases draw much attention, the crucial constitutional shortcoming, namely the lack of popular (democratic) control over the content of global law or transnational legal orders[18] could not be remedied by judicial fiat.

The search for the global constitution is usually a high-spirited exercise. The hope placed in supranational constitutional arrangements originates from the expectation that a power beyond the purview of the sovereign State may be able to counter its absolutism from the outside. At least for some scholars, constitu-

12 A. Peters, 'Compensatory Constitutionalism. The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law*, Vol. 19, 2006, p. 579.

13 E.M. Gongora-Mera, Inter-American *Judicial Constitutionalism: On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, Inter-American Institute of Human Rights, 2011.

14 61/2011 (VII. 14.) AB decision. At the same time, the Court made it clear that it did not have jurisdiction to declare constitutional amendments unconstitutional.

15 2 BvR 2735/14, 15 December 2015, esp. paras. 41, 43.

16 Judgment no. 49 of 2015 (Italian Constitutional Court).

17 G. Teubner, 'Global Bukowina. Legal Pluralism in World Society', *in* G. Teubner (Ed.), *Global Law Without a State*, Aldershot, Ashgate, 1997, p. 3.

18 T.C. Halliday & G. Shaffer, 'Transnational Legal Orders', *in* T. Halliday & G. Shaffer (Eds.), *Transnational Legal Orders*, Cambridge, Cambridge University Press, 2015, p. 1.

tionalism has started to depend on a 'transnational,'[19] 'global'[20] or 'cosmopolitan'[21] legitimacy. With roots in the Kantian ideal of a cosmopolitan-liberal world order, the search for the missing parts was conducted in a language invoking the universality of human rights. The consequences of the interplay of domestic constitutional arrangements were predicted in terms of universal convergence towards the respect for human rights, the rule of law and recognition of common democratic practices, associated with constitutionalism. Lurking behind these reassuring terms was a wide-ranging institutional variation of such extent that the untrained observer could hardly see true similarities with classic constitutionalism even after a careful and closer look.

Today the picture of multilayered constitutionalism is coloured by global economic crises, transnational terror networks and coordinated transnational responses to aggression – and a potential backlash due to the consequences of these developments. According to its many observers, sovereignty is becoming diffuse. It is replaced by a plural order with a less and less identifiable centre. At the moment all we know is that the nation State and its sovereignty are difficult to replace with an alternative construct for the purposes of making sense of the multilayered constitutional 'project'.[22] And it seems that when threatened, in the midst of uncertainty and insecurity, the nation State returns with scorn and vengeance. And it is welcomed by many, even when it does not promise to restore paradise lost (as it often does in populist constitutional 'theory').

Supranational constitutionalization refers to a specific legal formalization of decision-making processes and the spreading of myriads of legal rules across the board and national borders.[23] Yet this happens without the guarantees of an underlying normative commitment to common constitutional values and principles. Public law technicity spread by legal rules does not magically acquire the quality of constitutionalism without a genuine political community backing it up. Describing multilayered governance structures and processes in terms of constitutionalism is not only a misnomer: it is dangerous for constitutionalism itself. After all, the constitution is not simply an instrument of national government; it affords all the protection that can be provided in (and against) a sovereign nation State. In theory, supranational constitutionalism would be a most welcome development providing an independent control mechanism over national abuses. In practice, multilayered constitutionalism affords an opportunity to bypass that supreme instrument of sovereignty. Classic, sovereignty-based constitutional ter-

19 J.-R. Yeh & W.-Ch. Chang, 'The Emergence of Transnational Constitutionalism. Its Features, Challenges and Solutions', *Penn State International Law Review*, Vol. 27, 2008, p. 89; R. Dixon & D. Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', *International Journal of Constitutional Law*, Vol. 13, 2015, p. 606.

20 N. Walker, *Intimations of Global Law*, Cambridge, Cambridge University Press, 2015.

21 M. Kumm, 'The Cosmopolitan Turn in Constitutionalism. An Integrated Conception of Public Law', *Indiana Journal of Global Legal Studies*, Vol. 20, 2013, p. 605.

22 W. Sadurski, 'Supra-national Public Reason. On Legitimacy of Supra-national Norm-producing Authorities', *Global Constitutionalism*, Vol. 4, 2015, p. 396.

23 M. Loughlin, 'What is Constitutionalization?', *in* P. Dobner & M. Loughlin (Eds.), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press, 2010, p. 67.

minology falters, as it cannot capture the essence of conflicts between the nation State and the other weavers of the multi-layered web.

In the contemporary climate of backlash against constitutionalism and globalization, the fluid multilayered arrangement has become an easy target for political attacks with legal consequences.

One of the vulnerabilities of multilayered constitutionalism is that the disparate patterns that constitute it did not have an 'engine room' with a single design and political actors implementing it. Instead, it was a matter of happenstance driven by odd interdependencies of particular constitutional actors. Of course, at least in the beginning, a genuine vision of a Kantian constitutionalism lingered even in the corridors of power. In the 1990s there was an unstated expectation in Europe that peer pressure would gradually bring constitutional actors to build an ever closer union based on shared values and political commitments. But major gaps existed in this envisioned new reality: participants had different aspirations and expectations about the future.[24] The enthusiasm and commitment of international and dominant national political and constitutional actors suggested, nonetheless, that these gaps would be bridged over time. Supranational institutions were meant to coordinate the actions of Member States and hold them to their initial commitments when and where they strayed.[25]

In practice, it turned out that the holes were not that easy to patch: once the initial euphoria gave way to regular days in the office, mechanical copy-pasting of existing solutions became the standard working method. Obstacles resulted from the inability to bridge national differences, unexpected irreconcilable differences between various actors, lack of a common political and constitutional imagination, as well as lack of political (electoral) support for the multilayered experiment.[26] With the myriads of constitutional actors and their intended and unexpected interconnections, the multi-layered constitutional sphere is not transparent. Thus, to keep up with the mirage of the initial commitment a hope-filled narrative was much needed. Scholarship came to the rescue when it predicted, increasingly against the odds, global constitutional convergence and contributed to the spreading of the myth of multi-layered constitutionalism, where there were mostly only webs of murky powers. Noble hopes and wishes cannot always make dreams come true. For this reason alone, hope should not be abandoned.

It remains a matter of disagreement whether or not there is a traceable convergence of patterns, at least between democratic constitutional regimes. If there is an internationally recognized and shared expectation at least with regard to

24 For formative dynamics in the EU context, *see* J.H.H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, Vol. 100, 1991, pp. 2478-2483.

25 The European Union keeps insisting that its Member States curb public sector corruption. In Romania and Bulgaria, post-accession monitoring mechanisms keep tabs on reforms in the administration of justice.

26 On further reasons for resistance, *see* V. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford, Oxford University Press, 2010, p. 18-30.

certain elements of constitutionalism, it may still have a regulatory impact.[27] Such a development may enrich constitutionalism just as much as it may relocate its centre. Alternatively, it may undermine all the protection the national constitution granted against the might and arbitrariness of sovereign state power. As explained by Dieter Grimm, the internal erosion resulting from the transfer of sovereign powers

> endangers the capacity of the constitution to fulfil its claim of establishing and regulating all public power that has an impact on the territory where the constitution is in force. … [The transfer of sovereignty] prevents the situation from being unconstitutional. But it does not close the gap between the range of public power on the one hand and of constitutional norms on the other.[28]

C Supranational Constitutional Actors and Their Interactions

Multilayered constitutionalism is the product of interactions among national and supranational constitutional institutions and mechanisms (networks and processes). On the one hand, constitutionally relevant decisions are taken beyond the reach of competent domestic constitutional bodies. On the other hand, interactions at a supranational level may generate a supranational dimension of power where both international and national power will be limited in a multilayered constitutional space.

The interactions between the regional courts, national courts and other national and international instances offer a good example of multilayered constitutionalism.[29] Regional human rights courts set minimum standards and thus affect the content and application of constitutional provisions in the Member States. In addition, the judgments of human rights courts impact on separation of powers and checks and balances on the domestic level. For example, when the ECtHR finds a violation because national courts' judgments are not enforced at the national level, the ECtHR's judgment affects the power relations of the executive and the national judiciary.[30] Furthermore, the Court of Justice of the European Union (CJEU) may redraw domestic relations within and among branches of

27 For example, a nation's democratically accepted position not to care about the global environmental impact of its policies and actions will not be acceptable when it goes against the internationally agreed upon and democratically legitimized principles of other nations in their community. Once central players in the international playground decide to disregard the agreed upon system, the system is unlikely to sustain itself.

28 D. Grimm, 'The Achievement of Constitutionalism and Its Prospect in a Changed World', *in* P. Dobner & M. Loughlin (Eds.), *The Twilight of Constitutionalism?*, Oxford, Oxford University Press, 2010, p. 4 and 16.

29 G. Martinico & O. Pollicino, *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Laws*, Cheltenham, Elgar Publishing, 2012; M. Claes, *The* National Courts' *Mandate in the European Constitution*, London, Hart Publishing, 2006.

30 *Burdov v. Russia (no. 2)*, Application no. 33509/04, Judgment of 15 January 2009, similarly, *Yuriy Nikolayevich Ivanov v. Ukraine*, Application no. 40450/04, Judgment of 15 October 2009.

power in the name of the supremacy of EU law, even before an apparent conflict surfaces between EU law and national law.[31] The supranational decisions may even force Member States to abandon traditional constitutional arrangements, as it happened in the UK, where parliamentary sovereignty had to yield before the supremacy of EU law. At the same time, participation in an international regime may reinforce national constitutional structures. In the EU the Commission as a supranational constitutional actor, supervises public law reforms necessary for accession (*i.e*. membership in a supranational club).

The problem EU membership poses for constitutionalism originates in the limited control national legislature (or any other elected representative body) can exercise over key decisions and those who make them on the domestic level (checks and balances at best), while the representation of people in the European Parliament is considered insufficient. The European Stability Mechanism (ESM) is an intergovernmental organization established by EU Member States with a separate international treaty in response to the financial crisis; its purpose is to provide financial assistance (loans) to countries in the eurozone. When it reviewed the conditions of Germany's participation in the ESM in 2012 and 2014,[32] the German Constitutional Court insisted on preserving citizens' self-determination and equal participation in government:

> 107. As representatives of the people, the elected Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental governing … If essential budget questions relating to revenue and expenditure were decided without the mandatory approval of the German Bundestag, or if supra-national legal obligations were created without a corresponding decision by free will of the Bundestag, parliament would find itself in the role of mere subsequent enforcement and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget.[33]

The insistence of the German Constitutional Court on stronger legislative scrutiny over the executive in EU matters in its *Maastricht* judgment can be placed in a new light: instead of being a story of defending national constitutional identity, it can be read as a *story of reclaiming limited government* in an age when supranational bodies and networks 'liberate' domestic constitutional actors of constitutional constraints. Through the years, Member States developed different forms of ensuring legislative oversight over the executive in EU affairs in order to address this challenge.

Compliance with regional obligations does not necessarily result in raising the standard of fundamental rights protection, and national courts differ on how

31 C-106/77, *Amministrazione delle Finanze v*. Simmenthal *SpA*, Judgment of 9 March 1978.

32 Judgment of the Second Senate of 12 September 2012 – 2 BvR 1390/12 (temporary injunction) and Judgment of the Second Senate of 18 March 2014 – 2 BvR 1390/12.

33 Judgment of the Second Senate of 12 September 2012 – 2 BvR 1390/12 (temporary injunction), English translation, available at: www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html.

they translate the demands of EU law. The Spanish Constitutional Court[34] did not follow the lead of its German counterpart. In 2013, the CJEU in *Melloni* held that the Spanish Constitutional Court could not provide a higher level of protection for trials *in absentia* than available in EU law.[35] Thus, the harmonization of the execution of European arrest warrants prevailed over the right of the accused convicted *in absentia* to claim a retrial in a Member State in which he is present. In response, the Spanish Constitutional Court obliged and lowered the level of protection afforded for trials *in absentia* under the Spanish Constitution.[36] The Constitutional Court 'reconciled' EU fundamental rights standards with the Spanish Constitution, hinting at the theoretical possibility already suggested in an earlier case that the protection of the sovereignty of the Spanish people and the supremacy of the Spanish Constitution may not always permit such a reconciliation. Note that the CJEU is unlikely to retreat from expecting the EU level of rights protection to prevail over other, potentially higher alternatives in Europe. Its insistence on the requirement set in *Melloni* (as a 'specific characteristic' 'arising from the very nature of EU law') was one of the reasons why it objected to the terms of the agreement on the EU's accession to the European Convention on Human Rights.[37]

To be fair, supranational constitutional mechanisms may result in limiting the whims of national executives, preventing them from pursuing pet projects without initial authorization from their legislatures (or voters). Thus, in principle, multilayered constitutionalism has the potential to impose constraints on executive powers, at least incidentally. A supranational constraint may also result from the multiplicity of representations, as initially foreseen by James Madison in *Federalist* no. 10 for the U.S. when he explained the benefits of federalism.

D Weaving the Multi-Layered Constitutional Web: Convergence Revisited

In the 'post-national' era, lateral (horizontal), as well as hierarchical (vertical), forces shape constitutional developments across the globe. The most often studied instance of horizontal (State-to-State) interaction is probably transnational judicial borrowing. Empirical evidence, however, suggests that only ideas of a select few courts travel widely and that even strategic borrowing from foreign sources has a moderate effect on the overall jurisprudence of a national court.[38] While these findings do not question the existence of transnational judicial con-

34 The specific changes required by the EU may well be justified by demands of public security.

35 C-399/11, *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013.

36 STC 26/2014, 13 February 2014.

37 Opinion 2/13, 18 December 2014, para. 166.

38 M. Gelter & M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', *in* M. Andenas & D. Fairgrieve (Eds.). *Courts and Comparative Law*, Oxford, Oxford University Press, 2015, p. 200; T. Groppi & M.C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, London, Hart Publishing, 2013.

versations or the emergence of transnational judicial networks,[39] they are sufficient to cast doubts on the depth and intensity of global constitutional convergence.

While convergence along the horizontal axis depends a lot upon the will and whims of similarly situated constitutional peers, convergence along vertical lines seems almost taken for granted. After all, when nation States join international organizations they agree to be bound by the terms of membership, including the obligation to give effect to the decisions of supranational bodies created by them. The picture is colourful.

First, the development of regional and international standards of human rights through judicial intervention is fraught with competing forces: the desire for setting a generally applicable minimum standard clashes with the cherished (and fuzzy) principle of subsidiarity.[40] Subsidiarity advises that no level of government be called to perform any task if it can be performed better at a more local level.[41] This follows from respect for State sovereignty in international law and results in broad national discretion (a wide margin of appreciation in the ECtHR terminology). Subsidiarity makes human rights protection at the national level the default rule, and the supranational standard-setting mechanism becomes the exception.[42] Multilayered constitutionalism invites the consideration of national specificities, even if such claims can be (and in fact are) abused.

This kind of deference is in sharp contrast to reasons that inspired regional and international human rights instruments in the first place: the recognition that human rights are universal and that a supranational mechanism should give effect to these shared values even if it ultimately results in curbing national governments' options to pursue their political agenda. Caught between these competing visions, and especially in the face of backlash from national governments striving to preserve their constitutional identity and as much sovereignty as possible (among others, to continue to hide shortcomings of domestic constitutional control and abuse of power), regional courts are prompted to make strategic choices. The options include recognition of generally applicable principles and stating of narrow rules that are applicable to the very specific facts of the case before them, or hiding behind subsidiarity that allegedly requires respect of whatever domestic courts did, especially if enough ink was used to explain (away) deprivation of liberties. In these circumstances, the supranational network of promised multilayered constitutionalism becomes another level of hiding shortcom-

39 D.S. Law & W.-Ch. Chang, 'The Limits of Global Judicial Dialogue', *University of Washington Law Review*, Vol. 86, 2011, p. 523; A.M. Slaughter, 'A Global Community of Courts', *Harvard International Law Journal*, Vol. 44, 2003, p. 191.

40 M. Jachtenfuchs & N. Krisch, 'Subsidiarity in Global Governance', *Law and Contemporary Problems*, Vol. 79, 2016, p. 1.

41 "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, 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." Art. 5 (3) EU Treaty.

42 E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards', *New York University Journal of International Law and Politics*, Vol. 31, 1999, p. 843.

ings. It is telling that the ECtHR grants disappointingly wider and wider margins of appreciation to national authorities when it comes to permissible limitations on rights, giving itself up to "the insidious temptation to resort to a 'variable geometry' of human rights which pays undue deference to national or regional 'sensitivities'".[43]

This is not the only strategy. In sharp contrast to the ECtHR's deference to national differences in its jurisprudence, the Inter-American Court of Human Rights (IACtHR) insists on national adherence to the supranational minimum and requires national courts to perform 'conventionality control' of legal rules on the national level,[44] arguably even in instances where national law expressly bans courts from performing judicial review of legislation.[45]

The judgments of regional human rights courts are to be enforced by Member States, more precisely, national governments. Giving effect to a judgment rendered against a particular State is an obligation under international law. In light of the naked numbers of constitutional and statutory amendments or reopened judicial proceedings, the story of national compliance with supranational obligations is an unfinished one. National sovereign power remains overwhelming almost by default, at least in terms of authoritative power. In part, compliance depends on the black letter law question concerning the status of international instruments (and their interpretation) in national law.

The more complicated question is whether national courts, and especially national governments, are meant to give effect to the case law of these regional courts when a position was reached in a similar case concerning *another* Member State. Strictly speaking, the holding in one case shall not apply in cases from other countries. It is, of course, likely that a similar issue will be decided similarly in a similar case. Thus, smart national players (courts and even legislators) may find it advantageous to follow the ruling applicable to another country in order to avoid blame, or even because of a sincere belief in common standards. Others may refuse, hoping for exceptions and forcing double standards. They may also choose to disregard those holdings in the name of defending constitutional identity or national sovereignty.[46]

It is in the nature of multilayered constitutionalism that there is a high level of flexibility and uncertainty here, which grants the actors choices that may not exist otherwise in the more rigid national constitutional systems. Uncertainty and instability cause inconveniences to the legal system and generate frictions

43 Lord Lester of Herne Hill, The European Convention on Human Rights in The New Architecture of Europe, *in* A *Yearbook of the European Convention on Human Rights*, Vol. 38, 1995, p. 227.

44 Case of Almonacid-*Arellano et al v. Chile*. Judgment of 26 September 2006. (Preliminary Objections, Merits, Reparations and Costs), para. 124. The IACtHR indicated that a similar obligation of conventionality control applies to national governments.

45 A.E. Dulitzky, 'An Inter-American Constitutional Court? The Invention of Conventionality Control by the Inter-American Court of Human Rights', *Texas International Law Journal*, Vol. 50, 2015, p. 60 *et seq*., esp. n. 92.

46 On the changing authority and legitimacy, *see* M.R. Madsen, K.J. Alter & L. Helfer, 'How Context Shapes the Authority of International Courts', *Law and Contemporary Problems*, Vol. 79, 2016, p. 1.

that are not unknown in traditional domestic interbranch conflicts. Apart from conflicts of competence between constitutional actors, new layers and formats for contesting fundamental human rights added new ways for undermining the existing level of protection of fundamental rights almost by accident.[47]

The central tenet of multilayered constitutionalism is (was) that convergence occurs. In practice, the multilayered constitutional sphere is hardly the home of an emerging, new normative order. The evidence does not reveal more than regular interaction between multiple, somewhat interrelated constitutional actors with complex (and sometimes contradictory) motivations. This is certainly a lot less than what is suggested by the soothing chorus praising convergence on shared constitutional values. The days of institutional arrangements that would limit political powers (or at least policy options) both nationally and supranationally are still to come.

While similarities, as mutual reference points, may have a self-reinforcing effect, in and of themselves they do not guarantee a shared commitment to fundamentals. Unlike accounts on constitution-making, the metaphors on the forces driving multilayered constitutionalism do not give the impression of active political engagement with the multilayered constitution.

It is argued that for the multilayered system to work, its participants need to trust each other on a daily basis, unless a 'manifest deficiency' in the actions of their counterparts suggests otherwise.[48] The ECtHR explained that

> 102: ... [T]he United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms." ... [I]n interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.

Mutual trust between States sounds like a sensible premise for lasting cooperation, and our good fr iend, wishful thinking, may keep it strong for a while. However, when the premises of trust appear to be false, the consequences are not only spectacular, but also fatal – and not only for the multilayered constitutional experiment, but also for constitutionalism itself. To assume that one has to trust domestic authorities and then shift the burden to those who claim rights violation against States are gestures that indicate the unwillingness of the actors of the multilayered constitutional system to take their assumed job seriously.

47 S. Baer, 'A Closer Look at Law. Human Rights as Multi-level Sites of Struggles Over Multi-dimensional Equality', *Utrecht Law Review*, Vol. 6, 2010, p. 56.

48 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, [GC] Application no. 45036/98, Judgment of 30 June 2005, paras. 155-156.

This lack of direction at the supranational level reflects a new reality of the nation States. It may be time to admit that disagreement and conscious dissent on the national level remains an important factor explaining the operation of the multilayered constitutional reality.[49] Constitutional instability may result not from the shortage of building blocks from which lasting government can be constructed but from local political "inability to achieve stable agreement on any single design choice because each is a plausible option".[50] This would take the kind of commitment constitutionalism used to stand for prior to the haze of global aspirations. Giving up on the false promises of global constitutional convergence and starting to study how local oddities contribute to constitutionalism[51] would help in understanding what is left of constitutionalism in a post-national era.

E What Stays at the National Level: Enforcement Power

I More than a Coordination Problem?

Despite aspirations to the contrary, the nation State and its sovereignty are not that easy to replace or reinvent for the purposes of the multilayered constitutional regime. Diffuse social and legal systems are not good at coordination, and the complexity of multilayered constitutionalism in itself results in coordination problems, triggering destabilization. This can be documented in the EU, the supranational model that not too long ago was heralded as the prototype of a functioning, liberty-enhancing supranational entity.

Consider the litigation concerning the European Arrest Warrant. In the EU, the European Arrest Warrant first appeared as an ingenious tool of efficiency and expediency, making national criminal justice networks rely on each other in the spirit of mutual trust that is based on the assumption of the equivalency of rights protection. Nevertheless, in 2016 the CJEU agreed with the concerns of a German court that had reservations about the prison conditions in Hungary and Romania, and therefore refused to surrender a Hungarian and a Romanian national back to the prison systems of the countries of their citizenship.[52]

The referring German court relied on the judgments of the ECtHR, which found that prison conditions in those countries amounted to degrading treatment due to prison overcrowding. The CJEU confirmed that a national court must postpone the surrender of an individual until it ascertains that prison conditions in the receiving country do not constitute inhuman or degrading treat-

49 Theories of constitutional pluralism view disagreement between constitutional actors as opportunities to define the legitimate role of various actors within the multilayered constitutional experiment. M.P. Maduro, 'Interpreting European Law. Judicial Adjudication in a Context of Constitutional Pluralism', *European Journal of Legal Studies*, Vol. 1, 2007, p. 139.

50 M. Tushnet & M. Khosla, 'Unstable Constitutionalism', *in* M. Tushnet & M. Khosla (Eds.), *Unstable Constitutionalism, Law and Politics in South Asia*, Cambridge, Cambridge University Press, 2015, p. 5.

51 G. Frankenberg, 'In Verteidigung des Lokalen - Odd Details als globalisierungskritische Marker im Verfassungsvergleich',*Verfassung und Recht in Übersee*, Vol. 49, 2016, p. 263.

52 C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [GC], Judgment of 5 April 2016.

ment in violation of the EU Charter of Fundamental Rights (Art. 4). The lesson so far is that robust protection of human rights in Europe emerging from supranational interaction requires an increased level of care (and suspicion) between national institutions when they engage with each other through a pan-European criminal justice mechanism.[53]

Complications stemming from the principle of 'mutual trust' aside, in 2015 the German Constitutional Court indicated that the principles underlying the pan-European arrest warrant mechanism may violate a Member State's constitutional identity. The German Constitutional Court considers the principle of individual guilt to be part of German constitutional identity. What follows from the principle is not simply the inapplicability of certain measures of EU law, but also that German authorities cannot assist other States in violating human dignity.[54]

II A Very Special Conundrum: Listing Terrorists

A second element inherent in the self-destruction of the multilayered system results from the unfinished nature of the supra-constitutional structure.

Despite considerable global convergence on national security law,[55] the weaknesses of the multilayered system were aired in the open on account of the list of suspected terrorists and terrorist organizations prepared by the UN Security Council after the 9/11 attacks. The list was a measure in the global war on terror.[56] The global measure reflected genuine concerns for international cooperation and was devised on the approach previously used to address drug trafficking. The story illustrates how the security concerns of a few, directly affected countries (in the example, first of all the U.S.) compromised constitutionalism in less affected countries (Switzerland, in the *Nada* case that follows). Constitutional openness, a prerequisite for the operation of the multilayered constitutional regime, resulted in spectacular constitutional vulnerability, undermining the very foundations of supranational cooperation.

The seemingly simple and efficient mechanism of 'listing' terrorists was initially based on UN Security Council resolution no. 1267, which pre-dates the 9/11 attacks and was developed to curb the financing of global terrorism.[57] A UN committee created especially for this purpose prepares a list from names proposed by

53 It would be wrong not to see that the different networks may produce corrective mechanisms for the difficulties the system itself has created. In the fall of 2016 the Hungarian Parliament (like the Italian a few years earlier) adopted a prison reform that is hoped to satisfy the applicable human rights standards in response to the findings of the ECtHR. If the ECtHR finds this reform acceptable the obstacles of trust based on cooperation will diminish. Note, however, that trust is built on a case-by-case basis. A Member State that complies with one judgment does not necessarily comply with the next.

54 2 BvR 2735/14, 15 December 2015.

55 As discussed in K.L. Scheppele, 'The International Standardization of National Security Law', *Journal of National Security Law and Policy*, Vol. 4, 2010, p. 437.

56 K. Roach, 'Comparative Counter-terrorism Law Comes of Age', *in* K. Roach (Ed.), *Comparative Counter-terrorism Law*, Cambridge, Cambridge University Press, 2015, pp. 4-6.

57 S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct 15, 1999). The evolution of the process is described in C. Forcese & K. Roach, 'Limping into the Future. The U.N. 1267 Terrorism Listing Process at the Crossroads', *George Washington International Law Review*, Vol. 42, 2010, p. 221-227.

Member States (*i.e.* national security services) on the basis of mere suspicion, and without prior court proceedings. As a result, listed persons became subject to an international travel ban and an asset freeze that UN members are required to enforce, using their national laws. When a Member State requests the removal of a person from the list, any other Member State can veto the request. 'Listed' people have no way to know why they are listed and, equally importantly, cannot provide reasons that would enable their delisting. They do not have the protection that follows from natural justice or the rule of law. As Franz Kafka would be pleased to learn, in the UN's terminology these measures are known as 'targeted sanctions', invented primarily to reduce the human cost of general sanctions, a generous gesture in the field of global security.

Over the years, various jurisdictions dealt with challenges against implementing measures imposed on listed persons.[58] While national or regional authorities are free to choose the manner in which they give effect to the UN sanctions, the implementation measures essentially give effect to a procedure that lacks most basic due process guarantees (but may have full national democratic endorsement in case the measure is implemented by legislation). So long as the underlying process in the UN's responsible committee is lacking basic human rights guarantees, the implementing measures continue to violate procedural human rights. Viewed from a different perspective, decision-making seemed to have been removed from the traditional constitutional frame: there is no legislative determination (and apparently no judicial either), and the national security establishment could make its wishes prevail through an international cooperation mechanism. The 'network', *i.e.* the international cooperation or even uncoordinated parallel thinking and action of information-hungry intelligence services, does not look particularly constitutionalism-friendly.

As it happened, the EU implemented the UN sanctions with a Regulation that is applicable in all Member States without additional measures at the national level.[59] In 2005 in the *Kadi* case the CJEU found that the Regulation violated fundamental right as protected by EU law.[60] The CJEU emphasized that

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty which include the principle that all Community acts must respect fundamental rights (§ 285).

This was a moment wherein the CJEU was more concerned with defending the integrity of EU law as a system based on human rights and not with the compli-

58 J. Genser & K. Barth, 'Targeted Sanctions and Due Process of Law', *in* J. Genser & B. Stagno Ugarte (Eds.), *The United Nations Security Council in the Age of Human Rights*, Cambridge, Cambridge University Press, 2014, p. 195.

59 Regulation (EC) No. 881/2002 *Measures against persons and entities included in a list drawn up by a body of the United Nations*, 27 May 2002.

60 Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council*, Judgment of 3 September 2008.

ance of EU law with international law.[61] The revised EU Regulation was also found to violate EU law because the improved process in the UN that had kept Kadi on the terrorist list for over a decade continued to lack due process guarantees (especially the right to hearing and access to evidence).[62]

The *Kadi* case had a significant impact on the attitude of courts in subsequent cases. In 2012 in the *Nada* case, the ECtHR concluded that in implementing the UN sanctions the Swiss authorities did not manage to strike a proper balance within the powers they retain between the human rights obligations under the Convention and national security considerations.[63] Thus, regional judicial interaction questioned global forces, kicking back the ball to the national and regional constitutional actors' arena, adding a dose of rights' awareness to the multilayered architecture. A (regional) multinational player reinforced national sovereign constitutionalism (not absolutist sovereignty!) against another global network. This did not last long, as the ECtHR gave in, in the name of trusting the UN Security Council's good intentions of not wishing to violate human rights a few years later. In *Al-Dulimi* the Grand Chamber found that

> 147. … in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny.
>
> …149. Switzerland was not faced in the present case with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. … Consequently, the respondent State cannot validly confine itself to relying on the binding nature of Security Council resolutions, but should persuade the Court that it has taken – or at least has attempted to take – all possible measures to adapt the sanctions regime to the individual situation of the applicants, at least guaranteeing them adequate protection against arbitrariness.[64]

III The Return of the Sovereign

It may be too early to call, yet at the moment the winner of the trembling multilayered constitutional experiment appears to be the nation State with its cher-

61 G. De Búrca, 'The ECJ and the International Legal Order: A Re-evaluation', *in* G. De Búrca & J.H. H. Weiler (Eds.), *The Worlds of European Constitutionalism*, Cambridge, Cambridge University Press, 2012, p. 108.

62 Case T-85/09, *Kadi v. Commission* (Kadi II), Judgment of 30 September 2010. This judgment already assessed the reformed process on the UN level.

63 *Nada v. Switzerland*, [GC] Application no. 10593/08, Judgment of 12 September 2012.

64 *Al-Dulimi and Montana Management Inc. v. Switzerland*, [GC] Application no. 5809/08, Judgment of 21 June 2016, internal references omitted.

ished constitutional identity. National sovereignty is a diehard fighter. European integration seems to be the only form for the survival of a European way of life in the current international competition where the size, economic and military power of European States does not provide enough strength to any one of them to resist emerging economic powers of its own. This is what the short-term perception of large parts of the European public and (the lack of) statesmanly thinking do not seem to be ready to understand.

In the latest wave of the undoing of the multilayered system (constitutional or not), a growing number of outliers – which paid lip service to the rules of the club for long – feel that they can afford to jump the fence and leave the international networks and treaty regimes *en masse*, often at the moment when an international body would express inconvenient truths about them. As long as the supranational normative expectations were disregarded only by some poor States of lesser significance, the deviation was easy to ignore as a problem of outliers (which do not count as proper constitutional democracies anyway). However, once the same outcasts became influential on the supranational scene, they could not be dismissed as outliers any more. They started to take part in setting the international norm, shaping it according to their preferences (and to the effect of levelling down). Finally, after tolerating the substandard behaviour of the former outliers, some of the members of the elite club jumped on the opportunity to liberate themselves of the inconveniences of an external control. The consequence is that these international bodies, fearing further loss (including the end of their own existence), lower the allegedly shared or common standards further in order to keep their 'customers'.

Compliance with the judgments, opinions and views of supranational institutions on the national level has long been recognized as the Achilles point of multilayered constitutionalism. The more complex the national implementing measure needs to be and the more it departs from local constitutional self-understanding (identity, culture or tradition), the more unwilling a government will be to disburse its local political capital on adopting a corresponding local measure that would please supranational actors. A recent example of such resistance is the UK's refusal to reconsider its blanket ban on the prisoners' right to vote in light of ECtHR judgments.[65] At least initially, this issue was much less contentious in other countries, but the UK's resistance encouraged courts and national governments to defy the voting rights principle and the authority of the ECtHR with it.[66]

65 *Hirst v. the United Kingdom*, [GC] Application no. 74025/01, Judgment of 6 October 2005. A pilot judgment was entered in *Greens and M.T. v. the United Kingdom*, Application nos. 60041/08 and 60054/08, Judgment of 23 November 2010. In light of the UK's failure to act, in September 2013 the ECtHR ended the adjournment of the over 2000 pending applications from UK prisoners and started to process the cases.

66 For example, in 2015 Russia amended the Act on the Constitutional Court to permit the Constitutional Court to decide whether or not to comply with international human rights obligations Constitutional Court decision of 19 April 2016, in English translation, available at: www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf. The UK anti-Europe rhetoric is quite similar to the Russian approach.

National governments are not alone in defying regional and international obligations and human rights standards. National courts, especially constitutional courts, have been under pressure for decades to find a way to reconcile supranational constitutional and human rights standards with the requirements of national constitution. As already mentioned, ever since the *Maastricht* judgment the German Constitutional Court has been eager to reinforce its position for setting constitutional requirements in the face of mounting European pressure. Over the years, some constitutional courts took this as an encouragement to define those features of the domestic constitutional system that cannot be removed or amended away, at times sculpting constitutional identity out of political defiance.[67]

The multilayered constitutional experiment thrives on the interaction of its actors: without genuine commitment and cooperation supranational processes are a meaningless shell game. To make up for smaller cracks, theories on supranational constitutional developments often mask dissent and discord with putting these encounters in the frame of dialogue or, if the opposition of a particular State is too unambiguous, they credit disagreement to principled exceptionalism.[68] Of course, when a party formally exits an international organization, it is pointless to explain away disagreement.

Nonetheless, from the perspective of constitutionalism the main challenge comes from nation States reasserting their national sovereignty over supranational actors, standards or obligations. This could have a major negative impact on constitutionalism of those countries where constitutionalism has partly become anchored in the international web during the years of the multilayered experiment. It may also create a new hole in the national constitutional system by insisting on constitutionally incomplete national constitutional identity, because of what identity politics means for the democratic component of constitutionalism: disrespect of minorities, intolerance, security mania, censorship, suppression of civil society. This is troubling for constitutionalism in 'mature' democracies. The fear is the return to an unreflected, primitive national identity based on exclusion that disregards the surrounding, potentially global political community. The national provincialism of constitutional identity claims limits the citizen to the narrow cell of lived (manipulated) personal experience without a horizon.

A system that depends so much on the (often imaginary) momentum of convergence and mutual trust is malleable, and its collapse can be spectacularly fast. The Brexit shock, which sent a signal for lesser integration in other countries, illustrates the power of the nation State. It is ironic that the pretext of disintegration was the protection of national constitutionalism understood as untamed parliamentary sovereignty. Constitutional identity resonates with popular and populist sentiments on the domestic political scene.

Backsliding can take many forms. Although the reference to 'national identities' is not automatically interchangeable with 'national constitutional identity'

67 *See* 22/2016 (XII. 5.) AB decision (Hungarian Constitutional Court).
68 G. Nolte & H.P. Aust, 'European Exceptionalism?', *Global Constitutionalism*, Vol. 2, 2013, p. 407.

recognized in the EU Treaty,[69] when governments in Hungary (in 2010) and in Poland (in 2015) took to rebuilding their domestic constitutional infrastructures, they relied on the escape hatch of the constitutional identity argument opened for creating departures from shared European constitutional understandings and values. Even in this most integrated supranational constitutionalist entity there was no institutional capacity to handle deviations from allegedly shared fundamental constitutional commitments. This suggests the deep ambivalence of key constitutional actors towards a European multilayered constitutional experiment.[70] Nonetheless, it appears that the success of multilayered constitutionalism continues to depend greatly on the most traditional of constitutional actors: national governments.

G Conclusion: Multi-Layered Constitutionalism Revisited

The initial hope informing the multilayered constitutional experiment to be able to constrain national constitutional actors via supranational procedures has fallen short. Multidimensional constitutional conflicts result in fragmentation and create easy opportunities for backsliding. Of course, the executive's acquisition of unchecked powers, complete with the intensification of national constitutional identity exceptions, remains a most worrying concern.

The much lamented democratic deficit of supranational legislative processes is a concern not only because 'the people' do not have a say in these specific processes. The national constitutional framework has largely lost its relevance for processing conversation and disagreement on issues of public concern. This happened partly because these issues are not transformed into legal rules any more on the national level and partly because national democratic processes have little impact on the supranational level where decisions are made. Sure, supranational judicial processes may have the occasional corrective moment. Yet litigation in a select few cases cannot and should not (and does not) replace genuine public discourse and democratically legitimate decision-making.

For the time being it appears that wishful thinking, mutual trust and peer pressure were not sufficient for a bootstrapping that would have resulted in the consolidation of the multilayered constitutional experiment. The recent resurgence of national constitutional identity claims suggests that the high hopes of convergence were led by the creative force of, well, exactly that: high hopes.

The extent to which the existing institutions (like supranational courts) are capable or willing to resist, and mobilize resistance is unclear. Institutional interests of the multinational actors and even considerations of democratic politics at the national level may mobilize for further integration. There are stakeholders who have interest in furthering the multilevel system. Among them we find not

69 *See* M. Claes & J.H. Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case', *German Law Journal*, Vol. 18, 2015, p. 917.

70 D. Kochenov & L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU. Rhetoric and Reality', *European Constitutional Law Review*, Vol. 11, 2015, p. 512.

just politicians and institutions, but businesses and citizens concerned about their livelihoods that they would lose *in the absence* of globalization. They are also concerned about the values they have cherished so far without doing much to preserve them. Alleged losses due to globalization triggered frustration, resulting in anger (which became, oddly, a respected sentiment in the hands of populists). Perhaps losing the benefits of globalization may have similar mobilizing effects.

Constitutionalism as a label appeared to be useful to explain a supranational constitutional experiment: it granted it gravity and (somewhat ironically) gave it a unique sense of identity and even the promise of a bright future. Yet once the genie of multilayered constitutionalism was set loose, it turned against its masters. It started to have a life of its own, threatening the very foundations it was meant to strengthen.

There is more to explaining the ways governments and their officials have with power than adopting fancy labels. Constitutionalism may be an abstract concept, but it is a concept about the limits of the daily exercise of political power in a political community. Interactions between constitutional actors in the multilayered environment resulted in the expansion of the powers of the executive branch without serious constitutional controls and generated new legal norms of uncertain democratic credentials. In the process the mutual trust on which the multilayered constitutional experiment was premised is slowly evaporating: clashes highlight ever-greater divides between nation States on fundamentals. The resulting backlash against globalization fills national sovereignty with new life. It may be time to lure the genie back into the bottle, before it undermines the one force that can keep the sovereign at bay: constitutionalism, as we knew it before the multilayered experiment. This is not simply a battle cry for restoring constitutional democracy as it was before the post-national constellation. A return to watertight national constitutionalism is unlikely in the present level of international interdependence. Owing to their openness to supranational influences, national constitutions offer little protection against the operation (and malfunctioning) of the multilayered web. Where national courts insist on a national standard that departs from the supranational one in the name of constitutional identity, national courts are running the risk of being ostracized for being uncooperative. When national courts adapt national constitutional standards in order to 'reconcile' national law with supranational standards, they may lower the level of protection the national constitution used to afford. This is how national constitutional identity becomes a blessing and a curse in the multilayered constitutional environment.

Perspectives on Comparative Federalism

The American Experience in the Pre-incorporation Era

Kenneth R. Stevens[*]

Today the Bill of Rights – the first ten amendments to the United States Constitution – is understood to limit not only the national government but also (and to a greater extent) the power of the states, to infringe on the civil liberties of citizens. Such was not always the case. In the early days of the republic, most Americans feared federal authority far more than the states. This remained the case until passage of the 14th amendment to the Constitution followed by a series of interpretations over years by the Supreme Court that broadened its scope.

The Constitution was created out of frustration. After Britain's North American colonies declared independence in 1776, the Continental Congress formalized a government in the Articles of Confederation, an agreement to establish a perpetual "mutual friendship and intercourse among the people of the different states".[1]

But events demonstrated that the Articles were woefully inadequate and in May 1787, delegates from the states met in Philadelphia to create a new and more effective frame of government. One unique aspect of the newly created American government was the way the Constitution defined sovereignty. In the Confederation, the states retained their sovereignty except for powers specifically granted to the Confederation. The system the Constitution established was federalist, with power shared between the national government and the states. The preamble of the Constitution placed sovereignty in 'the people', delegating some power to the people in the states and some to 'the people' in a national sense. By seeking ratification of the Constitution by conventions of 'the people' in the states rather than by state governments, the framers reinforced this new concept of popular sovereignty. James Madison argued that this established "the fabrics of governments which have no model on the face of the globe".[2]

But the Convention was not without controversy. Americans were suspicious of government power in general and centralized power in particular. Though the Constitution included some civil liberties, such as the right of *habeas corpus* and

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1 *Journals of the Continental Congress*, Washington, DC, Government Printing Office, 1907, Vol. 9, available at: https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc0091)).

2 J. Murrin, '1787: The Invention of American Federalism', *in* D.E. Narrett & J.S. Goldberg (Eds.), *Essays on Liberty and Federalism: The Shaping of the U.S. Constitution*, College Station, Texas A&M University Press, 1988, p. 35-36, 40; J. Madison, 'Objections to the Proposed Constitution From Extent of Territory Answered', *Federalist*, No. 14, available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-14.

trial by jury in criminal cases, as well as prohibiting bills of attainder, *ex post facto* laws and religious tests for office, it did not include a comprehensive bill of rights like those seen in the state constitutions.

In the closing days of the Convention, on 12 September 1787, George Mason, the author of the 1776 Virginia Declaration of Rights, asserted that the proposed Constitution should have one, which "would give great quiet to the people". Elbridge Gerry, of Massachusetts, supported Mason. Roger Sherman of Connecticut countered that nothing in the Constitution repealed states' bills of rights and Mason's proposal was unanimously defeated.[3]

Three days later, Mason again objected because "[t]here is no Declaration of Rights", and since Article VI of the Constitution made the laws of the federal government "paramount to the laws and constitution of the several States, the Declaration of Rights in the separate States are no security". The Constitution had no provision for freedom of the press, trial by jury in civil cases or prohibiting standing armies in time of peace. It would lead, he said, to "a monarchy, or a corrupt, tyrannical 'oppressive' aristocracy".[4] On the final day of the Convention, 17 September 1787, Mason, joined by fellow Virginian Edmund Randolph and Gerry, declined to sign the Constitution. Though they expressed several concerns, all three complained that the Constitution did not include a bill of rights.[5] James Madison informed Thomas Jefferson, then in Paris, that Mason had returned to Virginia determined to defeat adoption of the Constitution because he considered the lack of a bill of rights 'a fatal objection'.[6]

But Mason was not alone in the belief that a bill of rights was in order. From Paris Jefferson said he did not like "the omission of a bill of rights providing clearly and without the aid of sophisms" for fundamental liberties. In his view "a bill of rights is what the people are entitled to against every government on earth … and what no just government should refuse or rest on inference".[7]

Madison himself was sceptical about adding a bill of rights. He wrote Jefferson that there was "scarce any point on which the party in opposition is so much divided as to its importance and propriety". He believed some of its advocates acted "from the most honorable and patriotic motives", but

> experience proves the inefficacy of a bill of rights on those occasions its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have

3 M. Farrand (Ed.), *The Records of the Federal Convention of 1787*, 4 Vols., New Haven, Yale University Press, 1937, p. 2:587-588; A. Koch (Ed.), *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, August 31, 1787, Athens, Ohio University Press, 1966, p. 630.

4 G. Mason, 'Objections to this Constitution of Government (September 16, 1787)', *in* R. A. Rutland (Ed.), *The Papers of George Mason, 1725-1792*, 3 Vols., Chapel Hill, University of North Carolina Press, 1970, p. 3:991.

5 J. Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution*, 5 Vols., Philadelphia, J.B. Lippincott, 1941, p. 1:482-496.

6 Madison to Jefferson, October 24, 1787, *in* M. Farrand, *The Records of the Federal Convention of 1787*, 4 Vols., New Haven, Yale University Press, 1937, p. 3:136.

7 Jefferson to Madison, December 20, 1787, *in* R.A. Rutland *et al*, *The Papers of James Madison*, 17 Vols., Chicago, University of Chicago Press, 1962, p. 10:335-339.

> seen the bill of rights violated in every instance where it has been opposed to a popular current.[8]

When the Convention sent the Constitution to the states for their approval, a national debate erupted. As opinion divided, those who favoured the new Constitution co-opted the term 'federalist' leaving those who had reservations about it described as 'anti-federalists'. Arguments ranged over the entirety of the Constitution's provisions and reflected widely differing views about government, including even whether the United States was too large, diverse and factious to sustain itself as a republic. But much of the debate focused on the necessity for a bill of rights.

Critics said that the proposed rights amendments were no more than throwing "a tub to the whale", a phrase borrowed from the practice of tossing an empty tub or a barrel to a whale to divert it until 'the harpoon' had secured the prey. A Federalist newspaper mocked the amendment fervour by writing that "[t]he worship of the ox, the crocodile, and the cat, in ancient time, and the belief in astrology and witchcraft by more modern nations, did not prostrate the human understanding more than the numerous absurdities" of the amendments. Connecticut Federalist Noah Webster opined that "paper declarations of rights are trifling things and no real security to liberty".[9]

At a meeting in the State House in Philadelphia, on 6 October 1787, Federalist James Wilson ridiculed the idea of a bill of rights as 'superfluous and absurd' because under the Constitution the government only had the specific powers it had been given and it could not misuse powers it had not been given. In reply, Judge Samuel Bryan said Wilson's argument was "an insult on the understanding of the people". Bryan repeated Mason's view that since the Constitution would be the supreme law of the land no power could restrain Congress, if it violated personal rights.[10]

The omission of a bill of rights became "the most important obstacle in the way of its adoption by the states". For many anti-federalists, it was a simply a matter of principle.[11]

The actions of the four largest states – Pennsylvania, Massachusetts, Virginia and New York – were critical to the success or failure of ratification. Should anyone of them withhold approval, it was unlikely that the fledgling nation could succeed.

8 James Madison to Thomas Jefferson, New York, Oct 17, 1788, *in* R.A. Rutland (Ed.), *Papers of James Madison, 7 March 1788-1 March 1789*, Charlottesville, University Press of Virginia, 1977, p. 11:295-300.

9 D.E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, Lawrence, University Press of Kansas, 1996, p. 98; K.R. Bowling, '"A Tub to the Whale": The Founding Fathers and Adoption of the Federal Bill of Rights', *Journal of the Early Republic*, Vol. 8, 1988, p. 225.

10 B. Bailyn (Ed.), *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters during the Struggle over Ratification*, 2 Vols., New York, Library of America, 1993, p. 1:64 & 1:77.

11 L.W. Levy, *Origins of the Bill of Rights*, New Haven, Yale University Press, 1999, p. 12; R.A. Rutland, *The Birth of the Bill of Rights, 1776-1791*, Bicentennial Edition, Boston, Northeastern University Press, 1991, p. 124-125.

At the Pennsylvania ratifying convention, on 28 November 1787, James Wilson again belittled the clamour over a bill of rights. The fact was, he said, that it had never been an issue at the Convention until three days before adjourning and "even then, of so little account" that it was dismissed without debate. It was certain, he said, that bills of rights were "unnecessary and useless". John Smilie, an Irish emigrant who became a member of the Pennsylvania legislature, objected that the power of government was so loosely defined that it would be impossible to determine the limits of government without 'a test of that kind'. And 750 residents of Cumberland County signed a petition asking that Pennsylvania not ratify the Constitution unless amendments for rights were added. Nonetheless, the convention was ratified without adding rights amendments by a vote of 46 to 23. Anti-federalists reacted to the defeat by calling their own convention at which they rejected the Constitution because it lacked a bill of rights.[12]

In Massachusetts, where the contest for ratification was closer, Federalists and Anti-Federalists brokered a deal in which John Hancock proposed adding a statement to the Constitution that all powers not explicitly granted to the federal government remained with the states. He hoped that this proposition would "quiet the apprehensions of gentlemen". Samuel Adams supported the proposal which, he said, amounted to "a summary of a bill of rights". Massachusetts was the first state to ratify the Constitution, by a vote of 187 in favour and 168 opposed, with a proposal to add rights amendments.[13]

The anti-federalist movement also was strong in the important state of Virginia. Patrick Henry, a Revolution era patriot, had declined even the opportunity to serve as a member of the state delegation to the Constitutional Convention because he said he 'smelt a rat' and George Mason's 'Objections' were so widely circulated that one federalist, David Stuart, complained there was a copy in every house in his county. Richard Henry Lee, who as a member of the Second Continental Congress had introduced the motion to declare independence from Britain in 1776 and served in the Confederation Congress, insisted that a bill of rights was necessary to protect the people. Edmund Randolph, who had refused to sign the Constitution at the Convention, however, had now switched sides and favoured ratification. Patrick Henry led the charge against ratifying the Constitution unless it included a bill of rights. He spoke "often and long, one speech lasting seven hours". He declared that a bill of rights was "indispensably necessary". Federalists in Virginia realized they needed to concede acceptance of a bill of rights. On 25 June 1788, the Virginia convention ratified the Constitution with the recommendation that rights amendments be added.[14]

The New York ratifying convention met in the Hudson River town of Poughkeepsie on 17 June 1788. The Federalist cohort included the influential Alexander Hamilton, John Jay and Chancellor Robert Livingston, the highest

12 Bailyn, 1993, p. 807 & 809; Rutland, 1991, p. 140-141.

13 Kyvig, 1996, p. 92; J. Elliot (Ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*…. 2nd ed., 5 Vols., Philadelphia, J.B. Lippincott, 1836, p. 2:123 & 2:131.

14 Bailyn, 1993, p. 636; Elliot (Ed.), 1836, p. 3:655-656; Kyvig, 1996, p. 95; Rutland, 1991, p. 163, 165, 167, 170 & 173-174; R. Labunski, *James Madison and the Struggle for the Bill of Rights*, New York, Oxford University Press, 2006, p. 38.

judicial officer in the state. The anti-federalists included state senator Thomas Tredwell, who warned that a government not limited by clearly defined rights was "like a mad horse, which, notwithstanding all the curb you can put upon him, will sometimes run away with his rider". After debate, the convention passed the Constitution on 24 July 1788 … with a recommendation that a bill of rights be added in the future.[15]

Thus the largest and most important states – Pennsylvania, Massachusetts, Virginia and New York – accepted the Constitution. The contest had been spirited in each and the failure of ratification in any one of them would have meant the failure of the Constitution.

The most important discussion of the meaning of the Constitution, of course, was The Federalist, a collection of 85 essays written by John Jay, James Madison and Alexander Hamilton, between October 1787 and August 1788 under the pen name 'Publius'.[16]

The Federalist explored nearly every aspect of the Constitution, including whether it should include a bill of rights. In several numbers of The Federalist, James Madison argued against adding a bill of rights, arguing that there was no agreement on what rights should be included and that the Confederation had functioned without one. He also asserted that the Constitution already prohibited the states from violating some rights and that a bill of rights was not necessary because the states would protect the people's rights. And once more, he objected that experience proved that state governments violated liberties even when they had bills of rights.[17]

Hamilton, in Federalist No. 84, largely reiterating James Wilson's arguments, wrote that a bill of rights was unnecessary. Historically, he said, bills of rights originated in conflicts "between kings and their subjects". This was not necessary in the American Constitution because it was a government based on the authority of the people. He added that "[t]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights". Moreover, he continued, adding a bill of rights was "not only unnecessary … but would even be dangerous" because it could provide a pretext to violate rights that were not specified.[18]

State judge Robert Yates, writing under the name 'Brutus', replied that the need for a bill of rights was obvious. Rulers had always tried "to enlarge their powers and abridge the public liberty". Supporters of the Constitution said that a declaration a bill of rights was not necessary, yet the power and authority granted

15 Rutland, 1991, p. 178 and 180-181.

16 *The Federalist Papers*, available at https://www.congress.gov/resources/display/content/The+Federalist+Papers.

17 *Ibid*., no. 38, 44, 46 & 48; Labunski, 2006, p. 62; P. Finkelman, 'James Madison and the Bill of Rights: A Reluctant Paternity', *Supreme Court Review*, Vol. 1990, Chicago, University of Chicago Press, 1990, p. 316-319.

18 A. Hamilton, 'Certain General and Miscellaneous Objections to the Constitution Considered and Answered', *Federalist*, No. 84, available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers.

the government in it "reaches to every thing which concerns human happiness – Life, liberty, and property, are under its control".[19]

The history of the ratification conventions in the states suggests that the Constitution won approval only because its supporters agreed to add a bill of rights as amendments. That understanding had provided the critical margin of success in several states.

James Madison took that commitment seriously. On 8 June 1789, now Congressman Madison proposed rights amendments drawn from those suggested by the state ratifying conventions. As his earlier remarks had shown, Madison was as suspicious of states as he was of federal power and he specifically proposed making rights of conscience, freedom of the press and trial by jury binding on the states.[20]

In the debate that followed, the House discussed the amendments as a Committee of the Whole and sent seventeen to the Senate. The Senate reduced that number to twelve, which were sent to the states for ratification at the end of September. Significantly, among the proposals discarded by the Senate was one that specifically prohibited the states from infringing on the rights of citizens.[21] The proposed amendments fell into three broad categories:

- the rights of citizens such as freedom of religion, speech, press, assembly, petition, participation in the militia, the right to keep and bear arms and protection against quartering troops in one's home;
- judicial rights, such as reasonable search, double jeopardy, compulsion to testify against oneself, due process of law, and the right to speedy and public trial by a jury of one's peers;[22]
- it also included the general principles of the ninth and tenth amendments: that specifying certain rights could not be construed to deny others retained by the people and that powers not delegated to the federal government are reserved to the states or to the people.

Adoption of the Bill of Rights was completed when Virginia ratified the amendment on 15 December 1791.

The states declined to approve two measures:

- An amendment that provided Congress could not increase its own compensation "until an election of Representatives shall have intervened". (That proposal was eventually ratified 203 years later as the 27th amendment in 1992.)
- The other amendment that failed ratification was one that would have adjusted the number of a state's representatives in the House of Representatives as the population increased. The measure would have limited the size of a dis-

19 H.J. Storing (Ed.), The Complete Anti-Federalist, Chicago, University of Chicago Press, 1981, Vol. 2, Part 2, p. 372-377, available at: http://teachingamericanhistory.org/library/document/brutus-ii/.

20 Kyvig, 1996, p. 98.

21 The debate is covered thoroughly in Bowling, 1988, p. 234-246.

22 Kyvig, 1996, p. 103.

> trict to no more than 50,000. (Today one member of Congress represents about 500,000 persons.)

Enacting the measures that made up the Bill of Rights was a significant achievement. The amendments satisfied many anti-federalists who had been concerned about the reach of federal power. A number of former anti-federalists subsequently served in the national government: Edmund Randolph served as attorney general in the administration of George Washington and Elbridge Gerry was later vice president in James Madison's administration. (George Mason was never fully able to reconcile himself to the Constitution, which led to estrangement between him and George Washington.)

The struggle over the Bill of Rights also demonstrated that, contentious as it was, the process of amending the Constitution provided a stable system for practical constitutional change and reform.

It remained a matter of dispute, at least in the minds of some, whether the Bill of Rights applied only against the power of the national government or included limits on the states. In 1825, Philadelphia attorney William Rawle wrote that since provisions for protection of rights differed among the states "[a] declaration of rights, therefore, properly finds a place in the general Constitution, where it equalizes all and binds all".[23]

A few years later, that issue came to the Supreme Court in the case of *Barron v. Baltimore*.[24] In 1815, John Barron built a profitable dock and warehouse in Baltimore, Maryland. Two years later, the city began street improvements in the area that caused sand and mud to accumulate around the wharves and seriously damage the businesses there. After appeals to the city were ignored, Barron sued. The local court agreed with Barron and awarded him damages, but the city appealed and the case made its way to the Supreme Court.[25]

At the Supreme Court, headed by Chief Justice John Marshall, Barron's lawyer argued that the city's actions violated the 'takings clause' of the 5th amendment of the Constitution which held that "private property [shall not] be taken for public use, without just compensation". It was an easy case for Marshall, who had been a member of Virginia ratification convention. Immediately after Barron's counsel made his argument, the Chief Justice informed Maryland state attorney, Roger B. Taney, that there was no need for him to say anything in the case.[26]

Marshall continued for a unanimous court.

> The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for

23 W. Rawle, *A View of the Constitution of the United States of America*, 2nd ed., Clark, New Jersey, The Lawbook Exchange, 2003, p. 120-121. Originally published Philadelphia, Philip H. Nicklan, 1829.

24 *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833).

25 F.W. Friendly, *The Constitution: That Delicate Balance*, New York, Random House, 1984, p. 1-6.

26 *Ibid*, p. 12.

> the government of the individual States. Each State had established a constitution for itself, and in those provided such limitations and restrictions on the powers of its particular government as its judgment dictated.... [T]he fifth amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested, such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.[27]
>
> We are of opinion that the provision in the Fifth Amendment to the Constitution declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States.[28]

In the historical context, Marshall was correct. The historical context provides the evidence. The Bill of Rights amendments were added to the Constitution at the behest of anti-federalists who had wanted to limit the power of the federal government over the states, not increase it. Where the Constitutional Convention did wish to restrict state action, it did so clearly. For example, Article 1, section 10 states explicitly that "[n]o state shall ... pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts". This, said Marshall, was "universally understood".[29]

Still, others disputed Marshall's interpretation. In *Holmes v. Jennison* (1840), a Vermont case involving the extradition of a fugitive sought by Canada, Cornelius P. Van Ness, the attorney for the accused said "with the utmost deference" that the Supreme Court had erred in *Barron v. Baltimore*. The Bill of Rights, he said, included "absolute rights, inherent in the people, and of which no power can legally deprive them". The principles in the Bill of Rights were "the very foundation of civil liberty, and are most intimately connected with the dearest rights of the people". The Court divided in a 4-4 on the issue and declined to decide the case.[30]

So the law stood until the 14th amendment was enacted in the aftermath of the Civil War. Ohio Congressman John Bingham, the author of the amendment, later explained that early drafts did not include specific restrictions on the states, but Marshall's limits on the meaning of the Bill of Rights in *Barron* inspired him to include the words "*No state shall* ... abridge the privileges or immunities of citizens" or "deprive any person of life, liberty, or property without due process of law" or deny any person of "equal protection" of the law.[31]

27 *Barron v. Baltimore*, 32 U.S. (7 Peters) 243, 247-248 (1833).

28 *Ibid.*, at p. 250-251.

29 *Ibid.*, at p. 250. The view that the Bill of Rights applied only to the federal government is convincingly presented in A.R. Amar, *The Bill of Rights*, New Haven, Yale University Press, 1998, p. 140-145.

30 *Holmes v. Jennison* 39 U.S. (14 Peters) 540, 556-557 (1840).

31 Amar, 1998, p. 164-165.

It would require time and case law to determine the full development of the 14th amendment. In the post-Civil War era, the nation's commitment to equality collapsed. In the *Civil Rights Cases* (1883), a collection of law suits from five states, the Supreme Court held that while the 14th amendment limited state discrimination, it did not prohibit individuals from practising racial discrimination. A few years later, in *Plessy v. Ferguson* (1896), the Supreme Court went further and allowed racial segregation as long as the facilities provided were 'separate but equal'. In those cases, Justice Harlan Fiske Stone, a former slave owner from Kentucky, dissented, arguing in *Plessy* that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law".[32] The idea that the Bill of Rights applied to all citizens eventually would take its place in the Constitution when *Plessy* was officially repudiated in *Brown v. Board of Education* in 1954. Achieving the reality of equality before the law is taking longer.

32 32 *Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Incorporation Doctrine's Federalism Costs

A Cautionary Note for the European Union

Lee J. Strang[*]

A Introduction

The United States has experienced both the 'incorporation'[1] of a Bill of Rights against its constituent states and the resulting costs of that incorporation to the United States' federal structure. Incorporation is the constitutional doctrine by which the Bill of Rights, adopted in 1791 and originally applicable only to the federal government,[2] applied to and limited the states. The United States' experience without and (later) with incorporation sheds light on the impact on federalism caused by incorporation. This experience hold lessons for the European Union as it decides whether and to what extent to incorporate its Charter of Fundamental Rights[3] against member nations.

In this article, I first briefly describe the U.S. Supreme Court's decades-long process of incorporating the federal Bill of Rights against the states. Second, I argue that incorporation of the Bill of Rights has come with significant costs to federalism in the United States. Third, I suggest that the American experience provides a cautionary note for the European Union as it grapples with the question of whether and to what extent to apply the Charter of Fundamental Rights to its constituent states.

Before I begin, however, a brief note of caution: I am confident that my evaluation of the United States' experience is reasonable because of my expertise in American constitutional law. However, my proffered lessons for the European Union are made with significantly less confidence because of my lack of expertise in European Union law.

Before describing incorporation, let me say a few introductory words about American federalism.

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1 *See generally McDonald v. Chicago*, 561 U.S. 742, 759-66 (2010) (Describing the history of incorporation.)

2 *Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

3 Charter of Fundamental Rights of the European Union (2009), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (last accessed 6 September 2017).

B Federalism Is an Important Structural Principal of the U.S. Constitution

Federalism is one of the key structural principles of the U.S. Constitution. The U.S. Constitution contains a number of structural principles. These are principles drawn from the text and structure of the document itself, and from the government that the Constitution created, but they do not originate from their own clauses or texts. For example, there is no principle of limited and enumerated powers clause; instead, this principle is evidenced by Article I, Section 1, Clause 1's statement that Congress possesses only the 'legislative Power' 'herein granted', coupled with the discrete listing of powers in Article I, Section 8, among other evidence.[4]

Federalism is a crucial structural principle of the U.S. Constitution. The Constitution describes an enduring federal-state relationship,[5] and in many ways. Most fundamentally, because the federal government is one of limited and enumerated powers, by implication and following historical practice, the rest of potential governmental power, including such important areas as property, tort and contract law – called the police power in the American legal system[6] – must be exercised by someone, and the states are the only alternative in the American constitutional system. States authorized the Constitution pursuant to Article VII,[7] and Article V makes state consent necessary for constitutional change.[8] And states play continuing roles in the political processes of the federal government including their representation in the Senate via two senators from each state.[9]

Federalism continues to play a significant role in American legal and political life, though, as I describe below, its role has been changed and muted, in part by incorporation of the federal Bill of Rights, to which I now turn.

C The Emergence of Incorporation in the United States

I Introduction

Incorporation is the name of the constitutional doctrine that the Bill of Rights – the first ten amendments to the Constitution – applies to and limits the states.[10]

4 For instance, scholars have argued that the requirement that congressional statutes passed pursuant to Congress' Necessary and Proper Clause authority must be 'proper' includes the principle of limited and enumerated powers. *See* G. Lawson & P.B. Granger, 'The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause', *Duke Law Journal*, Vol. 43, 1993, p. 267-336. (Showing that 'proper' requires that statutes must be consistent with the Constitution's structural principles.)

5 *See Texas v. White*, 74 U.S. 700, 725 (1868). ("The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.")

6 *See, e.g.*, D.B. Barros, 'The Police Power and the Takings Clause', *University of Miami Law Review*, Vol. 58, 2004, p. 473-498. (Describing the history of this concept.)

7 U.S. Constitution, Art. VII.

8 *Ibid.*, Art. V.

9 *Ibid.*, Art. I, Section 3, cl. 1.

10 *McDonald v. Chicago*, 561 U.S. 742, 759-67 (2010).

The incorporation doctrine emerged, with fits and starts,[11] over a period of approximately 60 years,[12] and it occurred after over a century during which time the Bill of Rights limited only the federal government.[13]

II The Bill of Rights Initially Limited Only the Federal Government

The original Constitution faced significant opposition during the ratification process.[14] One of its critics' most persuasive claims was that the proposed Constitution was fatally defective because it lacked a list of protected rights, like those that had become popular in state constitutions following the Revolution and which were the most recent example of an American tradition of written protections for rights.[15] For instance, the first and most famous such state Bill of Rights was the Virginia Declaration of Rights, adopted in 1776.[16] This defect was fatal because of the Anti-Federalist concern that the proposed federal government's powers were ambiguous and, hence, capable of abuse that would harm the states and individual Americans.[17]

Though the Federalist proponents of the Constitution initially argued that a Bill of Rights was imprudent – because it would imply that the federal government possessed the power to violate such rights,[18] which the Federalists denied – they saw that their argument was unpersuasive, and agreed to adopt a Bill of Rights once the Constitution was ratified and went into effect.[19] With this promise in place, ratification proceeded apace.

Once the Constitution went into effect, James Madison introduced into the first session of the first Congress the initial draft of the Bill of Rights, which he had derived from state bills of rights and state proposals made during the ratification process.[20] The Bill of Rights, which sought to limit federal power, both

11 The Supreme Court clearly rejected incorporation as late as 1899. *See Brown v. New Jersey*, 175 U.S. 172, 174 (1899). ("The first ten Amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on [the] Federal Government.") The Supreme Court suggested the possibility of incorporation in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), but did not clearly employ it until 1925, *Gitlow v. New York*, 268 U.S. 652 (1925).

12 From 1908, *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), to 1968, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

13 *See* C.I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States', *Indiana International and Comparative Law Review*, Vol. 27, No.1, 2017, p. 7-9 (Describing this history.); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). (Holding that the Bill of Rights did not apply to the states.)

14 For a collection of the key arguments against ratification, *see* W. B. Allen & G. Lloyd (Eds.), *The Essential Antifederalist*, 2nd ed., W.B. Allen & Gordon Lloyd, 2002.

15 *See* L.W. Levy, *Origins of the Bill of Rights*, New Haven, Yale University Press, 1999, p. 3-11. (Describing this history.)

16 *Virginia Bill of Rights*, *in* B. Frohnen, *The American Republic: Primary Sources*, Liberty Fund, 2002, p. 157.

17 Levy, 1999, p. 27-28.

18 *Ibid*., at p. 20-21.

19 *Ibid*., at p. 31-32.

20 *Ibid*., at p. 43.

through direct prohibitions on federal action,[21] and through rules of interpretation that mandated narrow constructions of federal power,[22] was ratified by the requisite number of states in 1791.[23]

The Bill of Rights' text suggests that it is applicable only to the federal government. For instance, the First Amendment identified only 'Congress' as the limited actor.[24] Other parts of the text, however, do not expressly identify whether the federal government or the states are limited. The Second Amendment, for instance, protects "the right of the people to keep and bear Arms", but does not say from what.[25] There are, however, additional textual clues that the Bill of Rights only applied to the federal government. The Bill of Rights' syntax, for instance, fit the Article I, Section 9 limits on the *federal* government, but did not fit the Article I, Section 10, *state* limits.[26] Every time a limitation on states is identified in Sections 9 and 10, it specifically identifies 'State[s]' as the limited entities. Therefore, the absence of a textually identified limited actor, as occurs in some of the amendments, suggests that only the federal government was limited.

The Constitution's structure and history likewise suggest that the Bill of Rights' framers and ratifiers intended and understood that it limited only the federal government. For example, the structural principle of limited and enumerated powers meant that the federal government did not have the power to restrict gun rights and, on this view, the Second Amendment served as an express confirmation of that structural principle and of this legal conclusion. The Tenth Amendment, which provided that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people",[27] was "originally understood .... to emphasize, clarify, and amplify restrictions on *federal* power contained in the Constitution of 1787".[28]

The case-law in the early Republic generally adhered to this view and applied the Bill of Rights (only) to the federal government, though state supreme courts sometimes applied the Bill of Rights to their state governments.[29] The U.S. Supreme Court definitively ruled on the issue in 1833, in a case called *Barron v.*

21 Such as the First Amendment's restrictions. U.S. Constitution, Amendment I.

22 Such as the Ninth and Tenth Amendments' rule that the federal government's powers must be narrowly interpreted. U.S. Const., amends. IX, X. *See* K.T. Lash, 'A Textual-Historical Theory of the Ninth Amendment,' *Stanford Law Review*, Vol. 60, 2008, p. 920. ("The Tenth limits the federal government to only enumerated powers. The Ninth limits the interpretation of enumerated powers.")

23 Virginia's ratification in 1791 made the Bill of Rights part of the Constitution. Brent Tarter, 'Virginians and the Bill of Rights', *in* J. Kukla (Ed.), *The Bill of Rights: A Lively Heritage*, Virginia State Library, 1987, p. 13-15.

24 U.S. Constitution, Amendment I.

25 *Ibid*., Amendment II.

26 *See* J. Mazzone, 'The Bill of Rights in Early States Courts', *Minnesota Law Review*, Vol. 92, 2007, p. 28, n. 109. (Making and supporting this point.)

27 *Ibid*., Amendment X.

28 G. Lawson, 'A Truism with an Attitude: The Tenth Amendment in Constitution Context', *Notre Dame Law Review*, Vol. 83, 2008, p. 471 (emphasis added).

29 J. Mazzone, 'The Bill of Rights in Early States Courts', *Minnesota Law Review*, Vol. 92, 2007, p. 23-24.

Baltimore.[30] There, Chief Justice Marshall, writing for a unanimous Court, ruled that the Fifth Amendment's Takings Clause and, by parity of reasoning, the rest of the Bill of Rights, limited only the federal government.[31]

III The Century-Long Incorporation Process

The Civil War initiated a sea change in American constitutional structure.[32] The Republicans that controlled Congress – who wished to preserve the civil rights gains made during the Civil War and to prevent states from reverting to their former ways – drafted the Fourteenth Amendment. Section 1 imposed unprecedented limits on the states, including the Privileges or Immunities Clause,[33] which the Republicans adopted to incorporate the Bill of Rights against the states.[34] However, a mere four years later, in 1872, the Supreme Court misinterpreted the Clause to *not* apply the Bill of Rights against the states in *The Slaughter-House Cases*.[35] To this day, the Supreme Court continues to follow *The Slaughter-House Cases*, despite repeated and powerful arguments to overrule it.[36]

This set up a dynamic where the Fourteenth Amendment's framers' and ratifiers' goal of limiting the states via the Bill of Rights was unfulfilled, and the reasons behind that goal remained,[37] but the Supreme Court's precedent seemed to preclude utilizing the natural home of incorporation, the Privileges or Immunities Clause. Following the 1872 *Slaughter-House Cases*, parties continued to bring cases to the Supreme Court arguing that the Bill of Rights limited the states via some facet of the Fourteenth Amendment.[38] The Due Process Clause was frequently utilized by such parties as the textual 'hook' for such claims.[39] The Supreme Court rejected incorporation until the early twentieth century.

30 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

31 *Ibid*.

32 *See, for instance*, E. Foner, 'The Strange Career of the Reconstruction Amendments', *Yale Law* Journal, Vol. 108, 1999, p. 2007. ("Reconstruction [w]as a moment of revolutionary change.") However, the sea change did not culminate with the Reconstruction Amendments; indeed, it stalled by the late nineteenth century. M.W. McConnell, 'The Forgotten Constitutional Moment', *Constitutional Commentary*, Vol. 11, 1994, p. 115-144.

33 U.S. Constitution, Amendment. XIV, Section 1. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

34 *See* K.T. Lash, *The Fourteenth Amendment Privileges and the Privileges and Immunities of Citizenship*, Cambridge University Press, 2014. (Explaining this view.) There is a robust scholarly debate over whether the Clause also applied *un*enumerated rights against the states. *See* R.E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton, Princeton University Press, 2004, p. 60-68. (Articulating this view.)

35 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

36 *McDonald v. Chicago*, 561 U.S. 742 (2010).

37 For example, mistrust of states to protect their citizens' privileges or immunities.

38 *Twining v. New Jersey*, 211 U.S. 78 (1908); *Brown v. New Jersey*, 175 U.S. 172 (1899); *Hurtado v. California*, 110 U.S. 516 (1884); *United States v. Cruikshank*, 92 U.S. 542 (1875).

39 *See Twining v. New Jersey*, 211 U.S. 78, 100 (1908) (noting a party's argument to this effect).

The U.S. Supreme Court first clearly incorporated a portion of the Bill of Rights in *Gitlow v. New York* in 1925,[40] where, without much explanation,[41] it applied the Free Speech and Press Clauses to New York. From then and for the next four decades, the justices debated whether and to what extent the Bill of Rights applied to the states.

There were two basic views advocated by the justices: selective incorporation and total incorporation. Justice Frankfurter was the most prominent advocate of selective incorporation and Justice Black was the most effective spokesman for total incorporation. Selective incorporation was the idea that only some facets of the Bill of Rights applied to the states, only those rights that are

> the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".[42]

Total incorporation, by contrast, required incorporation of all of the rights. As argued by Justice Black,

> [m]y study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.[43]

Though the Supreme Court utilized a selective incorporation theory,[44] the ultimate result was near-total incorporation of the Bill of Rights against the states[45] by 1971.[46] Today, after incorporation of the Second Amendment right to keep

40 *Gitlow v. New York*, 268 U.S. 652 (1925). The Supreme Court may have applied the Takings Clause to the states in the 1897 case of *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. (1897), but it is unclear, both because of the ambiguous opinion itself and the possible other nonincorporation legal resolutions of the case, and also because of the Court's later continued rejection of incorporation.

41 The Court offered only a one-sentence 'justification': "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow*, 268 U.S. at p. 666.

42 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969)) (internal citation omitted).

43 *Adamson v. California*, 332 U.S. 46, 71 (1947) (J. Black, dissenting) (overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964)).

44 *McDonald v. Chicago*, 561 U.S. 742, 759-61 (2010).

45 *Ibid*., at p. 759-766.

46 *See Schilb v. Kuebel*, 404 U.S. 357 (1971). (Incorporating the Eighth Amendment's prohibition against excessive bail.)

and bear arms in 2010, only four of the rights in the Bill of Rights remain unincorporated.[47]

IV The Contemporaneous Demise of Dual Federalism

During the same period when the Supreme Court slowly incorporated the Bill of Rights against the states, the Court also abandoned one conception of federalism for another. The Supreme Court abandoned dual federalism for cooperative federalism. The timing of these two doctrinal changes is not a coincidence and suggests that the Court understood (implicitly or explicitly) that its move towards incorporation either required a change to its federalism doctrine or that the change to federalism doctrine was the result of the same impetus for incorporation.

Dual federalism was the dominant conception of the federal-state relationship from the Republic's founding to the New Deal. Dual federalism is the conception of federalism where the federal and state governments have respective spheres of authority and that those spheres do not overlap.[48] Across a wide array of constitutional doctrines, the Supreme Court worked to maintain dual federalism. For example, in both its Interstate Commerce Clause and Dormant Commerce Clause case-law, the Court articulated a number of doctrines that supported dual federalism. The direct-indirect effects test, used in both contexts, prohibited *federal* regulation of *intrastate* activities that indirectly affected interstate commerce,[49] and prohibited *state* regulation of intrastate activities that directly affected *interstate* commerce.[50] The most direct implementation of dual federalism doctrine was the Court's judicial enforcement of the Tenth Amendment to limit the scope of congressional power.[51]

As in many areas of constitutional law, the Supreme Court shifted gears during the New Deal,[52] and it adopted the cooperative federalism conception in place

47 They include the Third Amendment, the Fifth Amendment grand jury indictment requirement, the Seventh Amendment right to civil jury trials and the Eighth Amendment prohibition on excessive fines. *McDonald*, 561 U.S. 765 n. 13.

48 *See* E.A. Young, 'Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception', *George Washington Law Review*, Vol. 69, 2001, p. 139. ("For much of our history, the Supreme Court has tried to preserve the balance between the states and the nation by dividing up the world into two separate spheres: 'local' and 'national,' 'intra-' and 'inter-state,' 'manufacturing' and 'commerce,' to name just a few. These dichotomies were intended to describe distinct fields of regulatory jurisdiction in which one government or the other would have exclusive authority. The Court's effort, commonly known as 'dual federalism,' died an ignominious death in 1937 or shortly thereafter.")

49 *See United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895). ("Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly.")

50 *See DiSanto v. Pennsylvania*, 273 U.S. 34, 37 (1927). ("A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.")

51 *See United States v. Butler*, 297 U.S. 1, 68, 74-75 (1936).

52 *See generally*, B. Ackerman, *We the People: Transformations*, Vol. II, Cambridge, Harvard University Press, 1998.

of dual federalism. Cooperative federalism is the idea that federalism is enhanced when the federal and state governments 'cooperate' in common programmes and processes. Under cooperative federalism, the federal government's powers are broad and overlap with the states.[53] The Supreme Court does not identify discrete spheres of power. Within these spheres of overlapping authority, the federal and state governments work out their respective regulatory roles. The results of these negotiations are federal statutes that enlist the states in their implementation. Many, if not most, of the major federal social welfare programmes established by Congress are principally administered by the states. For example, the major federal welfare programme, Temporary Assistance to Needy Families, is primarily funded by the federal government[54] and administered by the states, within very broad federal guidelines.[55]

The Supreme Court adopted cooperative federalism by changing a number of its interpretations of the Constitution's structural provisions. Most directly, the Court ruled that the Tenth Amendment was a mere 'truism'[56] and ceased enforcing it until the late-twentieth century.[57] In other areas, similar changes to the Court's constitutional interpretations cumulatively led to an unprecedented expansion of federal power and jurisdiction, and a corresponding contraction of exclusive state jurisdiction. For instance, in a series of New Deal cases, the Court effectively ceased enforcing limits on Congress' Commerce Clause power.[58] In principle, few, if any, areas of American life remained beyond the reach of the federal government,[59] and Congress used its new-found powers to regulate vast swaths of American life.

However, and for a host of reasons, Congress rarely entirely displaced the states. Instead, Congress generally – depending on one's perspective – co-opted or cooperated with states to implement federal regulations and programmes.

D Incorporation's Federalism Costs

I Introduction

In this part, I catalogue the impact incorporation had on federalism in the United States. To be clear, I do not evaluate whether the loss of federalism occasioned by incorporation was greater than its benefits.

53 *See* Young, 2001, p. 145-146, 50-53. (Describing the concurrent jurisdiction of federal and state governments that underlays cooperative federalism.)

54 42 U.S.C. § 603 (2017).

55 *See* 42 U.S.C. § 602 (2017). (Describing 'state plans' for providing assistance to needy families.)

56 *United States v. Darby*, 312 U.S. 100, 124-125 (1941).

57 *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

58 *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100, 124-125 (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942).

59 This analysis is putting to one side the Court's slightly later expansion of its interpretations of individual rights.

II Federalism's Three Primary Benefits

Let me begin by briefly describing the three main benefits of federalism identified by the Supreme Court and scholars. First, federalism protects individual liberty through two main mechanisms. The first mechanism is dividing power among different governments. Vertically dividing power among governments prevents the concentration of power, which is a necessary precondition to suppressing liberty. For example, the federal government does not possess an enumerated power over education, and states are the primary providers and regulators of education. Relatedly, dividing power among different governments also provides mechanisms to check governmental power. One government can check another government by active or passive resistance to its exercises of power and, in doing so, protect individual liberty. For instance, after the federal government passed the controversial Affordable Care Act, many states pushed back. My own state, Ohio, passed a state constitutional amendment forbidding state cooperation with implementation of the Act.[60] Florida led twenty-five other states to litigate the Act's constitutionality to the Supreme Court.[61]

The second mechanism by which federalism preserves individual liberty is creating jurisdictional competition for the affections of the American people. Humans value liberty and when governments compete for citizens and their affections, one of the axes upon which they compete is liberty. The states and federal governments compete to offer regulatory 'packages' that contain the most liberty. For instance, many states are currently liberalizing their restrictions on marijuana usage, and they are doing so self-consciously contrary to the federal government's rigorous restrictions on marijuana.[62]

Second, scholars and the Supreme Court argue that federalism is valuable because it provides a forum for jurisdictional experimentation. In a unitary state, there is only one jurisdiction and only that government can experiment with different approaches to subject matters. Experimentation presents significant risk because the entire jurisdiction suffers if the experiment fails. And, that assumes that experimentation will occur, which is more difficult in unitary states because of the difficulty garnering a sufficient consensus to experiment, assuming a nation with differing preferences that are relatively equal within that nation.

Federalism both increases the likelihood of experimentation and reduces the risks posed by it. It is more likely that experimentation will occur in a federal system because one state is more likely to have a consensus to experiment than the entire nation because of the uneven distribution of preferences. Also, if an experiment fails to provide net benefits, the experiment's costs are limited to that one state, and the other jurisdictions in fact benefit from that state's failed experiment by not duplicating it. For example, beginning in the 1980s, Wisconsin

60 Constitution of Ohio, Art. I, Section 21.

61 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540 (2012).

62 K. Steinmetz, 'These States Just Legalized Marijuana', *Time*, 2016, available at: http://time.com/4559278/marijuana-election-results-2016.

experimented with significant changes to its provision of welfare.[63] At that time, welfare reform was not possible on the national level, because preferences were relatively evenly spread throughout the nation.[64] The potential costs of welfare reform were internalized to Wisconsin. Other states, and the federal government, learned from and followed Wisconsin's successful experiment.[65]

Third, scholars and the Supreme Court argue that federalism provides a greater variety of environments in which the reasonable diversity of forms of human flourishing can find a home. Humans flourish when we participate in the basic human goods.[66] The basic human goods are the analytically distinct components of a full human life. These goods include activities like acquiring knowledge, engaging in leisure activities and cultivating friendships. A person who has friends is happier than one who is lonely. Human beings flourish through a nearly infinite variety of combinations of the basic human goods. Some humans, for example, value the good of knowledge relatively more than others, while others value friendship more than others, *etc*. Both are reasonable approaches to human happiness.[67]

This same reasonable diversity of approaches to human flourishing occurs on the state level. Federalism enables Americans to pursue their reasonably diverse approaches to human flourishing in jurisdictions that most closely match their conception of human flourishing. States in a robust federal system have the capacity to construct reasonably different conceptions of the common good that cater to different forms of human flourishing. For example, Iowa's state government promotes a different combination of goods than does California. To take just one example, Iowa generally privileges farming over environmental protection,[68] while California takes the opposite approach.[69]

III Incorporation Imposed Significant Federalism Costs

The Supreme Court's incorporation of the federal Bill of Rights harmed federalism in the United States on each of the three federalism benefits identified. First, incorporation dampened federalism's ability to protect individual liberty, and in two ways.

First, incorporation lessened the ability of states and, in particular, state courts, to impede the concentration of power in the federal government. The incorporation doctrine concentrates power in the hands of the federal govern-

63 *See* M. Kwaterski Scanlan, 'The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due Process Rights', *Berkeley Women's Law Journal*, Vol. 13, 1998, p. 155.

64 *Ibid*.

65 *Ibid*.

66 *See* J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 1980, p. 90-91.

67 So long, of course, as one does not act against one of the basic human goods or diminish one's participation in a good to such an extent that one is not acting practically reasonably. *Ibid*., at p. 118.

68 Iowa Code § 352.11 (2017).

69 *See* J. Medina, 'California Cuts Farmer's Share of Scant Water', *N.Y. Times* (12 June 2015), available at: https://www.nytimes.com/2015/06/13/us/california-announces-restrictions-on-water-use-by-farmers.html.

ment in two ways. First, and most obviously, incorporation concentrates power in the U.S. Supreme Court. The Supreme Court's grandiose conception of its own interpretative power was laid out in *Cooper v. Aaron*.[70] There, the Court claimed that its interpretations of the Constitution *were the Constitution*, and therefore received the label "supreme law of the land" under the Article VI Supremacy Clause. This was the *Cooper* Court's conclusion that it drew from its enthymeme:

> [i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[71]

Second, and to a lesser degree, incorporation of the Bill of Rights concentrates power in Congress. This is because Congress possesses the power under Section 5 of the Fourteenth Amendment to 'enforce' the Fourteenth Amendment's rights against the states.[72] Following incorporation, Section 5 of the Fourteenth Amendment authorizes Congress to enforce the Bill of Rights against the states.[73] This federal legislation is part of the 'supreme law of the land' under Article VI that all state officers must follow.[74] Coupling these two propositions together leads to the conclusion that incorporation means that states and state courts, in principle, have no independent authority over the important subjects covered by the Bill of Rights.

A Supreme Court interpretation of the Bill of Rights, and Congress' enforcement of those rights via legislation, are 'the Supreme Law of the Land', and state officials, who take an oath to support and uphold the Constitution,[75] have no legal mechanism to stop concentration of this interpretative power in the federal government.[76] Since the subjects covered by the Bill of Rights are so important, incorporation means that the federal government has a monopoly on those subjects.

One might argue that the concentration of control of interpretation of the Bill of Rights in the Supreme Court and Congress is not the type of concentration of governmental power that is likely to stifle individual liberty. One could argue that federal control over the meaning of the freedom of speech, for example, does not threaten individual liberty in the same way that federal control over commerce could threaten individual liberty. This argument is not persuasive for a number of reasons. First, the argument depends on a distinction between rights-protecting provisions and power-granting provisions that cannot carry the

70 *Cooper v. Aaron*, 358 U.S. 1 (1958).
71 *Ibid.*, at p. 17.
72 U.S. Constitution, Amendment XIV, Section 5.
73 *See The Civil Rights Cases*, 109 U.S. 3 (1883). (Stating that Congress has the power to enforce the provisions of Section 1 against the states.)
74 U.S. Constitution, Art. VI, cl. 2.
75 *Ibid.*, Art. VI, cl. 3.
76 Outside of the Article V amendment process or changing the Supreme Court's interpretations through changing the Supreme Court's personnel.

weight. Both types of provisions affect liberty depending on how broadly they are construed. A power-granting provision affects liberty the broader the power, and a rights-protecting provision affects liberty the more narrowly it is construed. Therefore, to the extent federal control of legal decisions more generally threatens individual liberty, its control over the meaning of individual rights may do so as well.

Second, and relatedly, a federal monopoly over the meaning of the Bill of Rights permits the federal government to narrowly construe those rights to the detriment of individual liberty. To the extent the federal government narrowly interprets the Bill of Rights, its interpretations govern both federal and state governments, and lead to less liberty protection.[77]

Incorporation also harms federalism's benefit of protecting individual liberty because it stifles jurisdictional competition for Americans' affections. By definition, the incorporation doctrine means that all jurisdictions have to protect the rights identified in the Bill of Rights with the same protection as identified by the U.S. Supreme Court. Therefore, incorporation precludes jurisdictional competition for Americans' affections on those subjects. The Bill of Rights protects numerous rights, and there are reasonably different conceptions of many or all of the rights. For instance, though it is the case that a just government must protect the freedom of speech to some degree, there is reasonable variation on the extent and kind of protection that just governments may provide.[78] Prior to incorporation, to the extent states chose to follow and interpret the Bill of Rights differently in their own jurisdictions, they provided different conceptions of those rights which, in turn, provided a 'market' of jurisdictional competition on the subject of individual rights. Incorporation stopped that competition.

One might argue that state supreme courts continue to possess the authority to interpret their state constitutions' rights-protecting provisions independently of the Supreme Court's interpretation of the federal Bill of Rights, and that this provides the legal space for jurisdictional competition in the constitutional rights context. This counterargument rests on what is known as the 'baseline' rule: the Supreme Court's interpretation of the Bill of Rights establishes a 'baseline' of protection for a protected right, and states may protect beyond the baseline through their state constitutional rights. This argument's premise is true, but in practice, its conclusion has not followed. In practice, the vast majority of states protect the vast majority of their state constitutional rights identically to the Supreme Court. This phenomenon is called 'lock-step'. Though state supreme courts possess the authority to interpret their state constitutional provisions differently from the Supreme Court's interpretations of the Bill of Rights, they generally do not do so.

77 The Supreme Court's interpretations of the Bill of Rights theoretically allows some interpretative freedom to states through the Court's doctrine that its interpretations set a baseline or floor for protection, and that states may increase individual rights protections beyond that. W.J. Brennan Jr., 'The Bill of Rights and the States: the Revival of State Constitutions as Guardians of Constitutional Rights', *N.Y. U. L. Rev*., Vol. 61, 1986, p. 535, 548-550. As I describe below, however, that interpretative freedom is, in practice, modest.

78 This is evidenced by the variation of protection provided among Western nations.

There are a variety of proffered explanations for this phenomenon of lock-step[79]; regardless of the cause, the effect is to reduce jurisdictional competition for individual rights.

Since states provide the same protection for the Bill of Rights, and interpret their state constitutions in lock-step with federal rights, they cannot compete for their peoples' affections. Instead, the citizens of each state look to the U.S. Supreme Court as the – sole – guardian of the Bill of Rights. This inclines many people to transfer their loyalty away from their state and its institutions, and to the federal government. For instance, why would I care about Ohio, its supreme court and constitution, when it is the U.S. Supreme Court interpreting the Bill of Rights that determines the scope of, and protects, my most important rights?

A limited way to measure this is to look at those areas where the states continue to possess modest interpretative independence from the Supreme Court. State interpretative autonomy currently exists where states can interpret their state constitutions to provide 'greater' protection to individual rights than the U.S. Supreme Court's interpretations of the federal Constitution. This has occurred, for instance, in some states following the Supreme Court's rulings that the Free Speech Clause did not protect free speech activities in privately owned shopping centres.[80] The California Supreme Court interpreted the California Constitution's Free Speech Clause to provide protection of speech in privately owned shopping malls.[81] The California Supreme Court's interpretative independence rejected the federal interpretation so that, within California, greater freedom of speech prevailed.[82] If the state courts would do this regarding all of the Bill of Rights, it would increase states' abilities to attract the American people's loyalty, but it has generally not occurred.

Second, incorporation has limited federalism's ability to facilitate jurisdictional experimentation. It does so by requiring states to follow one position – the U.S. Supreme Court's interpretation – on the meaning and scope of the Bill of Rights, and precluding other prima facie reasonable interpretations of those rights.

The Bill of Rights covers a broad array of very important subjects. For example, it specifies a robust scope for the freedom of speech; it provides moderate protection for religious liberty and broad reign to individual gun rights. Americans take prima facie reasonably different positions on the extent to which these rights should be protected.[83] For instance, many Americans argue that campaign

79 One explanation is that state supreme courts do not wish to subject themselves to criticism for interpreting rights protections differently from the Supreme Court. Another is that state supreme courts lack the institutional resources, or that state constitutions themselves lack the interpretative resources, to reasonably support divergent interpretations. There are other explanations as well.

80 *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

81 *Robins v. Pruneyard Shopping Center*, 592 P. 2d 341 (Cal. 1079).

82 Though, and correspondingly, less property protection prevailed in California.

83 These positions are prima facie reasonable because of the large number of Americans who hold these positions, and the reasonable arguments advanced by Americans in favour of these positions.

contributions should not be protected by the Free Speech Clause or that the protection does not preclude significant regulation[84]; many other Americans argue that the Free Exercise Clause should protect religiously motivated activity from government regulation, including regulations not targeted at religion[85]; and many Americans argue that the Second Amendment does not proscribe reasonable gun control legislation, such as limits on handgun ownership and possession.[86]

States may not adopt any of these *prima facie* reasonable positions because of incorporation. States may not experiment with any of these *prima facie* reasonable positions to help determine whether they are, in fact, reasonable. This is because the U.S. Supreme Court has ruled that: campaign contributions are protected by the freedom of speech from significant regulation, and that the federal government and states may not significantly restrict corporate campaign contributions[87]; the free exercise of religion provides minimal protections to religious exercise incidentally burdened by laws[88]; and the right to keep and bear arms proscribes much common gun control legislation.[89] If states could adopt such restrictions, they would be able to serve as experiments to determine whether the restrictions or the Supreme Court's interpretations were harmful or valuable, and how much so.

A limited way to measure this is to look at those areas where the states continue to exercise modest interpretative independence from the U.S. Supreme Court. Existing state interpretative autonomy has led to some experimentation. For instance, the U.S. Supreme Court has interpreted the Takings Clause to permit government taking of private property and transferring it to another private party to obtain the public benefit (purportedly) generated by increased economic activity from the new use(s) for the property.[90] Both before and after *Kelo*, state courts interpreted their state constitutions to provide a different and greater level of protection for property owners. In my home state of Ohio, for example, the Ohio Supreme Court in *City of Norwood v. Horney* expressly rejected the federal interpretation and ruled that the Ohio Constitution's Takings Clause prohibited such takings.[91] The interpretative independence exercised by states like Ohio is providing a series of experiments on which interpretation provides the most

84 R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Harvard University Press, 1996, p. 18.

85 M.W. McConnell, 'Free Exercise Revisionism and the Smith Decision', *The University of Chicago Law Review*, Vol. 57, 1990, p. 1109-1153.

86 *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting).

87 *Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010).

88 *Employment Division v. Smith*, 494 U.S. 872 (1990).

89 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

90 *Kelo v. New London, Conn.*, 545 U.S. 469 (2005).

91 *See Norwood v. Horney*, 853 N.E. 2d 1115, 1141 (Ohio 2006). ("[W]e find that the analysis by the Supreme Court of Michigan in *Hathcock*, 471 Mich. 445, 684 N.W.2d 765, and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution.")

net benefit. If the state courts did this regarding all of the Bill of Rights, it would increase states' abilities to experiment.

Third, incorporation undermined the United States' ability to provide a wide variety of different jurisdictional approaches to human flourishing. There are a variety of reasonable and reasonably different ways for individuals and societies to pursue and promote human flourishing. For instance, on the societal level, some countries pursue a relatively vigorous protection for free speech, like the United States, which protects even so-called hate speech,[92] and other countries protect relatively less free speech, like the Council of Europe, which suggests significant limits on hate speech.[93]

The rights protected in the Bill of Rights govern important facets of human flourishing. To take an obvious example, nearly everyone agrees that some amount of free speech is necessary for human flourishing.[94] At the same time, many, if not all, of the rights protected by the Bill of Rights are subject to reasonably different manners of protecting them. Think of all the rights about which reasonable Americans can and do disagree: free speech; religious liberty; establishment of religion; gun rights; and that's only from the first two amendments. Incorporation forecloses nearly all different reasonable approaches and imposes on the United States a one-size-fits-all rule. The U.S. Supreme Court chooses one reasonable manner of protection and precludes nearly all other forms of protection.

Incorporation hinders states from catering to the reasonable diversity of forms of human flourishing. If a state, such as California, wished to, for example, protect gun rights relatively less than another state, such as Wyoming, it cannot do so under incorporation. This means that many reasonable approaches to these rights are not present in any jurisdiction in the United States.

Furthermore, the activities protected by the Bill of Rights also interrelate in complex ways, and states are precluded from moulding these complex relationships to suit their diverse conceptions of human flourishing. One could imagine that a state that wished to facilitate robust religious practice would embrace broad conceptions of free speech and religious exercise, and it might also adopt a narrow conception of establishment. (There are, of course, many other approaches a state could take to facilitate religious exercise.)

A limited way to measure this is to look at those areas where the states continue to exercise modest interpretative independence from the U.S. Supreme Court. Existing state interpretative autonomy has provided some space for the reasonable diversity of human life to find a home in the United States. One area where Americans have reasonably diverged is the extent to which the law should protect religious beliefs and religiously motivated actions from legal regulation when that regulation is not targeted at the religion. Religion is a basic human

92 *See Virginia v. Black*, 538 U.S. 343 (2003). (Reversing a conviction for cross-burning on free speech grounds.); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (same).

93 *See* Council of Europe, Recommendation No. R (97) 20 (30 October 1997). (Suggesting that member states legally limit and punish 'hate' speech.)

94 *See, for instance*, R.P. George, *Making Men Moral: Civil Liberties and Public Morality*, Wotton-under-Edge, Clarendon Press, 1993, p. 192-208. (Providing a pluralist perfectionist account of speech.)

good the exploration of which is a component of human flourishing.[95] However, the fact that religion is valuable does not, by itself, determine the extent to which religiously inspired activity should be shielded from government regulation.

The U.S. Supreme Court famously ruled that the Free Exercise Clause did not protect religiously motivated activity from neutral government regulation, that is, regulation not targeted at the religiously motivated activity.[96] That is a reasonable, though not (at least at the time) a popular, approach. State supreme courts prior to and after *Smith* utilized their interpretative independence to provide more robust protection to religiously motivated activity. For instance, the Ohio Supreme Court rejected *Smith* and ruled that the Ohio Constitution's Free Exercise Clause provided greater protection to religiously motivated activity.[97] If the state courts could and would do this regarding all of the Bill of Rights – both increasing and decreasing protection – it would increase states' abilities to pursue reasonably different approaches to human flourishing

III Conclusion

In sum, the U.S. Supreme Court's incorporation of the Bill of Rights against the states has come at the price of significant costs to federalism. In particular, incorporation has harmed federalism's capacity to protect individual liberty, promote jurisdictional experimentation and provide fora for reasonably different approaches to human flourishing.

E Lessons for the European Union

I Introduction

The European Union is in a position analogous to the United States before 1925 where the Union's Charter of Fundamental Rights currently does not apply broadly to member states in their own capacities and instead only applies to the Union itself and member states acting on behalf of the Union. The United States' experience potentially offers evidence to support the conclusion that robust incorporation of the Charter against member states will cause significant harm to federalism within the Union.

II The United States' Experience Suggests that Incorporating the Charter of Fundamental Rights Will Significantly Harm European Union Federalism

Below I describe how, regarding each of the three benefits from federalism, European Union federalism is likely will be harmed to the extent that the Charter is applied to member nations. First, individual liberty is likely to be harmed through incorporation. Incorporating the Charter of Fundamental Rights will empower the Court of Justice of the European Union (CJEU), and take power away from member nations and their courts. This will diminish member nations' capacity to resist liberty-diminishing actions by the European Union.

95 J. Finnis, *Natural Law and Natural Rights*, Oxford, Oxford University Press, 1980, p. 85-86.
96 *Employment Division v. Smith*, 494 U.S. 872 (1990).
97 *Humphrey v. Lane*, 728 N.E. 2d 1039 (Ohio 2000).

One countervailing factor is that, at least some member nations have resisted the CJEU's jurisdiction, especially the German Constitutional Court and, one could argue, that resistance would continue even after incorporation. On the other hand, at one time, some American states strongly resisted federal power,[98] but today they tend no longer to do so.

Furthermore, incorporating the Charter will hinder member nations from retaining their citizens' loyalty because it will make the European Union and CJEU the focus of loyalty for rights protection. One countervailing factor is that member nations have much thicker identities than do the U.S. states, so that they may be able to resist this harm. For example, Italy is more distinct from Germany, than California is distinct from Utah. On the other hand, at one time, American states possessed significantly different identities,[99] and incorporation was one of the ways those distinct identities diminished.

Second, incorporating the Charter will severely diminish member nations' ability to experiment with different approaches to the rights protected by the Charter. Every member nation will have to provide at least as much protection as the CJEU provides, which will preclude member state experimentation with varying levels of protection. I suspect that this problem will be exacerbated by the Charter's lengthy list of vaguely worded and contestable 'rights' including, for example: Article 2(1): "Everyone has the right to life"; Article 14(1): "Everyone has the right to education … ." These more vaguely worded and contestable 'rights' would normally be subject to substantially reasonably different approaches, so that member nations could take a variety of different paths of experimentation. Therefore, the CJEU's univocal interpretation would cut off a relatively large amount of experimentation.

Third, incorporating the Charter will hamper member nations' ability to provide a diversity of options for different reasonable forms of human flourishing. Every member nation will have to provide the same package of rights protection. I think that this harm may be especially pronounced in Europe, where the member nations have significantly different ways of promoting human flourishing so that the loss of this distinctiveness would be profound.

III Mechanisms to Preserve Federalism

However, the European Union has options available to it to avoid at least some of this harm to federalism while, at the same time, securing some of the benefit that might be occasioned by incorporating the Charter. First, the Union could adopt the legal doctrine that incorporates the Charter's rights against member nations, but it could do so at a relatively low baseline. This way, the Charter's rights are respected, while member nations may, if they wish, protect the Charter significantly more robustly. This would be like how many American states have treated the Fifth Amendment's Public Use Clause, prior to and after *Kelo v. New London*

98 *See, e.g.*, during the antebellum era, Wisconsin effectively nullified the 1850 Fugitive Slave Act. *See generally Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858).

99 *See, e.g.*, in the early Republic, the Virginia Court of Appeals rejected U.S. Supreme Court supervisory authority. *See generally Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

ruled that public use included increased economic activity, tax base growth, and improved aesthetics.[100] This is a very slight limit on government takings, and most states have gone beyond that baseline. The CJEU might make a similar move regarding Article 17(1) "except in the public interest".

Second, the Union could incorporate the Charter and the CJEU could adopt rules of construction for their implementation that protect federalism. A rule of construction is an interpretative guide[101]; it pushes or pulls an interpreter to choose one reasonable interpretation instead of another. For example, the U.S. Supreme Court frequently uses a "clear statement rule" to protect federalism.[102] Under this rule of interpretation, Congress can only pre-empt state authority over an area of traditional state governance if it states its intent clearly.[103] Similarly, the European Court of Justice could employ a rule of construction under which a member nation's interpretation of the Charter is illegal only if it is a clearly erroneous interpretation. Given the vagueness of many of the Charter's rights, this rule of construction should frequently protect member state interpretative independence.

Third, the Union could incorporate the Charter and reduce the CJEU's supervisory authority over member nation courts. To the extent member nation courts wield interpretative independence from the CJEU, their interpretations of the Charter will differ, because reasonably different interpretations of the Charter's vague rights are plausible. This interpretative independence would allow the member nations to practice interpretative federalism. The trick would be to provide sufficient CJEU oversight, so that a member nation could not eliminate Charter protection. This could be done through relatively simple institutional means. For example, if the CJEU could not take a case without a high percentage of the justices supporting it, this would limit the number of cases and ensure that only cases about which there is an interpretative consensus are taken. Or, the CJEU could overrule a member nation's interpretation only with a high percentage of justices supporting it. This would ensure that only cases about which there is an interpretative consensus are taken. Or, the CJEU's judgements could be subject to a member nation's or another European Union institution's override upon a high percentage vote. This would provide an *ex ante* check on the CJEU, and an *ex post* check leading the CJEU to interpretative modesty. Lastly, the CJEU's justices could be selected by the member nations' legislatures instead of their govern-

100 *See generally Kelo v. New London, Conn.*, 545 U.S. 469 (2005).
101 *See, for instance, In re Binghamton Bridge*, 70 U.S. 51, 74 (1865).
102 *See, for instance, Bond v. United States*, 134 S. Ct. 2077 (2014).
103 *Ibid.*, at p. 2093-2094.

ments (typically the executive). This would more closely tie the justices to their member nations as separate nations.[104]

F Conclusion

In this article, I made three moves. First, I described the U.S. Supreme Court's decades-long process of incorporating the federal Bill of Rights against the states. Second, I argued that incorporation of the Bill of Rights has come with significant costs to federalism. Third, I suggested that the American experience provides a cautionary note for proposed European Union incorporation of the Charter of Fundamental Rights.

In this article, I make no comment on whether the harms to federalism in the European Union that would be occasioned by Charter incorporation are acceptable to achieve other goals. By way of analogy, in the American context, many scholars argued that loss of federalism was an easy-to-bear cost because of the much greater good gained, such as robust individual rights protection. One could plausibly make the same move in the European Union context and argue that the project of greater union provides so many and/or so powerful benefits that any federalism losses are acceptable.

I am sceptical of this move for a number of reasons. First, I believe that the rights protected by the Charter are subject to reasonable disagreement. By hypothesis, then, any gains made to individual rights protection are subject to dispute and should be discounted. Second, without federalism, there is no 'exit' option for states or individuals, and this means that the Union government has a monopoly on power and is likely, over the long term, to use its monopoly status like other monopolists: it will exert control over its 'customers' and diminish rights protections.

104 Each member nation appoints one CJEU justice, and those justices from nations with parliamentary systems are appointed by member nation governments. In light of this, one might argue that a sufficient number of the justices are already relatively closely tied to their member nations and that my proposal is unnecessary. However, my proposal retains traction for at least two reasons. First, executives of member nation governments may tend to identify more closely with the European Union than with their ostensible constituents. *See also* E.A. Young, 'Protecting Member States Autonomy in the European Union: Some Cautionary Tales from American Federalism', *N.Y.U. L. Rev*., Vol. 77, 2002, p. 1612, 1692 (making a similar point regarding the Council of Ministers). This greater connection to the European Union could occur for many reasons. For instance, an executive may be ideologically more closely aligned with the Union than with his constituents. Or, an executive may seek professional advancement in the Union. Second, member nation legislative appointment of CJEU justices would more closely tie those justices to their member nations because the nation's legislature more fully represents and is an expression of the nation *qua* nation than the executive. This can be seen from a number of perspectives. For example, jurisprudentially, it is typically held that a nation's parliament, and not its prime minister, is the legal sovereign in the nation. *See* J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, 1999 (making this claim regarding the United Kingdom). Practically, the United States' switch from legislative election of U.S. senators to popular election made senators less tied to their states as states.

The Architecture of American Rights Protections

Texts, Concepts and Institutions

Howard Schweber[*]

A Introduction

This article explores the 'architecture' of rights protections in the American system. The discussion is limited to national rights, those that are claimed to apply across all jurisdictions. This is the normal focus in discussions of constitutionalism, but in fact it leaves out an enormous amount. To take only one example, several State constitutions guarantee positive rights such as a right to education. State courts interpret and apply these provisions as legally enforceable rights claims to which the government of the State is required to respond; in other words, these are 'rights' in every meaningful sense of the term. Then there are rights protections that are adopted at the local level, as when a municipality bans discrimination on the basis of sexual orientation even in the absence of a State law to the same effect. Moreover, there is a tendency towards uniformity among State legal systems. In the nineteenth century, State courts and legislatures began citing and taking guidance from other States, a trend that continued in the twentieth century with the promulgatio and adoption of 'model codes'.[1] These publications have been highly influential, and many States have adopted various model codes with the result that legal rights have become significantly more uniform across the company. International law may also provide rights protections; these, too, are beyond the scope of this article.

Nonetheless, in this article, the focus will be solely on national rights secured by the U.S. Constitution and federal statutes and the legal architecture that has grown up around them. In addition, this inquiry is limited by virtue of its focus on the formal principles and structures of rights protection. Even a deep familiarity with the architecture of a building may not tell us very much about what it is like to live or work there. To understand the system of rights protections as it is experienced by real individuals, it would be necessary to focus as much on police

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1 The National Conference of Commissioners on Uniform State Laws was formed in 1892; later it joined with the American Law Institute, created in 1923 with a mandate to promote uniformity in the common law rules of different States as a remedy to the 'uncertainty' and 'complexity' of the system of State laws. The history and mission of these two organizations may be found at their websites: www.uniformlaws.org/and https://www.ali.org/, respectively (last accessed 25 January 2018). For a consideration of the project of the ALI at its founding, *see* Hull, N.E.H., 'Restatement and Reform: A New Perspective on the Origins of the American Law Institute', *Law and History Review*, Vol. 8, 1990, p. 55.

authorities, lawyers, administrators and bureaucrats, and judges in trial courts as we do on Supreme Court opinions and acts of Congress. Again, however, this article is limited, and the focus is solely on the formal systems of rights protections. It is with respect to that formal system of national rights protections that the term 'architecture' is applied.

The use of 'architecture' appeals to a structural metaphor. Frank Kafka created famous analogies for law and government in the form of a city ('Before the Law') and a palace ('The Imperial Messenger').[2] In the first story, the focus was on the idea that the system of laws has multiple entry points, each with its own obstacles and each leading to particular routes towards a goal (or in Kafka's version, to never reach that goal or even get beyond the initial entrance). In the second story, the architecture of the palace was an impediment that prevented the direct reception of the command of the sovereign as the messenger traversed endless corridors clogged with endless government personnel. One need not adopt Kafka's despair or surrealism to recognize the aptness of his metaphors. To assert a claim for the vindication of a particular right is to choose a point of entry into a structured system of principles and authorities. This idea of an 'architecture' of rights protection is used here to describe three distinct kinds of structured systems: textual, conceptual and institutional. Together, these architectures define the availability of entry points, channels through which a claim must proceed and possible endpoints, and at each point the design of the architecture may impede or enable the process of defining, adjudicating and enforcing rights protections.

The decision to begin with an examination of textual structure is based on the observation that in the American system, national rights claims begin with a written source of authority. The innovation of a written constitutional text was of great importance to early constitutionalists, as John Marshall explained in 1803. "This theory is essentially attached to a *written* Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society."[3] The U.S. Constitution and the various State constitutions are the most obvious textual sources, closely followed by statutes, and then by recorded judicial decisions. These are the primary sources for rights protections, but other secondary textual sources are frequently employed to inform their interpretation. To be sure, at times critics have complained that judges invented rights out of whole cloth rather than truly deriving them from primary textual sources. In some instances, Supreme Court justices themselves have explicitly derived constitu-

2 F. Kafka, *Collected Stories* (W. Muir, E. Muir & G. Josipovici trans.), New York, 1993.
3 *Marbury v. Madison*, 5 U.S. 137, 177 (1803), emphasis added.

tional principles entirely from non-written sources.[4] Nonetheless, whether an asserted right was discovered or invented in the course of a judicial opinion, until that opinion is written down and published it cannot be referenced by other authorities or relied upon by litigants. To make things even more complicated, not all court decisions are published, and lawyers and lower court judges are only permitted to draw on published opinions as a source for precedent. Thus, the body of published court opinions is itself a text (or a palimpsest) that is produced through the repeated application of processes of design and articulation of a right.

A 'conceptual architecture' is displayed in the first instance in the sense that there is a particular analytical structure that is associated with the adjudication of a particular right. That is, the intellectual approach to determining a contested rights claim involves a structured system of inquiries that employ a specific conceptual vocabulary that structures the inquiry. The structure of the inquiry is different for different kinds of rights claims, so that at any given time there is a system – an architecture – of rights analysis with different entry points and analytical channels as well as different levels of rights protection at the end of the process. Over time, too, the structures of these inquiry have varied. To borrow terms from another field of study, the structure of the system of rights protection has both synchronic and diachronic dimensions.[5] In addition, some rights are given greater protection than others, some rights are derivative of others, and in some cases national rights work against one another. The relationships among rights claims define another level of conceptual architecture just as different floors of a building may have different internal features yet fit within a larger design.

The 'institutional architecture' metaphor is the easiest to apply; indeed, institutional actors tend to inhabit literal architectures in the form of dedicated buildings such as courthouses or legislative houses.[6] The institutional architecture of rights protection begins with courts, and specifically the U.S. Supreme Court. Additional elements of this architecture include lower federal courts and State courts, federal and state legislatures, and administrative offices at the federal, state and local levels. This description is far from exhaustive: a fuller discussion would include law enforcement officers, lawyers and activists. This chapter, how-

4 These arguments tend to proceed from claims about background political theoretic understanding, especially those having to do with sovereignty. Examples include the derivation of inherent executive authority from the pre-constitutional status of the United States, the immunity of States from suit, and the immunity of State officials from a requirement of implementing federal laws. *United States v. Curtis-Wright Export Co*. 299/304 (1936) (holding that the authority of the President over foreign affairs predates the Constitution); *Printz v. United States*, 521 U.S. 898 (1987) (holding that State officials may not be compelled to enforce federal law because of background principles of sovereignty that predate the Constitution).

5 F. de Saussure, *Course in General Linguistics* (R. Harris trans.), C. Bally & A. Sechehaye, Eds., LaSalle, IL, Open Court, 1983.

6 The U.S. Supreme Court building is decorated with a recurring theme of turtles carved into the interior stonework of the building. The turtle is said to symbolize the deliberate pace of legal reasoning. More generally, there is a surprisingly rich literature on the architecture of courtrooms and judicial buildings, in particular. *See, e.g.*, L. Mulcahy, 'Architects of Justice: the Politics of Courtroom Design', *Social and Legal Studies*, Vol. 16, 2007, p. 383-403.

ever, focuses on the formal institutional architecture of the system by which national rights are formally articulated.

An initial overview of American rights protection would recognize that there are multiple systems, each of which has its own defining architectures as well as being situated within a larger structure. It is largely an artefact of scholarly prejudice that references to 'rights' in the American context automatically lead to the U.S. Constitution. To focus solely on the Constitution, however, is inadequate. To be sure, the Constitution and the Supreme Court's authoritative interpretations of its provisions stand at the apex of American rights protections. But federal statutes and regulations are an equally important source of protections. Some of these laws create assertable legal rights in themselves; others are legal expressions of constitutional rights protections. Particularly after the Civil War, federal laws enacted by Congress have been a critically important layer of rights protection. Each of these dimensions of the architecture of American rights protections has evolved and been subject to revision. As a result, this article will begin by proceeding historically, as follows.

B. The Colonial Period and Early Constitutionalism: 1620-1870
C. From Reconstruction Amendments to the *Lochner* Era: 1870-1938
    I Textual Architecture: 'Liberty' and the Due Process Clause
    II Conceptual Architecture: Reasonableness and Property Rights
    III Institutional Architecture: Judicial Supremacy
    IV Summary: From Reconstruction to *Lochner*
D. The Modern Era: 1938 to the Present Day
    I Textual Architecture
        1 Constitutional Text; Due Process, Equal Protection and Incorporation
        2 Judicial Precedents
        3 Federal Statutes Enacted Under Reconstruction Amendments
        4 Federal Statutes and Regulations Enacted Under General Governmental Powers
    II Conceptual Architecture: Multiple Channels and Hierarchical Orderings
    III Institutional Architecture: the U.S. Supreme Court, Other Courts, Legislatures and Agencies
E Conclusion: Summary and Comparative Comments

B The Colonial Period and Early Constitutionalism: 1620-1870

The settlement of the American colonies was an experiment in multiple ways. In Virginia, a commercial company sought to create an economic outpost and in the process created a new kind of polity. Across the New England colonies – Massachusetts, New Haven/Connecticut and Rhode Island – the element of experimentation in political and legal architecture was at the core of the mission as much as experimentation with religious doctrines and practices. In 1679, 50 years after the fact, James Allen looked back on the establishment of the Massachusetts colony:

> This was New England's glory and design. They came not hither to assert the prophetical or Priestly office of Christ so much, that were so fully owned in Old England, but his kingly, to bear witness to those truths concerning his visible Kingdom.[7]

Early attempts at written constitutions were among the products of these experiments. The Massachusetts Body of Liberties of 1641, in particular, was one of the first examples of a constitution that expressed higher law protections of rights.[8]

While these early constitutional texts were specific to their colonies, during the same period, the basis for national rights was already being established. Leading up to the American Revolution a common complaint was that the colonists were being denied 'the rights of Englishmen', a phrase that captured a vaguely defined but deeply felt set of entitlements grounded in a particular understanding of English common law. In the 1780s, the American conception of English legal rights was deeply influenced by William Blackstone's *Commentaries on the Laws of England*.[9] One interesting consequence of Blackstone's influence was that the American conception of English legal rights was far more uniform than that which prevailed in England, making it a suitable source for the assertion of national rights. The assertion that the British government was violating these rights was the crux of the justification for revolt. As a result, the language of justification for the revolution already contained an idea of rights national in their conceptualization and scope if not necessarily in their institutional allocation.

The adoption of the national Constitution in 1791 created a limited set of national rights. While their scope was relatively narrow, extending almost solely to the protection of property rights, these constitutional protections displayed a distinctive textual, conceptual and institutional architecture from the outset.

The key element of the textual architecture in this early period was the 'Supremacy Clause' of Article IV, which declared that the Constitution, federal laws and international treaties would be 'the supreme law of the land', "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[10] The Supremacy Clause established a vertically hierarchical textual architecture with the U.S. Constitution at its apex. There were endless possibilities of debate and interpretation, but once agreement was reached on the meaning of a particular provision it would supersede any other textual authority. The references to federal law and international treaties were potentially more complicated, but by virtue of the superior

7 E.S. Morgan, *Puritan Family*, Cambridge, 1966, p. 2-3.

8 D.S. Lutz, *Origins of American Constitutionalism*, Baton Rouge, Louisiana State University Press, 1988.

9 In American political writings published between 1760 and 1805, the three most frequently cited were, in descending order, B. Montesquieu & P.D. Locke Carrington, 'The Revolutionary Idea of Legal Education', *William & Mary Law Review*, Vol. 31, 1990, p. 527-574; C.E. Klafter, *Reason Over Precedents*. Westport, Green Wood, 1993; D.S. Lutz, 'The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought', *American Political Science Review*, Vol. 78, 1986, p. 189-197.

10 U.S. Constitution, Art. IV, sec. 2.

position of the Constitution in the textual architecture, these other sources of 'supreme' law also stood above any competing textual sources.

Another aspect of the textual architecture of the Constitution was a sharp distinction between rights protections that applied to the national government and those that applied to the States. That is, the architecture of rights protections within the text was as important as the relation between the constitutional text and other sources of authority. The Bill of Rights, adopted as the first ten Amendments to the Constitution, declared a set of limitations on the national government exemplified in the opening words of the First Amendment, 'Congress shall make no law'. The only textual source for rights protections applicable to the States was Article I, sec. 10, which prohibited States from a specific set of practices; prior to the adoption of the XIVth Amendment, no other constitutional rights guarantees were 'national rights protections' in any meaningful sense. The one area in which significant rights protections were established was in the protection of property rights. The Contracts Clause prohibiting States from 'impairing obligations of contract' was a particularly fruitful source for successful claims by individuals against State governments prior to the Civil War.

The conceptual architecture of rights protection was thus largely contained within the category of property and contract rights. Common law principles were imported to give content to these legal concepts, and the extension of rights protection in a given case depended on how the asserted right fit within that vocabulary The use of the term 'contract' in the Constitution did not open a door to the creation of a new set of national legal concepts of contractual prerogatives and obligations; instead, it was used to nationalize existing legal conceptions.

Issues of institutional architecture were initially very much in doubt. Article III of the Constitution created a Supreme Court and federal courts with jurisdiction over cases 'arising under' the Constitution and federal laws as well as cases involving assertions of legal rights between citizens of different States. But the relative authorities of different institutional actors were a matter for debate.

All three architectural dimensions were contested starting from the start. The very first important constitutional decision by the Supreme Court, *Chisholm v. Georgia* in 1793, involved a claim by a creditor against a debtor.[11] What made the case complicated was the fact that the debtor was the State of Georgia. Article III had granted federal courts jurisdiction over cases involving States and citizens of another State, the Contracts Clause gave those courts authority to define and enforce a set of rights between creditors and debtors. But Georgia claimed it had a tradition and unwritten privilege that superseded these elements of the constitutional text, 'sovereign immunity', that prevented the case from being heard in a federal court.

Georgia drew support for its arguments from numerous textual sources: historical practice, commentaries on 'the law of nations', principles of political theory. Conceptually, Georgia's appeal to 'sovereignty' raised the question of whether the Constitution articulated a set of principles specific to its design – that is, whether the Constitution founded a new conceptual architecture of rights

11 *Chisholm v. Georgia*, 2 U.S. 419 (1793).

protections – or whether the Constitution was attached to an inherited system of rights claims, prerogatives and practices. Institutionally Georgia challenged the place of federal courts in the system of adjudication for claims involving national rights and States.

James Wilson's opinion for the majority was a summary of Federalist constitutionalism. In Wilson's view, the entire concept of a 'sovereign' government was alien to the Constitution.

> To the Constitution of the United States, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. [The People] might have announced themselves 'SOVEREIGN' people of the United States.[12]

The point was not merely philosophical. Textually, the implication was that the mass of writings about sovereignty in the law of nations was excluded from the canon of sources in determining the scope of national rights. Conceptually, Wilson's approach meant that the meaning of the Constitution was a subject for independent inquiry without inherited categories of analysis or forms of argument. As for the question of institutional architecture, in 1793, Wilson simply took it for granted that it was the proper role of the Court to define the rights of individuals and States alike.

In response to *Chisholm*, the States' governments moved quickly to adopt the XIth Amendment establishing the immunity of States from suite in federal court for claims brought by citizens of other States, the kind of claim that had been presented in *Chisholm*.[13] This was the first amendment adopted after the Constitution with its Bill of Rights. As a matter of legal doctrine, this reflected a clear and powerful rejection of the Court's ruling. As a matter of architectural structure, however, the adoption of the XIth Amendment may be taken as confirmation of Wilson's propositions. The amendment would not have been needed, after all, if the text of the Constitution did not stand alone as the sole and sufficient point of reference. The amendment would also have been entirely unnecessary if the conceptual architecture of States' rights included theories of political philosophy or inherited understandings of 'the law of nations'. And the amendment would have been completely unnecessary if the ruling of the Supreme Court could simply be ignored, overridden or rejected in a particular instance of controversy.

Issues of textual, conceptual and institutional architecture arose again in 1796 in *Ware v. Hylton*.[14] The question was whether a Pennsylvania statute that prevented English creditors from seeking recovery of debts in State courts was rendered void by the terms of the Treaty of Paris that guaranteed access to American courts for that purpose. Writing for the Court, Justice Chase had no hesita-

12 *Id*., at p. 454.

13 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

14 *Ware v. Hylton* 3 U.S. 199 (1796).

tion about declaring that the Supremacy Clause governed the outcome without reference to any other textual sources. The Supreme Court also had no hesitation in asserting that State courts could be required to apply such 'supreme' laws in cases brought before them. In light of this powerful combination of textual and institutional elements, Chase did not find it necessary to delve deeply into the implications of his decision for the conceptual architecture at work in *Ware*. However, he took the opportunity for just such an exploration in *Calder v. Bull* in 1798.[15] The question in *Calder* was whether the legislature of Connecticut had violated the Constitution when it adopted a measure setting aside a ruling by a State judge about a will. The case led Justice Chase to engage in a description of the conceptual scope of judicial review that to modern ears sounds almost incredible.

> The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it....An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.[16]

It is interesting to consider what constitutional rights would look like in the modern era if the approaches of Wilson and Chase had remained dominant. But even among the justices on the Court there was disagreement. Justice Iredell insisted that the role of the Court was only to enforce the legal limitations prescribed in the constitutional text. Specifically, Iredell was disputing Chase's and Wilson's arguments that the constitutional text was an expression of a larger political theory that provided a source for rights protections. On the institutional question, however, there was no disagreement. Iredell, Wilson and Chase agreed that it was the proper function of the Court to review State laws and strike down those that were found to be unconstitutional.

Whether the federal courts had similar authority to review laws enacted by Congress was less clear. That issue was squarely confronted in 1803 in what is probably the most famous case for studies of American constitutionalism, *Marbury v. Madison*. In 1800, the outgoing President, John Adams, appointed a number of federal judges literally in the last day of his administration. The formal delivery of those appointments was left to the next administration, that of Thomas Jefferson. On Jefferson's instructions, the Secretary of State declined to deliver the official appointment documents. Marbury was one of the newly appointed judges. He sued in the Supreme Court under a federal law giving the Court jurisdiction over cases of this kind asking for a judicial order compelling the federal government to perform its duty (delivery of the commission).

In his opinion for the Court, Marshall ruled that Marbury had a right to the judicial appointment and that the matter was a proper one for judicial determina-

15 *Calder v. Bull*, 3 U.S. 386 (1798).
16 *Calder*, 3 U.S. at 388.

tion, but he also ruled that the law granting the Court jurisdiction over the case in the first place was itself unconstitutional and therefore void. As a result, while Marbury had a legally cognizable right, the Supreme Court could not provide protection for that right based on the institutional architecture of the Constitution.

In the process of reaching his three-part ruling, Marshall expanded on all three dimensions of rights-protecting architecture. Textually, Marshall used the case to reaffirm the primacy of the Constitution as a source of authority, and specifically its character as a written text. In making that argument, Marshall essentially took Iredell's side against Chase in *Calder*. The supremacy of the Constitution as written text meant a rejection of appeals to background principles of political philosophy or appeals to 'the rights of Englishmen' except insofar as those arguments addressed questions of textual interpretation.

At the same time, however, Marshall described the conceptual architecture of constitutional rights protections in a way that brought the system of common law principles back into the discussion. The conceptual categories of property rights permeated the discussion. Marshall relied on common law private property rights to declare that Marbury had a 'vested' (enforceable) right to the appointment. The use of this vocabulary reinforced Marshall's argument that the Court was solely engaged in legal as opposed to political or philosophical reasoning; in this way, Marshall adopted Iredell's legalistic understanding rather than the broader political conceptions of Wilson and Chase. That move, in turn, emphasized the extent to which constitutional rights protections would take their substantive meaning from established legal doctrines. After *Marbury*, it became a matter of general acceptance that only constitutional rights that could be expressed as legal claims could receive protection from a court.

The most famous element of Marshall's *Marbury* opinion was its description of an institutional architecture that followed directly from the textual and conceptual structures, and particularly the sharp division between legal and political questions. Judicial authority to review federal as well as State actions was based on the premise that courts would limit themselves to deploying a system of legal concepts applied through a system of written texts. "It is emphatically the province and duty of the Judicial Department to say what the law is,"[17] wrote Marshall. To secure this claim to institutional authority, Marshall had to explicitly disavow any institutional role for the courts in determining the outcome of political issues.

> The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.[18]

17 *Marbury*, 5 U.S. at 177.
18 *Marbury*, 5 U.S. at 170.

This was the beginning of the 'political question doctrine', a major principle of institutional architecture that says that courts should only consider rights questions that can be expressed in purely legal terms.

In the decades between the decision in *Marbury* and the Civil War, the Supreme Court repeatedly reasserted the architecture of property rights protection: State courts were bound by federal courts' interpretations, States were obliged to observe contract rights and so on. The articulation of these rights continued to appear primarily in the context of claims that States had violated individuals' rights to property under the Contracts Clause.[19] In resolving these issues, the Court drew on a rich set of textual sources that included 'federal common law', a set of background legal concepts developed by federal judges. In 1837, for example, Taney applied a principle that monopoly contracts issued by the State should be read narrowly in order to promote the public good.[20] Conceptually, the Court continued to import legalistic concepts from traditional doctrines. And institutionally, the Court had no hesitation in continuing to declare itself the supreme arbiter of the requirements of the Contracts Clause.

But while these issues could be addressed within the architectures that had been expressed in *Ware* and *Marbury*, the same could not be said of the biggest and most important issue concerning national rights: slavery. The text of the Constitution was explicit in its recognition of slavery as a legitimate practice, most notably in the Fugitive Slave Clause that required free States to 'deliver' escaped slaves to their owners.[21] Congress adopted the Fugitive Slave Act to enforce the constitutional provision, and in 1842, the Court applied the idea of federal supremacy to compel unwilling States to cooperate in what was essentially a system of industrialized kidnapping without even the most minimal protections of due process.[22] Politically, the system of national government was twisted to protect the practice of slavery against the threat of federal legislation. Slave States were overrepresented in Congress, and when new States were added to the Union, the national authorities reached agreements binding them to the status of 'slave' or 'free' in order to artificially preserve a political balance (the 'Missouri Compromise').

The Supreme Court went to great lengths to forestall the assertion of any rights that might interfere with the practice of slavery. In the most infamous case of all, *Dred Scott v. Sanford*, Chief Justice Taney authored an opinion that invoked the first clear expression of 'originalism' to argue that slaves and their descendants could not be considered 'citizens of another State' for purposes of federal court jurisdiction on the grounds that in 1791 such individuals had not been considered members of the national 'people' and were therefore not parties to the

19 *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Trustees of Dartmouth College f. Woodward*, 17 U.S. 518 (1819).

20 *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

21 "No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due." U.S. Constitution, Art. IV, sec. 2.

22 *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

U.S. Constitution. At the same time, Taney also struck down the Missouri Compromise as an unconstitutional limitation on the rights of new States to decide whether to permit slavery within their jurisdictions.[23]

The contradiction between the idea of the Constitution as an instrument of national rights protection and the existence of slavery challenged the architectures or rights protection at every level. Textually, contradictions both between and among texts made it impossible to identify the authoritative relevant sources. Conceptually, the multiple intellectual contradictions displayed in cases like *Dred Scott* threatened to render the idea of constitutionalism incoherent. And institutionally, the lack of clear mandates to define or enforce rights protections opened infinites possibilities for different States and different parts of the national government to deny the legitimacy of actions taken by the others.

After *Marbury* and up to the Civil War the architecture of rights protection can be described as a vestigial system focusing on legalistic interpretations of traditional rights of contract and associated property rights claims. Textually, this system depended on a small number of constitutional clauses and a body of judicial opinions built up around them. Conceptually, the narrow range of these rights claims made it easy to import legalistic categories from common law precedents, accompanied by federal common law doctrines addressing the specific legal questions that were raised. Institutionally, the federal courts first established and then jealously guarded their position of superiority over this narrow range of legal rights claims.

C From Reconstruction Amendments to the Lochner Era: 1870-1938

Following the Civil War the U.S. Constitution was altered by the addition of three 'Reconstruction Amendments', the XIIIth (1865), XIVth (1868) and XVth (1870). The XIIIth Amendment abolished the Southern American version of slavery once and for all. The XVth Amendment imposed specific requirements on States to permit freed slaves and future members of racial minority groups to vote. These were enormously important in their historical context, but neither represented a fundamental reconceptualization of the scope of national rights. That was accomplished in the XIVth Amendment adopted in 1868,[24] arguably the single most important rights protecting element of the entire constitutional text and the beginning of a genuine system of national rights protections in the United States.

The XIVth Amendment is explicitly addressed to protecting rights against actions by the States, thus creating national rights outside Article I, Sec. 10. The substance of these new national rights was contained in three extremely broadly phrased clauses that followed the proscription 'No State shall': "deny the Privi-

23 *Dred Scott v. Sanford*, 60 U.S. 393 (1856). For a careful and provocative analysis of the case, *see* Graber, Mark, *Dred Scott and the Problem of Constitutional Evil*. Cambridge 2006. Graber concludes that according to the jurisprudence of the time Taney's ruling was arguably correct on the merits, a conclusion which points to the possibility that a constitution may legitimate a substantively evil practice.

24 The last State to ratify the XIVth Amendment was Kentucky in 1976.

leges and Immunities of Citizenship," "deny the Equal Protection of the Laws" and "deprive any person of life, liberty, or property without Due Process of Law". Other elements of the Amendment established the principle of birthright citizenship, guaranteed protections of political representation and most important for this discussion in its final clause granted Congress the power to enact 'appropriate legislation' to carry out the purposes described in the remainder of the text. The Privileges and Immunities Clause, Due Process Clause and Equal Protection Clause are all contained in the first section of the Amendment ('XIV(1)') while the empowerment of Congress to enact a new category of national rights-protecting legislation is contained in the fifth and final section ('XIV(5)'). The XIIIth and XVth Amendments also contain clauses authorizing Congress to enact appropriate federal laws.[25]

For the first two decades, the Supreme Court took the position of denying that the XIVth Amendment had created any new national rights. In a series of judicial decisions between 1870 and 1890 the Court declared among other things that the Privileges and Immunities Clause did not create any significant rights that States were bound to respect; that States were not bound to respect the rights contained in the Bill of Rights nor could federal law be used to enforce those rights; and that racial segregation of public and private facilities was not barred by Constitution.[26] Starting in the 1890s, however, the Court moved in a different direction, and in the process the architectural transformations of the XIVth Amendment became apparent.

I Textual Architecture

The Reconstruction Amendments established an entirely new textual basis for rights protections, with open questions to be resolved about the relevant library of supporting texts and the relation between the new Amendments and other provisions of the Constitution. Over time, a body of judicial opinions specifically about these new provisions would develop, creating a body of textual referents whose interpretation, application and reconciliation with other bodies of precedent would create new architectural structures.

25 XIV(1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." XIV(5): "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article," The omitted sections refer to diminution of a State's representation in Congress upon proof of voter suppression (XIV(2)), the requirement of loyalty for representatives (XIV(3)) and payment of public debts (XIV(3)).

26 *Slaughterhouse Cases*, 83 U.S. 36 (1873) ('Privileges and Immunities Clause' does not create substantive rights protections); *United States v. Reese*, 92 U.S. 214 (1875) (XVth Amendment guarantee of right to vote does not require State authorities to count votes cast by African American voters); *United States v. Cruikshank*, 92 U.S. 542 (1876) (constitutional rights of assembly, expression, and bearing arms cannot be enforced by federal claims against individuals); *Civil Rights Cases* 109 U.S 3 (1883) (portions of the Civil Rights Act of 1875 prohibiting racial discrimination in places of public accommodation held unconstitutional).

The approach to defining a textual architecture changed dramatically in the 1890s as the Court moved to finding new expressions of the national property rights that had earlier been recognized under the Commerce Clause. There was no attempt to locate these rights in specific textual provisions. Instead, the focus was on the word 'liberty' as the source of property rights ('liberty of contract'), and on the terms 'due process' and 'equal protection' read together as a single broad principle forbidding laws that favoured one economic actor over others ('class' legislation) or laws that lacked a reasonable basis in a legitimate public interest ('arbitrary' legislation). In 1897, for example, the Court determined that a Colorado statue imposing liability for attorneys' fees on railroad corporations but not other defendants was an unconstitutional violation of both equal protection and due process.[27] The treatment of the text was striking. The terms 'due process' and 'equal protection' were applied without reference to any other textual provisions, including those occurring in the same paragraph as well as historical or contemporaneous legal sources.

In this specific context, at least, the Court was adopting a version of a textual architecture in which words in the Constitution would be read to identify broad concepts. Moreover, those broad concepts would not only supersede all other textual sources, they would stand alone as the source for future articulations by the federal judiciary, with all the implications for federal statutes and State courts and legislatures that were identified earlier. This was an approach that treated the textual architecture of national rights protections as an entirely separate structure broken off from the prior body of texts including the Constitution itself, a new library with empty shelves to be filled by the courts.

In the same period, however, another parallel version of a textual architecture was being explored. In the 1920s, in a series of cases, the Court rejected its earlier ruling that the Bill of Rights did not apply to the States and instead began to explore the idea that some of those rights might be 'incorporated' through the Due Process Clause of the XIVth Amendment. The only Amendment that was explored in this way was the First Amendment, and only those clauses in that Amendment protecting freedoms of speech and of the press. What makes this move particularly striking is that the First Amendment, unlike other elements of the Bill of Rights, states 'Congress shall make no law'. To apply this provision to the States was to break the remainder of the text out of its original container and import it into the text of the XIVth Amendment.

In 1925, the Court reviewed a criminal conviction of a publisher who had produced two pamphlets expressing radical political ideas under a New York State law against 'criminal anarchy'. Justice Sanford read the term 'liberty' in the XIVth Amendment's Due Process Clause as importing protections from the First Amendment. "For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' pro-

27 *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1897).

tected by the due process clause of the Fourteenth Amendment from impairment by the States."[28]

The statement 'we…assume' accurately reflects the lack of any extended analysis, and the limiting clause '[f]or the present purposes' cast doubt on the reach of the already unclear principle. Nonetheless, the idea that the term 'Due Process' might in at least some circumstances incorporate other elements of the text in addition to acting as a freestanding protection against arbitrary or class legislation added a new element to the textual architecture of constitutional rights protections in which one clause of the Constitution (the XIVth Amendment's Due Process Clause) would be given substantive content by looking to another clause (the Ist Amendment). The interpretation of the Ist Amendment, however, would be undertaken as a new exercise in textual interpretation unmoored to earlier discussions. Later, a similar approach would be taken in the incorporation of other elements of the Bill of Rights.

Separate from the development of these judicial doctrines, by granting Congress the authority to create rights-protecting legislation entirely outside the scope of Article I the Amendments opened the door to new systems of federal law. Early on, Congress eagerly adopted its new role, starting with the Civil Rights Acts of 1860, 1861 and 1875, the 'Anti-Klan Act' of 1870 and 1871, and numerous other federal statutes. These statutes created separate and independent textual sources for the assertion of rights claims.

Most importantly, the textual sources for rights protection became national. To assert a rights claim one looked first to the Constitution and federal statutes; reliance on State constitutions or common law principles would be relegated to the position of a secondary strategy reserved for the relatively rare cases where they might provide greater protection or guarantee more rights than the XIVth Amendment. Where terms in State constitutions paralleled the language of the XIVth Amendment, the interpretation of those terms would increasingly be guided by federal courts' interpretations of the national Constitution. And where State constitutions or statutes contradicted the Reconstruction Amendments, they would no longer be available as sources of authority.

II Conceptual Architecture

The year 1897 is identified as the beginning of what is known as the '*Lochner* Era'. In that year, the Court announced the arrival of the theory that the Due Process Clause protected the 'liberty of contract'.

> The "liberty" mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all con-

28 *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See also Whitney v. California*, 274 U.S. 357 (1927), *Near v. Minnesota*, 283 U.S. 697 (1931).

> tracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[29]

The justices recognized that to apply this concept as a limitation on actions by the States was a novel step, as Justice Taft described the departure from historical practice.

> It is true that in the days of the early common law an omnipotent parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public.[30]

The most famous case from the period is the one that gives the era its name, *Lochner v New York*. In *Lochner*, the Court struck down a provision in a New York law that limited the working hours of bakers. Writing for the majority, Chief Justice Peckham described the right at issue in the Due Process Clause as the right to be free from 'arbitrary' legislation.

> Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[31]

The rejection of 'arbitrary' lawmaking was one of two mainstays of the liberty of contract, the other being protection against 'class legislation', laws that benefitted some economic actors at the expense of others.[32] The two ideas together marked the intersection of the Due Process and Equal Protection Clauses, while their substantive application was found in the liberty of contract.

On the one hand, these passages articulated a broad conception of 'liberty', but on the other, the breadth of that concept was largely restricted to business activities; nothing in *Allgeyer* or *Lochner* suggested that the Court intended to revisit the narrow readings of non-contract-based rights with the possible exception of the First Amendment. Nonetheless, in a few cases, the idea of substantive due process was extended beyond this limited purpose. In two cases in the 1920s, the Court found that the Due Process Clause protected parents' decisions about

29 *Allgeyer v. Louisiana*, 165 U.S. 587, 589 (1897).
30 *Wolf Packing Corp. v. Court of Industrial Rel.s, State of Kansas*, 262 U.S. 522 (1923).
31 *Lochner v. New York*, 198 U.S. 45, 57 (1905).
32 H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers*, Durham, Duke University Press, 1992.

the education and upbringing of their children, whether on religious or non-religious grounds.[33] This was a hint of things to come.

A critical element in the conceptual architecture of the liberty of contract was the relationship between national rights and democratic politics. Under traditional common law notions, States have broad 'police powers' to regulate conduct for the promotion of 'health, safety, welfare, and morals'. The justices in the *Lochner* Era believed that new political ideologies threatened cherished legal conceptions, especially with regard to property rights. As Justice Peckham put it in his majority opinion in *Lochner*, radical political theories were 'on the increase'.

> It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives…The court looks beyond the mere letter of the law in such cases.[34]

To look beyond the letter of the law meant that legal rights defined the limits of legitimate politics. This expansive conception of the relation between legal and political principles had been previously expressed in a surprising source: the majority opinion in *Plessy v. Ferguson*.[35] Anyone with a passing knowledge of American constitutionalism will recognize *Plessy* as a leading member of the constitutional 'anti-canon', cases so disreputable that they exert influence by pushing people away from any argument reminiscent of their rulings.[36] In *Plessy*, the Court upheld racial segregation of railroad cars on the preposterous basis that the separation of the races was not intended to suggest any inferiority in one group compared with the other. At the same time, however, Justice Brown – without for a moment abandoning a facially absurd factual interpretation – expressed the idea of a constitutional test for 'reasonableness'.

> It is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people upon the other…The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class…So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question

33 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents have a right to have their children educated in a foreign language); *Pierce v. Society of Sisters*, 268 U.S. 510 (parents have a right to have their children educated in a religious private school).

34 *Lochner v. New York*, 198 U.S. 45, 64 (1905).

35 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

36 R. Primus, 'Canon, Anti-Canon, and Judicial Dissent', *Duke Law Journal*, Vol. 48, 1999, p. 243.

> whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order.[37]

Notwithstanding the deferential evaluation of the State's justification, the standard of 'reasonableness' and the blanket rule against laws enacted 'for the annoyance or oppression of a particular class' are a form of judicial review of the political process that significantly altered the conceptual architecture of 'rights' that courts might enforce.

The proposition that the Equal Protection and Due Process Clause were an independent source of nationally protected rights described a new and different conceptual architecture. Where once it might have been said that the core or top-level conceptual vocabulary of rights protection was found in the Constitution and federal law, now the same statement would have indicated that 'the Constitution' referred to several different conceptual strains that operated independently from one another, each with its own analytical vocabulary, and that 'federal law' occupied yet another conceptual architecture of its own.

III Institutional Architecture

The transformations in textual and conceptual architectures were not matched by a similar differentiation among judicial authorities. If anything, the federal courts strengthened their claim to an institutional superior position on questions of rights, frequently be preventing State and federal authorities from protecting rights. In this context as elsewhere, the connections among textual, conceptual and institutional architectures become apparent. When Congress acted under the textual authority of XIV(5) to enact a law prohibiting racial segregation in places of public accommodation, the Court struck down that law as outside Congress' legitimate power by the terms of the clause authorizing 'appropriate' legislation.[38] When Congress attempted to adopt other laws that might be thought of as rights-protecting under its Article I authority, such as a law banning child labour, the Court struck down those laws based on its conception of interstate commerce.[39] Both of these actions reflected the Court's assertion of its position of institutional superiority vis-à-vis Congress, but the differences in conceptual and textual architecture pointed in different directions for future actions.

IV Summary: From Reconstruction to Lochner

To summarize, the period from 1870 to 1938 saw dramatic changes in the textual architecture of national rights protection with the adoption of the XIVth Amendment. Textual sources for rights protections both multiplied and became differen-

37 *Plessy*, 163 U.S. at 549-550.
38 *Civil Rights Cases*, 109 U.S. 3 (1883).
39 *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

tiated as a result: the XIVth Amendment, the First Amendment by incorporation through the XIVth Amendment, a new category of federal statutes authorized by XIV(5). Conceptually, the architecture of rights protections developed into broadly defined principles of 'liberty' drawing on legal rights contained in State and federal common law, with a strong hint of separately conceived incorporated rights. Institutionally, the expansion of the range of legal concepts available for the assertion of national rights encouraged the courts to take on a far greater role in policing the limits of legitimate politics and abandoning most of its deferences to both States and co-equal branches of the national government.

Substantively, the effects of these systems was to privilege some rights claims to a very great extent while essentially avoiding others altogether. In particular, the pattern of restricting substantive rights protections to economic and contract-based rights that had become clear in the early nineteenth century continued into the twentieth, with the obvious exception that formal slavery was abolished. Even where the XVth Amendment appeared to specifically identify a right of political participation, the Court used its position of institutional supremacy and its conceptual framework of formal legalistic rights based on the contract model to deprive that guarantee of substance. In 1876, the Court found that a federal law making it a crime for State election officials to destroy ballots cast by African Americans was not authorized by the XVth Amendment because that Amendment's reference to 'the right of citizens to vote' did not extend to having those votes counted.[40]

D The Modern Era: 1938-Present

In discussing the modern era, in particular, it is both critically important and sometimes difficult to separate the architectures of rights protections from the substantive content of protected rights. The period from 1940 to 1980, in particular, was marked by a consistently expanding set of non-economic national rights protections at every level even as the 'liberty of contract' theory was abandoned. In the 1980s, there was a shift towards a more conservative constitutional philosophy that resulted in a partial retrenchment and in particular on the imposition of greater limitations on federal law.

The textual architecture of national rights protections retained its multipart structure: the constitutional text including the Bill of Rights (directly or by incorporation through the XIVth Amendment); the Equal Protection and Due Process Clauses of the XIVth Amendment; the body of judicial precedents interpreting these textual sources; acts of Congress undertaken as 'appropriate' legislation under the XIIIth, XIVth and XV Amendments; and acts of Congress and the executive branch under their original grants of authority including federal legislation and regulations promulgated by executive agencies. Strong rights claims became increasingly associated with specific constitutional clauses, in sharp contrast to

40 *United States v. Reese*, 92 U.S. 214 (1876).

the broad application of 'liberty' or the equivalency of equal protection and due process in the earlier era.

The same differentiation among textual sources was reflected in a proliferation of conceptual approaches. Each specific category of rights protection, moreover, was increasingly associated with its own analytical approach and body of relevant textual sources. As a result, the conceptual system of rights that has emerged displays an increasingly complex architecture. Due process, equal protection, free speech, freedom of religion, rights of criminal defendants, rights of political participation, and a dozen other specific categories of national rights protection with specific standards and tests for adjudication have been created, each anchored in a particular clause in the constitutional text. In addition, some rights have been declared to be of greater weight than others, a determination that directed disputes to different locations in the institutional architecture and to different textual sources. Most broadly and most importantly, national rights became defined less in terms of the limits of legitimate government action and more in terms of individually held prerogatives. By the same token, there has been a general trend away from conceiving rights as interests to be weighed against countervailing public interests, and towards the idea of 'strong rights' claims characterized by Ronald Dworkin in the phrase 'rights as trumps'.[41] Legal conceptions continued to provide necessary content for constitutional rights in some classes of cases, while in others a distinct and freestanding constitutional understanding was sufficient.

The elements of the institutional architecture of rights protection have proliferated along with the textual and conceptual systems. The authority to recognize national rights in the Constitution has been separated from the authority to create national rights in federal law. The authority to recognize constitutional rights has been institutionally segregated from the authority to enforce those rights. The Court continued to assert its position of supremacy and to reinforce the hierarchical relationship among itself, lower federal courts, and State courts and legislatures. At times this meant not only compelling States to protect certain rights but also preventing State and federal efforts to create legal rights protections on the grounds that they conflicted with constitutional principles including both rights-protecting principles and others. At the same time, Congress and the Executive branch including federal administrative agencies have emerged as important institutional sources of rights and rights protections.

I Textual Architecture

1 Constitutional Text: Due Process, Equal Protection and Incorporation

The list of constitutional provisions that courts would consider as sources of national rights grew dramatically between the late 1930s and the 1970s. The most important alteration to the textual architecture of the Constitution was the continuing process of incorporation that brought additional elements of the original Bill of Rights into the architecture of rights protection. Various provisions

41 R. Dworkin, *Taking Rights Seriously*, London, Duckworth, 1978.

were incorporated across the decades: the Free Exercise and Establishment Clauses of the Ist Amendment in 1940 and 1947 respectively[42]; the IVth Amendment rights to be free of unreasonable searches and seizures in 1961,[43] and many others throughout the 1960s and 1970s. The latest of these events was the 2010 incorporation of the Second Amendment to guarantee an individual the right to bear arms against State efforts to limit gun ownership.[44] Aside from any effect on the range of protected rights, the introduction of these varied textual sources for assertable rights claims constitutes a dramatic change in constitutional architecture all by itself.

In addition, the Due Process Clause and the Equal Protection Clause of the XIVth Amendment has each developed into the basis for separate and extensive bodies of protected rights. The Due Process Clause has come to be understood as the source of rights to privacy, procedural protections in criminal and civil proceedings, and rights deriving from family relationships, and as the basis for striking down actions that lack a sufficient justification under the 'bare animus' principle that was announced in *Plessy*. The Equal Protection Clause has been the basis for striking down actions by States that discriminated on the basis of race, religion, nationality and gender. And through a process of 'reverse incorporation', the requirements of the Equal Protection Clause have been applied to the federal government as well as the States.[45] None of these changes involved alterations to the text itself, only changes in the way clauses are treated relative to one another and relative to various forms of legislation or government action. There have also been amendments to the text that affected the architecture of rights protections by adding to the list of protected rights (voting at age 18, for example), although the most far-reaching proposal, the Equal Rights Amendment, was defeated in the 1980s.

At the same time, at the outset of the modern era, a major source of rights jurisprudence was abandoned. In 1938, in *Erie v. Tompkins*, the Court summarily stated that there is no such thing as federal common law. The case involved an ordinary claim for negligence. Previously, federal courts had taken it upon themselves to declare principles of 'general law', common law principles that would apply nationally in place of State's own doctrines. Justice Brandeis denied the legitimacy of such a source of national rules.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.

42 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
43 *Mapp v. Ohio*, 367 U.S. 642 (1961).
44 *McDonald v. Chicago*, 561 U.S. 742 (2010).
45 *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The effect of this rule on the textual architecture was dramatic. For one thing, from that point onwards, federal courts would accept State courts' interpretations of State law as authoritative. For another, any national rights protection thereafter would have to be derived from a specific textual source. Earlier judicial opinions would continue to act as a source for reference, but only insofar as they addressed interpretations of other textual sources (the Constitution or federal statutes). The existence of a separate body of rights protections embedded in judicial opinions standing alone was abandoned.

Changes in the manner of textual interpretation also affected the textual architecture of rights protection. Beginning in 1980, in particular, judicially conservative justices introduced theories of 'textualism' and 'originalism'. These approaches both emphasized the importance of texts and expanded the range of texts relevant to the inquiry. Textualism, the idea that any discussion of rights protection must begin with a specific textual reference, quickly became a dominant orthodoxy. As late as 1980, writers could distinguish among 'interpretivists' and 'noninterpretivists', meaning judges who began with consideration of the text and those who operated in the absence of any textual referent at all (hence without 'interpretation').[46] By the 1980s, if not before, the idea of a genuinely atextual theory of national rights had become untenable whether the claim was based on the Constitution or a statute. As Justice Kagan said in a speech in 2015, 'we are all textualists now'.[47]

Originalism was and remains far more controversial. The idea that the meaning of a textual provision was fixed at some moment in history meant that judges and justices were required to examine historical texts to determine that earlier meaning. Court decisions, legal commentaries, the writings of supporters and opponents of the adoption of the Constitution, political philosophies prominent at the appropriate historical moment and other documents such as the Declaration of Independence all were grist for the historicist mill of originalism. In an originalist approach, the textual architecture underwent a transformation. Extended interpretations of historical texts became central to judicial opinions. In some cases, 'background understandings' from earlier periods of history could supplement or even replace the text outright in an inversion of the traditional textual architecture.[48]

2 *Judicial Precedents*

The modern era of constitutional rights protection began in 1938 with a complete reconsideration of the limits on both State and federal authority. In *West Coast Hotel v. Parrish*, the Court essentially repudiated the approach to defining

46 J.H. Ely, *Democracy and Distrust*: A Theory of Judicial Review, Cambridge, Harvard University Press, 1980.

47 E. Kagan, 'Delivering the Scalia Lecture at Harvard Law School', 18 November 2015, available at: https://www.youtube.com/watch?v=dpEtszFT0Tg (last accessed 25 January 2018).

48 "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition … which it confirms." *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996) (J. O'Connor).

national rights it had adopted in the preceding decades. Upholding a State minimum wage law, Chief Justice Hughes declared that it was not the business of the justices to evaluate the reasonableness of legislation, only to test its consistency with the Constitution.[49] The change in approach was even more clear in *United States v. Carolene Products*, where the Court declared that when Congress makes a policy determination in economic affairs, the courts should show extreme deference in evaluating the resulting enactment. Even in the absence of any evidence in the legislative record, said Justice Stone, courts should presume the legislature had an adequate and legitimate justification for its actions.

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[50]

This 'rational basis' approach to reviewing legislation – applied to both State and federal regulations of economic activities – could not have been farther from the *Lochner* Court's approach of evaluating the 'reasonableness' of such legislation.

But *Carolene Products* is not primarily remembered for its expression of judicial deference in questions of economic regulation. Instead, the most famous part of Justice Stone's majority opinion is a footnote that considers other kinds of rights claims. Footnote 4 is certainly the most famous footnote in American legal history and quite possibly the most famous footnote ever.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. (…)
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[51]

49 *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).
50 *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).
51 *Carolene Products*, 304 U.S. at p. 152.

Footnote 4 invited future lawyers and judges to look for claims that might justify rigorous scrutiny: in other words, to look for judicially enforceable rights claims. Each category also refers to a different textual authority. 'Rights identified in the constitutional text' invites examination of that text, and specifically consideration of whether particular elements of the Bill of Rights are incorporated by the XIVth Amendment to apply against the States. Not coincidentally, in that same year the Court went farther than it ever had before in describing a standard for incorporation: rights contained in the Bill of Rights that a court deemed 'essential to ordered liberty' would be incorporated, others would not.[52]

The reference in Footnote 4 to 'discrete and insular minorities' led courts directly to the development of the Equal Protection Clause, naming the conditions that would trigger invocation of that clause's protections. The textual reference involved in 'laws affecting the political process' was less clear, but in addition to giving forceful effect to the XVth Amendment's protection of the voting rights of racial minorities, the Court has used the XIVth Amendment as a basis for adopting the principle of 'one man, one vote' as a constitutional protection against unequal electoral districts.[53]

One thing that was notably missing from Footnote 4 was any equivalent to the idea that the term 'liberty' or other elements of 'due process' implied a set of unenumerated but enforceable rights. That idea, however, would later be resuscitated in a highly modified form.

Carolene Products was the beginning, not the end, of the development of a textual architecture contained in the body of judicial precedents. Over the decades that followed, numerous 'landmark' cases established new constitutionally protected rights. In sharp contrast to the reliance on 'liberty' in the earlier period, in the modern era specific rights have tended to be grounded in specific textual provisions, with the result that there is a body of texts in the form of judicial precedents that is attached to each relevant element of the text. To speak of any particular right is to automatically invoke a textual reference and a line of case opinions that interpret and apply that text in a particular manner.

There is an obvious analogy to religious text and the commentaries that accompany them, complete with duelling authorities, rival traditions and fights over what texts count as canonical or relevant. There is no serious argument that the textual record of Supreme Court decisions is not the relevant and primary source text for determining the scope of constitutional rights. The deployment of historical, philosophical or other extraconstitutional textual sources takes place within the discussion of the codex of Supreme Court case opinions. Supreme Court justices have the authority to revise that codex, but that freedom was not available to the judges in federal and State courts who heard the vast majority of cases involving rights claims. And even at the level of the Supreme Court there is a powerful *ethos* of conservation that cautions against making radical changes captures in the idea of *stare decisis*.

52 *Palko v. Connecticut*, 302 U.S. 319 (1937).
53 *Baker v*. Carr, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

3 Federal Statutes and Regulations under the Reconstruction Amendments

A set of federal statutes provides the body of texts that implement and give specific substance to the guarantees of the XIIIth, XIVth and XVth Amendments. Three of the most important of these laws derive from the Civil Rights Acts of the 1860s and 1870s; these laws provide federal remedies for State violations of constitutional rights and prohibit racial discrimination in a range of areas including both public and private rights.[54] Arguably even more important have been the elements of the modern Civil Rights Acts that are included as exercises of XIV(5) powers. These along with the Voting Rights Act of 1965 are the backbone of national rights protections in areas of political participation, housing, education and numerous other areas. Although the authority for these laws derives from the constitutional text, these written statutes and their supporting materials provide a separate and independent system of textual references, informed by their own associated body of judicial interpretations and drawing on a specific set of historical sources. Furthermore, many of these rights-protecting statutes are implemented through federal agencies such as the Equal Employment Opportunity Commission that promulgate their own regulatory codes, adding yet another layer of textual authority. Each of the systems of textual authorities is brought to bear through a different proceeding, each is used to authorize different remedies and each involves its own distinctive analytical approach.

4 Federal Statutes and Regulations under Original Congressional and Executive Authorities

Separate from the texts of the Constitution and judicial opinions, federal statutes and regulations play an increasingly important role as rights-defining texts. Antidiscrimination rules and statutes, in particular, have become the primary mechanism for defining and enforcing national rights. In enacting the Civil Rights Acts of 1964, 1968 and 1991, Congress drew on its authority under Article I as well as the XIVth Amendment. In particular, federal laws prohibiting racial segregation in places of public accommodation have been upheld as a valid exercise of Congress' authority to regulate commerce.[55] This was precisely the goal that the Court had declared to be beyond the reach of Congress' power when it struck down provisions of the Civil Rights Act of 1875.[56]

Federal statutes and regulations also define a wide range of rights protections that apply within the apparatus of the national government itself, including employees, contractors and consumers of governmental services. There were more than 2.5 million federal employees in 2016, and it is impossible to calculate the number of persons affected by these rules as contractors and consumers.[57] These rights protections do not require any particular constitutional authoriza-

54 42 U.S.C. §§ 1981, 1982, 1983.

55 *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

56 *Civil Rights Cases*, 109 U.S. 3 (1883).

57 These data are drawn from government websites: https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/and https://about.usps.com/who-we-are/postal-facts/size-scope.htm (last accessed 20 January 2018).

tion; they are byproducts of the fact that all federal operations are generally subject to federal law. For example, in 1993, Congress adopted the Religious Freedom Restoration Act ('RFRA').[58] RFRA required both State and federal governments to provide accommodations for religious practices. As it applied to the States, the law was struck down on the grounds that the Court had previously ruled that such accommodations are not constitutionally required, and Congress had no authority to define constitutional rights beyond those recognized by courts.

In other words, Congress is not permitted to exercise its powers under XIV(5) to protect a right that is not recognized by the courts, an important element of institutional architecture.[59] But to the extent that the federal law governed operations of the federal government its constitutionality was not in question. From the operation of federal prisons to administrative offices, today all elements of the federal government are covered by the requirement to grant religious accommodations under RFRA and various successor statutes. To take another critically important example, all operations in the enormous system of federal agencies are bound by the protections of procedural rights defined in the Administrative Procedures Act of 1946 ('APA').[60] All acts of administrative rule-making and enforcement are subject to the requirements of the APA, creating a detailed system of procedural rights protections that operates within the systems of the national government. The Code of Federal Regulations is thus an important and often overlooked source of national rights protections in its own right.

II Conceptual Architecture: Multiple Channels and Hierarchical Ordering

The modern architecture of rights protection has been marked by increasingly separated channels defining the scope of particularized rights claims, a hierarchy among more or less preferred rights, and a shift in thinking about rights as limitations inherent in the design of the system of government to thinking about rights as individual entitlements.

The contrast between the extreme deference shown to Congress' regulations of commercial transactions and the possible different treatment of other kinds of actions in *Carolene Products* pointed to an emerging pattern. In the earlier period, the Due Process Clause was understood to protect liberty of contract and not very much else. That is, these were very nearly the only 'rights' recognized as national. In the modern era, the range of national rights is far broader, but they are divided into more and less important rights. Rights recognized as 'fundamental' are protected against government action to a far greater degree than those considered merely incidental. The results of this distinction vary by the textual system within which the rights claim occurs. Where substantive rights are claimed under the XIVth Amendment without incorporation – that is, 'substantive due process' rights – *only* those rights determined to be 'fundamental' are given judicial cognizance. Where substantive rights are claimed on the basis of reference to the Bill of Rights by incorporation, only rights deemed to be sufficiently important are

58 Codified at 42 U.S.C. 2000bb *et seq*.
59 *City of Boerne v. Flores*, 521 U.S. 507 (1997).
60 Codified at 5 U.S.C. 500 et seq.

incorporated at all. But related rights that derive from incorporated principles may be protected to a lesser degree on the grounds that they are not fundamental.

Probably the most complete taxonomical system of differential rights protections appears in discussions of freedom of speech. Freedom of speech is treated as a 'preferred freedom',[61] protected to an even greater degree than other rights deemed 'fundamental'. Yet within that freedom there are categories of speech-like expression that are protected through incorporation but nonetheless trigger less extensive protections (commercial speech, expressive conduct), as well as categories of expression that have been found to fall outside the scope of protected rights at all (obscenity, blackmail, threats, fraud).

In the area of equal protection, building on the idea of a 'discrete and insular minority' the courts have found that differential treatment on the basis of categories such as race or religion trigger much stronger rights protections than differential treatment on the basis of 'neutral' characteristics such as age. Although the original conceptual basis for this distinction appeared to be a theory about the limitations of democratic politics in order to protect vulnerable minorities, in later years this intellectual underpinning was abandoned in favour of a formal statement that certain classifications are simply disfavoured, a shift captured in the move from the use of the phrase 'protected class' to the phrase 'suspect classification'.[62] But the architecture of equal protection remains marked by a series of levels of increasing protection against unequal treatment depending on the basis of the treatment.

Both with respect to equal protection and rights protections, the formal categories are referred to as 'tiers of scrutiny'. Where a law infringes on a 'fundamental' right or treats people differently on the basis of race, religion or nationality, a court will apply 'strict scrutiny', meaning that the burden is entirely on the government to demonstrate a 'compelling interest' that cannot be accomplished with a 'less restrictive means'.[63] Other kinds of restrictions or other bases for classification trigger other levels of scrutiny, identified as 'intermediate' or 'rational basis', the test described in *Carolene Products* for economic regulations. In practice, the judicial application of these concepts often looks less like a series of clearly defined ascending steps and more like a continuum in which particular levels of scrutiny are devised for particular situations. For example, where discrimination on the basis of citizenship ordinarily only triggers rational basis scrutiny, but where the issue involved access to public education the Court applied a stricter version of that test on the grounds that education is an especially important public service.[64] Where expressive conduct rather than speech is concerned the Court has applied something like a combination of the standards developed

61 *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (C.J. Stone, concurring).

62 *Adarand v. Pena*, 515 U.S. 200 (1995).

63 The first specific references to strict scrutiny appeared in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down a law imposing sterilization as a punishment for crimes of 'moral turpitude') and *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans during World War II).

64 *Plyler v. Doe*, 457 U.S 202 (1987).

for strict and intermediate scrutiny.[65] And in numerous instances, the application of the various formal standards suggests subtle adjustments in the level of protection, upward or downward depending on the particulars of a case.

The conceptual architecture of constitutional rights is directly reflected in the architecture of legal rights created pursuant to Congress' authority under XIV(5) and the equivalent provisions of the XIIIth and XVth Amendments. The Court has held that Congress' authority in this area is limited in a number of ways: Congress can only implement constitutional rights protections by addressing state actions, not private conduct; Congress' authority does not extend to discovering constitutional rights, only to enforcing rights identified by courts; and efforts to enforce constitutional rights through legislation are limited by tests of 'proportionality' and a 'remedial' purpose said to inhere in the term 'appropriate legislation'.[66]

The degree to which these limitations have been understood strictly has varied over time. In the 1960s, the Voting Rights Act imposed remedies on State governments that included requiring all changes in election laws to be subjected to prior review by federal courts to ensure they were not hidden attempts to disenfranchise racial minorities. These remedies were upheld in 1966[67]; 50 years later, the Court was much less sure and required a reconsideration of the basis for imposition of the rule.[68] On the other hand, and despite shifts in the prevailing doctrines, it is a matter of consensus that when Congress is acting under the XIVth Amendment in a proper case, the usual limitations imposed by principles of federalism will have far less force.

The conceptual architecture of legal rights established by federal law under Congress' Article I powers or by executive agencies under Article II is different. There is no equivalent sense of hierarchy of importance, because the key question is whether the creation of the 'right' was within the power of the government. In general, the protection of a right under a federal statute is found in the criminal justice system or civil remedies provided within the law itself. In other words, actions to enforce these rights are not treated differently than other forms of legal action. Norms of procedural fairness apply to these proceedings as they apply to any others, but conceptually these rights protections – their justifications, the sources of their creation, the approach to their interpretation – are separate from the system of constitutional rights. One key exception arises when Congress attempts to create a legal right for individuals in ways that courts find to infringe on the 'rights' of States. The phrase 'States' rights has been mentioned before. To explain this concept would be a difficult and contentious exercise. From the perspective of an architectural discussion, the important thing is to recognize that principles of federalism that limit the powers of the national government extend to limiting the power to create and enforce rights under the Articles

65 *United States v. O'Brien*, 391 U.S. 367 (1968).
66 *City of Boerne v. Flores*, 521 U.S. 507 (1997).
67 *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
68 *Shelby County v. Holder*, 570 U.S. 2 (2013).

in ways that do not apply when Congress acts under the authority of the Reconstruction Amendments.

The resulting conceptual architecture is characterized by separate and parallel channels attached to different textual provisions that act as points of entry. In some situations, a litigant may choose from among several possibilities, a choice that also involves choosing among different conceptual schemes. For example, consider the case of federal laws enacted to combat racial discrimination in employment. Such practices may be challenged, in an appropriate case, under either the XIVth Amendment's Equal Protection Clause or under a federal statute. At one time, the federal statute was designed to apply the same standards as the judicial interpretation of the constitutional provision. Specifically, in both contexts a case of discrimination could be demonstrated by a showing of 'disparate impact', an employment practice that appeared neutral on its face but that could be shown to consistently result in discriminatory outcomes.[69] In 1976, however, the Supreme Court altered the rules for proving discrimination under the XIVth Amendment; thereafter only proof of a deliberate intent to discriminate would suffice to state a claim.[70] Yet the standard under the federal statute remained the same.

Another example arose where Congress cited multiple textual sources of authority for enacting the Violence against Women Act in 1994. Reviewing that law, the Court found that Congress had exceeded its authority under either the Commerce Clause or the XIVth Amendment, but to reach that conclusion the majority had to separately analyse each textual source, its supporting texts (primarily judicial precedents) and its associated structure of analysis. The rights protections that Congress was seeking to protect was the same in the two discussions, but the analysis of the scope of the right and the limits on its implementation was sharply different.[71]

The conceptual architecture of modern rights protections displays the same pattern of channels that was seen in the textual architecture, and the two are directly connected. The increasing reliance on specific textual provisions, the differentiation among those provisions and the association of a specific body of supporting texts in each category created an environment that encouraged the development of similarly different conceptual approaches. Within each of these conceptual challenges hierarchies of preference have emerged, among more or less preferred rights and more or less protected classes or disfavoured classifications. Rights-protecting federal statutes follow the models of their associated constitutional sources, as do the body of precedents deemed relevant in each area. The conceptual and textual architectures are thus marked by a multiplicity of entrance points, multiple parallel channels and differing endpoints. Unsurprisingly, this multiplication of textual and conceptual architectures is mirrored at the level of institutional design.

69 *Griggs v. Duke Power Co*., 401 U.S. 424 (1971).
70 *Washington v. Davis*, 426 U.S. 229 (1976).
71 *United States v. Morrison*, 529 U.S. 598 (2000).

III Institutional Architecture: Federal Article III Courts, Other Courts, Legislatures and Agencies

Where the basis for an asserted national right is a direct appeal to the Constitution, the institutional architecture remains the same: the Supreme Court sits at the apex of a descending system of adjudicating authorities in the federal and State systems. But within this structure the Court has developed theories of jurisdiction and shared authority that have significantly altered the relationships among the structural elements of the system. Various 'prudential' doctrines have emerged that justify the federal courts and the Supreme Court in declining to consider rights claims. 'Abstention' doctrines explain why a federal court may decline to hear a case if it is thought to be properly within the jurisdiction of a State level court either because questions of State law are involved, a State proceeding has to finish before federal rights claims are established or simply because the justices conclude that State authorities will have more expertise on relevant matters specific to State policies and conditions.[72] 'Justiciability' rules of standing, ripeness and mootness explain that the courts may decline to hear rights claims if the circumstances are not sufficiently urgent to demand immediate resolution. And the 'political question' doctrine refers to a whole set of criteria that determine when a question of rights protection is best left for resolution to one of the other branches of the federal government, including the justices' conclusion as to "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded".[73] Justice Brandeis referred to these various rules as 'avoidance doctrines', principles developed by the Supreme Court to shift responsibility for various categories of claims (including rights claims) to other institutional authorities.[74] Issues of conflicting authority claims by State courts, on the other hand, have been relegated to history. The Court has made it clear, and its view is generally accepted, that the Constitution is the supreme law of the land and that the Supreme Court's interpretations define the specific requirements of constitutional rights protections.[75]

Congress' role in enforcing the protections of the XIVth Amendment through appropriate legislation has waxed and waned. During the 1960s and 1970s, Congress' authority was at its apex. Starting in the 1980s and continuing to the present day, the Court has been increasingly willing to find that Congress is limited by an institutional architecture – primarily the system of federalism – that creates limits to where Congress can go. On the other hand, as noted above, Congress has found that its authority to regulate 'commerce' under Article I give it the power to create and enforce national rights in ways that had previously been denied to it by the Court. As a matter of institutional role, then, Congress took up a larger place in the protection of national rights than had been the case in earlier eras.

72 *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

73 *Baker v. Carr*, 369 U.S. 186, 198 (1962).

74 *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

75 *Cooper v. Aaron*, 358 U.S. 1 (1958).

Perhaps the biggest institutional change has been the creation of the administrative state, including both agencies and a system of administrative courts. Executive branch agencies produce rules, the interpretation and application of which is determined by Executive branch ('Art. II') courts. These determinations are very often the on the ground point at which rights protections are first enforced. A whole set of issues arise in determining the relationship between these administrative courts and more traditional federal ('Art. III') courts.

E Summary and Comparative Comments

One might imagine a system of national rights whose textual, conceptual and institutional architectures were simple. A single text might declare 'everyone has a right to be treated fairly in all things' and leave it at that. There might be one court with exclusive authority to enforce this general guarantee. There might be no practice of recording the ways in which that single rights guarantee was applied or interpreted, and as a matter of interpretive philosophy the relevant authorities might conclude that no other textual sources provide relevant guidance. As an analogy, this would be a structure with one door (the single sentence), no interior walls or corridors (once inside one may go wherever one pleases) and only one inhabitant. A one-room schoolhouse occupied by a single teacher.

The American system of national rights protections looks more like a multistorey office building. There are numerous points of entry, each leading to a complex system of corridors some of which intersect, leading to rooms that may be accessible from one entrance but not from another or may be accessed by very different routes.

The textual architecture of this system comprises at least five distinct, separate points of entry: the text of the U.S. Constitution, itself broken down into numerous specific provisions and clauses that affect the scope of other clauses, notably the XIVth Amendment; the text of federal laws enacted to give effect to constitutional rights guarantees; the text of federal laws enacted under the general authority of the national government; the text of regulations enacted by government agencies, in some case agencies created for the purpose of rights protection; and the text of judicial opinions interpreting these other sources.

The conceptual architecture of constitutional rights protections involves strong and specific rights claims, each associated with a particular mode of analysis that may or may not share characteristics with those of other rights protections even where the professed purpose is the same. Among constitutional rights, the level of protection for substantive rights varies along a hierarchy of more or less preferred rights or more or less dangerous forms of discrimination. Procedural rights protections similarly occupy a hierarchy in which the extent of procedural rights protections depends on an assessment of the significance of the action the government is undertaking.

Where rights protections derive from federal laws enacted to implement constitutional guarantees, the conceptual architecture of constitutional rights is repeated but in a modified form. Most importantly, constraining walls have been

created to ensure that the laws implementing a right do not go far beyond the scope of the right itself. Where rights protections derive from laws or regulations adopted by the government in the exercise of its original powers, by contrast, the conceptual architecture is not specific to rights protections at all; it is the general architecture of the American systems of federalism and separated powers.

The institutional architecture gives pride of place to courts, and especially the U.S. Supreme Court. But only a small minority of rights claims are heard by the Court. Lower federal courts, administrative law courts and State courts hear the vast majority of complaints and are responsible for implementation of national rights protections in practice. Congress and agencies of the executive have the authority to enact statutes and rules for the same purpose.

As has been noted repeatedly, the architectures of rights protections are ultimately subject to constitutional review by the Supreme Court, including the place of that court itself in the system of legal institutions. Recently, the Court has indicated a willingness to reconsider significant elements of the architecture of rights protection. The role of Congress in enacting legislation to implement the protections of the XIIIth, XIVth and XVth Amendments has come into question. An earlier acceptance of an expansive authority to adopt 'prophylactic' legislation, a judicial willingness to focus on the kind of factors enumerated in *Carolene Products* and a significantly greater willingness to see courts second-guess Congress on the empirical facts establishing a relationship between a constitutional rights violation and a piece of legislation all have pointed towards a general pattern of limiting the role of federal statutes in defining national rights. Similarly, the Court is increasingly sceptical of federal efforts to use the general powers of government to protect rights where claims against States are involved. Conceptually, the current Court has reoriented the enquiries that apply to a number of different areas of rights protection. And textually, as noted above, the increased emphasis on various versions of 'originalist' interpretation has meant a concomitant increase in the range of historical texts that may be treated as sources of authority while at the same time curtailing the appeals to empirical findings or modern extraconstitutional sources.

In considering the American architecture of rights protections comparatively, a number of observations emerge. The multiplicity of structures may be partly due to the absence of anything like the German *Wesengehalt* of human dignity.[76] That is, there is no single core substantive value around which claims of constitutional rights are centred; each 'right' or set of rights is grounded in its own set of normative principles. Second, there is nothing like the principle of subsidiarity or the margin of appreciation in American rights protection. Despite the complexity and variability of the analyses, ultimately the question comes down to a binary 'yes or no' – is there a national right at issue or is not there? – and the appropriate analysis proceeds from there. Finally, given that the United States is nearly as large in both area and population as the entirety of Europe, the emphasis on national rights in the American system is worthy of comment. The discussion in

76 *See, e.g.*, *Regarding the Luftsicherheitsgesetz*, German Constitutional Court, Judgment of 15 February 2006, 1 BvR 357/05, BVerfGE 115, 118.

this article is focused on a system of national rights, but there was no inherent necessity for such a system to emerge at all, let alone in the detailed and extensive form that it has taken. Whether Europe's transnational textual, conceptual and institutional architectures of rights protections will develop in a similar fashion is a critical question for the future of rights protections across the European Union.

Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens

Searching for the Golden Mean in US Constitutional Law

Barry Sullivan[*]

A Introduction

In 1979, then-Professor Antonin G. Scalia contributed to a symposium on "The Quest for Equality". Professor Scalia's article was entitled "The Disease as Cure: 'In order to get beyond racism, we must first take account of race.'"[1] It was an ironic title, built around a quotation from Justice Blackmun's separate opinion in *Regents of the University of California v. Bakke*,[2] with which Professor Scalia obviously and deeply disagreed. In a voice that would soon become familiar to the readers of the United States Reports, Professor Scalia began his commentary with the following words: "[a]s you know, every panel needs an anti-hero, and I fill that role on this one. I have grave doubts about the wisdom of where we are going in affirmative action, and in equal protection generally. I frankly find this area an embarrassment to teach."[3] The problem, according to Professor Scalia, was that the Supreme Court's decisions were "tied together by threads of social preference and predisposition", rather than by "threads of logic and analysis".[4] He concluded the opening paragraph with a flourish: "Frankly, I don't have it in me to play the game of distinguishing and reconciling the cases in this utterly confused field."[5]

Of course, Justice Scalia's observations were not those of a dispassionate observer. Even in 1979 his commitments were clear. His objections were due as

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1 *Washington University Law Quarterly*, Vol. 35, 1979, p. 147. The symposium papers had been delivered by a diverse group of constitutional law scholars in nine separate programmes during the 1978-1979 academic year. *Id*., at p. 1-3.

2 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

3 A. Scalia, 'The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"', *Washington University Law Review*, Vol. 1979, No. 1, p. 147.

4 *Id*.

5 *Id*.

much to the trend and substance of the jurisprudence as to the doctrinal incoherence that he attributed to it. Nonetheless, while one might be inclined to dismiss Justice Scalia's observations as so much hyperbole, there is some justice in them. Justice Scalia was writing at a time of particular flux and considerable confusion in the area of equal protection law.[6] In 1973, for example, a majority of the Court in *Frontiero v. Richardson*[7] had struck down a gender-based classification pertaining to spousal benefits for members of the armed forces, but the Court could not agree on the appropriate test for determining the validity of that classification. At the time, the received wisdom was that race-based legislative classifications should be 'strictly' scrutinized, while other classifications should be subject to a less rigorous 'rational basis' test.[8] In *Frontiero*, four Justices thought that strict scrutiny should be applied to gender-based classifications, but that position did

6 In terms of state governmental action, the ultimate source of equal protection and due process protection is Section 1 of the Fourteenth Amendment to the United States Constitution, which was adopted after the Civil War and provides, in relevant part, that "[n]o State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1 (1868). For federal governmental action, the ultimate source of protection is the Due Process Clause of the Fifth Amendment, which was adopted in 1791 as part of the Bill of Rights and provides in relevant part that "[n]o person shall … be deprived of life, liberty, or property, without due process of law". U.S. Const., Amend. V (1791). The Supreme Court has made clear that the Due Process Clause of the Fifth Amendment should be interpreted to encompass a guarantee of equal protection as well as due process. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954) (requiring public school desegregation in the District of Columbia under the equal protection component of the Due Process Clause of the Fifth Amendment). *See also* K. L. Karst, 'The Fifth Amendment's Guarantee of Equal Protection', *North Carolina Law Review*, Vol. 55, 1977, p. 541-562 (discussing the equal protection component of the Due Process Clause.).

7 411 U.S. 677 (1973).

8 *See Craig v. Boren*, 426 U.S. 190, 220-21 (1976) (Rehnquist, J., dissenting) ("I would think we have had enough difficulty with the two standards of review which our cases have recognized – the norm of 'rational basis,' and the 'compelling state interest' [or strict scrutiny] required where a 'suspect classification' is involved – so as to counsel weightily against the insertion of still another 'standard' between those two."). *But see San Antonio v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) ("The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review -- strict scrutiny or mere rationality. But this Court's decisions … defy such easy categorization.")

not command a majority of the Court.[9] Only three years later, in *Craig v. Boren*,[10] the Court again rejected the application of strict scrutiny to classifications based on gender but seemingly adopted a third, intermediate level of review for evaluating the constitutionality of gender-based classifications. Using that standard, the Court struck down the gender-based classification at issue in *Craig*. Also in 1976, the Court decided *Washington v. Davis*,[11] which held that a party challenging the constitutionality of state action that was neutral on its face but discriminatory in its effect could not prevail without proving discriminatory intent. Finally, in 1978, in *Regents of the University of California v. Bakke*,[12] a deeply divided Court was unable to agree on the proper standard for evaluating the constitutionality of race-conscious university admissions plans. Of the nine Justices, only Justice Powell concluded both that the Constitution did not categorically preclude colleges and universities from taking an applicant's race into account in admissions

9 The *Frontiero* plurality consisted of Justices Brennan, Douglas, White and Marshall. *See Frontiero*, 411 U.S. at p. 688. Justice Brennan subsequently wrote the majority opinion in *Craig*.

10 429 U.S. 190 (1976). Subsequently, in *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court struck down a section of the Illinois Probate Code that discriminated against children born outside of a legally recognized marriage. Writing for the Court, Justice Powell stated that "[i]n a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose". *Id*., at p. 769. Justice Rehnquist vigorously dissented in an opinion joined by three other Justices. *Id*., at p. 776. Katie Eyer has recently argued that the majorities in *Craig* and *Trimble* did not think of themselves as articulating a new, intermediate standard of review, but understood the cases as simply applying a more robust form of rational basis review. "[C]ases that were at the time understood by the Court itself as applying minimum tier standards have been reimagined today as outside the minimum tier canon – as cases in which the Court was acting at, but not actually, applying rational basis review." *See* K.R. Eyer, 'Constitutional Crossroads and the Canon of Rational Basis Review', *University of California, Davis Law Review*, Vol. 48, 2014, p. 535. According to Professor Eyer, "the vision of minimum tier review that has come to dominate canonical accounts – a form of review so deferential as to be meaningless – has been made possible only by the exclusion from the canon of cases in which a more robust form of review was applied. In fact, when viewed over the broad sweep of history – including, but not limited to the Court's early sex, illegitimacy, and sexual orientation cases – there is a deep history on the Court of taking groups and rights seriously, even outside of the context of formally heighteed review." *Id*., at p. 536.

11 426 U.S. 229 (1976). The Court reinforced that approach in Village of *Arlington Heights v. Metropolitan Hous. Dev. Corp*., 429 U.S. 252 (1977), and *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979).

12 438 U.S. 265 (1978).

decisions and that the particular admissions programme involved in the case was unconstitutional.[13]

13 Justice Powell concluded that the Constitution and laws did not categorically prohibit race-conscious admissions decisions, because student diversity could be a legitimate academic concern of colleges and universities, but that the UC Davis medical school's specific admissions programme nonetheless failed to meet constitutional standards. *Id*., at p. 314-315, 319-320. According to Justice Powell, the UC Davis plan, which was simply a 'set-aside' or quota system, did not allow for the individualized assessment of applicants and therefore failed to satisfy strict scrutiny, which, also according to Justice Powell, was equally applicable to both malevolent and 'benign' considerations of race. While Justice Powell wrote the lead opinion in *Bakke*, no other Justice joined in both of his central conclusions. Four Justices – Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens – did not reach the constitutional question but thought (*id*., at p. 408-421) that a relevant federal statute (Title VI of the 1964 Civil Rights Act) prohibited any consideration of race in the admissions process. Four other Justices – Justices Brennan, White, Marshall, and Blackmun – thought that the programme did not violate Title VI or the Constitution, but those four Justices did so based on their view (not shared by Justice Powell) that so-called 'benign' discrimination should not be subject to strict scrutiny. *Id*., at p. 324-408. In all, six opinions were filed in the case. Justice Powell recognized that this dizzying array of opinions did nothing to make the Court's holding transparent. For that reason, he delivered an oral summary of the opinions from the bench, but he did not include that summary in his published opinion. *See* J. Goldstein, *The Intelligible Constitution*, Oxford, Oxford University Press, 1992, p. 97-104. (Describing Justice Powell's oral summary and explanation.)

In one sense, then, Justice Scalia's observation about the unsatisfactory state of equal protection law was not wide of the mark in 1979,[14] and the situation has not improved greatly in the intervening period. Indeed, this is an area fraught with complexity. Among other things, the law has become even more complex in some respects because of the Court's new emphasis on cabining Congress's enforcement power under Section 5 of the Fourteenth Amendment.[15] Moreover, although the current law has often been presented as relatively straightforward – being centred on a three-tiered analytical framework – the reality might better be described, as two leading commentators put it, as one in which the Court uses "*at least* three standards of review … in equal protection decisions".[16] Moreover, the

14 Of course, then Professor Scalia was not alone in expressing frustration with the state of equal protection law. In 1972, Gerald Gunther detected a "mounting discontent [among the Justices] with the rigid two-tier formulations of the Warren Court's equal protection doctrine". G. Gunther, 'The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection', *Harvard Law Review*, Vol. 86, 1972, p. 12 & 17. In *Dandridge v. Williams*, 397 U.S. 471, 520-521 (1970) (Marshall, J., dissenting), and *San Antonio v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting), Justice Marshall had expressed disagreement with the idea that the Court's jurisprudence could (or should) be understood in terms of precisely defined levels of scrutiny. In *Rodriguez*, he wrote: "[t]he Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review. But this Court's decisions … defy such easy categorization. A principled reading of what this Court has done reveals … a spectrum of standards … [and] variations in the degree of care with which the Court will scrutinize particular classifications." *Id*., at p. 98-99. In *Craig v. Boren*, 429 U.S. 190 (1976), Justice Rehnquist objected to the articulation of what he took to be an intermediate standard of review on the very different ground that "[t]he Court's conclusion that a law which treats males less favorably than females 'must serve important governmental objectives and must be substantially related to achievement of those objectives' apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard." *Id*., at p. 220 (Rehnquist, J., dissenting). Justice Rehnquist's objection is somewhat peculiar, given the absence of explicit support in the text of the Equal Protection Clause for either the rational basis test or the strict scrutiny test. Chief Justice Rehnquist took a more nuanced view of a similar issue in *Dickerson v. United States*, 530 U.S. 428, 442 (2000), where he declined to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), and also found unconstitutional a congressional statute that purported to do so. H. Jefferson Powell has offered an insightful commentary on the disagreement between Justice Scalia and Chief Justice Rehnquist in that case: Justice Scalia "insisted that the Court lacked the authority to invalidate the act of Congress, there being no violation of the Constitution. For the Court, Chief Justice Rehnquist conceded that the warnings required by *Miranda* are *not* 'required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements'; the warnings were a strategic device created and imposed by the Court because the Justices believed existing practice ran an unacceptably high risk of permitting unconstitutional criminal convictions." H.J. Powell, 'Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law', *Washington Law Review*, Vol. 86, 2011, p. 233.

15 *See* U.S. Const. Amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, this article."). In *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966), the Court held that, under Section 5, Congress had "the same broad powers expressed by the Necessary and Proper Clause" of Art. I, Section 8, Clause 18 of the Constitution, as construed by the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), however, the Court announced that legislation enacted pursuant to Section 5 would be reviewed under a more demanding 'congruence and proportionality' test.

16 *See* R.D. Rotunda & J.E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, 4th ed. Vol. 3, West, 2012 p.306 (emphasis added).

Supreme Court's decisions have frequently been opaque, with the Court sometimes failing to explain the outcome in terms of the three canonical standards of review, and sometimes even failing to clarify whether a particular decision rests on the Equal Protection Clause or the Due Process Clause.[17] In addition, the Court may sometimes describe its analytic method in terms of one standard of review, while apparently applying another.[18] More fundamentally, the underlying purpose of equal protection analysis points to something more complex, and the Court's jurisprudence is consistent with that reality.

17 The same analytical framework is used in substantive due process cases, but, while the canonical version of equal protection analysis consists of three tiers, the substantive due process rubric omits the intermediate tier. *See, e.g.*, E. Chemerinsky, *Constitutional Law: Principles and Policies*, Philadelphia, Wolters Kluwer, 2015, p. 564-566, 570-572. The Court's occasional lack of clarity with respect to the applicable standard of review is demonstrated by its decision in *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979), in which the Court upheld an agency's anti-drug use employment policy without indicating the relevant level of scrutiny. Several more recent cases are also instructive. In *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013), *e.g.*, the Court held, in an opinion by Justice Kennedy, that a federal statute defining marriage as the union of one man and one woman unconstitutionally deprived same-sex couples of the liberty protected by the Fifth Amendment, but the Court did not specify the level of scrutiny being used to reach that conclusion. In *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Kennedy, writing for the majority, found that the Texas sodomy statute violated substantive due process, but did not specifically identify the level of scrutiny utilized in making that determination. At the end of the opinion, however, Justice Kennedy did say that the statute "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id*., at p. 578. Justice O'Connor concurred in the judgment, but would have held the Texas statute unconstitutional under the Equal Protection Clause, finding that it failed the appropriate, "more searching form of rational basis review" because "moral disapproval is [not] a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy". *Id*., at p. 580, 582. In dissent, Justice Scalia pointed to the absence of any discussion of strict scrutiny in Justice Kennedy's opinion – and to Justice Kennedy's statement that the law was not supported by any 'legitimate state interest' – to argue that the proper test was rational basis review, which he thought that the Texas statute clearly met. *Id*., at p. 594, 599. Justice Scalia also rejected Justice O'Connor's equal protection argument and her suggestion that a "more searching form of rational basis review" was appropriate. *Id*., at p. 599-602. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court, in an opinion by Justice Kennedy, held that state laws prohibiting same-sex marriage violated equal protection and due process, but did not explain the analytical basis upon which that holding rested. Justice Kennedy attempted to compensate for that lack of analysis by writing that "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and more comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Id*., at p. 2603. One of four dissenting Justices, the Chief Justice argued that "[t]he majority's decision is an act of will, not legal judgment." *Id*., at p. 2612. In addition, he noted that "[a]bsent from [the equal protection] portion [of the majority opinion] … is anything resembling our usual framework for deciding equal protection cases." *Id*., at p. 2623.

18 *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (purporting to apply rational basis review, but seemingly applying a stricter test); *Reed v. Reed*, 404 U.S. 71 (1971) (same). Some observers would make a similar point with respect to the Supreme Court's decision in *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016), where the Court purported to apply strict scrutiny but arguably departed from the classic version of that standard.

The central meaning of equal protection – that like cases should be treated alike, and those that are different should be treated differently – is both a characteristic and an aspiration of the rule of law. It also seems to presuppose a common understanding as to the criteria by which sameness and difference are to be evaluated. But we know that this common understanding frequently breaks down, as issues of similarity or dissimilarity show themselves to be matters of degree and judgment, and that reality has important ramifications when the search for similarity is not simply an abstract exercise but an essential part of "say[ing] what the law is".[19] If law is both will and reason, this is a place where those competing forces clearly intersect, and they do not intersect in a vacuum. At least in the US context, they intersect in a complex environment deeply affected by principles of separation of powers and federalism and a fraught and contested history. Because of that, the courts may view their role in enforcing the Equal Protection Clause as having to decide not whether a classification or distinction is correct or justified in any absolute sense, but whether it is justified in light of what might be called the margin of appreciation that is properly due to the determinations of another set of actors – those belonging to a different branch or level of government.[20] On this view, the judge is not asked to decide whether he or she would find certain differences or similarities relevant and material, if the decision were his or hers to make *de novo*.[21] Instead, the judge's task is to determine and apply the proper standard of review (and, thus, the appropriate margin of appreciation to be given) to the work of other governmen-

19 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).

20 This view has long been identified with James Bradley Thayer. *See* J.B. Thayer, 'The Origin and Scope of the American Doctrine of American Constitutional Law', *Harvard Law Review*, Vol. 7, 1893, p. 129-156. Thayer was a friend and professional colleague of Justice Holmes, a teacher of Justice Brandeis, and a strong influence on Justice Frankfurter. *See* G.E. White, *Justice Oliver Wendell Holmes: Law and the Inner Self*, Oxford, Oxford University Press, 1993, p. 378-380; P.W. Kahn, *Legitimacy and History*, New Haven, Yale University Press, 1992, p. 84. *See also* Powell, 2011, p. 222 (Noting "the role of constitutional doctrine, judicial standards of scrutiny or modes of analysis that the Court creates in order to implement constitutional norms without claiming that the standards or modes of review are themselves identical to those norms".).

21 Thus, rational basis review, which is the default standard, is generally thought to be strongly deferential. *See, e.g., Fitzgerald v. Racing Assoc. of Central Iowa*, 539 U.S. 103, 108 (2003) ("Neither could the Iowa Supreme Court deny that the 1994 legislation, *seen as a whole*, can rationally be understood to do what that court says it seeks to do, namely, advance the racetracks' economic interests. Its grant to the racetracks of authority to operate slot machines should help the racetracks economically to some degree – even if its simultaneous imposition of a tax on slot machine adjusted revenues means that the law provides less help than respondents might like. At least a rational legislator might so believe."); *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1997) ("[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the classification arbitrary or irrational.").

tal actors who have sought to determine the relevance and materiality of specific similarities and dissimilarities in various circumstances.[22]

Just as the law relating to equal protection has become more complicated in the past forty years, so too has the law with respect to substantive due process, which shares a common analytic framework.[23] Overall, some of the additional complexity in this area undoubtedly stems from the Court's specific applications of the three-tiered approach; while formally repeating the tripartite formula, the Court's results sometimes strongly suggest that all Gaul is actually divided into more than three parts.[24] But an equally, if not more, significant part of the complexity is attributable to the Court's outright departures from that analytic framework in the abortion and voting rights contexts, that is, the Court's retreat from the strict scrutiny analysis that it once applied to those areas, and its development of the 'undue burden' standard as something akin to an alternative intermediate scrutiny test in the reproductive rights context.[25] That retreat is no doubt the result of many factors, but prominent among them is a widespread contemporary acceptance of the view that courts must occupy a more modest role

22 On this view, courts must accommodate two competing values: the deference due to the political branches, on the one hand, and faithfulness to the courts' obligation to interpret and enforce the Constitution, on the other. Achieving that balance may be difficult in practice. *See, e.g.*, J. Tussman & J. tenBroek, 'The Equal Protection of the Laws', *California Law Review*, Vol. 37, 1949, p. 366. Indeed, the Court has sometimes applied the rational basis test in a way that suggests that it believes that the primary determination as to rationality is for the Court rather than the legislature. In *F.S. Royster Guano Co. v. Virginia*, 453 U.S. 412, 415-417 (1920), *e.g.*, the Court recited the test and the conclusion that there was no conceivable basis for the distinction at issue. Justice Brandeis dissented, joined by Justice Holmes, noting that they could conceive of a justification for the statutory distinction, which they therefore found 'not illusory'. *Id.*, at p. 418.

23 *See, e.g.*, Chemerinsky, 2015, p. 570.

24 *See supra* notes 9, 14, and 16 and accompanying text.

25 *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (O'Connor, Kennedy, & Souter, JJ.) (plurality opinion). ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.")

in the protection of individual rights than was previously thought to be the case.[26]

The correct answer to many questions is now thought to be simple: let the democratic process work it out. While that means that the courts should generally defer to the choices made by the political branches of government, our understanding of such an imperative is necessarily circumscribed by a recognition that constitutional democracy entails something more than simple majority rule, even when the power of the majority is tempered by the constitutional devices of federalism and separation of powers; constitutional democracy contemplates a system in which majority power is further tempered by the rule of law and provi-

26 Perhaps partially in response to what was deemed by some to be an excessive judicial concern with individual and minority rights during the period of the Warren and Burger Courts, some recent Justices have taken a much broader view of majoritarian rule and a more circumscribed view of the Court's role in protecting individual and minority rights. *See, e.g.*, B.A. Murphy, *Scalia: A Court of One*, New York, Simon & Schuster, 2014, p. 234 (Quoting Justice Scalia on the limited constitutional protection allegedly afforded to minority rights); G. Will, 'Where Scalia Was Wrong', *National Review*, 1 February 2017, http://www.nationalreview.com/article/444488/antonin-scalias-natural-rights-error-neil-gorsuch-supreme-court-nomination (Arguing that Justice Scalia misunderstood the importance of minority rights in the American system of constitutional democracy). Long before he joined the Court, Justice Rehnquist was a stern critic of Warren Court decisions such as *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and he may well have given inaccurate testimony during his confirmation hearings about a pre-decisional memorandum that he drafted for Justice Jackson, for whom he served as a law clerk while the case was pending. The memorandum argued that *Plessy v. Ferguson*, 163 U.S. 537 (1886), which held that racial segregation did not violate the equal protection clause, was correctly decided. At his confirmation hearings, Justice Rehnquist insisted that the memorandum reflected Justice Jackson's views rather than his own. *See* B. Snyder & J.Q. Barrett, 'Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown', *Boston College Law Review*, Vol. 53, p. 632. Among other things, the memorandum asserted that, although in theory "a majority may not deprive a minority of its constitutional right … in the long run it is the majority who will decide what the rights of the minority are." D.M. O'Brien, *Justice Robert H. Jackson's Unpublished Opinion in Brown v. Board*, University of Kansas Press, 2017, p. 73 (Quoting Memorandum). Moreover, the Court has recently begun to discuss in explicit terms the need for maintaining public approval of its work, which may be seen to set some parameters with respect to the Court's vindication of individual and minority rights. In Planned Parenthood of *Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 868 (1992), *e.g.*, the plurality emphasized the Court's need for maintaining popular support and belief in its legitimacy: "It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible." *See* B. Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, Farrar, Strauss, and Giroux, 2009, p. 328-330 (discussing plurality's observations concerning legitimacy in *Casey*).

sions for the protection of minorities.[27] Most important, the principle of deference to the political branches is less weighty when governmental majorities use their lawmaking authority to distort the political process itself in a way that disenfranchises their opponents and perpetuates their hold on power. In other words, deference makes sense but only "so long as the people have their say in the public forum and at the ballot box".[28] Indeed, nothing is more basic to constitutional democracy than the citizen's right to speak in the public forum and to cast a meaningful vote for candidates of his or her choice. As the Court said more than 130 years ago in *Yick Wo v. Hopkins*,[29] "the political franchise of voting" is fundamental because it is "preservative of all rights". Those rights must therefore be protected as zealously as possible in any case, but particularly so when the threat to meaningful political participation comes not in the form of lawless actions by private individuals, but as legislation properly enacted by a majority through punctilious compliance with the forms of law. It is far from clear that current Fourteenth Amendment jurisprudence, complicated though it is, adequately protects the right to meaningful political participation through the electoral process. That is the central concern of this essay.

This article has five parts. First, it discusses the canonical tiered approach to levels of scrutiny and its limitations as an analytical framework. Second, it considers the Court's rejection of strict scrutiny in the reproductive rights area and the Court's adoption of the 'undue burden' test in its place. Third, the article discusses an analogous movement away from strict scrutiny in the area of voting rights. With extreme political polarization[30] and gerrymandered legislatures hav-

27 *See Letter of James Madison to Thomas Jefferson*, October 17, 1788, *in* J. Madison, *Writings*, J. Rakove (Ed.), New York City, The Library of America, 1999, p. 421 ("In our Governments, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government, contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."); W.F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, Baltimore, The Johns Hopkins University Press, 2007, p. 10 ("Although the people's freely chosen representatives should govern, those officials must respect certain substantive limitations on their authority").The United States Constitution leaves the states with "wide leeway when experimenting with the appropriate allocation of legislative power", *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907), and some state constitutions provide for direct democracy in the form of referenda and initiatives, *see, e.g.*, Cal. Const. art. 2, §§ 8 and 9, but the United States Constitution notably does not. Peter Schrag has provided a useful account of California's experience with direct democracy. *See* P. Schrag, *Paradise Lost: California's Experience, America's Future*, New York City, The New Press, 1998 (discussing California's experience with direct democracy).

28 *See* G. Gunther, 'The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection', *Harvard Law Review*, Vol. 86, 1972, p. 44. *See also* B. Sullivan, 'FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"', *Maryland Law Review*, Vol. 72, 2012, p. 1-84 (emphasizing importance of access to government information in constitutional democracy).

29 118 U.S. 356, 370 (1886).

30 *See, e.g., Pew Research Center, Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affects Politics, Compromise and Everyday Life* (June 2014), http://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf.

ing become the norm in the US,[31] legislative majorities are able to enact voting regulations specifically aimed at disadvantaging, in the exercise of the franchise, members of groups they think are unlikely to support them. For a number of reasons, the Court has been unwilling or unable to find a satisfactory solution to this problem, which strikes at the heart of constitutional democracy. Fourth, the article reviews a thoughtful proposal for strengthening the 'undue burden' test in the context of reproductive choice[32] and considers whether a similar methodology might be used to enhance the constitutional protection of voting rights. Finally, a brief summary and conclusion are presented.

B Two Tiers, Three Tiers and the Theoretical Background

The beginning student of US constitutional law soon learns that the key to unlocking many (but not all) of the secrets of contemporary equal protection and substantive due process law is to be found in the three-tiered standard of review model that Justice White described in 1985 in *City of Cleburne v. Cleburne Living Center, Inc*.[33]:

> The Equal Protection Clause ... commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. ... Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged [on this ground]. The general rule is that legislation is presumed to be valid and will be sustained if the classification ... is rationally related to a legitimate state interest. ... When social or economic legislation is at issue, the Equal Protection Clause allows the States

31 *See, e.g.*, A.J. McGann *et al, Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*, Cambridge, Cambridge University Press, 2016, p. 2. ("We now have a remarkable situation. Drawing districts with different population sizes is prohibited by the Constitution. However, achieving the same partisan advantage by cleverly manipulating the shape of the districts apparently is permitted.")

32 *See* E. Freeman, 'Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis', *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 48, 2013, p. 279-323.

33 473 U.S. 432 (1985). In *Cleburne*, the sponsors of a proposed group home for developmentally disabled persons challenged the city's requirement that they seek a special use permit that was not generally required. They argued that mental disability should be considered a 'quasi-suspect classification', and therefore subject to a standard of review more exacting than 'rational basis'. While the Court rejected that argument, it held that the special use permit requirement did not even satisfy the rational basis standard because it appeared to rest only on an irrational prejudice against developmentally disabled persons. *Id*., at p. 446, 450. Ironically, *Cleburne* illustrates the danger of putting too much faith in the canonical three-tiered approach, because, while Justice White accurately summarized the three-tiered approach, the result in the case seemingly cannot be explained in those terms. Instead, the mode of analysis used in the Court's decision appears to be more demanding than the canonical form of rational basis review that the Court purportedly applied.

> wide latitude, … and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.
>
> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. … Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.
>
> Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability … is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." … [S]tatutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. … [O]fficial discriminations resting on [illegitimacy] are also subject to somewhat heightened review. Those restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." …
>
> [On the other hand,] … where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.[34]

One might assume from Justice White's account that this three-tiered mode of analysis has always provided the polestar for equal protection enforcement – and that it has always been followed religiously – but that is not the case. Intermediate scrutiny did not become part of the Court's formal analytic framework until at

34 *Id.*, at p. 439-442. The Court explained that age had not been deemed to be a suspect or quasi-suspect classification because the aged have not experienced a "'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities". *Id.*, at p. 441.

least 1976, when the Court decided *Craig v. Boren*,[35] and, at least as a formal matter, the term "[s]trict scrutiny did not appear in racial discrimination equal protection cases until 1978".[36] Nor, as previously noted, would it be fair to say that the framework has been followed religiously.[37] In any event, as the foregoing excerpt from *Cleburne* suggests, the Court's general approach is informed by an understanding that the central meaning of equal protection is that "all persons similarly circumstanced should be treated alike",[38] and, presumably, that what counts for 'likeness' and 'non-likeness' – or, to put it more precisely, relevant and material similarity and difference – should be amenable to normative justifica-

35 429 U.S. 190 (1976). Earlier, in *Reed v. Reed*, 404 U.S. 71, 76 (1971), the Court had struck down a gender-based classification, purportedly because it failed to satisfy the rational basis test. Also during the 1970s, a plurality of the Court flirted with the idea that gender-based classifications should be evaluated under strict scrutiny, but that view did not command a majority of the Court. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (Brennan, J.) (plurality opinion) ("[C]lassifications based on sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny.") As previously noted, some scholars would attach a later date to the emergence of intermediate scrutiny on the ground that the majority in *Craig* was actually utilizing a more demanding form of rational basis review, rather than articulating a new, intermediate level of scrutiny. *See* K.R. Eyer, 'Constitutional Crossroads and the Canon of Rational Basis Review', *University of California, Davis Law Review*, Vol. 48, 2014, p. 535. In any event, some Justices clearly did not believe that there was a two-tiered system prior to *Craig*. In *San Antonio v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting), *e.g.*, Justice Marshall insisted that a 'principled reading' of the Court's jurisprudence revealed a 'spectrum of standards' and 'variations in the degree of care with which the Court will scrutinize various classifications'. In any event, the Court extended the sweep of intermediate scrutiny review to include classifications based on illegitimacy in *Clark v. Jeter*, 486 U.S. 456, 461-465 (1988).

36 *See* S.A. Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny', *American Journal of Legal History*, Vol. 48, 2006, p. 402 ("In that year, Justice Powell, who was not speaking for the Court, employed strict scrutiny in casting the deciding vote in *Board of Regents of the University of California v. Bakke* [438 U.S. 265 (1978)]."). *But see* R.H. Fallon, 'Strict Judicial Scrutiny', *University of California Law Review*, Vol. 54, 2007, p. 1276 (noting that, in *Bolling v. Sharpe*, 347 U.S. 497 (1954) (the companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), which involved school desegregation in the District of Columbia), the Court "said that '[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions' and thus … are 'constitutionally suspect'".). In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), of course, Justice Black stated that "courts must subject [legal restrictions which curtail the civil rights of a single racial group] to the most rigid scrutiny", and Justice Douglas used the term 'strict scrutiny' in *Skinner v. Oklahoma*, 316 U.S. 353, 541 (1942), but that case did not involve a racial classification.

37 *See supra* notes 17, 18, and 35 and accompanying text.

38 *Cleburne*, 437 U.S. at 439. *See also F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

tion.[39] In that sense, the Court's formulation hearkens back to Aristotle[40] and an interpretive tradition influenced by Aristotle.[41]

But the recognition that similar cases must be treated similarly, and that the differences between cases must be closely evaluated for relevance and materiality, is only half the story. Once one recognizes that the fact of similarity and dissimilarity (and the relevance and materiality of such similarities and dissimilarities) is a matter of judgment, it becomes important to decide whose judgment should matter. In other words, should the judgment that ultimately prevails be that of the political branches of government, which have acted on the basis of their perception and evaluation of the facts, in light of their own policy values and choices, and consistent, presumably, with their duty to uphold the Constitution?[42] Or should the controlling judgment be that of the judges, whose fact-finding abilities are limited (insofar as legislative facts and the real stuff of public policy are con-

39 *See Plyler v. Doe*, 457 U.S. 202, 217 (1982) ("The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill."). *See also* I. Berlin, 'Equality', *in* H. Hardy (Ed.), *Concepts and Categories: Philosophical Essays by Isaiah Berlin*, New York City, Viking Press, 1979, p. 98 ("The goodness of the reasons will depend upon the degree of value or importance attached to the purposes or motives adduced in justifying the exceptions, and these will vary as the moral convictions – the general outlooks – of different individuals or societies vary."). *But cf*. Aristotle, *The Politics of Aristotle*, E. Barker (Ed.), Oxford, Oxford University Press, 1958, p. 131. ("[T]here is … no good reason for basing a claim to the exercise of authority on any and every kind of superiority. Some may be swift and others slow; but this is no reason why the one should have more [political rights], and the other less. It is in athletic contests that the superiority of the swift receives its reward.")

40 *See, e.g.*, Aristotle, *Ethica Nicomachea*, Bk.5, §1131a (W.D. Ross, trans. 1925) ("And the same equality will exist between the persons and between the things concerned; for as the latter – the things concerned – are related, so are the former; if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints – when either equals have and are awarded unequal shares, or unequals equal shares."). *See also* P. Westen, 'The Empty Idea of Equality', *Harvard Law Review*, Vol. 95, 1982, p. 543 (summarizing Aristotle: "[e]quality in morals means this: things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness.")

41 *See, e.g.*, Tussman & tenBroek, 1949, p. 341-381 ("[L]aws may classify. And 'the very idea of classification is that of inequality.' … [T]he Court has neither abandoned the demand for equality nor denied the legislative right to classify. … It has resolved the[se] contradictory demands … by a doctrine of reasonable classification. … The Constitution … does require … that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated. The difficulties concealed in this proposition will [need to be] analyzed.")

42 *See* United States Constitution, Art. VI cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."). Interestingly, some scholars have recently argued that the rational relationship test, by deferring to the people's representatives, does too little to protect the people themselves. *See, e.g.*, R.E. Barnett, 'Why Popular Sovereignty Requires the Due Process of Law to Challenge 'Irrational or Arbitrary' Statutes', *Georgetown Journal of Law and Public Policy*, Vol. 14, 2016, p. 368. ("For the people cannot be presumed to have 'entrusted to the government' the power to irrationally or arbitrarily restrict their liberties.")

cerned), and whose individual policy values and choices are institutionally irrelevant[43] – but who necessarily have the last word on constitutionality in the US system?[44]

As we have seen,[45] given the nature of the US constitutional system, the answer must be that there is – and can be – no simple or categorical answer to that question. It cannot be the case, for example, that the courts should always feel free to substitute their judgment for that of the political branches.[46] But neither can it be the case that the courts should always defer to the political branches. Legislation is normally entitled to a presumption of constitutionality under US law, as Justice White noted in *Cleburne*, but that presumption sometimes can – and should – count for more or less. Sometimes the courts will look more closely at the rationale for official action and sometimes less so. Sometimes the courts will even supply a rationale where the political branches have either failed to do so or have offered a rationale that simply lacks the power to persuade. In the most general terms, the point of the three-tiered approach is to provide some degree of regularity and predictability as to those circumstances in which the courts should scrutinize more or less closely the work of the political branches.

Given the substantial degree of doctrinal fluidity that beginning law students encounter in the introductory constitutional law course (in contrast, perhaps, to some other introductory courses, where the relevant doctrine appears more sta-

43 That is not to say, of course, that judges function like machines in the area of legal interpretation; their views are influenced in one way or another, to one degree or another, by education and experience. *See* B. Sullivan, 'The Power of Imagination: Diversity and the Education of Lawyers and Judges', *University of California, Davis Law Review*, Vol. 51, 2018, p. 1109. Moreover, as Justice Breyer has noted, the opinions of individual Justices "have emphasized different constitutional themes, objectives, or approaches over time." *See* S. Breyer, *Active Liberty: Interpreting our Democratic Constitution*, New York City, Alfred A. Knopf, 2005, p. 9. For his own part, Justice Breyer would give special emphasis to the concept of constitutional liberty, which he takes to mean "not only freedom from government coercion, but also the freedom to participate in the government itself". *Id*., at p. 3. In Justice Breyer's view, the current Court has not paid sufficient attention to the second aspect, namely the individual citizen's right to participate in government. *Id*., at p. 10-11.

44 *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803) (C.J. Marshall). ("It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. … This is of the very essence of judicial duty."). *See also* M.J. Klarman, *How* 'Great Were the "Great" Marshall Court Opinions?', *Virginia Law Review*, Vol. 87, 2001, p. 1113-117 (showing that judicial review was well established before *Marbury*).

45 *See supra* notes 21-24 and accompanying text.

46 The essential constitutional concern with the question 'Who decides?' necessarily precludes the universal application of a *de novo* proportionality test. *See, e.g.*, N. Gertner, 'On Competence, Legitimacy, and Proportionality', *University of Pennsylvania Law Review*, Vol. 160, 2012, p. 1587. ("Proportionality analysis is simply not within the competence of the American judiciary. Worse yet it is not even within their legitimate role.") Such a test would greatly simplify the work of the courts, but it would not satisfy the threshold concern as to legitimacy. That is not to say, of course, that proportionality is irrelevant or unimportant. *See, e.g.*, E.T. Sullivan & R.S. Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions*, Oxford, Oxford University Press, 2009, p. 6 (noting increasing reliance on proportionality review in US law).

ble), students are normally delighted to encounter this easily grasped and seemingly straightforward three-tiered approach. The students' delight may be short-lived, of course, as they not only attempt to apply the approach to concrete cases, but also discover that the test itself may not be as simple, as straightforward or as universally applicable as they were led to believe. In addition, some students will wonder about the origins and legitimacy of the test. Where does it say in the text of the Constitution, for example, that possible violations of equal protection and due process are to be identified and analysed in this way?[47] How does one derive this tiered approach from the seemingly categorical (if also opaque) guarantees set forth in the relevant clauses?[48] In one sense, Justice White answered those questions in the quoted excerpt from *Cleburne*: Section 5 of the Fourteenth Amendment authorizes Congress to enact legislation to enforce the substantive provisions of the Amendment, but those substantive provisions are also self-executing and judicially enforceable.[49] In other words, the Court is responsible for interpreting Section 1, thereby executing its duty "to say what the law is",[50] but Congress and the courts otherwise share responsibility for enforcing the substantive provisions of the Fourteenth Amendment. Both are authorized to formulate

47 *See, e.g., Craig v. Boren*, 429 U.S. 190, 211-212 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.")

48 *See, e.g., National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 626 (1949) (Frankfurter, J., dissenting) ("Great concepts like 'Commerce … among the several States,' 'due process of law,' 'liberty,' 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.")

49 *See, e.g.*, W. E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, Cambridge, Harvard University Press, 1988, p. 55 ("One noteworthy feature of this proposal, from which the Fourteenth Amendment was ultimately derived, was its apparent adoption of the suggestion of Representative Giles W. Hotchkiss … that any new constitutional provision be framed as a self-executing guarantee of rights, and not merely as a grant of power to Congress to legislate for the protection of rights. … [Hotchkiss] wanted to be certain that rights would be enforced by the judiciary even if Congress fell under Democratic control.") Many would argue that certain recent decisions reflect the opposite problem, that is, that Congress may have become more solicitous than the Court with respect to the values embodied in the Civil War Amendments. *See, e.g., Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (striking down the central part of the Voting Rights Act of 1965, which had been re-enacted in 2006 by votes of 98-0 in the Senate and 390-33 in the House of Representatives and signed into law by President George W. Bush).

50 *Marbury v. Madison*, 5 U.S. (1 Cranch) at p. 177.

appropriate rules and techniques for doing so, and conflicts may therefore arise.[51] In another sense, of course, the answer to the inquiry about origins is more complicated. One could begin by tracing the modern doctrine from Justice Stone's famous footnote four in *United States v. Carolene Products Co.*,[52] and the Court's subsequent use of the term 'strict scrutiny' in *Skinner v. Oklahoma*,[53] but the route from those sources to the Court's present articulation of the three-tiered approach is far from straightforward.[54] And the issue is further complicated, of course, by a divergence of views concerning the appropriate constitutional relationships between the courts and the political branches, on the one hand, and the national and state governments, on the other hand.

51 *See, e.g.*, R.B. Siegel & R.C. Post, 'Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act', *Yale Law Journal*, Vol. 112, 2003, p. 1945 ("Because Section 5 of the Fourteenth Amendment vests in Congress 'power to enforce, by appropriate legislation, the provisions of this article,' the great rights contained in Section 1 … are enforced by both Congress and the Court. How to conceive of the relationship between the legislative power established in Section 5 and the judicial power authorized by Section 1 is one of the deep puzzles of American constitutional law.") *See also* W.D. Araiza, *Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law*, New York, New York University Press, 2015, p. 17 (The "core insight [of *City of Boerne v. Flores*, 521 U.S. 507 (1997)] – that enforcement legislation must exhibit some relationship to Court-stated Fourteenth Amendment law – appears here to stay. A court's scrutiny of that relationship may well be deferential. … Similarly, the Court may have to adjust its understanding of what that underlying Fourteenth Amendment law actually says, and thus what constitutes the target for congruence and proportionality review."); J.T. Noonan, *Narrowing the Nation's Power: The Supreme Court Sides with the States*, Berkeley, University of California Press, 2002, p. 6 (The congruence and proportionality test "means that the federal judiciary, from the Supreme Court itself down to the federal district court in Guam, may, and indeed must, treat Congress the way courts treat an administrative agency, whose work will be set aside on appeal if the court finds the record made by the agency not substantial enough to justify the agency's rulings".)

52 304 U.S. 144 (1938). In *Carolene Products*, the Court applied an extremely deferential standard of review to an early statute pertaining to the sale in interstate commerce of 'filled milk', that is, milk that was produced through the extraction of its natural cream content and the substitution of another kind of fat or oil for the natural component. In footnote 4, Justice Stone indicated that a more muscular form of constitutional review might sometimes be warranted: "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments. … It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny. … Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious … or national, … or racial minorities [or] whether prejudice against discrete and insular minorities may be a special condition … [calling] for a … more searching judicial inquiry." *Id.*, at p. 152, n. 4.

53 316 U.S. 353 (1942). In his opinion for the Court, Justice Douglas used the term 'strict scrutiny', *Id.*, at p. 541, but recognized that the classification (which allowed for the sterilization of thrice-convicted chicken thieves, but not for embezzlers, regardless of the degree of recidivism) was not supported by any rational basis. *Id.*, at p. 538-539. Chief Justice Stone and Justice Jackson concurred in the result but thought that the case should have been decided under the due process clause, whereas Justice Douglas based his opinion on the equal protection clause. *See id.*, at p. 543-547.

54 *See, e.g.*, Fallon, 2007, p. 1267-1337; Siegel, 2006, p. 355-407.

A better question might be why the three-tiered approach takes the precise form that it does. As previously noted, the beginning constitutional law student also learns that the ultimate purpose of this framework is, as Justice White signalled in the cited passage from *Cleburne*, to articulate a standard approach to judicial review for constitutionality of legislation and other forms of government action that is responsive to a variety of sometimes competing concerns: the need to protect constitutional rights; the desirability of holding government accountable to the rule of law; the need to give effect to the respective functions and roles of the judiciary and the political branches in the constitutional system;[55] and the need to avoid unnecessary friction between the state and national components of a federal system.[56] The problem presented by legislation and regulation is particularly acute because they inevitably classify, whether explicitly or not, and the kind of line drawing involved in the crafting of legislation and regulations involves questions of judgment and policy generally thought to be matters for the political branches. At the same time, of course, those classifications touch on constitutional rights and structures.

Students also learn that a court's threshold determination as to which of the three tests should be applied in the circumstances of a particular case will often determine the outcome. A plaintiff might well prevail, for example, if the court decides that the government's action is subject to strict scrutiny, while the same

55 See, *e.g.*, Thayer, 1893, p. 144 (1893) (The Court "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one – so clear that it is not open to rational question. … This rule recognizes that, having regard to the great, complex, unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice or judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional".) *Compare Lochner v. New York*, 198 U.S. 45, 76 (1905) (J. Holmes, dissenting). ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. … A reasonable man might think [the statute at issue] a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.")

56 The Court explained the deference due to state legislation in *Skinner v. Oklahoma*, 316 U.S. 535 (1942): "[i]t was stated in *Buck v. Bell* [274 U.S. 200, 208 (1927)] that the claim that state legislation violates the equal protection clause … is 'the usual last resort of constitutional arguments.' … [T]he States … need not provide 'abstract symmetry'. … They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. … 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.' … [And] the equal protection clause does not prevent the legislature from recognizing 'degrees of evil' … '[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.'" *Id.*, at p. 539-540. *See* E. Chemerinsky, *The Case Against the Supreme Court*, City of Westminster, Penguin Publishing, 2014, p. 1-5 (discussing the facts of *Buck v. Bell*); J.M. Wisdom, 'The Frictionmaking, Exacerbating Political Role of Federal Courts', *Southwestern Law Journal*, Vol. 21, 1967, p. 411-428 (discussing role of federal courts in protecting civil rights plaintiffs against unconstitutional actions by state officials).

plaintiff would face certain defeat on the same record if the rational basis standard were to be applied. Such is the power of the tests and the stark differences among them. Thus, rational basis review, the most permissive level of scrutiny, has often been disparaged as 'a rubber stamp'[57] for government action, while strict scrutiny, the most exacting level of review, has famously been characterized as "strict in theory and fatal in fact".[58]

One commentator has explained that "[c]ourts consider rational basis review the default standard. To uphold state action under rational basis, a court must only determine that the challenged legislation is reasonably related to a legitimate state interest. … Typically, courts uphold legislation if any conceivable circumstance exists to justify it, and concoct statutory rationales if the state's proffered interest does not pass constitutional muster. Rational basis applies to equal protection claims that do not implicate gender, suspect classifications or fundamental rights; it also applies in the due process context where no fundamental rights are implicated."[59] It bears emphasis that courts are not limited under the rational basis test to evaluating the reasons the legislature gave for enacting the legislation. Far from rewarding the thoroughness or thoughtfulness of the legislature, the rational basis standard rewards the creativity of litigators for the state who are called upon to generate some plausible post hoc justification for the government's action. Moreover, if even the state's litigators cannot 'concoct' a plausible post hoc justification, the courts may concoct one for themselves. In short, "[r]ational basis review places the burden of persuasion on the party challenging a law, *who must disprove 'every conceivable basis which might support it'*."[60]

Scholars and courts often group together intermediate and strict scrutiny under the heading of 'heightened scrutiny',[61] but they do not operate in the same way. As Justice White noted in *Cleburne*, the intermediate scrutiny standard is somewhat more demanding, with respect to both establishing the degree of importance of the state interest thought to be furthered by the challenged classification and the showing of a strong connection between the classification and the end to be achieved. The Supreme Court has relied on intermediate scrutiny in

57 *See, e.g.*, Freeman, 2013, p. 282. *But see* K. R. Eyer, 'Constitutional Crossroads and the Canon of Rational Basis Review', *University of California, Davis Law Review*, Vol. 48, 2014, p. 535-36 (arguing that the current view of rational basis review as 'toothless' is in part due to academic amnesia and the omission from the canon of earlier cases in which the courts employed a more muscular form of rationality review).

58 *See* Gunther, 1972, p. 8. *But see Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

59 *See* Freeman, 2013, p. 282-283.

60 *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added).

61 *See, e.g.*, K. Yoshino, 'The New Equal Protection', *Harvard Law Review*, Vol. 124, 2011, p. 756 (The Court's framework of tiered scrutiny "distinguishes between classifications that draw 'heightened scrutiny' and classifications that draw 'rational basis review.'"). As Professor Yoshino notes, the Court has not added to the list of characteristics worthy of heightened review since 1977. *Id.*, at p. 756. "The claim that the canon has closed on heightened scrutiny classifications must be tempered by acknowledging the Court's use of a more aggressive form of rational basis review," which academic commentators have referred to as 'rational basis with bite'. *Id.*, at p. 759.

cases involving classifications based on gender and illegitimacy,[62] holding that such classifications will fail "unless [they are] substantially related to a sufficiently important governmental interest".[63] But the Court has been reluctant to extend this more searching standard of review to additional kinds of classifications.[64]

Strict scrutiny is the most demanding of the three levels of review. It has been applied to certain so-called 'fundamental rights', such as the right to vote[65] and to 'suspect classifications', such as race, national origin and religion, which are thought to warrant a higher degree of judicial interrogation.[66] When a classification warrants strict scrutiny, the government bears a particularly heavy burden. As the Court said recently in setting aside certain race-conscious pupil assignment plans in *Parents Involved in Seattle Schools v. Seattle School District No. 1*,[67]

62 *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to those objectives.").

63 *City of Cleburne v. Cleburne Living Center, Inc.*, 473 US 432, 441 (1985). Commentators have identified three tests for determining whether a classification merits intermediate scrutiny review: "[f]irst, is the classifying trait, like race, an immutable personal characteristic – an accident of birth beyond a person's control or responsibility – rendering it presumptively unjust for the government to use the trait as a basis for allocating rewards or penalties? Second, is the trait, like race, broadly irrelevant to legitimate generalization, rendering discrimination on this basis not only unfair, but also indefensible in a wide range of governmental settings? And third, is the disadvantaged group, like African-Americans and other racial minorities, a group that lacks political power and therefore warrants special judicial solicitude, that is, special protection from the ordinary operation of the political process?" *See* D.O. Conkle, 'Evolving Values, Animus, and Same-Sex Marriage', *Indiana Law Journal*, Vol. 89, 2014, p. 34.

64 For example, some commentators have argued that sexual orientation should be subject to intermediate scrutiny as well. *See, e.g.*, S.L. Sobel, 'When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications', *Cornell Journal of Law and Public Policy*, Vol. 24, 2015, p. 493-531; K. LaCour, 'License to Discriminate: How a Washington Florist is Making the Case for Applying Intermediate Scrutiny to Sexual Orientation', *Seattle University Law Review*, Vol. 38, 2014, p. 122-124. Some lower courts have also applied an intermediate standard of review in sexual orientation cases, but the Supreme Court has chosen to invalidate certain classifications based on sexual orientation, without specifying the appropriate level of scrutiny. *See, e.g., Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (heightened scrutiny required), *aff'd on other grounds*, 133 S. Ct. 2675 (2013) (discrimination based on sexual orientation held unconstitutional, without specifying the appropriate level of scrutiny); *Lawrence v. Texas*, 539 U.S. 558 (2003) (same). *See also Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional provision that withdrew previously granted protection against discrimination based on sexual orientation because it was motivated by a bare desire to harm a politically unpopular group).

65 *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667, 670 (1966) ("Long ago, in *Yick Wo v. Hopkins*, … the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of all rights.' … We have long been mindful that, where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

66 *See, e.g., Adarand Construction, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that all racial classifications, whether benign or not, are subject to strict scrutiny); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (indicating that classifications based on illegitimacy are similarly subject to strict scrutiny).

67 551 U.S. 701 (2007).

> It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. ... As the Court recently reaffirmed, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." ... In order to satisfy this searching standard of review, the [defendants] must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest.[68]

As with intermediate scrutiny, the Court has declined in recent years to extend strict scrutiny review to additional rights or classifications.

But there are complications. Once students have mastered the rudiments of the canonical approach, they will be asked to look a bit more carefully at the Court's application of the three levels of scrutiny to see whether the Court's jurisprudence is really consistent with the three-tiered typology that the Court often treats as if it were exhaustive.

The Court's decision in *Cleburne* is a suitable starting point. In that case, the Court expressly rejected the applicability of intermediate scrutiny to classifications affecting the rights of mentally disabled persons, holding that such classifications should simply be reviewed under the deferential rational basis standard. But the standard of review actually applied by the *Cleburne* Court seems far removed from the exceptionally deferential, textbook version of rational basis review. The Court's mode of analysis in *Cleburne* is indeed more probing than

68 *Id*., at p. 720. In *Parents Involved*, the Court struck down certain school assignment plans that sought to achieve racial balance in the public schools. The Court applied strict scrutiny and ultimately found the plans to be unconstitutional, because they took race into account. In a controversial plurality opinion, Chief Justice Roberts suggested that this result was dictated by the Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), which he took to hold that any consideration of race in school assignments was subject to strict scrutiny and ordinarily unconstitutional. *Parents Involved*, 551 U.S. at p. 746. Others have thought *Brown* to be concerned with the problem of racial classification in aid of prejudice and discrimination or subordination, rather than with the mere existence of racial classification. *See e.g.* R.B. Siegel, 'Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown', *Harvard Law Review*, Vol. 117, 2004, p. 1470-1547. In *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), Chief Justice Burger discussed the rationale for applying strict scrutiny in terms more consistent with Professor Siegel's anti-subordination theory: "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns." In *Palmore*, the Court set aside a state court judgment that awarded custody to a child's father simply because the child's mother had married an African-American after the failure of the relationship that produced the child. The state courts had reasoned that being part of a mixed-race household was not 'in the best interests' of the child. *Id*., at p. 433. The Supreme Court recognized that the child might experience prejudice because of his family situation but concluded: "[t]he question ... is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not." *Id*., at p. 433.

rational basis and has come to exemplify a standard of review commonly known as 'rational basis with bite'.[69]

Some uncertainty may also exist concerning the contours of the intermediate scrutiny standard of review. In her opinion for the Court in *Virginia v. United States*,[70] for example, Justice Ginsburg summarized "the Court's current directions for [evaluating] cases of official classification based on gender", by stating that

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. … The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" … The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[71]

As Justice Ginsburg notes in the foregoing passage, the Court has sometimes articulated the test relevant to sex or gender discrimination as one that places on the State the burden of proffering an "exceedingly persuasive" justification for the classification,[72] but the Court has otherwise described the state's burden in such cases in the more traditional terms associated with intermediate scrutiny, namely, the obligation to demonstrate that a discriminatory classification is 'substantially related' to the achievement of 'important governmental objectives'. Justice Ginsburg does not distinguish between the two tests and seems to treat them as substantially the same. In his separate concurrence, however, Chief Justice Rehnquist took issue with Justice Ginsburg's reliance on the "exceedingly

69 The phenomenon seems to have been identified for the first time by Gerald Gunther in 1972. *See* Gunther, 1972, p. 1-306. Professor Gunther noted that the Court sometimes "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard". *Id*., at p. 17-18. *See also* R. Holoszyc-Pimental, 'Reconciling Rational Basis Review: When Does Rational Basis Bite?', *New York University Law Review*, Vol. 90, 2015, p. 2071-2117 (tracing development of jurisprudence); J.B. Smith, 'The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation', *Fordham Law Review*, Vol. 73, 2005, p. 2769-2814 (advocating that Court should acknowledge its use of a more searching version of rational basis review in cases involving discrimination based on sexual orientation); R.C. Farrell, 'Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans', *Indiana Law Review*, Vol. 32, 1999, p. 370 (tracing development of jurisprudence); G. L. Pettinga, 'Rational Basis with Bite: Intermediate Scrutiny by Any Other Name', *Indiana Law Journal*, Vol. 62, 1987, p. 779-803 (tracing development of jurisprudence).

70 518 U.S. 515 (1996).

71 *Id*., at p. 532-533.

72 *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127, 136-137 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982): *Kirchberg v. Feenstra*, 450 U.S. p. 460-461 (1981); *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

persuasive justification" formulation. The Chief Justice wrote, "[i]t is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test."[73] He continued: "[w]hile terms like 'important governmental objective' and 'substantially related' are hardly models of precision, they have more content and specificity than does the phrase 'exceedingly persuasive justification.' … To avoid introducing potential confusion, I would have adhered more closely to our traditional … standard that a gender-based classification 'must bear a close and substantial relationship to important governmental objectives.'"[74] It is unclear, of course, whether Justice Ginsburg was attempting to state a more demanding formulation of the state's burden – as the Chief Justice seems to have assumed – or was simply stating the test as she thought the Court had developed.

Finally, the Court has seriously split in recent years with respect to the proper application of strict scrutiny. In *Fisher v. University of Texas*,[75] which upheld the university's affirmative action programme against the claim that it constituted impermissible race-based discrimination, the dissenting Justices did not simply disagree about the outcome, but viewed it as profoundly incompatible with any competent application of the strict scrutiny standard. Justice Thomas, for example, observed that "[t]he Court's decision … is irreconcilable with strict scrutiny, rests on pernicious assumptions about race, and departs from many of our precedents."[76] Similarly, Justice Alito observed that

> UT's race-conscious admissions program cannot satisfy strict scrutiny. UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest. By accepting UT's rationales as sufficient to meet its burden, the majority licenses UT's perverse assumptions about different groups of minority students – the precise assumptions strict scrutiny is supposed to stamp out.[77]

To underscore the point, Justice Alito suggested that the majority's application of strict scrutiny was unfaithful to one of its most basic aspects, that is, the principle that the burden of proof rests with the state: "[t]ellingly, the Court frames its analysis as if petitioner bears the burden of proof. … But it is not the petitioner's burden to show that the consideration of race is unconstitutional. To the extent the record is inadequate, the responsibility lies with UT."[78] Justice Alito continued: "[f]or '[w]hen a court subjects governmental action to strict scrutiny, it cannot construe ambiguities in favor of the State,' … particularly where, as here, the

73 *United States v. Virginia*, 518 U.S. 559 (Rehnquist, C.J., concurring in judgment).
74 *Id*., at p. 559.
75 136 S. Ct. 2198 (2016).
76 *Id*., at p. 2215 (Thomas, J., dissenting).
77 *Id*., at p. 2220 (Alito, J., dissenting).
78 *Id*., at p. 2238.

summary judgment posture obligates the Court to view the facts in the light most favorable to petitioner".[79]

Whether Justices Alito and Thomas are correct in perceiving a weakening of the strict scrutiny standard remains to be seen. What seems clear, however, is that the Court may be divided with respect to the level of specificity that is necessary to satisfy the strict scrutiny standard, at least in some circumstances, such as cases of "benign" racial "discrimination" involving access to higher education. If that is the case, the Court certainly has not explained it in those terms and is unlikely to do so in light of prior jurisprudence. On the other hand, the prior jurisprudence would suggest that the holding in *Fisher* is a fragile one and might amount to little more than "a restricted railway ticket, good for this day and train only",[80] to use Justice Owen Roberts's memorable phrase.

On closer inspection, therefore, the three-tiered approach to review appears less tidy and straightforward than it did at first blush. But the 'undue burden' standard – and the displacement of strict scrutiny – complicates matters even more.

C From Strict Scrutiny to Undue Burden: The Right to Choose

In 1973, the Supreme Court decided *Roe v. Wade*,[81] in which the Court held that a woman's right to choose whether to continue a pregnancy to term was a fundamental right protected by the Constitution.[82] As with other fundamental rights, however, the Court recognized that the right to choose an abortion was not absolute and that the scope of the right was subject to adjustment in light of other important governmental interests. For example, "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is per-

79 *Id*., Justice Alito continued, noting that, "[e]ven though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT's position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable – and remarkably wrong." *Id*., at p. 2243.

80 *See Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

81 410 U.S. 113 (1973).

82 *Id*., at p. 153-155. Justice Blackmun summarized the grounds on which the constitutionality of the Texas statutes was challenged: "[t]he principal thrust of appellant's attack ... is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Id*., at p.460 (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. at p. 486 (Goldberg, J., concurring)." *Roe*, 410 U.S. at p. 129. The argument, based on the existence of a liberty interest embodied in the Fourteenth Amendment, properly finds its source in Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). As Justice Souter later observed in *Washington v. Glucksberg*, 521 U.S. 702, 752, 756 n.2 (1997) (Souter, J., concurring in judgment), the Supreme Court's modern substantive due process jurisprudence is uniquely indebted to Justice Harlan's dissenting opinion in *Poe*.

formed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise."[83] But the Court further recognized that the state also has another legitimate interest: "as long as … potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone."[84] Nonetheless, because it understood reproductive choice to be a fundamental right, the *Roe* Court held that strict scrutiny was the appropriate standard for reviewing any state-imposed limitations. Such limitations "may [therefore] be justified only by a compelling state interest and … must be narrowly drawn to express only the legitimate state interests at stake".[85] The Court then articulated its now-famous trimester-based approach, whereby it divided pregnancy into three trimesters and stated that the balance between the interests of the woman and the state should be calibrated differently in each of the three trimesters.[86] The Court reasoned:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact … that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.
>
> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his

83 *Roe*, 410 U.S. at p. 150.

84 *Id*., Although the Court recognized the state's interest in protecting 'prenatal life', the Court rejected the view that a fetus was a person within the meaning of the Fourteenth Amendment. *Id*., at p. 157-158. That remains the case today.

85 *Id*., at p. 155.

86 *Id*., at p. 162-166. The Court summarized its approach: "(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id*., at p. 164-165.

> medical judgment, the patient's pregnancy should be terminated.... [T]he judgment may be effectuated by an abortion free of interference by the State.
>
> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[87]

Although only two Justices dissented from the Court's decision in *Roe*,[88] several filed separate concurring opinions.[89] As time went by, the decision became a lightning rod and was probably as controversial, both within the legal community and among the general public, as any Supreme Court decision since *Brown v. Board of Education*[90] or *Engel v. Vitale*.[91]

The Court revisited the subject almost ten years later in *City of Akron v. Akron Center for Reproductive Health*.[92] By then, Justice Stevens had taken Justice Douglas's seat on the Court, and Justice O'Connor had replaced Justice Stewart. In an opinion by Justice Powell, the Court invalidated certain provisions of the Akron ordinance, but specifically reaffirmed *Roe* and its trimester scheme.[93] The case is significant, however, because of Justice O'Connor's dissent, in which she argued that the Court's test was unworkable and should be replaced with an 'undue burden' test. In an opinion joined by Justices Rehnquist and White, Justice O'Connor wrote: "Our recent cases indicate that a regulation imposed on 'a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion.' ...

87 *Id.*, at p. 163-164.

88 Justices Rehnquist and White both dissented, believing that the issues in *Roe* should be left to the legislative process. *Id.*, at p. 221 (White, J., dissenting); *id.*, at p. 223 (Rehnquist, J., dissenting).

89 *Id.*, at p. 208 (Burger, C.J., concurring); *id.*, at p. 217 (Douglas, J., concurring); *id.*, at p. 167 (Stewart, J., concurring).

90 347 U.S. 483 (1954). *See, e.g.*, M. Ziegler, 'Beyond Backlash: Legal History, Polarization, and Roe v. Wade', *Washington and Lee Law Review*, Vol. 71, 2014, p. 969-1021.

91 370 U.S. 421 (1962). In *Engel*, the Court held that New York school officials violated the Establishment Clause by requiring students to recite a government-authored prayer at the beginning of the school day, which had been a long-standing tradition, in one form or another, throughout the United States.

92 462 U.S. 416 (1982).

93 *Id.*, at p. 420. In a challenge to portions of Akron's ordinances regulating the conduct of abortions, the Court "affirm[ed] the judgment of the Court of Appeals invalidating those sections ... that deal with parental consent, informed consent, a 24-hour waiting period, and the disposal of fetal remains [and reversed that] portion of the judgment [that] sustain[ed] Akron's requirement that all second trimester abortions be performed in a hospital". *Id.*, at p. 452. According to Justice Powell, the Akron ordinances were inconsistent with the Court's understanding in *Roe* that "[f]rom approximately the end of the first trimester of pregnancy, the State 'may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health'" and that, even in the second trimester, the regulation must be consistent with "accepted medical practice" and "legitimately related to the objective the State seeks to accomplish". *Id.*, at p. 430-431.

In my view, this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved. If the particular regulation does not 'unduly burde[n]' the fundamental right, … then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose."[94]

Three years later, when the Court invalidated several portions of a Pennsylvania abortion law in *Thornburgh v. American College of Obstetricians and Gynecologists*,[95] Justice O'Connor once more dissented and again invoked the notion of 'undue burden', which she now defined as an "absolute obstacle or severe limitation" on the right:

> The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist "throughout pregnancy." … Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an "undue burden" on the abortion decision. … An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may inhibit' abortions to some degree." … And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," … the possibility remains that the statute will withstand the stricter scrutiny.[96]

94 *Id*., at p. 453. She also argued that the test was inconsistent with the Court's more general fundamental rights jurisprudence. *See id*., at p. 452-453.

95 476 U.S. 747 (1986). In *Thornburgh*, the Court, speaking through Justice Blackmun, specifically reaffirmed *Roe* and invalidated several provisions of a Pennsylvania abortion law. *Id*., at p. 759 ("The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies. Appellants claim that the statutory provisions before us today further legitimate compelling interests of the Commonwealth. Close analysis of those provisions, however, shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.") Justice Stevens filed an important concurrence, in which he responded to several points made by Justice White's dissent. Chief Justice Burger, Justice Rehnquist and Justice O'Connor also filed dissenting opinions. Justice Rehnquist joined in both Justice White's and Justice O'Connor's dissents.

96 *Id*., at p. 828. Justice O'Connor continued: "[t]hese principles for evaluating state regulation of abortion were not newly minted in my dissenting opinion in *Akron*. Apart from *Roe's* outmoded trimester framework, the 'unduly burdensome' standard had been articulated and applied with fair consistency by this Court in cases such as *Harris v. McRae*, 448 U.S. 297, 314 (1980), *Maher v. Roe*, 432 U.S. 464, 473 (1977), *Beal v. Doe*, 432 U.S. 438, 446 (1977), and *Bellotti v. Baird*, 428 U.S. 132, 147 (1976). In *Akron* and *Ashcroft*, the Court, in my view, distorted and misapplied this standard, *see Akron*, 462 U.S. at p. 452-453 (O'Connor, J., dissenting), but made no clean break with precedent, and indeed 'follow[ed] this approach' in assessing some of the regulations before it in those cases. *Id*., at p. 463 (O'Connor, J., dissenting)." *Thornburgh*, 476 U.S. at p. 828-829.

When the Court took up *Webster v. Reproductive Health Services*[97] three years later, Justices Scalia and Kennedy had joined the Court, and Justice Rehnquist had become Chief Justice. In *Webster*, the state specifically asked the Court to overrule *Roe*, and many thought that would happen. The Court declined to do so, however, because a majority of the Justices did not believe that the case presented an appropriate occasion for reconsidering *Roe*.[98] Justice O'Connor observed in a critical concurring opinion that there was no need to accept the "invitation to reexamine the constitutional validity of *Roe*" because the challenged "viability testing requirements [did not] conflict with any of the Court's past decisions concerning state regulation of abortion".[99] But she also reconfirmed the vulnerability of *Roe*, saying, "there will be time enough to examine *Roe* [when the issue is properly presented]. And to do so carefully".[100] Significantly, Justice O'Connor once again invoked the 'undue burden' test:

> I dissented from the Court's opinion in *Akron* because it was my view that, even apart from *Roe*'s trimester framework, … the *Akron* majority had distorted and misapplied its own standard for evaluating state regulation of abortion which the Court had applied with fair consistency in the past: that, previability, "a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion."
>
> It is clear to me that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision.[101]

97 492 U.S. 490 (1989).

98 Chief Justice Rehnquist, in a plurality opinion joined by Justices White and Kennedy, strongly criticized the holding in *Roe*: "We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' … [T]he rigid *Roe* [trimester] framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework – trimesters and viability – are not found in the text of the Constitution, or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. … [T]he trimester framework has left this Court to serve as the country's '*ex officio* medical board.'" *Id*., at p. 518-19. He also faulted the line drawn in *Roe* between the state's pre-viability and viability interests. *Id*., at p. 519. But the testing requirement at issue was "reasonably designed to ensure that abortions are not performed where the fetus is viable – an end which all concede is legitimate – and … sufficient to sustain its constitutionality". *Id*., at p. 520. Writing separately, Justice Scalia also thought that *Roe* should be explicitly overruled. *Id*., at p. 532. Justice Blackmun, Justice Brennan and Justice Marshall dissented. Justice Blackmun saw the writing on the wall: "[f]or today, at least, the law of abortion stands undisturbed. … But the signs are … very ominous, and a chill wind blows." *Id*., at p. 557.

99 *Id*., at p. 525.

100 *Id*., at p. 526.

101 *Id*., at p. 529-530.

The most significant post-*Roe* ruling came down in 1992, when the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[102] In a highly unusual move, three Justices – Justices O'Connor, Kennedy, and Souter – signed a joint, plurality opinion.[103] They emphasized the critical importance of precedent in constitutional law, the link between stability in the law and public confidence in the Court, and the narrow circumstances in which precedents might properly be set aside. The plurality found that those circumstances were not present here.[104] Although the plurality emphasized the need to follow *Roe*, they also sought to distil its 'essential holding' from its 'non-essential' aspects, and to give effect only to the former.[105] The plurality described *Roe*'s 'essential holding' as follows:

> *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to

102 505 U.S. 833 (1992). In its petition for Supreme Court review, Planned Parenthood framed the question presented as "Whether the Supreme Court overruled *Roe v. Wade*, holding that a woman's right to choose abortion is a fundamental right protected by the United States Constitution?" *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Petition for A Writ of Certiorari at i (No.91-744). As Jeffrey Toobin has pointed out, the question was extremely provocative, essentially suggesting that the Court might have decided that *Roe* was no longer binding precedent, without being forthright about it. *See* J. Toobin, *The Nine: Inside the Secret World of the United States Supreme Court*, New York, Anchor, 2007, p. 49. The United States took the position that *Roe* should be overruled. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992), Brief for the United States as Amicus Curiae (No. 91-744).

103 *Id*., at p. 843. Justices Blackmun and Stevens each filed opinions (*see id*., at p. 911 Stevens, J., concurring in part and dissenting in part; *id*., at p. 922 Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), as did Chief Justice Rehnquist (speaking for himself and Justices White, Scalia and Thomas) and Justice Scalia (speaking for himself, Chief Justice Rehnquist and Justices White and Thomas). *See id*., at p. 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id*., at p. 979 (Scalia, J., concurring in the judgment in part and dissenting in part).

104 *Id*., at p. 854-69. Among other things, the plurality found that scientific advances had made the *Roe* Court's trimester scheme obsolete and that the analytic framework should be centred on viability. *Id*., at p. 860, 870. The trimester scheme also was seen to "undervalue […] the potential life within the woman". *Id*., at p. 875. In any event, the plurality "reject[ed] the trimester framework, which we do not consider to be part of the essential holding of Roe". *Id*., at p. 873.

105 *Id*., at p. 846. The plurality wrote that "[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today." *Id*., at p. 869. Chief Justice Rehnquist mocked the plurality's "newly minted variation on *stare decisis*", *id*., at p. 944 (Rehnquist, C.J., concurring in the judgment and dissenting in part) and catalogued all of the plurality's disagreements with *Roe*. *Id*., at p. 953-954. Most significantly, "*Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to 'strict scrutiny' and would be justified only in the light of 'compelling state interests.' The joint opinion rejects that view." *Id*., at p. 954.

> restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.[106]

Summing up, the plurality stated its understanding of the central meaning of *Roe*: "it is a constitutional right of the woman to have *some* freedom to terminate her pregnancy."[107] The plurality added: "[t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."[108] The plurality further noted that,

> That portion of the decision in *Roe* [emphasizing the state's 'important and legitimate interest in potential life'] has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. … Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.[109]

More specifically, the plurality observed that the state may regulate (but not prohibit) abortion before viability, but that it can prohibit abortions once viability has been reached. Significantly, the plurality compared the law relating to abortion with that concerning the right to vote:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement on

106 *Id.*, at p. 846.

107 *Id.*, at p. 869. In a somewhat strange turn of phrase, the plurality then noted that "the basic decision in *Roe* was based on a constitutional analysis which we *cannot* now repudiate". *Id.* (emphasis added). In the same vein, the plurality observed that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and component of liberty that we *cannot* renounce." *Id.*, at p. 871 (emphasis added). Chief Justice Rehnquist construed these expressions, among others, as evidence that the plurality lacked enthusiasm for defending the merits of *Roe*. *See id.*, at p. 954 (the plurality "cannot bring itself to say that *Roe* was correct as an original matter"). But that point may understate the significance of the plurality's insistence on what it took to be the 'most central principle' of the case.

108 *Id.*, at p. 871.

109 *Id.*

> the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.[110]

Analogizing the right to choose an abortion to the right to vote, the plurality concluded that, contrary to *Roe*, the woman's right to choose was not absolute at any stage of her pregnancy. The plurality noted that, "[b]efore viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy".[111] The plurality further noted that "[t]he very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue".[112] Thus, the plurality concluded, "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty".[113]

As we have seen, Justice O'Connor had made reference to the 'undue burden' standard in separate opinions in earlier cases, but the phrase would now be defined in a somewhat different way. In *Thornburgh*, Justice O'Connor had said that "[a]n undue burden will generally be found 'in situations involving absolute obstacles or severe limitations on the abortion decision,' not wherever a state regulation 'may inhibit' abortions to some degree".[114] In *Casey*, by contrast, the plurality stated that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus".[115] The plurality also specifically held that "measures designed to advance [the State's] interest [in ensuring that the woman's choice is properly informed] will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion", and the measures do not unduly burden "her right of choice".[116] The plurality also recognized the state's interest in promulgating appropriate medical regulations but stated that "unnecessary" regulations that have the "purpose or effect of presenting a substantial obstacle to a woman seeking an abortion [would constitute] an undue burden on the right".[117] Moreover, while "a State may not prohibit any woman from making the ultimate decision to

110 *Id*., at p. 873-874.
111 *Id*., at p. 876.
112 *Id*.
113 *Id*.
114 *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. at p. 828 (O'Connor, J., dissenting). In addition, the plurality took up Justice O'Connor's suggestion in *City of Akron* that "this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. at p. 453 (O'Connor, J., dissenting).
115 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at p. 877.
116 *Id*., at p. 878.
117 *Id*.

terminate her pregnancy before viability", the state may, subsequent to viability, "regulate, and even proscribe, abortion except where it is necessary … for the preservation of the life or health of the mother'".[118] Finally, the plurality explained that, in determining whether an obstacle is an undue burden, the "proper focus … is the group for whom the law is a restriction, not the group for whom the law is irrelevant", because the validity of legislation is "measured … by its impact on those whose conduct it affects".[119]

Justice Stevens, who concurred and dissented in part, observed that "[c]ontrary to the suggestion of the joint opinion, … it is not a 'contradiction' to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests, such as maternal health, may). The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty. It is appropriate, therefore, to consider more carefully the nature of the interests at stake".[120] Justice Blackmun (the author of *Roe*) also concurred and dissented in part. He fundamentally disagreed with the standard of review adopted by the plurality: "[t]oday, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected to the strictest of judicial scrutiny."[121]

Chief Justice Rehnquist and Justice Scalia each wrote an opinion concurring in part and dissenting in part; both also joined in the other's opinion, and Justices White and Thomas also joined both opinions.[122] The Chief Justice thought that *Roe* was wrongly decided,[123] but that the case also was distinguishable because it involved a *prohibition* of abortion, whereas *Casey* involved only its *regulation*.[124] Rejecting the plurality's 'undue burden' standard as "an unjustified constitutional compromise, one which leaves the Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do

118 *Id.*, at p. 878-879 (*quoting Roe v. Wade*, 410 U.S. at 164-165).
119 *Id.*, at p. 894.
120 *Id.*, at p. 914.
121 *Id.*, at p. 925. In addition, according to Justice Blackmun, the "application of [the trimester] analytical framework is no less warranted than when it was approved by seven Members of this Court in Roe. Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion." *Id.*, at p. 930.
122 *See id.*, at p. 944 (Rehnquist, C.J., concurring in part and dissenting in part); *id.*, at p. 979 (Scalia, J., concurring in part and dissenting in part).
123 *Id.*, at p. 944.
124 *Id.*, at p. 945.

so under the Constitution",[125] the Chief Justice thought that "the correct analysis is that … [a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion in ways rationally related to a legitimate state interest".[126] In other words, abortion regulations should be measured according to the most deferential possible standard of review. For his part, Justice Scalia emphasized that the regulation of abortion was a matter for resolution by the political process.[127]

Finally, in *Stenberg v. Carhart*,[128] a majority of the Court explicitly adopted the 'undue burden' test, which it applied to strike down a state statute prohibiting a controversial procedure sometimes called 'partial birth abortion'. Speaking for the majority, Justice Breyer wrote:

> Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court … has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. …
>
> Three established principles determine the issue before us. … First, before "viability the woman has a right to choose to terminate her pregnancy."
>
> Second, "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. An "undue burden is shorthand for the conclusion that a

125 *Id*. Chief Justice Rehnquist was particularly critical of the plurality's 'undue burden' standard: "*Roe v. Wade* adopted a 'fundamental right' standard under which state regulations could survive only if they met the requirement of 'strict scrutiny.' While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result in the sort of 'simple limitation,' easily applied, which the joint opinion anticipates. … In sum, it is a standard which is not built to last." *Id*., at p. 964-965.

126 *Id*., at p. 966, *citing Williamson v. Lee Optical Co. of Oklahoma, Inc*., 348 U.S. 483, 491 (1955).

127 *Id*., at p. 1002. ("[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.")

128 530 U.S. 914 (2000).

> state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."
>
> Third, "'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'"[129]

In subsequent cases, the Court has continued to apply the undue burden test in cases pertaining to the constitutionality of regulations relating to reproductive choice.[130] Some commentators have criticized the test on various grounds, including the difficulty of its application.[131] For example, Erwin Chemerinsky thinks that the test is inconsistent with the four-part analysis that the Court typically uses in cases involving individual liberties: "[f]irst, is there a fundamental right? Second, is the right infringed? Third, is the government's action justified by a sufficient purpose? And fourth, are the means sufficiently related to the end sought?"[132] According to Dean Chemerinsky, the undue burden test collapses the last three of these questions into one, which does not make the test more manageable or transparent:

> Obviously 'undue burden' pertains to whether there is an infringement of the right, but … *Casey* also uses it to analyze whether the law is justified. No level of scrutiny is articulated by the joint opinion: there is no statement that the goal of the law must be compelling or important or that the means have to be necessary or substantially related to the end. Undue burden is thus confusing to apply because it melds together three distinct issues.[133]

Dean Chemerinsky also suggests that the test has an internal tension in that a law will be deemed to place an undue burden on a woman's choice if its 'purpose or effect' is to place 'a substantial obstacle' in the path of a woman seeking a previability termination of her pregnancy, but measures to assure that the woman's choice is informed will be upheld "as long as their purpose is to persuade the

129 *Id.*, at p. 920-21. Justices Stevens, O'Connor and Ginsburg filed concurring opinions, while Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas filed dissenting opinions.

130 *See Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2309-2310 (2016) (holding that certain regulatory provisions constituted an undue burden because they did not afford "medical benefits sufficient to justify the burdens [that they imposed] upon access"); *Gonzales v. Carhart*, 550 U.S. 124, 167-168 (2007) (distinguishing the statute invalidated in *Stenberg* and holding that those challenging the facial validity of a federal statute prohibiting so-called 'partial birth abortions' had failed to demonstrate that the statute "would be unconstitutional in a large fraction of relevant cases").

131 *See, e.g.*, Freeman, 2013, p. 279 (noting that *Casey* "has engendered confusion rather than clarity" and that "the correct method of implementing [its] test remains murky"). In this regard, Freeman notes that the "courts have applied Casey inconsistently and unfaithfully, creating a tangled body of abortion precedent and rendering the undue burden standard insufficient to protect women's reproductive autonomy". *Id.*, p. 279.

132 *See* Chemerinsky, 2015, p. 828.

133 *Id.*, at p. 863.

woman to choose childbirth over abortion" and they do not unduly burden her right.[134] Dean Chemerinsky further argues: "[e]very law adopted to limit abortion is for the purpose of discouraging abortions and encouraging childbirths. How is it to be decided which of these laws is invalid as an undue burden and which is permissible? The joint opinion simply says that the regulation "'must not be an undue burden on the right.' But this, of course, is circular; it offers no guidance as to which laws are an undue burden and which are not".[135] Finally, Dean Chemerinsky questions how many people would have to be adversely affected before a statute would be determined to be unconstitutional.[136]

D Down from Strict Scrutiny: Regulating the Right to Vote

In some ways, the modern history of the right to vote parallels the history of the right to choose whether to terminate a pregnancy. Neither the Constitution of 1787 nor the Bill of Rights specifically protects the right to vote. On the contrary, the constitutional text leaves to the separate states the matter of qualifications for voting, even in federal elections: "the Electors [in federal elections] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[137] Although that remains the case, the Constitution has been amended several times to prohibit the states from relying on certain criteria to deny persons the right to vote. Thus, in 1870, the people adopted the Fifteenth Amendment, which prohibited the states from withholding the right to vote "on account of race, color, or previous condition of servitude".[138] In 1920, the people adopted the Nineteenth Amendment, which prohibited the states from withholding the right to vote "on account of sex".[139] In 1964, the people adopted the Twenty-fourth Amendment, which prohibited the states from withholding the right to vote "by reason of failure to pay any poll tax or other tax".[140] And in 1971, the people adopted the Twenty-sixth Amendment, which guaranteed that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States

134 *Id*., at p. 864.
135 *Id*.
136 *Id*.
137 U.S. Const. Art. I, § 2, cl. 1. In addition, the Constitution provides that the president and vice-president shall be chosen by an electoral college, rather than by the voters, and it leaves to the states the determination as to how the members of the electoral college should be selected. *Id*., at Art. II, § 1, Amend. XII, XX. And the Constitution originally provided that members of the Senate were to be chosen by the members of the state legislatures. *Id*., at Art. I, § 2, cl. 1. The Seventeenth Amendment provided for the direct election of Senators in 1919. *Id*., at Amend XVII.
138 *Id*., at Amend. XV.
139 *Id*., at Amend. XIX.
140 *Id*., at Amend. XXIV.

or by any State on account of age."[141] In addition, Congress enacted the Voting Rights Act of 1965, which currently provides, among other things, that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of [certain other] guarantees."[142]

These constitutional and statutory changes have given rise, as one commentator has said, to "a triumphant narrative about voting and citizenship that Americans embrace".[143] In other words, Americans take pride in a narrative that emphasizes the progressive legal expansion of the franchise over the course of American history. But the historical truth is that legal expansions of the franchise invariably have been followed by the invention of new barriers to its exercise.[144] "Various arguments and beliefs advocating the exclusion of 'unworthy' voters have existed over time."[145] Moreover, those arguments and beliefs have regularly been used by those in power to justify the exclusion from the franchise, either legally or practically, of those thought to be their political adversaries. Over the years, efforts by those in power to exclude from the franchise those who are thought unlikely to support those in power have taken many forms: literacy tests,

141 *Id*., at Amend. XXVI. In addition, the Constitution originally provided that the members of the federal House of Representatives would be directly elected by the people, while members of the Senate would be chosen by the state legislatures. *See* U.S. Const., Art. I, § 3, cl. 1. In 1913, however, the Seventh Amendment was adopted to provide for the direct election of senators. *Id*., at Amend. XVII.

142 Voting Rights Act of 1965, Section 2, currently codified at 52 U.S.C. § 10301 *et seq*. In *Shelby County v. Holder*, 570 U.S. 2 (2013), the Court found that the pre-clearance coverage formula, a key section of the Voting Rights Act that required certain 'covered' jurisdictions to secure prior approval for changes in voter qualifications and other matters relating to the franchise, was unconstitutional because the coverage formula was based on stale data, so that it was no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. Many previously covered jurisdictions have recently adopted measures to make it more difficult to vote. *See* Brennan Center for Justice, 'Election 2016: Restrictive Voting Laws By The Numbers', 28 September 2016, available at: https://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers ("Starting after the 2010 election, legislators in nearly half the states passed a wave of laws making it harder to vote. These new restrictions ranged from cuts to early voting to burdens on voter registration to strict voter ID requirements. While courts stepped in before the 2012 election to block many of these laws, the Supreme Court's 2013 decision in *Shelby County* gutting the most powerful protections of the Voting Rights Act made it even easier for states to put in place restrictive voting laws.") On the other hand, Atiba Ellis points out that "politicians, typically of a conservative persuasion, have echoed the voter fraud argument since the November 2000 election and resulting *Bush v. Gore*, 531 U.S. 98 (2000) debacle." A.R. Ellis, 'The Meme of Voter Fraud', *Catholic University Law Review*, Vol. 63, 2014, p. 881-882.

143 *Id*., at p. 898.

144 *Id*., at p. 897 (describing devices such as "poll taxes, literacy tests, and similar exclusionary tools" used to target newly enfranchised minority voters, and compensations made by law to exempt favored voters who would otherwise be affected by the tools). Professor Ellis also points out that "the meme of voter fraud represents the latest round of America's evolution from an exclusion-based republic to an inclusive republic supporting full participation of all citizens." *Id*., at p. 893.

145 *Id*., at p. 883.

poll taxes, the exclusion of persons previously convicted of crimes, regulations relating to voter rolls, ballot access, and the conduct of elections, and, more recently, voter identification laws and political gerrymandering.[146]

As long ago as 1886, the Supreme Court noted that "the political franchise of voting" is rightly "regarded as a fundamental political right, because preservative of all rights".[147] More recently, in 1964, the Court in *Wesberry v. Sanders*[148] observed that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[149] In 1966, in *Harper v. Virginia State Board of Elections*,[150] the Court held that the imposition of a $1.50 poll tax on eligible voters was unconstitutional. The Court held "that a State violates the Equal Protection Clause ... whenever it makes the affluence of the voter or payment of any fee an electoral standard".[151] The Court further observed that "[w]e have long been mindful that where fundamental rights and liberties are asserted ... , classifications which might invade or restrain them must be closely scrutinized and carefully confined. ... Those principles apply here. ... [W]ealth or fee-paying has ... no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned."[152]

In 1969, in *Kramer v. Union Free School District*,[153] the Court applied strict scrutiny to invalidate a state law that restricted voting in school board elections to those who held real property or had custody of children enrolled in the schools. Also in 1969, in *Cipriano v. City of Houma*,[154] the Court applied strict scrutiny to strike down a Louisiana law that conditioned the right to vote with respect to bond issues on the ownership of property. In 1970, when the Court held in *Evans v. Cornman*[155] that residents of a federal enclave could not be prevented from voting in state elections, the Court noted that the right to vote was uniquely precious inasmuch as it is "protective of all fundamental rights and privileges".[156] And, in

146 It is obviously beyond the scope of this article to deal comprehensively with all of the particular constitutional and legal issues raised by these practices. *See* Rotunda & Nowak, 2009, p. 219-349.

147 *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

148 376 U.S. 1 (1964).

149 *Id*., at p. 17.

150 383 U.S. 663 (1966).

151 *Id*., at p. 666. The Court overruled its 1937 decision in *Breedlove v. Suttles*, 302 U.S. 377 (1937), which upheld the constitutionality of provisions that conditioned voting on the payment of a poll tax. The Court also distinguished its earlier decision in *Lassiter v. Northampton County Bd. of Elec*., 360 U.S. 45 (1959), in which the Court upheld a North Carolina literacy test. The Court stated that "the *Lassiter* case does not govern the result here, because, unlike a poll tax, the 'ability to read and write * * * has some relation to standards designed to promote intelligent use of the ballot.'" *Id*., at 51.

152 *Harper v. Va. State Bd. of Elections*, at p. 670.

153 395 U.S. 621 (1969).

154 395 U.S. 701 (1969).

155 398 U.S. 419 (1970).

156 *Id*., at p. 422.

1972, the Court applied strict scrutiny to strike down certain Tennessee residency requirements in *Dunn v. Blumstein*.[157]

As with the liberty interest in reproductive choice that the Court identified as fundamental in *Roe*, it appeared that the Court would henceforth treat the right to vote as a fundamental right subject to strict scrutiny review under the First and Fourteenth Amendments.[158] That would make sense for two reasons. First, unlike other fundamental rights, the right to vote exists only within a legal framework. As Atiba Ellis has pointed out, "[u]nlike other fundamental rights, the right to vote actually requires governmental participation in order to effectively and meaningfully manifest the right. Therefore the right-bearer depends upon the government for actualization of the right".[159] Second, as Professor Ellis also points out, "politicians have an incentive to define the electorate to whom they wish to be accountable".[160] Given the importance of the right to meaningful participation in the electoral process, it would make sense that regulations and restrictions on the effective exercise of that right should require a justification more substantial "than the mere incantation of a proper state purpose".[161] As with the liberty interest in reproductive choice, however, the Court soon indicated that the right to vote would not invariably be given the most muscular form of constitutional protection. Thus, as two leading constitutional scholars have noted, the Court has been reluctant to give strict scrutiny its customary meaning in this context: "in this context 'strict scrutiny' means only that judges must independently review the voting regulation or restriction. If [the] restriction is in fact related to important or overriding state interests, the Court will sustain that regulation or restriction."[162] In other words, "strict scrutiny analysis in this area may

157 405 U.S. 320 (1972). *But see Sayler Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (upholding limitation on right to vote in water district elections to property owners and permitting votes to be apportioned according to assessed valuation of land within the district). In an amicus curiae brief in *Crawford v. Marion County Election Bd.*, Nos. 07-21 and 07-25, Dean Chemerinsky attempted to draw a distinction between the foregoing cases and the Court's later jurisprudence (which is summarized below), based on whether the deprivation of the right to vote was direct or indirect. If it were direct (as in the forgoing cases), strict scrutiny would apply. If not, the balancing test of *Burdick v. Takushi*, 504 U.S. 428 (1992) would control. *See Crawford v. Marion County Election Bd.*, Nos. 07-21 and 07-25 (U.S.), Brief of Professor Erwin Chemerinsky as Amicus Curiae in Support of Neither Party (filed 13 November 2007). The Court did not credit that distinction, which might have provided one answer to the problem, while leaving a potentially large universe of possibly serious infringements outside the purview of strict scrutiny review. Indeed, the distinction seems to provide the basis for redressing simple-minded violations of voting rights while countenancing those that are more ingenious.

158 Infringements on the right to vote may be conceptualized in either equal protection or First Amendment terms, but the same analysis applies. *See* Rotunda & Nowak, 2009, p. 222.

159 Ellis, 2014, p. 913-914.

160 *Id.*, at p. 894. Indeed, "[p]oliticians and policymakers throughout American political history manipulated the rules of entry to the franchise in order to control voter turnout." *Id.*, at p. 893-94. It is for that reason that the kind of deference to the political process that Justice Frankfurter advocated in *Colegrove v. Green*, 328 U.S. 549, 552 (1949), seems inadequate. *See* Rotunda & Nowak, 2009, p. 310-312 (describing evolution of law with respect to justiciability beginning with *Colegrove*).

161 *See Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (Powell, J.).

162 *See* Rotunda & Nowak, 2009, p. 221.

only require the state to demonstrate that its regulation is narrowly tailored to promote an interest that is significant enough to outweigh any incidental restriction on the right to vote or the right of political association".[163] In both areas, of course, the right of the individual is not absolute, but is seen to stand in tension with a legitimate state interest. In the one case, the state was said to have a legitimate interest not only in the woman's health, but also in the promotion of childbirth and the protection of potential life. In the other case, the state was said to have a legitimate interest in a fair and efficient electoral system. Indeed, the very efficacy of the right to vote depended on it. But, unlike the situation with reproductive choice, there was no consideration akin to the viability of the fetus to help structure the inquiry into the proper accommodation of the individual and governmental interests.

In *Anderson v. Celebrezze*,[164] a third-party candidate for president challenged a March filing deadline that Ohio law imposed on independent candidates who wished to stand for election in the November general election. In a 5-4 decision, the Court found that the early filing deadline was unconstitutional. Speaking through Justice Stevens, the Court noted that "'[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'"[165] According to Justice Stevens, "the right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'"[166] Justice Stevens further observed:

> Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." ... Each provision [of sometimes complex election codes] inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.[167]

To determine whether an election regulation satisfies constitutional requirements, the Court said, a court must first consider the character and magnitude of

163 *Id*., at p. 222. "Laws that totally prohibit a class of persons from voting in a general election or laws that are designed to restrict the voting power of a particular class of persons in a general election are unlikely to survive such a standard. Laws that regulate the electoral system to promote substantial state interests in the conduct of efficient and honest elections need to be examined on a case-by-case basis." *Id*.

164 460 U.S. 780 (1983).

165 *Id*., at p. 786.

166 *Id*., at p. 787.

167 *Id*., at p. 788.

the asserted injury to constitutional rights. The court must then identify and evaluate the precise interests put forward as justifications for the burdens imposed by the rule. Finally, the court "must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights".[168] According to the Court, "[t]he results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'"[169]

According to the Court, "the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters."[170] Moreover, "[a] burden that falls unequally on new or small political parties or on independent candidates ... discriminates against those candidates – and of particular importance – against those voters whose political preferences lie outside the existing political parties."[171] The Court also noted that the Ohio law not only burdened the rights of independent voters and candidates, but also "place[d] a significant state-imposed restriction on a nationwide electoral process".[172] The state proffered three justifications for the early filing date, but the Court found them unpersuasive, holding that "[u]nder any realistic appraisal, 'the extent and nature' of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline".[173]

In dissent, Justice Rehnquist thought that the appropriate rule was that "so long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot, this Court should not interfere with Ohio's exercise of its Art. II, § 1, cl. 2, power."[174] Justice Rehnquist further argued that the Court had never before determined in this kind of case that the states must "meet some kind of 'narrowly tailored' standard," but that the courts' role was simply "to ensure that the State 'in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life'".[175] According to Justice Rehnquist, "[i]f it does not freeze the status quo, then the State's laws will be upheld if they are 'tied to a particularized legitimate purpose, and [are] in no sense invidious or arbitrary.'"[176]

In 1993, the Court decided *Burdick v. Takushi*,[177] which, by a 6-3 vote, upheld a Hawaii statute that prohibited write-in votes. Justice White, one of the dissenters in *Anderson*, wrote for the majority, noting that the party challenging the statute "proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so

168 *Id.*, at p. 789.
169 *Id.*, at p. 789-790.
170 *Id.*, at p. 792.
171 *Id.*, at p. 793-794.
172 *Id.*, at p. 795.
173 *Id.*, at p. 806.
174 *Id.*, at p. 808.
175 *Id.*, at p. 817.
176 *Id.*
177 504 U.S. 428 (1992).

hold".[178] The Court interpreted the test set forth in *Anderson* as a two-part test, whereby the rigour of the inquiry depended on the extent to which the challenged regulation burdens constitutional rights:

> [W]hen those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." ... But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions" upon the ... rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.[179]

Justice White conceded that "the Hawaii election laws, like all election regulations have an impact on the right to vote," but he concluded that "it can hardly be said that [these laws] limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot. Indeed, petitioner understandably does not challenge the manner in which the State regulates access to the ballot".[180] While Justice White emphasized that Hawaii's overall system provided adequate ballot access, the plaintiff had challenged "the write-in prohibition [on the ground that it] deprives him of the opportunity to cast a meaningful ballot".[181] "At bottom," according to Justice White, the plaintiff "claims that he is entitled to cast and ... [have counted] 'a protest vote' for Donald Duck, ... and that any impediment to this asserted 'right' is unconstitutional."[182] But "a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme."[183]

In his dissent, Justice Kennedy agreed that the majority had properly stated the relevant balancing test, but he thought that the proper application of that test led to the conclusion that "the write-in ban deprives some voters of any substantial voice in selecting candidates for the entire range of offices at issue".[184] According to Justice Kennedy, the record in the case showed that the Hawaii law placed a 'significant burden' on the rights of voters to vote for whomever they wished and therefore prevented voters who preferred to vote for persons not listed on the ballot "from participating in Hawaii elections in a meaningful manner".[185] Justice Kennedy continued:

> For those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total. The fact that write-in candi-

178 *Id*., at p. 432.
179 *Id*., at p. 434.
180 *Id*., at p. 434-435.
181 *Id*., at p. 437.
182 *Id*., at p. 938.
183 *Id*., at p. 441.
184 *Id*., at p. 446.
185 *Id*., at p. 442-443.

> dates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful.[186]

Justice Kennedy then discussed the state's justifications, which he found insubstantial compared with the 'significant burden' that the ban places on these voters.[187]

In 2007, in *Crawford v. Marion County Election Board*,[188] the United States Court of Appeals for the Seventh Circuit addressed the constitutionality of an Indiana law that required persons wishing to vote in person at polling places to present a special, government-issued photo identification ('ID') card.[189] Voters had previously been required to verify their identities by signing the poll book, which would be checked against signatures on file. Several plaintiffs challenged the law "as an undue burden on the right to vote".[190] In an opinion by Judge Richard Posner, a distinguished jurist and legal scholar, a divided panel held that "[a] strict standard would be especially inappropriate in a case such as this, in which the right to vote is on both sides of the ledger".[191] The Seventh Circuit further observed that:

> The Indiana law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest of defraying the cost of elections or in limiting the franchise to people who really care about voting or in excluding poor people or in discouraging people who are black. The purpose of the Indiana statute is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes – dilution being recognized to be an impairment of the right to vote. … On one side of the balance in this case is the effect of requiring a photo ID in inducing eligible voters to disfranchise themselves. That effect, so far as the record shows, is slight. …
>
> On the other side of the balance is voting fraud, specifically the form of voting fraud in which a person shows up at polls claiming to be someone else.

186 *Id.*, at p. 447.
187 *Id.*, at p. 448.
188 472 F.3d 949 (2007).
189 *Id.*, at p. 950. The statute did not place the same restriction on persons who were eligible to cast an absentee ballot or voted in a nursing home. *Id.* In addition, voters could cast provisional ballots and return within 10 days with appropriate documentation. *Id.* To secure a state-issued ID card, it is necessary to have a certified birth certificate, and "it's not particularly easy for a poor, elderly person who lives in South Bend, but was born in Arkansas, to get a certified copy of his birth certificate." *Id.*, at p. 955 (Evans, J. dissenting). The majority speculated that "[t]he benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value …), and even very slight costs in time or bother or out-of-pocket expense deter people from voting, or at least from voting in elections they're not much interested in. So some people who have not bothered to obtain a photo ID will not bother to so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say what the hell and not vote, rather than go home and get the ID and return to the polling place." *Id.*, at p. 951.
190 *Id.*, at p. 950.
191 *Id.*, at p. 952.

> ... Without requiring a photo ID, there is little if any chance of preventing this kind of fraud because busy poll workers are unlikely to scrutinize signatures and argue with people who deny having forged someone else's signature.[192]

The district court had found that approximately 43,000 Indiana residents, or slightly less than 1% of its voting age population, had no qualifying ID.[193] The record showed that "as far as anyone knows, no one in Indiana, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter," but the Seventh Circuit panel found the explanation for that fact in either "the endemic underenforcement of minor criminal laws" or "the extreme difficulty of apprehending a voter impersonator." The panel apparently discounted the possibility that the Indiana law was either a solution in search of a problem or an effort to discriminate against poor and minority voters. The panel also explained the absence of any published reports of voter fraud as "reflect[ing] nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate".[194]

In a spirited dissent, Judge Evans wrote: "[t]he Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny – or at least, in the wake of *Burdick* ... something akin to 'strict scrutiny light' – and strike it down as an undue burden on the right to vote."[195] Judge Evans observed that there was little or no evidence of the type of polling-place fraud that photo ID laws seek to stop, but that "this law will make it more difficult for some eligible voters – I have no idea how many, but 4 percent is a number that has been bandied about – to vote ... [a]nd this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof".[196] He continued: "*Burdick* adopts a flexible standard, and as I read it, strict scrutiny may still be appropriate in cases where the burden, as it is here, is great and the state's justification for it, again as it is here, is hollow."[197]

The court of appeals denied rehearing en banc by a vote of 7 to 4. In an opinion for the four dissenting judges, Judge Wood wrote that:

> [T]he panel assumes that *Burdick* also means that strict scrutiny is no longer appropriate in *any* election case. As Judge Evans makes clear, however, *Burdick* holds no such thing. To the contrary, *Burdick* simply established a threshold inquiry that a court must perform before it decides what level of scrutiny is required for the particular case before it. ... [W]hen there is a serious risk

192 *Id*., at p. 952-953.
193 *See Indiana Democratic Party v. Rokita*, 458 F.Supp.2d 775, 782-84 (S.D. Ind. 2006).
194 Crawford, 472 F.3d at p. 953. Judge Posner has subsequently confessed that his resolution of the case was incorrect. *See* Richard A. Posner, *Reflections on Judging*, Cambridge, Harvard University Press 2013, p. 851.
195 Crawford, 472 F.3d at p. 955.
196 *Id*.
197 *Id*., at p. 956.

> that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny. …
>
> The state's justification for the new voting requirement is voter fraud – specifically, the problem of fraud on the part of people who show up in person at the polling place. Yet the record shows that the existence of this problem is a disputed question of fact. It is also a crucial question for the inquiry that *Burdick* demands, because if the burden on voting is great and the benefit for the asserted state interest is small as an empirical matter, the law cannot stand. …
>
> *Burdick* requires an inquiry into the "precise interests put forward by the State as justifications for the burden imposed," but in this case, the "facts" asserted by the state in support of its voter fraud justification were taken as true without any examination to see if they reflected reality.[198]

On further review, the Supreme Court affirmed the Seventh Circuit panel decision.[199] Justice Stevens wrote the lead opinion for the majority, but only the Chief Justice and Justice Kennedy joined in his reasoning. Justice Stevens acknowledged that "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications," but that "'even-handed restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*".[200] Justice Stevens added: "[h]owever slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[201] In Justice Stevens's view, "a court must identify and evaluate the interests put forward … as justifications for the burdens imposed by [the state's] rule, and then make 'the hard judgment' that our adversary system demands."[202] There was, of course, no record evidence to show that voter impersonation fraud was a problem in Indiana or anywhere else, as Justice Stevens expressly conceded.[203] Nonetheless, Justice Stevens thought that the record evidence failed to establish the facial invalidity of the Indiana voter ID law: "[w]hen

198 *Crawford v. Marion County Election Board*, 484 F.3d 436, 437-439 (7th Cir. 2007). Judge Wood pointed out that, contrary to Judge Posner's understanding, "as a matter of law, the Supreme Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters. Voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance." *Id*., at p. 438.

199 *See Crawford v. Marion County Election Board*, 533 U.S. 181 (2008).

200 *Id*., at p. 189-190.

201 *Id*., at p. 191.

202 *Id*., at p. 190.

203 As Justice Stevens put it, "[t]he only kind of voter fraud [the law] addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id*., at p. 194. Nor was there any evidence to show that the Indiana law would provide an effective means for dealing with that phantom problem or improve the situation in any way. Justice Stevens nonetheless discounted the significance of both points: "[w]hile the most effective method of preventing election fraud may well be debatable, the propriety of doing so is not." *Id*., at p. 296.

we consider only the statute's broad application to all Indiana voters we conclude that it 'imposes only a limited burden on voters' rights,'" and "[t]he 'precise interests' [advanced by Indiana] are ... sufficient to defeat petitioners' challenge."[204]

Justice Scalia, together with Justices Thomas and Alito, concurred in the judgment, but their reasoning departed significantly from that of Justice Stevens. Justice Scalia wrote:

> The lead opinion assumes petitioners' premise that the voter-identification law "may have imposed a special burden on" some voters, ... but holds that petitioners have not assembled evidence to show that the special burden is severe enough to warrant strict scrutiny. ... That is true enough, but for the sake of clarity and finality (as well as adherence to precedent), I prefer to decide these cases on the grounds that petitioners' premise is irrelevant and that the burden at issue is minimal and justified.[205]

Justice Souter dissented in an opinion joined by Justice Ginsburg. Justice Souter thought that cases involving administrative restrictions on voting necessarily raise "two competing interests," one being "the fundamental right to vote," which requires that the judiciary "train a skeptical eye on any qualification of that right."[206] "As against [that] unfettered right," Justice Souter continued, lies the constitutional imperative that "'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"[207] Thus, Justice Souter thought that, as the Court held in *Burdick*, "'[h]owever slight [the] burden may appear, ... it must be justified by relevant and state interests sufficiently weighty to justify the limitation.'"[208] Applying this test, Justice Souter would have held that the Indiana law "threaten[ed] to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens ... and a significant percentage of those individuals are likely to be deterred from voting."[209] According to Justice Souter, the Indiana statute therefore failed to satisfy the test set out in *Burdick*:

> [A] state may not burden the right to vote merely by invoking abstract interests, be they legitimate ... or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. The State has made no such justification here, and as to some aspects of its law, it has hardly even tried.[210]

Justice Breyer also dissented. He would have "balance[d] the voting-related interests that the statute affects asking 'whether the statute burdens any one such

204 *Id*., at p. 202-203.
205 *Id*., at p. 204.
206 *Id*., at p. 210.
207 *Id*.
208 *Id*., at p. 211.
209 *Id*., at p. 209.
210 *Id*.

interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of a clearly superior, less restrictive alternative).'"[211] Pursuant to that standard, Justice Breyer would have held that "the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID".[212]

Justice Scalia's concurring opinion well illustrates the difficulties with the majority's understanding and application of the appropriate constitutional test. First, Justice Scalia observes that, since strict scrutiny applies only if the burden placed on voters is severe, "the first step is to decide whether a challenged law severely burdens the right to vote."[213] In other words, the first step is not to determine whether there is any problem to be solved (a significant omission here, given the absence of evidence to show that voter impersonation fraud was now or ever had been a problem in Indiana or elsewhere),[214] nor whether the law actually serves any legitimate purpose. Instead, according to Justice Scalia, the first step is simply to assess the severity of the burden that the law imposes. In other words, a limitation that the Court deems not to be "severe" will pass constitutional muster even if the problem to be solved is imaginary, and there is no evidence to suggest that the limitation will accomplish any good whatsoever. That seems a seriously inadequate means of protecting a "fundamental right," particularly the right to vote, which is, as the Court said in *Yick Wo*, "preservative of all rights".[215] Second, burdens are not severe, according to Justice Scalia, unless they "go beyond the merely inconvenient;" they must be "'so burdensome' as to be 'virtually impossible' to satisfy."[216] That is a similar view, of course, to that taken by Justice O'Connor when she invoked the undue burden test in the reproductive choice context in *Thornburgh*. In that case, she used the expression to mean an "absolute obstacle[…] or severe limitation[…]" on the right.[217] That was not, of course, the version of the 'undue burden' test that a plurality of the Court adopted in *Casey* or that a majority of the Court subsequently adopted in *Stenberg*.

In addition, Justice Scalia thinks that the severity of a burden is to be measured in terms of its "reasonably foreseeable effect on *voters generally*",[218] not on any particular, identifiable demographic group or subgroup, such as the elderly,

211 *Id*., at p. 237.

212 *Id*.

213 *Id*., at p. 205. In this sense, Justice Scalia builds on Justice Stevens's holding that strict scrutiny review is not required in this type of case, where the restrictions placed on the right to vote are not "unrelated to voter qualifications". *Id*., at p. 189. Similarly, the court of appeals had held that "the law should [not] be held by the same strict standard applicable to a poll tax because the burden on voters was offset by the benefit of reducing the risk of fraud." *Id*., at p. 188.

214 *Id*., at p. 194. ("The only kind of voter fraud that [the Indiana law] addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud occurring in Indiana at any time in its history.")

215 *See Yick Wo v. Hopkins*, 118 U.S. at p. 370.

216 *Crawford*, 533 U.S. at p. 205.

217 *See Thornburgh*, 476 U.S. at p. 828. The *Casey* plurality adopted a less demanding version of the test. *See Casey*, 505 U.S. at p. 876.

218 *Crawford*, 505 U.S. at p. 206 (emphasis in original).

the poor, or those born in another state.[219] That, according to Justice Scalia, is because "our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes."[220] It seems clear, however, that not even the Virginia poll tax could have been struck down if a majority of the Court in *Harper v. Virginia Board of Elections*[221] had followed the approach outlined by Justice Scalia in *Crawford*. Moreover, the Court has held, in the reproductive rights context that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant".[222] Finally, Justice Scalia argues that "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. *A fortiori*, it does not do so when, as here, the classes complaining of disparate impact are not even protected."[223] Thus, according to Justice Scalia, "weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence."[224] But the fact that the right to vote has long been deemed to be a fundamental right rebuts that point, as does the fact that the point is likewise inconsistent with the jurisprudence relating to reproductive choice. Most fundamentally, perhaps, Justice Scalia expressed the view that the regulation of voting should be left to state officials, whose "judgment must prevail unless [the law] imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class".[225] That again sounds like the version of the undue burden test that Justice O'Connor proposed in *Thornburgh* – which the Court has not adopted in the area of reproductive choice, let alone in the voting rights area.

Needless to say, the problem was not solved in *Crawford*, and it continues to manifest itself wherever one party has control of the machinery of government and chooses to use that machinery to enact legislation that limits the rights of others to participate fully and effectively in the electoral process. Whether that legislation conditions voting on the presentation of identification documents that are not readily available to all or allows for partisan gerrymandering, the purpose is the same: preventing meaningful participation in the political process by those thought not to be supporters of those who make the rules. Given the number of instances in which state governments have chosen to enact such legislation in recent years, it is clear that the problem will not go away until the Court imposes a more realistic and rigorous test for evaluating such legislation. To date, the

219 The trial judge "found that petitioners had 'not introduced evidence of a single, Indiana resident who will be unable to vote as a result of [the law] or who will have his or her right to vote unduly burdened by its requirements'". *Id.*, at p. 187. The trial court refused to credit the testimony of an expert witness, who testified that the law could affect up to 989,000 registered voters who lacked a government-issued ID, but the trial court nonetheless estimated that only about 43,000 (or less than 1%) of Indiana residents would be affected. *Id.*, at p. 187-188.

220 *Id.*, at p. 205.

221 383 U.S. 663 (1966).

222 *See Casey*, 505 U.S. at p. 894.

223 *Id.*, at p. 207 (emphasis omitted).

224 *Id.*

225 *Id.*, at p. 208.

Court has been unwilling to do so, as shown by its decision in *Crawford*. Moreover, the Court has affirmatively demonstrated hostility to the notion of judicial protection of the right to vote, as indicated by its decision in *Shelby County v. Holder*,[226] which struck down a key component of the Voting Rights Act of 1965. But the problem remains, and it cries out for an effective judicial solution. In this Term alone, the Court will face two partisan gerrymandering cases, one involving a Republican gerrymander in Wisconsin, the other a Democratic gerrymander in Maryland.[227]

E The Forest and the Trees: Protecting the Fundamental Right to Vote

The people have repeatedly recognized the importance of the right to vote by enacting amendments to the Constitution to prohibit the withholding of the right to vote from various groups.[228] The Supreme Court has also recognized the central importance of the franchise in a constitutional democracy. In 1886, the Supreme Court observed that "the political franchise of voting" is rightly "regarded as a fundamental political right because preservative of all rights".[229] As we have also seen, the modern Supreme Court has continued to refer to the right to vote as a "fundamental right", and it initially held that restrictions on the right to vote should be subject to strict scrutiny, in its accepted sense. The backdrop for such judicial pronouncements, of course, was the persistent efforts, both ingenious and simple-minded, whereby those in control of the electoral machinery had exploited that control to make meaningful participation in the political process

226 570 U.S. 2 (2013).

227 In *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wisc. 2016), a three-judge district court struck down a Republican redistricting plan in Wisconsin. In *Benisek v. Lamone*, 266 F.Supp.3d 799 (E.D. Md. 2017), a three-judge district court declined to strike down a Democratic redistricting plan in Maryland. *See Gill v. Whitford*, No. 16-1161, jurisdictional statement filed 24 March 2017; *Benisek v. Lamore*, No. 17-333, jurisdictional statement filed 1 September 2017.

228 In 1870, as previously noted, the people of the United States acknowledged the importance of the right to vote by adopting the Fifteenth Amendment to the Constitution, which guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const., Amend. XV. Similar amendments have since been adopted to prohibit exclusions from the franchise based on gender, the failure to pay "any poll tax or other tax," or on account of age if the putative voter is "eighteen years of age or older." *Id*., Amend. XIX (1920) (gender), Amend. XXIV (1964) (poll or other tax), Amend. XXVI (1971) (age). In addition, Congress enacted the Voting Rights Act in 1965. *See* Voting Rights Act of 1965, 79 Stat. 437, *codified, as amended*, 52 U.S.C. §101001, *et seq*. *But see Shelby County v. Holder*, 570 U.S. 2 (2013) (holding that the coverage formula of Section 4(b) is unconstitutional because it is based on data over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and the "equal sovereignty of the states"). In addition, in 1913, the people amended the Constitution to provide that United States Senators would henceforth be elected by the people of the several states, rather than by the state legislatures. In addition, in 1913, the people amended the Constitution to provide that United States Senators would henceforth be elected by the people of the several states, rather than by the state legislatures. U.S. Const., Amend. XVII.

229 *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

more difficult or impossible for members of groups thought for one reason or another to be politically antagonistic to those in control.[230] In other words, notwithstanding the clear trend towards greater inclusiveness in the formal legal definition of the electorate, and the progressive dismantling of *de jure* barriers to voting, those opposed to the enlargement of the franchise (or simply hostile to one identifiable group or another) have repeatedly found new ways of stifling the electoral voices of those whose votes they fear. They are able to do so because of the simple fact that "[u]nlike other fundamental rights, the right to vote actually requires governmental participation in order to effectively and meaningfully manifest the right".[231] In other words, elections necessarily require electoral regulations and machinery, and state officials have been given broad discretion in designing and implementing that machinery. Recognizing that the state theoretically acts on behalf of all voters when it regulates voting to protect the regularity and integrity of the electoral process, the Court has held that the state may justifiably impose 'reasonable, nondiscriminatory restrictions'[232] on the electoral process. But the inquiry mandated by that principle turns out to be considerably more difficult – and the protection it affords to the right of a citizen to cast a meaningful vote less certain and sure – than its simple words would suggest. The gulf between promise and reality is simply too great, at least if one takes seriously the centrality of the right to vote.[233]

As *Crawford* demonstrates, the difficulty rests in ensuring the adequate protection of the fundamental right to vote while also allowing the state the regulatory power it needs to conduct elections on a neutral and even-handed basis. As *Crawford* also shows, the Court has thus far failed to formulate a test that does not in practice encourage state officials to abuse that power. Whether one adopts Justice Stevens's version or that of Justice Scalia, the *Crawford* test provides scant protection for the right to vote and can be easily manipulated by those who control the electoral machinery. Among other things, neither Justice Stevens nor Justice Scalia would even require the state to show at the threshold that there is a problem to be solved. Whatever the Court might say, the reality after *Crawford* seems to be that the existence of such a problem can simply be assumed. One can always justify additional measures to perfect the voting process, notwithstanding the fact that those additional measures deprive some people of the right to vote,

230 *See, e.g., Louisiana v. United States*, 380 U.S. 145 (1965) (invalidating Louisiana statute that authorized the registrar of voters to determine whether a voter's 'understanding' of the federal or state constitution was sufficient to permit him or her to vote); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (invalidating state statute that created a 28-sided city boundary by which nearly all African-American voters would be excluded without excluding any whites); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating the so-called 'grandfather clause', an Oklahoma constitutional amendment that provided that "no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to do so read and write sections of such constitution.").

231 Ellis, 2014, p. 913-914.

232 *See Anderson v. Celebreeze*, 460 U.S. 780, 788 (1983).

233 *See generally* J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge, Harvard University Press, 1980.

if one is not called upon to show that the absence of perfection is actually problematic. In that case, one can always justify new regulations based on the possibility, which is necessarily perpetual, of 'improving the election machinery'. The same is true if, and contrary to the common understanding of the words used, the existence of an 'undue burden' will be seen to depend only on the absolute size of the burden created, without regard to any possible balancing of the burden against benefits allegedly to be achieved. In those circumstances, no medicine could possibly be too strong. Moreover, the *Crawford* concept of burden seemingly relates to an effect on the population at large rather than on the effect on those on whom the burden actually falls. Given those features, the illusory nature of the protection offered by the *Crawford* test is clear. Indeed, the test used in *Crawford* seems as undemanding as the rational basis standard used with respect to ordinary commercial activities. Indeed, in *Williamson v. Lee Optical of Oklahoma, Inc.*,[234] the canonical rational basis case in which the Court famously upheld an under-inclusive state statute pertaining to the regulation of eye care professionals on the ground that the state was entitled to pursue regulation 'one step at a time',[235] the Court emphasized that "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[236] Although the Court gave excessive deference to the legislature in that case,[237] it did seem to suggest the necessity for showing the existence of 'an evil at hand for correction', that is, a genuine problem to be solved, and some rational relationship between that problem and the means chosen to correct it.

A wealth of judicial statements suggests that the solution to one problem or another should rest with the political process.[238] In most cases, that is surely an appropriate response. In a representative democracy, we necessarily look in the

234 348 U.S. 483 (1955).

235 *Id.*, at p. 489.

236 *Id.*, at p. 488. *See also id.*, at p. 489. ("The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.")

237 *Id.*, at p. 488. ("We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois* ..., 'For protection against abuses by legislatures, the people must resort to the polls, not to the courts.'")

238 *See, e.g., Obergefell v. Hodges*, 135 S.Ct. 2584, 2627 (2015) (J. Scalia, dissenting) ("Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work."); *Planned Parenthood of Southeastern Pennsylvania, Inc. v. Casey*, 505 U.S. 833, 1002 (1992) ("[B]y foreclosing all democratic outlet for the deep passions this [reproductive choice] issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.").

first instance to the political process to synthesize, prioritize and resolve our public problems. That is in the nature of our government, and it is an approach that works much of the time. We act at our peril when we seek to short-circuit its customary processes. But fundamental rights and suspect classifications present a special case, as Justice Stone recognized in *Carolene Products*.[239] And that is especially true when the very problem to be solved *is* the political process – its integrity, its inclusiveness and its fundamental fairness. Moreover, that is where we stand with respect to the current state of the right to vote. The current reality is that those who control the electoral machinery often use that control for their own purposes, self-interest, and perpetuation in office, and for discriminatory or partisan ends. They are truly 'judges in their own cases',[240] and the courts, having first diluted the meaning of 'strict scrutiny', and then having rejected the application of even that weak version to all but a fraction of voting rights cases,[241] appear powerless to ensure fairness in this centrally important and foundational area of civic life. The Court must either rediscover the importance of strict scrutiny in voting cases, which seems highly unlikely, or it must devise a new approach for affording greater protection to the fundamental right to vote.

Some guidance in that regard may be found in a recent article by Emma Freeman,[242] who takes issue with what she sees as the Court's (possibly inadvertent)[243] diminution of the constitutional protection afforded to a woman's right to reproductive choice and suggests a refinement to the Court's approach, whereby she hopes to give an additional degree of "bite" to this constitutional protection.[244] Although the two areas are obviously dissimilar in many respects, they do share some important commonalities and may be susceptible to analogous methodological treatment. In contemplating approaches that might provide more muscular protection for the right to vote, it is therefore appropriate to consider Freeman's approach, which aims "to imbue the [undue burden] test with as much rigor as it can tolerate".[245]

As Freeman notes, the problem that concerned the Court in *Casey* was the need to reconcile two competing interests: the woman's right to terminate her pregnancy, on the one hand, and the state's interests in protecting both the woman's health and potential life, on the other hand.[246] In the *Casey* Court's view, *Roe* had given sufficient weight to the woman's interest but not to those of the state. The *Casey* plurality therefore intended to correct that error by adopting a standard of constitutional review that gave appropriate weight to both interests.[247] While the *Casey* plurality chose not to adopt a balancing test, there is no

239 *See United States v. Carolene Products*, 304 U.S. 144, 153 n. 4 (1938).
240 *See* John Locke, *Of Civil Government: Second Treatise*, Chicago, Regnery/Gateway, 1955, § 13, p. 11.
241 *See* Rotunda & Nowak, 2012 p. 222.
242 *See* Freeman, 2013, p. 279-323.
243 *Id*., at p. 280.
244 *Id*., at p. 281.
245 *Id*.
246 *Id*., at p. 321.
247 *Id*.

doubt but that it continued to take seriously the woman's right to choose.[248] Indeed, Freeman believes that the *Casey* plurality intended to provide a high degree of protection to the woman's right to terminate her pregnancy,[249] but inadvertently created a standard that failed to meet that objective.[250] In Freeman's view, a significant part of the problem rests in the fact that the *Casey* approach contains no nexus requirement. "Omitting nexus analysis denies *Casey* its rightful bite because regulations without unduly burdensome purposes or effects may still fail to further reasonably a legitimate state interest."[251] Under *Casey*, the courts must look to the purpose and effect of the regulation but not to the relationship between them, Freeman writes:

> Even rational basis review, the most forgiving standard of constitutional scrutiny, nominally requires courts to establish as adequate the connection, or "nexus," between the state's legislative ends and its legislative means. Though purportedly as stringent as intermediate scrutiny, undue burden lacks such a nexus inquiry: under *Casey*, courts must analyze a statute's purpose and its effects, but need not assess the relationship between the two. ...

248 *Id*., at p. 321-322. Freeman writes: "[t]hough it is difficult to speculate about the Court's reluctance to adopt a proportionality-based test, that hesitation may be symptomatic of the judiciary's conception of its own perceived boundaries." *Id*., at p. 322.

249 For example, Freeman argues that "[i]t is evident that the plurality believed state regulations on abortion must further a *genuinely legitimate* state interest. Though they did not incorporate this inquiry into their articulation of the undue burden test, the plurality opinion repeatedly assessed the state's interest to ensure its validity. The state had no legitimate interest, *e.g*., in "giv[ing] to a man the kind of dominion over his wife that parents exercise over their children.'" *Id*., at p. 294, *quoting Casey*, 505 U.S. at p. 898 (plurality opinion).

250 Freeman suggests that the *Casey* plurality intended for the 'undue burden' test to constitute an intermediate level of scrutiny, "lying somewhere between the deferential rational basis and the punishing strict scrutiny". *Id*., at p. 298. According to Freeman, the plurality did not intend "to retreat wholly from *Roe*'s protection of a woman's independence and discretion", but "sought to construct a less strict but still vigorous standard capable of defending the abortion right". *Id*., Finally, "[i]t is precisely *because* undue burden is a form of intermediate review that Justice Blackmun expressed his preference for *Roe*'s strict scrutiny and Chief Justice Rehnquist for *Webster*'s rational basis." *Id*. at p. 299-300.

251 *Id*., at p. 316.

> The Court's imprecise discussion of that test has led the appellate courts to apply the test in ways that poorly safeguard women's reproductive choice.[252]

To restore the *Casey* standard to the degree of muscularity that Freeman believes that the plurality intended, she suggests that the courts should first apply what she calls a 'rational basis with bite' standard as a threshold requirement before moving on to an application of the 'purpose and effect' test. Freeman takes *City of Cleburne v. Cleburne Living Center*[253] and *Plyler v. Doe*[254] to exemplify what she means by 'rational basis with bite'. In *City of Cleburne*, according to Freeman, Justice Brennan departed from standard rational basis analysis by concluding that the statute at issue "could not be considered rational unless it furthered a 'substantial' state goal".[255] Likewise, in *Plyler*, according to Freeman, Justice White "analyze[d] each of the city's purported rationales in great detail and ultimately concluded that the statute appeared to 'rest on an irrational prejudice against the mentally retarded'" so that "the city lacked 'any rational basis for believing' that a group home for retarded persons would 'pose any special threat to the city's legitimate interests'".[256]

The next step in the analysis depends on whether the regulation satisfies this heightened rational basis review. Freeman continues:

> Rational basis with bite [or heightened rationality review] includes a searching nexus analysis that enables courts to invalidate challenged legislation. If the legislation survives heightened rationality review, the court should then assess the permissibility of its purpose and the severity of its effects. Should the legislation fail heightened rationality review, however, the court should invalidate the statute without proceeding to the purpose and effects test.

252 *Id*., at p. 279-280. Freeman points out that traditional rational basis review and heightened rational basis review both contain a nexus requirement, but that courts implementing the former "merely invoke, but do not in fact apply, nexus analysis", whereas courts implementing the latter "actually examine the relationship between state means and ends". *Id*., at p. 285. Freeman also observes that "[b]ecause the Court has been reluctant to acknowledge overtly the existence of rational basis with bite, much less identify the factors that trigger such enhanced review, the standard's boundaries remain blurry." *Id*., at p. 287. In any event, heightened rationality review differs in three ways from traditional rational basis review: "the 'bite' renders the courts less deferential to the legislature, less tolerant of over- and under-inclusive classifications, and less open to state experimentation." *Id*., at p. 285. Finally, Freeman notes that because of the Court's extensive use of the language of rational basis review, "some scholars remain 'unclear whether *Casey*'s undue burden standard subjects abortion regulations to intermediate scrutiny, or merely to rational basis review.'" *Id*., at p. 293. Indeed, as Freeman also observes, even Justice Scalia expressed confusion, noting that the plurality's "description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness". *Id., quoting Casey*, 505 U.S. at 986 n.4 (Scalia, J., concurring in part and dissenting in part).

253 457 U.S. 202 (1982). In neither case, of course, did the Court indicate that it was applying any test other than the standard rational basis test.

254 473 U.S. 432 (1985).

255 Freeman, 2013, p. 286.

256 *Id*., at p. 286-287.

> Derived in equal measure from *Casey*'s text and *Roe*'s promise, the method aims to balance loyalty to precedent with advocacy for the abortion right.[257]

Importantly, Freeman observes that "only rational basis with bite can truly assess – rather than simply presume – the legitimacy of a state's interest."[258] That is so because heightened rationality or rational basis with bite review (in contrast to ordinary rational basis review) does not permit the state to prevail in a challenge to its regulation by simply invoking a 'conceivable' justification that played no role whatever in the state's determination but was merely the product of resourceful and imaginative litigation lawyers who were called upon to justify the measure after the fact. If one can generalize from *Plyler* and *City of Cleburne*, what seems to be significant to the Court in heightened rationality review is not the articulation of reasons that are merely 'conceivable', but the identification of the government's *real* reasons for taking the action it took, as well as the demonstration of a connection between those reasons and a 'substantial' goal of the state. In addition, the Court seems to expect that the state will come forward with those reasons. Under heightened rationality review, the party challenging the regulation does not have the obligation to prove the negative; that is, it is not required to "disprove 'every conceivable basis which might support it'".[259] Thus, it is necessary for the Court to assess – rather than just presume – the reality and legitimacy of the state's interest, and it is necessary to determine whether the means selected to further a real and legitimate state interest are a reasonable means of furthering that interest. Freeman further writes:

> Inherent in these statements is a substantial analysis of the relationship between the state's interest and its legislation. Although traditional rational basis review technically contains such analysis, only rational basis with bite actually applies it: courts implementing rationality review purport to assess the connection between the state's means and its ends, but they do not in fact do so. Nexus analysis only truly comes to fruition through rational basis with bite.[260]

Under Freeman's two-part scheme, the court's inquiry will terminate if the regulation does not meet the heightened rational basis standard.[261] In the event that the regulation does meet that standard, however, the court will then consider the constitutionality of the regulation under the purpose and effects test. In the abortion context, the purpose prong requires an evaluation of "the state's reason for enacting the challenged statute, determining whether it sought to make abortions more difficult to procure".[262] Freeman continues: "[t]he effects prong, on the other hand, looks not to the state's rationale but to the statute's concrete conse-

257 *Id.*, at p. 280.
258 *Id.*, at p. 294, quoting *Casey*, 505 U.S. at p. 898 (plurality opinion).
259 *Heller v. Doe*, 509 U.S. 312, 320 (1993).
260 Freeman, 2013, p. 294-295.
261 *Id.*, at p. 301.
262 *Id.*, at p. 295.

quences. How might a twenty-four-hour waiting provision, for instance, practically affect a woman seeking to obtain an abortion? In short, the purpose and effect prongs are the two routes through which a regulation may prove unduly burdensome."[263] And the effect of the regulation will be measured on the basis of its effect on those who are affected by it, not on those for whom it does not matter.[264] Freeman also emphasizes the importance of engaging in the two inquiries in the order in which she has discussed them: "[t]he undue burden standard will not retain its intended rigor unless rational basis analysis is properly situated before, rather than within, the two prongs of that test. … Whereas the purpose and effects test examines the state's means and its ends separately, asking whether each is sufficient in itself, the nexus inquiry of rational basis with bite examines the connection between those means and those ends, assessing the adequacy of the relationship between them."[265]

Clearly, the two-part analysis set forth in Freeman's article would provide additional protection for the constitutional right originally recognized in *Roe*. In Freeman's view, it would also provide the kind of muscular protection for that right that the *Casey* plurality sought, but failed to achieve, when it created the 'undue burden' test. But what lessons, if any, does Freeman's revamping of the *Casey* test hold for the similar problem facing the realm of voting rights?

One impetus for Freeman's work on the law relating to reproductive choice was her recognition that the Court had expended a great deal of time and effort in reaching its present point with respect to the relevant jurisprudence. A majority of the Court had soon come to the conclusion that *Roe* was too lopsided in its protection of the woman's interest and gave insufficient attention to the state's legitimate interest. For that reason, the Court embarked on a long intellectual journey, seeking what it deemed to be a better balance between the competing rights and interests within the constraints imposed by stare decisis. Although Freeman thought that the proper solution to the problem was to return to *Roe*'s strict scrutiny test, the Court was unlikely to go back. Indeed, given the long history of the Court's jurisprudence in this area, it was extremely unlikely that the Court would suddenly return to its previous view that strict scrutiny provides the proper standard of review in the context of regulations relating to reproductive choice. The Court had long recognized that reproductive choice issues require the courts to be attentive to multiple interests, which was thought to make strict scrutiny inap-

263 *Id*., at p. 296.

264 *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

265 Freeman, 2013, p. 302. Freeman finds support for her interpretation of the undue burden test in Justice Stevens's partial concurrence in *Casey*, in which he remarked that, notwithstanding the opacity of the plurality's opinion, "[t]he future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion." *Id*., at p. 322, *quoting Casey*, 505 at 920 n.6 (J. Stevens, concurring in part and dissenting in part). According to Freeman, Justice Stevens recognized that the undue burden standard "tests the weight of the burden, the legitimacy of the state's regulatory purpose, and the sufficiency of the relationship between them. A regulation that fails any of the above components is an unconstitutionally undue burden on the right to abortion". *Id*.

propriate. Thus, although Freeman thought that strict scrutiny was the appropriate standard, she set about constructing an alternative mode of analysis that would ensure more muscular protection for the woman's interest, while also giving appropriate attention to the state's interest. In this way, she hoped to garner the support of a majority of the Court. Given the relative theoretical underdevelopment of the undue burden test, Freeman chose to focus her attention on how that test could be more adequately articulated in a way that gave greater protection to the woman's interest in reproductive choice.

A somewhat similar, but not identical, situation exists with respect to the protection of voting rights. To start with, both areas are characterized by some need to balance competing interests. In the reproductive choice area, the Court recognizes that the state has a strong interest both in the promotion of childbirth and in the protection of maternal health – interests that may well conflict with the woman's interest in reproductive choice. Similarly, the Court recognizes that the right to vote would be illusory if there were no regulation of voting. Elections – and the right to vote – would be a farce if, for example, anyone could cast a vote without having to identify herself in some way, or, alternatively, could cast as many votes as she could fit into her schedule. In both cases, there are competing concerns, but the Court treats them quite differently in practice, even today. Even under existing jurisprudence, a law regulating reproductive rights will not be upheld merely because the state says that there *might* be a problem and a more onerous regulation *might* ameliorate the problem if it does exist.[266] Thus, in *Whole Woman's Health*, for example, the Court found no basis for doubting the district court's conclusion that there was "no significant health-related problem that the law helped to cure".[267] If a problem does not exist, the need to solve it cannot provide the basis for a rational regulation. Yet that is the only standard that makes sense in attempting to describe the Court's decision in *Crawford*. There the Court accepted a merely theoretical concern as a valid justification, while a similar, also purely theoretical concern was not deemed sufficient in *Whole Woman's Health*.

As *Crawford* shows, the Court's voting rights jurisprudence has proved too anaemic in practice to provide the kind of protection that the right to vote deserves and demands. The Court clearly recognizes the central importance of the right to vote, and the Court certainly must realize the ease with which that right can be nullified by those who control the machinery of the electoral process – but the Court seems incapable of affording adequate protection to it. There is a serious need for a new approach – one that can actually be administered by the lower courts, with a view to guaranteeing the integrity of the electoral process while also ensuring that individuals are not unfairly excluded from the franchise, whether by means that are 'sophisticated' or by those that are 'simple-minded'.[268]

266 *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-2310 (2016) (holding that certain regulatory provisions constituted an undue burden because they did not afford "medical benefits sufficient to justify the burdens [that they imposed] upon access").

267 *Id.*, at p. 2311.

268 *See, e.g., Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J.) ("The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.")

There are several possibilities. First, the Court could return to the strict scrutiny standard that the Court adopted in *Harper*. Of course, the Court has moved a long way away from that standard and is unlikely to return to it. As was the case with *Roe*, the Court obviously believes that strict scrutiny pays insufficient attention to the state's competing interest, which can be seen, in the case of voting, as the state's interest in an honest and efficient voting system. For that reason, the Court presumably believes that its current approach is preferable, notwithstanding its failure to give adequate protection to the right to vote.[269] But a new approach is clearly warranted. Thus, another possibility is that the Court could adopt something along the lines of Freeman's approach. This would allow the Court to place this area of the law within the class of cases to which undue burden analysis is applied, while also providing a greater level of protection for the right to vote.[270] The two-step analysis that Freeman would apply in the reproductive choice context would apply equally well to voting rights regulations. First, the regulations would be subject to the type of heightened rationality review that Freeman draws from *Cleburne* and *Plyler*. At that stage, the state could not rest on any "conceivable" purpose to support its legislation or regulation. The state would have the burden of coming forward with what really was on the minds of those who crafted the regulation. Where the regulation was meant to be remedial, the state would not be entitled to rely on a presumption that a problem existed. The state would be required to identify the problem that it sought to solve and to show that the problem was a real one, not something that might conceivably be a problem for someone somewhere in some theoretical universe, but an actual problem that existed in the state that enacted the legislation or promulgated the regulation. In this way, the reality and legitimacy of the state's interest would be made a matter of proof rather than presumption. The court would also be able to address, in a similarly grounded way, the appropriateness of the means chosen to further the state's real and legitimate interest.

If the state could not satisfy this heightened rational basis test, that would be the end of the matter. If, on the other hand, the state succeeded in meeting that test, the court would be required to proceed further. At the second stage, the court would consider the constitutionality of the regulation under the purpose and effects test that Freeman has described or pursuant to a more general balancing test. In either event, the court would be allowed to delve more deeply into the problem, particularly with respect to the costs and benefits of the state regulation, while at the same time demonstrating the degree of respect due to the political processes of the state. At this point, however, the state would not be able to justify a regulation that yields only the smallest of benefits, while imposing a heavy burden on an identifiable group for whom the regulation matters. As the Court has made clear in the reproductive rights context, the inquiry must focus

269 As previously noted (*see supra* note 157), Dean Chemerinsky offered the Court another alternative, based on a distinction between direct and indirect violations of the right to vote, but the Court rejected that alternative as well.

270 *See* G. Metzger, 'Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence', *Columbia Law Review*, Vol. 94, 1994, p. 2038-2040 (discussing burden analysis in dormant commerce clause and First Amendment jurisprudence).

on those who are burdened by the regulation, not on those for whom it makes no difference at all. In addition, the court would be entitled at this second stage to inquire further into the purpose of the regulation. In this way, appropriate attention could be given to the state's legitimate interest in the integrity of the electoral process, but the mere incantation of a theoretical interest would not suffice to disenfranchise those whose political beliefs and interests are thought not to be congruent with those of the officials who have the power to make the rules.

F Conclusion

As we have seen, the process by which meaning is given in individual cases to the requirements of substantive due process and equal protection is not tidy. The three-tiered approach may be more honoured in the breach, and it tells only part of the story in any event, while perhaps only the outlines of the 'undue burden' test have thus far been disclosed by the jurisprudence. But, far from agreeing with Justice Scalia, we can conclude that this area of the law is not 'an embarrassment'. And, unlike Justice Rehnquist, we can take no comfort in basing our rejection of innovation on the ground that the words of a new test are not contained in the text of the Constitution – when that was also true of the words of the old test too.[271]

The mere fact that equal protection law requires the use of a number of tests and therefore lacks doctrinal tidiness is not necessarily an evil in want of a cure. Aristotle seems to have understood this point when he acknowledged that different subjects admit different degrees of certainty and therefore warrant different modes of inquiry.[272] Aristotle also would have recognized that approaches must change as the life they are meant to govern also change. Last year's influenza vaccine will do no good in dealing with this year's strain of the disease. The seemingly uncertain or changing nature of the doctrine reflects the complexity of the circumstances to which the doctrine must be applied as well as the multiplicity of values that must be considered in formulating that doctrine. This seeming uncertainty or change also reflects the fact that circumstances may require that some matters of judgment be committed for structural reasons to one kind of decision maker rather than another. A multiplicity of tests may cause confusion, and an unwarranted multiplicity of tests should not be countenanced for that reason. On the other hand, a multiplicity of tests may be required to accommodate reality. In that case, evil does not lie in a multiplicity of tests, but only in the lack of explanation and transparency as to their need and use.

That is not to say that current doctrine necessarily is coherent or in good form, and the apparent density of this area of the law reflects that fact as well. Such complex doctrines are always in a state of evolution and always warrant improvement to better reflect an appropriate balance of values. That is particularly true at the present moment with respect to the law relating to voting rights.

271 *See Craig v. Boren*, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting).

272 *See* Aristotle, *Nicomachean Ethics*, Martin Ostwald (Trans.), Indianapolis, Boobs-Merrill, 1962, p. 18-19.

In *Wesberry v. Sanders*,[273] the Court correctly observed that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Representative democracy itself depends on affording the highest possible degree of protection to that right, which is 'preservative of all rights'.[274] But, notwithstanding these inspiring words, the Court clearly has afforded an excessive degree of deference to state officials, allowing citizens to be disenfranchised on the flimsiest of grounds. As we have seen, the right to vote cannot adequately be protected when the state places the responsibility for making the rules in the hands of those whose own interests are at stake, and the courts effectively absolve the state from any obligation to show that it acted in response to a real problem or otherwise explain its actions. The law in that area clearly needs an overhaul.

273 376 U.S. 1, 17 (1964).
274 *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

Trinity Lutheran and Its Implications for Federalism in the United States

Brett G. Scharffs[*]

A Introduction

In the United States, federalism refers to the constitutional relationship between the federal government of the United States and state governments.[1] The long arc of the history of federalism in the United States over the past 200 years is for the most part a story of the gradual decline of state power and an increase in federal power.[2] Nevertheless, there are occasional developments that merit attention, including an interesting case decided in the summer of 2017, *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[3] This case is noteworthy not only for what it signals about the complex relationship between state and federal law, but also how those complexities are compounded when they occur at the intersection of different U.S. constitutional law imperatives, in this case the protection of 'free exercise' of religion and the prohibition of an 'establishment' of religion.

On its face, the case could hardly be more prosaic. It was about whether the state of Missouri could exclude a church-owned school from participating in a 'tire scrap' programme for resurfacing playgrounds, pursuant to the constitutional provision of Missouri prohibiting state funding of religion, or whether by excluding the church, the State was in violation of the Free Exercise Clause of the First Amendment. But the case was about much more than scraped knees. It created a standoff between a State constitutional provision forbidding any state funds to aid religion (known as state 'Blaine Amendments') and the Federal constitutional Free Exercise provision guaranteeing neutrality and non-discrimination in matters of religion.

To the surprise of many observers, the U.S. Supreme Court held that Missouri's policy amounted to unlawful discrimination against churches, and was thus a violation of the Free Exercise Clause. As Justice Sonja Sotomayor pointed

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1 *See* L.D. Kramer, 'Understanding Federalism', *Vanderbilt Law Review*, Vol. 47, 1994, p. 1488, n. 5. (Defining federalism in the United States.)

2 *See* J. Bulman-Polzen, 'From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism', *Yale Law Journal*, Vol. 123, 2014, p. 1920-1957; H.N. Scheiber, 'Redesigning the Architecture of Federalism – An American Tradition: Modern Devolution Policies in Perspective', *Yale Law and Policy Review*, Vol. 14, 1996, p. 227-296.

3 137 S. Ct. 2012 (2017).

out in her dissent, in so holding the Court 'profoundly change[d]' the relationship between church and state "by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church".[4] Justice Sotomayor asserts that this outcome "weakens this country's longstanding commitment to a separation of church and state beneficial to both".[5]

This article is a brief introduction to the *Trinity Lutheran* case and the federalism dimension of the case. To some extent, the federalism issue was the lion that did not roar in the case. But the relative silence of that lion does not mean its presence was not significant, nor that the lion has disappeared. The Court did not directly address the question of whether the State constitutional law provision was itself a violation of the Free Exercise Clause. Thus, the great unknown remains unknown – whether these state law provisions can be used to prohibit religious schools from receiving other forms of state aid, including the politically and economically significant form of school vouchers.

Section B will set the stage for the case by describing the history of the unsuccessful 'Blaine Amendment' to the U.S. Constitution, as well as the proliferation of State constitutional provisions known as 'Baby Blaine' Amendments. It will also briefly summarize a few of the key precedents important to the *Trinity Lutheran* case. Section C will describe the *Trinity Lutheran* case in greater detail, focusing upon how the federalism issue was addressed by the Court. Section C addresses the question of what the *Trinity Lutheran* case means for the future of the state Blaine Amendments, as well as for the future of federalism in the United States.

4 *Ibid*., at 2027 (Sotomayor, J., dissenting).
5 *Ibid*.

B Setting the Stage

I The Failed Blaine Amendment and Its State Law Counterparts

In the 1870s, James G. Blaine was a Republican U.S. Representative and eventually Senator from Maine, who wanted to be president.[6] He was the child of a Catholic mother, and a Protestant father who may have converted to Catholicism, but he lived in post-Civil War America at a time when anti-Catholic sentiment was high.[7] Public 'common schools' were gaining momentum and became an important battleground for the tensions between the country's Protestant majority and its Catholic minority. In most parts of the country, the public schools were de facto Protestant institutions,[8] and Catholic immigrants were setting up schools of their own where their children could receive a Catholic education.[9] It was also a time when U.S. politics in general, and Republican politics in particular, had a powerful anti-Catholic current.[10]

6 *See* Ph. Hamburger, 'Prejudice and the Blaine Amendments', *First Things* (20 June 2017), available at: https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments (Explaining the political context surrounding Blaine Amendments.) "For decades, states had used taxes to support public and private schools controlled by Protestants, with the goal not merely of Americanizing but of Protestantizing Catholic children." *Ibid*. As the number of Catholic immigrants increased, "there were widespread fears that Catholics would balance this out by voting for politicians, mostly Democrats, who would direct tax funds to public or private schools dominated by Catholics." *Ibid*. Blaine's amendment would have prevented tax money from coming under the control of any 'religious sect'. *Ibid*. As Professor Hamburger explains, "Existing constitutional provisions against establishments of religion did not bar public spending on education from reaching schools with religious affiliations, and Blaine's amendment did not propose to alter this arrangement except by excluding Catholics. *Ibid*. The Catholic Church, being attached to its orthodoxies, had theological objections to cooperating theologically with Protestants, and it therefore could only operate schools that were distinctly Catholic or 'sectarian'. *Ibid*. In contrast, Protestants were willing to join with Protestants of other denominations in running schools. *Ibid*. Thus, when the Blaine Amendment stated that public money could not go to institutions belonging to any one 'sect', it effectively proposed to prevent money from reaching Catholic institutions – without cutting off funds for institutions shared by Protestant denominations." *Ibid*.

7 *See* S.K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine*, Oxford, Oxford University Press, 2012, p. 94-95, 170 & 187-190 ("By the early 1870s, focus shifted to … how to preserve the public school system while ensuring that Catholic schools did not obtain a share of the school funds."); P. Hamburger, *Separation Of Church And State*, Cambridge, Harvard University Press, 2002, p. 191-478 (Detailing virulent anti-Catholicism in church-state issues); *see also* S.K. Green, 'The Blaine Amendment Reconsidered', *American Journal of Legal History*, Vol. 36, 1992, p. 42-55. (Reviewing the 1870 political efforts to remove religious activities from schools.)

8 D.L. Drakeman, 'Book Review: K. Green, *The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine*, Oxford University Press, 2012', *American Political Thought*, Vol. 1, 2012, p. 331-332.

9 *Ibid*.

10 R.G. Bacon, 'Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions', *Delaware Law Review*, Vol. 6, 2003, p. 3-4. "The huge midcentury Catholic wave … stirred Protestant fury" and Irish Catholics became something of "urban bogeymen" (quoting K. Phillips, *The Cousins' Wars*, New York, Basic Books, 1999, p. 483).

In 1875, President Ulysses S. Grant, in his annual message to Congress, proposed amending the Constitution to "establish and forever maintain free public schools" for all children, and forbidding the teaching of "religious, atheistic, or pagan tenets" in public schools, and banning spending public money "in aid, directly or indirectly, of any religious sect or denomination".[11]

In response, Congressman Blaine proposed in 1875 an Amendment to the U.S. Constitution to prohibit spending any public money on religious institutions including religious schools.[12] Because this would have been a federal constitutional amendment, it would have applied to the federal government as well as all the states. The federal Blaine Amendment eventually failed to pass in Congress, so it was never sent to the states for ratification.[13] Senator Blaine was unsuccessful in his bid to win the Republican nomination for president in 1876, but was twice named Secretary of State and was the Republican nominee for president in 1884, an election he narrowly lost to Grover Cleveland.[14]

Although the federal Constitutional provision failed, in the 1870s and the decades that followed a number of states adopted State constitutional provisions, which came to be known as 'Baby Blaine' Amendments.[15] These provisions varied somewhat in wording, but shared the goal of limiting state funding of churches and religious schools. For some states, adopting such provisions was a precondi-

11 Ph.R. Moran, *Ulysses S. Grant 1822-1885*, New York, Oceana, 1968, p. 92 (Quoting Grant's comments from his Seventh Annual Message on December 7, 1875.); M.E. DeForrest, 'An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns', *Harvard Journal of Law and Public Policy*, Vol. 26, 2003, p. 565.

12 S.K. Green, 'The Blaine Amendment Reconsidered', *American Journal of Legal History*, Vol. 36, 1992, p. 50. The proposed Blaine Amendment read, "[n]o state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." *Ibid*.

13 Philip Hamburger explains, "Blaine's proposal passed in the House by 180 to 7. But, in the Senate, it was criticized as an 'election dodge,' and it fell two votes short of the two-thirds required to propose a constitutional amendment. Revealingly, Blaine, who by this time was a senator, did not even attend the vote. His goal all along, as *The Nation* commented, had been merely to 'catch anti-Catholic votes' for his campaign." P. Hamburger, 'Prejudice and the Blaine Amendments', *First Things* (20 June 2017), available at: https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments

14 Office of the Historian, *Biographies of the Secretaries of State: James Gillespie Blaine (1830-1893)*, available at: https://history.state.gov/departmenthistory/people/blaine-james-gillespie.

15 *See* M.E. DeForrest, 'An Overview and Evaluation of State Blaine Amendment: Origins, Scope, and First Amendment Concerns', *Harvard Journal of Law and Public Policy*, Vol. 26, 2003, p. 573; E. Smith, 'Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs', *Federalist Society Review*, Vol. 18, 2017, p. 53.

tion for their being accepted into the Union as states.[16] Today, nearly forty states have such State constitutional provisions.[17]

The failed Blaine Amendment, along with its state law counterparts, have been widely criticized for being motivated by anti-Catholic bias and animus.[18] Some historians have argued persuasively that these clauses were based largely on anti-Catholic bigotry, but others have pointed out that there were multiple reasons for these laws, including a desire to promote a strong system of public education in the aftermath of the Civil War.[19]

There is some question whether the Missouri law in question is really a 'Baby Blaine' Amendment, since it was debated a few months before the federal constitutional provision was introduced.[20] But, as Mark Edward DeForrest has explained, Missouri's State constitutional provision arose from the same cultural and political milieu and is one of the most restrictive versions of these type of laws.

> Missouri teams an extensive prohibition on government aid to religious bodies and religious schools with another constitutional provision that mandates that the state educational fund be used only for the establishment and maintenance of "free public schools".[21]

The Missouri Constitution contains several provisions that prohibit state funding of religion. Article I, Section 7 provides:

16 "6 states … were compelled to include a Blaine Amendment as a condition of admission to the Union after 1889." U.S. Commission on Human Rights, *School Choice: The Blaine Amendments & Anti-Catholicism*, 2007, p. 48, available at: www.usccr.gov/pubs/BlaineReport.pdf (Providing a table in appendix one that lists the following states as those which were compelled to adopt a Blaine Amendment: New Mexico, North Dakota, South Dakota, Oklahoma, Washington, and Utah.)

17 Due to the variety of wording, exact counts of the number of State Blaine Amendments vary. Most counts are between 37 and 39. In her dissenting opinion, Justice Sotomayor states that in addition to Missouri, thirty-eight states have such provisions in their State constitutions. *Trinity Lutheran Church of Col., Inc. v. Comer*, 137 S. Ct. 2012, 2037 (2017) (Sotomayor, J., dissenting).

18 *See, e.g.*, D. Laycock, 'Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty', *Harvard Law Review*, Vol. 118, 2004, p. 185-187 ("Much of the American tradition of refusing to fund private schools is derived from nineteenth-century anti-Catholicism."); G. Bacon, 'Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions', *Delaware Law Review*, Vol. 6, 2003, p. 40.

19 *See* Brief for Legal and Religious Historians as Amici Curiae Supporting Respondent, *Trinity Lutheran Church of Col., Inc. v. Comer*, No. 15-577 (U.S. 26 June, 2017). (Arguing that Missouri's Blaine Amendment did not "ar[ise] from pervasive anti-Catholic animus".)

20 Professor Ravitch notes, "It is true that Article I, Section 7 of the Missouri Constitution was passed in 1875 – the same year the failed federal Blaine Amendment was introduced. … The key, however, is not the year it was passed, but rather the dates on which it was debated. The Missouri provision was discussed by the Missouri Constitutional Convention months before Senator Blaine proposed the federal amendment. This adds some fuel to the argument that it is not a baby-Blaine." F.S. Ravitch, 'A 147-Year-Old Dispute between Church and State Spills onto a School Playground', *Observer.com* (4 May 2017).

21 M.E. DeForrest, 'An Overview and Evaluation of State Blaine Amendment: Origins, Scope, and First Amendment Concerns', *Harvard Journal of Law and Public Policy*, Vol. 26, 2003, p. 587.

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship

And Article I, Section 8 provides:

> Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.

In the run-up to the *Trinity Lutheran* case, some commentators speculated that the Court might use the case as an opportunity to strike down Missouri's Blaine Amendment, and by implication other similar state provisions, on the grounds that it was motivated by religious animus. This would have significant impact for contemporary controversies in the United States about state funding of religious schools through voucher programmes. The U.S. Supreme Court has interpreted the Establishment Clause of the First Amendment to limit direct government funding of religion, but state law provisions like Missouri's have been even more restrictive of state funding.[22] Thus, for example, while the U.S. Supreme Court has said that school voucher programmes that include religious schools do not violate the Establishment Clause, Blaine Amendments in state constitutions have been cited by a number of state Supreme courts as a basis for limiting religious schools access to such funding. As a result, the State laws have often been more restrictive of government funding of religious schools than the Establishment Clause. And a holding by the Supreme Court that state Blaine Amendments violate the Free Exercise Clause would remove a significant obstacle to state funding of religious schools. Thus, to a significant extent, the *Trinity Lutheran* case could be viewed as a stalking horse for the school voucher controversy.

22 "The government may not directly fund religious exercise." *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting) (*Citing Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947).); *Mitchell v. Helms*, 530 U.S. 793 (2000)); *see also, e.g.*, *Locke v. Davey*, 540 U.S. 712 (2004). (Holding that Washington did not violate the Free Exercise Clause by refusing to fund a devotional theology instruction, pursuant to Washington's statute that prohibits direct and indirect funding to religious entities; moreover, noting that a "differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution …".)

II Free Exercise and Non-Establishment

It is generally understood that there is some tension between the Free Exercise Clause and the Establishment Clause. The tension is most noticeable in controversies involving funding. Funding religion would seem to violate the Establishment Clause, but prohibiting some types of funding, especially when it is available to non-religious actors, might interfere with Free Exercise. Grappling with this potential paradox has been one of the central challenges of the Supreme Court's religion clause jurisprudence. An early case, *Everson v. Board of Education*, illustrates the tension.[23]

1 Everson v. Board of Education

In *Everson*, a New Jersey statute authorized local school districts to establish rules for transportation of children to and from school.[24] One township board of education, acting pursuant to the statute, authorized reimbursement payments to parents who spent personal funds transporting their kids on local bus systems.[25] A portion of these reimbursements went to parents who sent their children to religious schools that provided secular and religious education.[26] In response, a district taxpayer filed suit contending that the New Jersey statute violated both the state and federal constitutions because taxpayer dollars were being expended to aid children who were receiving a religious education.[27]

The key question before the Court was whether the New Jersey statute was a "law respecting the establishment of religion".[28] The Court's opinion can fairly be described as being of two minds. The first half of the opinion stresses the importance of separation of church and state and invokes Thomas Jefferson's metaphor of a 'wall of separation' between church and state, which would suggest that funding is constitutionally impermissible.[29] The second half of the opinion emphasizes the concept of neutrality, and concludes that the State's programme did nothing more than "provide a general programme to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools".[30]

23 *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947).
24 *Ibid*., at p. 3.
25 *Ibid*.
26 *Ibid*.
27 *Ibid*., at p. 3-4.
28 *Ibid*., at p. 8.
29 *Ibid*., at p. 16. In a letter to the Danbury Baptist Association, Jefferson commented that "religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only1 and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that *their* legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof; thus building a wall of separation between church and state". T. Jefferson, 'Draft Reply to the Danbury Baptist Association, [on or before 31 December 1801]', *Founders Online*, available at: https://founders.archives.gov/?q=Thomas%20Jefferson%201802%20Author%3A%22Jefferson%2C%20Thomas%22%20danbury&s=1411311111&sa=&r=3&sr=.
30 *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 18 (1947).

The *Everson* case set the stage for the next fifty years of Establishment Clause jurisprudence, which is characterized by a struggle between 'separationist' readings and 'accommodationist' readings. These two visions of the meaning of the anti-establishment principle came to a head in 2002 in a school voucher case, *Zelman v. Simon-Harris*.[31]

2 Zelman v. Simon-Harris

In *Zelman*, state taxpayers filed an action challenging the Ohio Pilot Scholarship programme – a voucher programme providing tuition aid to both public and private school students in the city of Cleveland, Ohio. Because roughly 96% of private school students receiving the aid attended religiously affiliated schools, Ohio taxpayers sought to enjoin the programme as a violation of the Establishment Clause.[32] The Supreme Court upheld the Ohio programme on the grounds that it provided 'true private choice', and was 'neutral in all respects toward religion'.[33] The Court concluded that the programme only incidentally, and not through a direct 'purpose or effect',[34] provided government aid to religious institutions by the deliberate intervening choice of individuals. Thus, the Court concluded the Ohio programme did not violate the Establishment Clause.[35]

The *Zelman* case left unresolved the question of "whether government *must* fund religious entities when it opens up a generally available funding program".[36] The question whether government *may* fund religious organizations through such programmes was clearly answered by the Court, but the resolution of whether it *must* was left untouched. This question arose in a 2004 case, *Locke v. Davey*.[37]

3 Locke v. Davey

In *Locke*, a student sought to use a generally available Washington State scholarship programme to pursue a double major in pastoral studies and business administration at Northwest College.[38] Washington has a State constitutional provision prohibiting funding religion,[39] and so Washington did not permit this scholarship to be used in the pursuit of a theology degree.[40] Locke brought an action arguing

31 *Zelman v. Simon-Harris*, 536 U.S. 639 (2002).
32 *Ibid*.
33 *Ibid*., at p. 639-640.
34 *Ibid*., at p. 648-649.
35 *Ibid*., at p. 662.
36 F. Ravitch, 'Symposium: Trinity Lutheran and Zelman – Saved by Footnote 3 or a Dream Come True for Voucher Advocates?', *SCOTUSBlog* (26 June 2017, 10:59 PM), available at: www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates/(emphasis added).
37 *Locke v. Davey*, 540 U.S. 712 (2004).
38 *Ibid*., at p. 716-718.
39 The relevant portion of the Washington Constitution states that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment …". Constitution of Washington, Art. I Section 11 (amended in 1993).
40 *Ibid*., at p. 717.

that the denial of his scholarship violated his First Amendment right to Free Exercise.[41]

The Court's framing of the issue is significant:

> [T]here is no doubt that the State *could*, consistent with the Federal Constitution, *permit* Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.[42]

The Court concluded that the State did not violate the Free Exercise Clause by excluding religious uses from the scholarship programme:

> Washington's exclusion of the pursuit of a devotional theology degree from its otherwise-inclusive scholarship aid program does not violate the Free Exercise Clause. This case involves the "play in the joints" between the Establishment and Free Exercise Clauses … . The State's interest in not funding the pursuit of devotional degrees is substantial, and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here.[43]

III Vouchers and School Choice

School choice is a slogan attached to any policy that enables parents "to choose the best [educational] opportunity for their children",[44] whether by attending a public or private school. Since the early 1990s when this movement began gaining traction, school choice and vouchers have gained significant ground.[45] Today there are an estimated twenty-six operating voucher programmes in fifteen states, most of which are small and targeted on failing school systems.[46] Statistics also show that the majority of private schools are religiously affiliated.[47] Thus, the question of whether voucher programmes can or must include religious

41 *Ibid*., at p. 712.

42 *Ibid*. (citation omitted) (emphasis added).

43 *Ibid*.

44 *See* R.D. Komer & O. Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, 2nd ed., Institute for Justice, 2016, p. 9, available at: http://ij.org/wp-content/uploads/2016/09/50-state-SC-report-2016-web.pdf.

45 *See* E. Smith, 'Blaine Amendments and the Unconstitutionality of Excluding Religious Options from School Choice Programs', *Federalist Society Review*, Vol. 18, 2017, p. 49.

46 *Resource Hub: Fast Facts*, EdChoice, available at: https://www.edchoice.org/resource-hub/fast-facts/#voucher-fast-facts. (Showing a dramatic increase in interest since programmes were initially sparked by the 1990 Milwaukee Parental Choice Program.)

47 *Facts and Studies*, Council of American Private Education, available at: http://www.capenet.org/facts.html (Providing facts that show that 25% of all US schools are private schools, and within these schools, 79% are religiously affiliated organizations.)

schools is important to the viability of voucher programmes, and also raises important issues of the non-establishment and free exercise of religion.

There has been extensive litigation in the United States about whether voucher programmes that permit religious schools are permitted (under the Establishment Clause), or whether religious schools can be excluded (without violating the Free Exercise Clause). As noted above, the most significant case was the 2002 case, *Zelman v. Simon-Harris*,[48] where the Supreme Court answered the first question, whether vouchers used to fund education at religious institutions violate the Establishment Clause.[49] The Court concluded that the voucher programme did not violate the Establishment Clause, even though a large portion of the vouchers were used at religiously affiliated schools. Left unanswered, however, was the question of whether a state *must* include religious organizations in its voucher programmes.[50]

At the time, there was a general expectation that the *Zelman* case would open the floodgates to voucher programmes that included funding religious schools, but this expectation for better or worse has not been realized. One significant obstacle has been the existence of State constitutional 'Blaine Amendments', which provide further state-based limitations to school choice and voucher programmes. Thus, we arrive at one of the crucial federalism debates that many hoped to see resolved in *Trinity Lutheran*: whether the federal courts would strike down or uphold state Blaine Amendments.

C *Trinity Lutheran Church v. Missouri*

I Facts and Holding

The Trinity Lutheran Church Child Learning Center, originally set up as a non-profit organization and later merged with the Trinity Lutheran Church, is a preschool that operates on church property and enrols approximately ninety children in its educational programme.[51] The Center admits students of any religion but its curriculum and mission are religious in character. The Center maintains a playground with an assortment of children's equipment, and the equipment is located over a surface of course pea gravel that can be 'unforgiving' when children fall.[52]

48 536 U.S. 639 (2002).

49 U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion … .").

50 *See* F. Ravitch, 'Symposium: Trinity Lutheran and Zelman – Saved by Footnote 3 or a Dream Come True for Voucher Advocates?', *SCOTUSBlog* (26 June 2017, 10:59 PM), available at: http://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates ("Still, a question left open in *Zelman* was whether government *must* fund religious entities when it opens up a generally available funding program … .")

51 *Trinity Lutheran Church of Col., Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

52 *Ibid*.

In 2012, the Center began looking into options for replacing the gravel.[53] The Center applied for a grant from 'Missouri's Scrap Tire Program',[54] which offered grants to non-profit groups to replace their playground surfaces with pour-in-place rubber surfaces made from recycled tyres. The Center's application was ranked fifth among the forty-four applicants, and the top fourteen programmes received grants.[55] But the Center was disqualified on the grounds that it was a religious organization.[56] This disqualification was based on Article I, Section 7 of the Missouri Constitution.[57] Following the rejection, the Center brought suit against the Director of the Department, alleging that the grant denial was in violation of the Free Exercise Clause because it was based entirely on the Center's status as a religion.

The Federal District Court of Missouri granted the Missouri Department's motion to dismiss because it found the facts to be 'nearly indistinguishable' from those encountered in *Locke v. Davey*.[58] The Eighth Circuit Court of Appeals affirmed the District Court's decision because it thought clear that Missouri *could* award the grant based on the Establishment Clause, but was not *compelled* to do so under the Free Exercise Clause.[59] The U.S. Supreme Court granted *certiorari*, agreeing to decide whether Missouri's policy violated the Free Exercise Clause.

The Supreme Court held in favour of the Center, because it found that the Department's denial of a generally available State grant 'solely on account of religious identity' violated the Free Exercise Clause.[60] Further, the Court found that this case was distinguishable from *Locke v. Davey* because the Missouri policy directly targeted religions based on who they are as opposed to what they are doing.[61] Based on this type of targeting, the Court found that such a policy required the 'most exacting scrutiny'.[62] The Court concluded that Missouri's exclusion of the Center from a public benefit "for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand".[63]

53 *Ibid.*
54 *Ibid.*
55 *Ibid.*, at p. 2018.
56 *Ibid.*
57 "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Constitution of Missouri, Art. I, Section 7.
58 *Trinity Lutheran*, 137 S. Ct. at 2018.
59 *Ibid.*
60 *Ibid.*, at p. 2015.
61 *Ibid.*, at p. 2022-2024.
62 *Ibid.*, at p. 2021. (Comparing this case to the prior case of *McDaniel v. Paty*, 435 U.S. 618, (1978), where both situations put the religion to a choice: participate in a benefit or remain a religious institution.)
63 *Ibid.*, at p. 2025.

II Key Propositions of the Court's Majority Opinion

Chief Justice Roberts begins the majority opinion by reinforcing the importance of neutrality as set forth in cases including *Everson* and *McDaniel v. Paty*, which struck down a state law prohibiting religious clergy from holding public office.[64] Justice Roberts emphasized that the Center was not claiming an entitlement, but rather the right to participate as an applicant in a general programme and to not be singled out for disfavourable treatment solely on the basis of religious identity.

The majority opinion distinguishes the *Locke* case by emphasizing that Locke was disqualified based on what he planned to do with government funding, not a denial because of *who he was*.[65] In contrast, the Court concluded, Missouri's denial was based on the Center's identity as a church and was therefore a violation of the Free Exercise Clause.

The breadth of the Court's holding, however, is a matter of considerable doubt, due to limiting language included in 'footnote 3' of the opinion, where Chief Justice Roberts stated,

> This case involves express discrimination based on religious identity with respect to playground resurfacing. *We do not address religious uses of funding or other forms of discrimination*.[66]

This part of the opinion is not binding, as two justices (Neil Gorsuch and Clarence Thomas) explicitly decline to join it.[67]

As law and religion scholar Frank Ravitch has noted, on its face, this footnote seems to "limit the ruling to programs that have no direct religious content".[68] This would have significant repercussions for school voucher programmes, since religiously affiliated schools include religious content in their curriculum.

On the other hand, perhaps footnote 3 does not project such a definitive answer to future questions, but rather simply narrowly defines the scope of the holding in this case. In support of this view, it is important to note the recurring importance of neutrality in the Court's reasoning. An underlying theme throughout the Chief Justice's opinion is the idea that States cannot discriminate against

64 *Ibid*. (J. Gorsuch, concurring). (Explaining that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order'".)

65 *Ibid*., at p. 2023 (majority opinion) (emphasis added).

66 *Ibid*., at p. 2024, n. 3 (emphasis added).

67 Justice Gorsuch explains, "[o]f course the footnote is entirely correct, but I worry that some might mistakenly read it to suggest that only 'playground resurfacing' cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the Court's opinion. Such a reading would be unreasonable for our cases are 'governed by general principles, rather than ad hoc improvisations.' And the general principles here do not permit discrimination against religious exercise – whether on the playground or anywhere else." *Ibid*. 2026 (J. Gorsuch, concurring) (citation omitted).

68 Ravitch, 2017.

religious organizations solely because of who they are.[69] Although this point does not seem novel in and of itself, it might indicate that religious liberty is being treated as being to a large extent a non-discrimination norm.

Also noteworthy, the majority opinion remains steadfastly silent about the constitutionality of state Blaine Amendments. One might conclude that Missouri's Blaine Amendment was unconstitutional 'as applied' in this case, without concluding that the State's Blaine Amendment itself violates the Free Exercise Clause of the Federal Constitution.[70]

III The Concurring and Dissenting Opinions

Justices Clarence Thomas, Neil Gorsuch and Stephen Breyer penned three concurring opinions. Justice Thomas (together with Justice Gorsuch) joined the Court's opinion, but voiced his concern regarding the court's endorsement of *Locke*. In his words, the holding in *Locke* was 'troubling',[71] but because the Court construed *Locke* narrowly he joined the judgement.

Justice Gorsuch (joined by Justice Thomas) took issue with footnote 3, and further expressed his apprehension with the Court's drawing a line between religious status and how funds are used.[72] The distinction between 'status' and 'use', he says, is blurry, "much the same way the line between acts and omissions can blur when stared at too long …".[73]

The final concurring opinion, written by Justice Breyer, emphasized the narrowness of the Court's holding, noting that the Court needed only to consider the nature of the public benefit at issue in this case (a general programme to protect the health and safety of children, which he likened to cases involving ordinary police and fire protection), and that it could "leave the application of the Free Exercise Clause to other kinds of public benefits for another day".[74]

Justice Sonia Sotomayor's dissent (joined by Justice Ruth Bader Ginsburg) expresses alarm that the Court mandates state funding for a religious school. Justice Sotomayor asserts that the Court 'profoundly changes' the relationship of church and state "by holding, for the first time, that the Constitution requires the

69 By our count, there are at least 15 references to discrimination in the majority opinion, and another 13 in the other opinions. *See Trinity Lutheran*, 137 S. Ct. at 2012.

70 "[C]ourts define an *as-applied* challenge as one 'under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances.'" A. Kreit, 'Making Sense of Facial and As-Applied Challenges', *William and Mary Bill of Rights Journal*, Vol. 18, 2010, p. 657. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *e.g.*, the Supreme Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion". M.W. McConnel, 'Free Exercise Revisionism and the Smith Decision', *The University of Chicago Law Review*, Vol. 57, 1990, p. 1109-1153. In *Yoder*, the Court held that a generally applicable compulsory school attendance law could not constitutionally be *applied* to Amish parents who kept their children out of school, even though there was no constitutional deficiency in the statute itself. *Yoder*, 406 U.S. at p. 218-219.

71 *Trinity Lutheran*, 137 S. Ct. 2025 (J. Thomas, concurring).

72 *Ibid.*, at p. 2025-2026 (J. Gorsuch, concurring).

73 *Ibid.*, at p. 2025.

74 *Ibid.*, at p. 2026-2027 (Breyer, J., concurring).

government to provide public funds directly to a church".[75] This move, she maintains, "weakens this country's longstanding commitment to a separation of church and state beneficial to both".[76]

Justice Sotomayor contends that discussions of 'discrimination' against religion must be nuanced. For example, sometimes the government is permitted to "relieve religious entities from the requirements of government programs", such as by providing property tax exemptions to houses of worship, or allowing religious non-profit entities to make "employment decisions on the basis of religion".[77] At other times, the government is permitted to "close off certain government aid programs to religious entities", for example by declining to fund "the training of a religious group's leaders".[78] Justice Sotomayor notes that, "in this area of law, a decision to treat entities differently based on distinctions that the Religion Clauses make relevant does not amount to discrimination".[79] Then Justice Sotomayor issues a stern warning, that if different treatment is discriminatory, then favourable treatment that accommodates religion could be viewed as discriminatory as well.

> If the denial of a benefit others may receive is discrimination that violates the Free Exercise Clause, then the accommodations of religious entities we have approved would violate the free exercise rights of nonreligious entities.[80]

Justice Sotomayor argues that the U.S. experience with state establishments, and the implementation of the non-establishment principle, is intimately tied up with the question of state funding of religion. "The use of public funds to support core religious institutions can safely be described as a hallmark of the States' early experiences with religious establishment." As all of the state's with religious establishments pursued the path of disestablishment,

> those who fought to end the public funding of religion based their opposition on a powerful set of arguments, all stemming from the basic premise that the practice harmed both civil government and religion.

Respecting Missouri's Blaine Amendment, Justice Sotomayor asserts, is a matter of respecting this history.

Significantly, Justice Sotomayor sidesteps entirely the anti-Catholic history of these State constitutional provisions, and does not even refer to them as 'Blaine Amendments'. Rather, she says,

75 *Ibid*., at p. 2027 (Sotomayor, J., dissenting).
76 *Ibid*., at p. 2031-2032.
77 *Ibid*., at p. 2032.
78 *Ibid*.
79 *Ibid*., at p. 2039.
80 *Ibid*. (citing *Corp. of Pres. Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), which permitted religious non-profits to utilize religion as a criterion in hiring.

> Today, thirty-eight States have a counterpart to Missouri's Article I, § 7. The provisions, as a general matter, date back to or before these States' original Constitutions. That so many States have for so long drawn a line that prohibits public funding for houses of worship, based on principles rooted in this Nation's understanding of how best to foster religious liberty, supports the conclusion that public funding of houses of worship 'is of a different ilk'.[81]

Justice Sotomayor's invocation of the history of these provisions as a rationale for respecting them may result in unintended consequences. If their history is considered closely, the anti-Catholic animus and bigotry that motivated these state laws may open the door for striking them down on Free Exercise, anti-Establishment, or Equal Protection grounds.

D What Does Trinity Lutheran Mean for the Future?

We are yet to see what the implications of the *Trinity Lutheran* case will be for federalism in general, or for the more specific question of the constitutionality of state 'baby' Blaine Amendments.

We do not know whether the case stood for a broad proposition (that it is unconstitutional for states to discriminate against religion when offering state funding), or a narrow proposition (that a state must not discriminate on the basis of religious status in general programmes that have no religious content such as 'playground resurfacing').[82] Because the Court also sidestepped the question of whether state Blaine Amendments violate the Free Exercise Clause, the future of the financial dimension of church–state relations remains uncertain. So, the elephant in the room remains: whether these State constitutional provisions are a legitimate basis for denying religious organizations the right to participate in state educational voucher programmes? Also unanswered is the question of whether the Free Exercise Clause requires states to include religious institutions in voucher programmes.

Justice Sotomayor's dissent certainly foresees a broad application of the non-discrimination principle, noting that in *Trinity Lutheran* the Court held for the first time "that the Constitution requires the government to provide public funds directly to a church".[83] Thus, the dissenters seem warranted in their worry that this case may significantly alter the relationship between civil government and religious institutions.

But the case might stand for a much narrower proposition, as reflected in footnote 3. At face value, footnote 3 might limit the non-discrimination principle to state programmes that have no direct religious content. Under such an interpretation, *Trinity Lutheran* might not create a wedge to force state and local governments to include religious organizations in school voucher or many other funding programmes. As Professor Frank Ravitch notes,

81 *Ibid*., at p. 2037-2038 (citation omitted).
82 *Ibid*., at p. 2024 n. 3 (majority opinion).
83 *Ibid*., at p. 2027 (Sotomayor, J., dissenting).

> how much footnote 3 limits the broader holding in *Trinity Lutheran* is unclear, especially given some of the strong language used in the majority opinion suggesting that excluding religious entities from 'public benefit' programs based on the fact that they are religious entities is inherently discriminatory.[84]

Less noticed, but also of potential significance is another footnote in the majority opinion – footnote 4, which seems to be an oblique reference to the status of the Missouri Constitutional provision. In footnote 4, the Court states, "we have held that 'a law targeting religious beliefs as such is never permissible.'"[85] The Court then says, somewhat cryptically, "We do not need to decide whether the condition Missouri imposes in this case falls within the scope of that rule, because it cannot survive strict scrutiny in any event."[86] Reading between the lines, this may be a suggestion by Chief Justice Roberts that the state Blaine Amendments are themselves unconstitutional if they are laws 'targeting religious beliefs as such', which seems like a real possibility.

Another clue about the scope of the Court's holding can be found in the immediate aftermath of the case. A few days after deciding *Trinity Lutheran*, the Supreme Court sent two cases about state aid to religious schools back to lower courts to be reconsidered in light of their decision. One of these cases involved a state textbook-lending programme for private schools, including religious schools, in New Mexico.[87] There the Supreme Court of New Mexico held that the State's Blaine Amendment prohibited the aid. According to the private schools appealing the decision,

> Here, the New Mexico Supreme Court explicitly acknowledged that [the state constitution's provision barring aid to religious schools] is a Blaine Amendment that was forced upon the state by a federal Congress driven by nativist religious animosity against Catholics.[88]

The other case (or group of cases) is from Colorado and involves vouchers for a tuition scholarship programme for students to attend private schools, including religious schools.[89] The Colorado Supreme Court held in 2015 that Colorado's Blaine Amendment prohibited vouchers being used at religious schools.

84 Ravitch, 2017

85 *Trinity Lutheran*, 137 S. Ct. 2024 n. 4 (majority opinion).

86 *Ibid*.

87 *Moses v. Skandera*, 367 P.3d 838 (2015), vacated and remanded by *N. M. Ass'n of Nonpublic Sch. v. Moses*, No. 15-1409 (U.S. 27 June 2017). In *Moses*, the New Mexico Supreme Court held that the long-standing state programme for lending textbooks to students attending public and private schools violated the State's Blaine Amendment. *Moses*, 367 P.3d at p. 849.

88 Petition for Writ of Certiorari at 17, *N. M. Ass'n of Nonpublic Sch. v. Moses*, No. 15-1409 (U.S. June 27, 2017).

89 The Colorado cases include *Doyle v. Taxpayers for Pub. Educ*. (No. 15-556), *Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ*. (No. 15-557), and *Colo. Bd. of Educ. v Taxpayers for Pub. Educ*. (No. 15-558).

In responding to the Court's order for these cases to be reconsidered in light of *Trinity Lutheran*, Michael Bindas, an attorney with the Institute for Justice, which represents the private schools in the Colorado case, expressed the view that this was good news for voucher advocates.

> Today's order sends a strong signal that just as the U.S. Supreme Court would not tolerate the use of a Blaine Amendment to exclude a religious preschool from a playground resurfacing program, it will not tolerate the use of Blaine Amendments to exclude religious options from school choice programs.[90]

President Trump's Secretary of Education, Betsy DeVos, a strong supporter of school choice, was similarly optimistic about the implications of the *Trinity Lutheran* decision, saying it

> sends a clear message that religious discrimination in any form cannot be tolerated in a society that values the First Amendment. We should all celebrate the fact that programs designed to help students will no longer be discriminated against by the government based solely on religious affiliation.[91]

From the opposite end of the political spectrum, Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State, expressed the view that, "[t]his ruling threatens to open the door to more taxpayer support for religion, which is at odds with our history, traditions and common sense".[92]

E Conclusion

In conclusion, *Trinity Lutheran* appears to have generated more questions than answers. With so many uncertainties (including the status of state Blaine Amendments under the Free Exercise Clause), it is apparent that the federalism issues the Court faced, and will continue to face, have no easy resolution. After *Trinity Lutheran*, we remain at an important constitutional crossroads, uncertain whether state Blaine Amendments that prohibit state funding of religion will stand, or whether the non-discrimination principle will be applied liberally in a way that forecloses such disadvantaging of religion.

90 Quoted in M. Walsh, 'Justices Ask Lower Courts to Reconsider Rulings Blocking Religious School Aid', *Education Week's blog* (27 June 2017 1:35 PM).

91 *Ibid*. (quoting U.S. secretary of Education Betsy DeVos).

92 *Ibid*. (quoting Rev. Barry W. Lynn, Executive Director, Americans United for Separation of Church and State).

Rights in the Australian Federation

Nicholas Aroney & James Stellios[*]

The Commonwealth of Australia has been a stable federal democracy since its establishment in 1901. By international standards, Australia is consistently assessed as maintaining high levels of personal freedom, political rights, civil liberties and the rule of law.[1] This is despite the fact that Australia does not have a constitutionally entrenched bill of rights, and only two Australian jurisdictions, the State of Victoria and the Australian Capital Territory, have enacted Statutory Charters of Rights.[2] The Constitution of the Commonwealth of Australia contains only a small number of constitutional limitations on power that protect individual rights, and most of these protections apply only to the Commonwealth and not to the States. Why is this so, and how has Australia maintained high standards of personal freedom and the rule of law without a national bill of rights that binds both the Commonwealth and the States?

The primary objective of the Australian Constitution was to create the political institutions necessary for the establishment of a federation of the six constituent colonies that had occupied the Australian continent since before the mid-nineteenth century.[3] Most of the provisions of the Constitution are concerned with defining the nature and composition of those institutions and conferring powers and functions upon them. The two essential means by which the Constitution achieves this are the construction of a Parliament consisting of two houses representing the people of the Commonwealth and the people of the States (Sections 7 and 24) and the conferral of specific legislative powers on the Commonwealth with a guarantee that the constitutions and general powers of the States would continue subject to the Constitution (Sections 51, 52, 106 and 107).[4] The goal of the framers of the Constitution was to establish the Commonwealth and the States as partly independent, partly interdependent, self-governing political communities.

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1 World Justice Project, *Rule of Law Index*, Washington DC, 2015, p. 8; Freedom House, *Freedom in the World 2017*, Washington DC, 2017, p. 20.

2 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

3 *See* N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, Cambridge University Press, 2009, Chap. 5.

4 *Ibid*., Chaps. 8 and 10.

Because the Australian Constitution is primarily concerned with establishing the institutional foundations of a federal commonwealth, the limitations on power imposed by the Constitution are chiefly directed towards maintaining an effectively operating federal system.[5] The Constitution does not contain a general bill of rights because at the time it was drafted the prevailing view was that properly functioning systems of representative and responsible government at a Commonwealth and State level would, on the whole, provide adequate protection for civil and political rights.[6] Sir Owen Dixon, one of Australia's most distinguished judges, put it this way:

> The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.[7]

At the time that the Australian Constitution was being drafted, the general climate of opinion, as Jeffrey Goldsworthy has observed, had come to regard parliamentary democracy as the key to a more just and prosperous future.[8] There was not the same concern to limit the powers of government to protect rights that had motivated the American anti-federalists to insist on a bill of rights as a condition of the ratification of the US Constitution in the late eighteenth century. Sir Daryl Dawson, a distinguished Justice of the High Court of Australia, put it this way:

> [T]hose responsible for the drafting of the Constitution saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the United States Constitution, but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[9]

As a consequence, even when the Constitution protects rights or freedoms, the protections are *prohibitions* on the exercise of legislative and other forms of gov-

5 N. Aroney, P. Gerangelos, J. Stellios & S. Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation*, Cambridge, Cambridge University Press, 2015, p. 282-287.

6 For a range of views on whether national constitutions such as Australia's should contain a comprehensive bill of rights, *see* T. Campbell, J. Goldsworthy & A. Stone (Eds.), *Protecting Human Rights: Instruments and Institutions*, Oxford, Oxford University Press, 2003.

7 O. Dixon, *Jesting Pilate*, Melbourne, Law Book, 1965, p. 102.

8 J. Goldsworthy, 'The Constitutional Protection of Rights in Australia', *in* G. Craven (Ed.), *Australian Federation: Towards the Second Century*, Melbourne, Melbourne University Press, 1992, p. 151-158.

9 *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106, 186; *see also* p. 135-136.

ernmental power rather than assertions of personal *rights* or *freedoms*. The protections are also usually shaped, in one way or another, by federal considerations. Section 116 of the Constitution is an example. It provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 thus applies only to the Commonwealth, leaving the States free to exercise the powers they possessed, as colonies, prior to federation. Its purpose and operation are perhaps best captured by Gaudron J in *Kruger v. Commonwealth*:

> By its terms, Section 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, 'in form, a constitutional guarantee of the rights of individuals'. It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation on Commonwealth legislative power.[10]

Section 116 also operates as a fetter on legislative power, rather than a positive affirmation of the right to freedom of religion. As such, it presupposes a background legislative power vested in the Commonwealth, even though the topic of 'religion' does not appear in the list of federal legislative powers in Section 51 of the Constitution.

The limitation of Section 116 to the Commonwealth was very deliberate. Early in the framers' deliberations it was proposed that the Constitution contain two clauses on the topic of religion, one that bound only the States and protected only the free exercise of religion and another that bound the Commonwealth and prohibited any law that established any religion, gave preferential recognition to any religion or prohibited the free exercise of any religion.[11] It was later proposed that the scope of the prohibition be reframed and changed so that it applied to both the Commonwealth and the States.[12] However, the entire clause, including this extension to it, was resisted on a range of grounds. The most decisive of these objections was that to place limits on the States would be inconsistent with

10 *Kruger v. The Commonwealth* (1997) 190 CLR 1, 60, p. 124-125.

11 R. G. Ely, 'Andrew Inglis Clark and Church-State Separation', *Journal of Religious History*, Vol. 8, No. 3, 1975, p. 285.

12 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, p. 658, 664.

one of the fundamental principles of the federation, which was that the States were to "retain all such powers as they do not hand over to the Commonwealth".[13] The main proponent of the freedom of religion clause, Henry Bournes Higgins, saw the point and refocused his energies on convincing the members of the federal convention to adopt a clause that would bind only the Commonwealth. Section 116, which applies only to the Commonwealth, was the result.[14]

Section 51(xxxi) of the Constitution is similar. It provides that the Commonwealth Parliament shall have power to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". The primary purpose of Section 51(xxxi) is to confer legislative power on the Commonwealth. However, it also restricts the power of the Commonwealth to legislate with respect to the acquisition of property by requiring that the acquisition must be on 'just terms', which means that fair compensation must be paid for the property acquired and that the compensation to be paid must be assessed in procedurally fair manner.[15] Section 51(xxxi) thus operates as a control on Commonwealth power, but like Section 116, has no application to the States.

Two other important limiting provisions in the Constitution are Sections 80 and 92. Section 80 requires that "trial on indictment of any offence against any law of the Commonwealth shall be by jury" and Section 92 stipulates that "trade, commerce, and intercourse among the States ... shall be absolutely free". Both sections limit the capacity of the Commonwealth to regulate the relevant subject matter, although Section 92 also binds the States because, as will be explained, freedom of interstate trade and commerce was one of the central objectives of the federation.

The Commonwealth is able, within the scope of its legislative powers (*see* Sections 51 and 52), to create criminal offences tried before federal and state courts. Section 80 requires that any trial on indictment for such an offence must be by jury and is to be held in the State where the offence was committed. The reason for including the provision is unclear. Most obviously, it might be seen as protecting the rights of the accused to be judged by his or her peers. However, much of the case law in Australia does not support such a view. For example, the provision can be avoided by Parliament prescribing that a trial proceed other than on indictment, and the accused cannot waive the requirement in Section 80 in favour of trial by judge alone. These interpretations are incongruent with a view of Section 80 as protecting the liberty interests of the accused.

Alternative views of the purpose of Section 80 are available. Consistently with the broader federal architecture of the Constitution, Section 80 might have been intended as a structural provision to provide the Commonwealth with a vehicle for the administration of criminal justice at the federal level.[16] Without its

13 *Ibid*., p. 662.
14 Aroney *et al*, 2015, p. 338-341.
15 *Ibid*., p. 307-310.
16 *See* J. Stellios, 'The Constitutional Jury: "A Bulwark of Liberty"?', *Sydney Law Review*, Vol. 27, 2005, p. 113-142.

inclusion, there may have been doubt as to whether federal offences could be tried by a panel of lay people in the English tradition of that institution. Furthermore, it might be seen as guaranteeing democratic participation in the administration of criminal justice by requiring the trial to be held in the State where the offence was committed. As emphasized recently by Justice Gageler in *Alqudsi v. The Queen*, Section 80 "has the result that the democratic participants in the requisite trial by jury will ordinarily in practice be people of that State".[17]

Given the primarily federal purpose of the Australian Constitution, the inapplicability of Section 80 to State offences and the uncertainty of its purpose, it is not surprising that aspects of these alternative explanations have emerged to impede interpretations that are protective of the accused.

The Commonwealth also has power to make laws with respect to "trade and commerce … among the States" (Section 51 (i)). Section 92 stipulates that it must not do so in a way that interferes with freedom of interstate trade, commerce and intercourse. However, unlike the other provisions considered so far, Section 92 is unique in that it applies to the States as well. They too are not able to make laws that interfere with freedom of interstate trade, commerce and intercourse. This is because freedom of interstate trade was regarded as one of the most fundamental objectives of federation, a principle that both the Commonwealth and the States are required to respect.[18]

In this way, even the apparently rights-protective limitations on power that exist in the Australian Constitution are best understood as aspects of its federal architecture.[19] Most of the protections are deliberately addressed only to the Commonwealth on the assumption that, unless some federating imperative makes it necessary, any controls on the powers of the State governments are matters for the peoples of the States to address through their respective State constitutions and parliamentary institutions. And the rights-protective limitations that apply to both Commonwealth and State power, such as Section 92, have an obvious federal rationale.

At one point in time the framers of the Australian Constitution did consider the inclusion of a more far-reaching provision. In early drafts of the Constitution, there was a section partially modelled on two provisions of the United States Constitution, namely Article IV and the Fourteenth Amendment. The Fourteenth Amendment was inserted into the American Constitution to protect the rights of emancipated slaves following the Civil War (1861-1865). In language very similar to the Fourteenth Amendment, the draft provision considered by the framers of the Australian Constitution prohibited any State from making or enforcing any law "abridging any privilege or immunity of the citizens of other States" or denying to any person "the equal protection of the laws".[20] Unlike the restrictions on power considered so far, this draft clause was directed at the States, not the Com-

17 (2016) 258 CLR 203, p. 256-257.

18 Aroney *et al*, 2015, p. 310-313.

19 *See* W. Harrison Moore, 'The Commonwealth of Australia Bill', *Law Quarterly Review*, Vol. 16, 1900, p. 40.

20 *Official Report of the National Australasian Convention Debates*, Sydney, 1891, p. 962; *Official Report of the National Australasian Convention Debates*, Adelaide, 1897, p. 1241.

monwealth. However, the framers of the Australian Constitution eventually decided not to include such a far-reaching provision, opting instead for the more narrowly-worded Section 117, which provides:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.[21]

The framers' reasons for rejecting the wider language of the original proposal were several.[22] One was that there was no pressing need for such a provision because the special circumstances that the United States faced following the Civil War did not obtain in Australia, and it was thought imprudent to include a provision of such generality into the Constitution without specific reason for it. A second reason was that such a rule might prevent the States from continuing to enact laws specifically directed at Chinese and South Pacific immigrants and indentured labourers. This anxiety was connected with a more general concern not to multiply the points at which the Constitution would interfere with the independent legislative powers of the States. A third reason concerned a fundamental disagreement about the nature of citizenship within the proposed federation. Some of the framers of the Australian Constitution wanted a kind of national citizenship to be established, but others insisted that in a federation there must be a 'dual' citizenship of both the Commonwealth and the States. A majority of the framers concluded that the Constitution should remain silent on the question of citizenship and leave the decision as to whether the States would continue to enact racially discriminatory laws in the hands of their elected Parliaments. The States and the Commonwealth did continue to enact such laws for several decades, but these were progressively repealed as community attitudes to such laws changed in the 1960s and 1970s. Moreover, although Australians would also continue formally to be 'subjects of the Crown' until the *Australian Citizenship Act 1948* (Cth) came into force in 1949, an underlying idea of *dual* citizenship existed from the time of federation.[23]

There have been several attempts since federation to insert rights-protective provisions into the Constitution. None have been successful. In 1944, a proposal to insert guarantees of freedom of expression and to extend the freedom of religion provision to the States was rejected by a majority of voters nationally and in all but two States.[24] In 1988, a proposal to insert guarantees of the right to vote,

21 On the interpretation of Section 117, *see Street v. Queensland Bar Association* (1989) 168 CLR 461; *Goryl v. Greyhound Australia Pty Ltd* (1994) 179 CLR 463; *Sweedman v. Transport Accident Commission* (2006) 226 CLR 362.

22 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, p. 246-248; 8 February 1898, p. 664-691; 3 March 1898, p. 1780-1802; 11 March 1898, p. 2397.

23 *See* B. Galligan & W. Roberts, *Australian Citizenship*, Melbourne, Melbourne University Press, 2004.

24 According to Section 128 of the Constitution, the Constitution can be amended only by referendum at which a majority of Australian voters and a majority of voters in a majority of States approve the proposed change.

and to extend to the States the existing protections in relation to acquisition of property on just terms, jury trial and freedom of religion, failed by very substantial margins to secure a majority in any State. Attempts to introduce statutory human rights laws at a Commonwealth level in the 1970s and 1980s were also unsuccessful.[25] Since then, Charters of Rights that provide for a 'weak' form of judicial review have been adopted in two Australian jurisdictions[26] but not elsewhere. In 2009, a National Human Rights Consultation recommended in favour of a range of reforms, including a (non-constitutional) Human Rights Act,[27] but the Commonwealth decided only to implement the educative, administrative and procedural aspects of the recommendations, including provision for greater parliamentary scrutiny of legislation.[28] The debate over a bill of rights in Australia continues, shaped by evaluations of Australia's human rights record, which though not perfect is very good by world standards.[29]

Despite the framers' reticence in relation to rights, and the unwillingness of the Australian people to approve the insertion of additional rights-protecting provisions into the Constitution, the High Court has found that the Constitution contains certain implied limitations on power said to be derived by inference from the text, structure, principles and purposes of the Constitution. These include a system of reciprocal intergovernmental immunities protecting the Commonwealth from State interference and the States from undue Commonwealth interference[30] and a set of rules maintaining the separation of judicial power from executive and legislative power and protecting the integrity of the courts.[31] The High Court has also held that the democratic features of the Constitution necessarily imply that the Commonwealth and the States cannot unjustifiably interfere with freedom of communication concerning political matters.[32]

Individual members of the High Court have at times also suggested that additional civic freedoms might be implied by the democratic features of the Constitution, such as freedom of association and freedom of assembly; however, none of these propositions has secured the support of a majority of the High Court. What the High Court has never done is to adopt the suggestion of Sir Robin Cooke, then of the New Zealand Court of Appeal, that the legislative powers of Parliaments within the Westminster tradition might be restrained by judicially enforceable rights deeply rooted in the common law.[33] In *Durham Holdings Pty Ltd v.*

25 G. Williams, *A Charter of Rights for Australia*, Sydney, University of New South Wales Press, 2007, p. 57-62.

26 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic). For assessments, *see* C. Campbell & M. Groves, *Australian Charters of Rights a Decade On*, Annandale, Federation Press, 2017.

27 *National Human Rights Consultation: Report* (Commonwealth of Australia, 2009).

28 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

29 T. Campbell, J. Goldsworthy & A. Stone, *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia*, Aldershot, Ashgate, 2006.

30 *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31.

31 *R v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

32 *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 108 CLR 577.

33 *See, e.g.*, *Taylor v. New Zealand Poultry Board* [1984] 1 NZLR 394, 398; *Fraser v. State Services Commission* [1984] 1 NZLR 116, 121.

NSW, for example, the High Court of Australia rejected the argument that the common law gives rise to a limitation on the capacity of the Parliament of the State of New South Wales to deprive a person of his or her property without just or adequate compensation.[34] As the Court pointed out in that case, the existence of limitations on the powers of Australian Parliaments have to be found in the text and structure of the Constitution itself and not in principles extraneous to the document.[35]

In these respects the High Court has been generally attentive to the fundamentally federal nature and design of the Australian Constitution. However, the Constitution's treatment of the powers and composition of the courts marks a partial exception to this general tendency. Part of the reason is that the judiciary in Australia is the most integrated of the three arms of government. Modelled on Art III of the United States Constitution, Chapter III of the Constitution establishes a federal judiciary that is distinct from the State judicial systems. However, there are two important departures from the United States model. First, for reasons of expense and efficiency, the framers of the Australian Constitution adopted the 'autochthonous expedient'[36] of permitting the Commonwealth Parliament to vest federal jurisdiction in State courts. Second, the High Court of Australia sits at the apex of the Australian judicial system and determines appeals from federal and State courts. Although the framers rejected American-style due process and equal protection clauses, these constitutional structures for the exercise of judicial power have provided opportunities for judicially created implications protecting the judicial process. The separate creation and identification of judicial power in Chapter III of the Constitution has given rise to two separation of judicial power limitations on the Commonwealth Parliament: that federal judicial power can be exercised only by courts and that those courts can exercise only judicial or incidental non-judicial power. Additionally, the autochthonous expedient of permitting State courts to exercise federal judicial power has been seen as justifying a limitation on State Parliaments preventing the enactment of laws that would be incompatible with their exercise of federal power. These limitations operate to protect the independence and impartiality of the Australian courts, the fairness of the procedure offered to litigants, and the openness and transparency of the process for administering justice. In the absence of entrenched bills of rights, these limitations have been said to offer "the Constitution's only general guarantee of due process".[37]

The clearest basis for such implications draws from the federal character of the Constitution. Indeed, the seminal cases supporting these limitations ground them in the federal character of the Constitution: the limitations are required to protect the judiciary when performing its constitutional function of adjudicating the federal distribution of powers between the Commonwealth and the States.[38]

34 *Durham Holdings Pty Ltd v. NSW* (2001) 205 CLR 399, p. 408-410, 418-423, 433.
35 *Ibid*., at p. 410, 431-432.
36 *The Queen v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, p. 268.
37 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580.
38 *See*, for instance, *The Queen v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, p. 276; *Forge v. Australian Securities and Investments Commission* (2006) 228 CLR 45.

These justifications resonate strongly with the views of the framers of the Constitution when designing the judicial provisions.[39] Nonetheless, there have been liberty-protecting rationales advanced to support these limitations. The judiciary and judicial power have been viewed as safeguarding liberty through the independent determination of disputes about basic rights,[40] and in protecting the individual from detention in the custody of the state.[41] Thus, it has been held that the adjudgment and punishment of criminal guilt requires an exclusive exercise of judicial power by a court.[42] As explained recently by Justice Gageler in *Magaming v. The Queen*:

> Why that should be so is founded on deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the Constitution … . Chapter III of the Constitution … reflects and protects a relationship between the individual and the state which treats the deprivation of the individual's life or liberty, consequent on a determination of criminal guilt, as capable of occurring only as a result of adjudication by a court.[43]

The federal character of the Constitution does not require these principles. Rather, this view of the role of the courts within a system of separated power is animated by a "concern for the protection of personal liberty lying at the core of our inherited constitutional tradition, which includes the inheritance of the common law".[44] Indeed, some judges have elevated this limitation to the status of a 'constitutional immunity'[45] from the deprivation of liberty otherwise than through the ordinary curial process of adjudging and punishing criminal guilt.[46] It remains to be seen how rigorously these sentiments will be applied to federal legislative regimes for executive detention and court-ordered preventative detention.

The simultaneously federal and democratic character of the Australian Constitution is also to be seen in the complex electoral system that it establishes. Part of this complexity derives from the fact that the system of representative government operating at a Commonwealth level is constructed upon the pre-existing systems of parliamentary government established at a State level. Thus, for exam-

39 *See* J. Stellios, *The Federal Judicature: Chapter III of the Constitution*, Chatswood, LexisNexis, 2010, p. 68-72.

40 *The Queen v. Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11.

41 *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, p. 27.

42 These limitations operate at their highest in relation to the Commonwealth Parliament. The State Parliaments may well have greater freedom to remove aspects of the criminal process from State courts.

43 *Magaming v. The Queen* (2013) 252 CLR 381, 400, 401.

44 *North Australian Aboriginal Justice Agency Ltd v. Northern Territory* (2015) 256 CLR 569, p. 610.

45 *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, p. 28.

46 *See also* the important statement of Gummow J in *Fardon v. Attorney-General (Qld)* (2004) 223 CLR 575, p. 613-614.

ple, although Section 24 provides that the Commonwealth House of Representatives consists of members "directly chosen by the people of the Commonwealth" and further stipulates that "the number of the members of the House chosen in the several States shall be in proportion to the respective numbers of their people", it also provides that "five members at least shall be chosen in each Original State". Moreover, although the Commonwealth Parliament was given ultimate control over the qualifications of electors and candidates for federal office (Sections 8 and 30), the size and location of federal electoral divisions (Sections 7 and 29) and the organization and conduct of federal elections (Sections 7, 9 and 31), prior to Commonwealth determination of these matters, the rules applying in the States were applied to the Commonwealth.

This adaptation of the principles of democracy to the principles of federalism has shaped the way in which the High Court has interpreted the Constitution in relation to civil and political rights. Thus, the Court has held that there are limits to the Commonwealth's ability to alter the right to vote and the scope of the franchise (*i.e.* so as to maintain full adult franchise).[47] However, a majority of the Court has rejected the proposition that democratic principle requires that federal electoral divisions must be approximately equal in population, because to do so would be to ignore the way in which principles of majoritarian democracy are qualified by principles of federalism under the Constitution.[48] This adaptation of democracy and federalism is seen in Section 7, which requires that each Original State must be equally represented in the Senate notwithstanding very significant differences in the populations of each State. The adaptation of federalism to democracy is also seen very dramatically in the prescribed process for formal amendment of the Constitution, Section 128 of which requires that any proposal to alter the Constitution must be simultaneously approved by a majority of voters in the Commonwealth as a whole and a majority of voters in a majority of States.

Given the importance of this adaptation of federalism to democracy, it may come as a surprise that the High Court has held that the implied freedom of political communication binds *both* the Commonwealth and the States and applies to the discussion of political matters at *both* levels of government. The extension of the implied freedom to the States is based on the proposition that although the Constitution establishes a system of representative democracy only for the Commonwealth, Australian federal and state politics are so integrated that a distinction cannot be drawn between the discussion of politics at one level of government and discussion at another level. Although this appears to adapt the implied freedom to the federal nature of the system, it has a nationalizing effect. This is because the implied freedom is conceptually grounded upon an essentially unitary conception of the Australian democratic system, predicated upon a direct relationship between 'the people' and 'the government', and therefore requires the

47 *Roach v. Electoral Commissioner* (2007) 233 CLR 162; *Rowe v. Electoral Commissioner* (2010) 243 CLR 1.

48 *McGinty v. Western Australia* (1996) 186 CLR 140. *See* N. Aroney, 'Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective', *University of Toronto Law Journal*, Vol. 58, No. 4, 2008, p. 421-480.

same uniform standard, derived from the Commonwealth Constitution, to be applied to both the Commonwealth and the States. However, this conclusion sits somewhat uneasily with the system of *federal* democracy that the Constitution establishes, involving a complex set of interlocking but distinct relationships between the people of each State, the people of the Commonwealth, and their respective constitutions and governments at a Commonwealth and State level.

For this reason it may be better to conceive the foundation of the implied freedom of political communication as based rather in a set of implied intergovernmental constraints, as the High Court seemed to envisage in its early approach to civil and political rights.[49] Here the idea would be that, building on the doctrine of intergovernmental immunities, it lies beyond the power of the Commonwealth and the States to interfere with the independent functioning of the democratic systems of each other. On this view, it might also lie beyond the competence of the Commonwealth to interfere with the proper functioning of the democratic system operating at a federal level because the Commonwealth is itself constitutively federal, incorporating the component democratic bodies politic of the States into its own body politic in a way that maintains the integrity of each State as a self-governing body politic. If the implied freedom were to be reconceived in this way, there would be less warrant for an implied limitation on the capacity of the States to interfere with their own democratic systems, except that the integrity of the federal system is dependent on the integrity of the State systems as well. The High Court is of course far from reconceptualizing the implied freedom in this way, but such an approach would at least cohere better, it is submitted, with the federal nature of the Constitution than the existing rationale.[50]

49 *R v. Smithers; Ex parte Benson* (1912) 16 CLR 99.

50 J. Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government', *Melbourne University Law Review*, Vol. 31, 2007, p. 239-265.