Constitutional Disintegration and Disruption

Withdrawal and Opt-Outs from the European Union

Oliver Garner

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 07 July 2020

European University Institute
Department of Law

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Thesis Summary

This thesis analyses constitutional disintegration and disruption in the European Union. These phenomena take the form of Member State withdrawal and opt-outs. The supranational constitutional order of the European Union is legitimated by individuals as Member State nationals and citizens of the European Union. Its construction and reconstruction are exercises of constituent power by the representatives of the Member States. Withdrawal through Article 50 TEU functions as a guarantee to nationals of the Member States that constituent power can be repatriated. The process of disintegration is subject to an orderly process in the interests of all EU citizens under the withdrawal clause. Opt-outs are reservations of constituent power by individual Member States made possible by the executive dominated process of treaty amendment. Opt-outs take effect through *ad hoc* Protocols addended to the Treaties that disapply EU law in certain sectors. The origins and development of withdrawal and opt-outs are analysed through the Brexit case study of disintegration, and the narrative of disrupted integration concerning the United Kingdom, Denmark, and Ireland. Disintegration through withdrawal has more dramatic consequences for individuals. The constituent status of EU citizenship is terminated for former Member State nationals and the territory of application for EU law contracts. Opt-outs disrupt supranational constitutionalism and the symmetry between individuals as democratic subjects and juridical objects *qua* Member State nationals and EU citizens. The thesis concludes with reform proposals for a dedicated constitutional clause that would subject the creation and maintenance of opt-outs to supranational constraints. Amendments to the text of Article 50 TEU are proposed to realise its telos to provide a sovereign right of withdrawal for Member State nationals whilst ensuring an orderly process for all EU citizens.

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Introduction

I. The Emergence of Disintegration after Disruption

On 23 June 2016, the population of the United Kingdom was asked the referendum question 'Should the United Kingdom remain a member of the European Union or leave the European Union?'. The 52% majority answer for 'Leave' sent shockwaves through Europe. An atmosphere of uncertainty prevailed at both the national level and the European level. When Article 50 of the Treaty on European Union (TEU)[1] had been established by the Lisbon Treaty amendments the EU establishment did not envisage that it would ever be triggered. In turn, when the UK Parliament passed the European Union Referendum Act 2015, it seems that the government of David Cameron never envisaged that a result to trigger the withdrawal clause would be returned. The realisation of the previously unthinkable scenario of Member State withdrawal has dominated the United Kingdom's legal and political arena for nearly four years. The final confirmation of the United Kingdom's withdrawal on 31 January 2020 came after three extensions to the two-year period under Article 50 TEU, two changes of UK government, and two seminal UK Supreme Court cases called *Miller* that have defined the contemporary vision of the British constitution.

The consequences of the withdrawal of a Member State from the European Union reach into nearly every aspect of European law and politics. An attempt to cover all these implications in the course of one doctoral thesis would not be practicable. The analysis in this thesis will concentrate on the consequences of this phenomenon for individual citizens. Rather than narrowly focusing on the legal rights that the individuals of the withdrawing state will lose in the Union, and that Union citizens will lose in the withdrawing state territory,[2] this thesis takes a holistic view. The analysis also considers the implications that withdrawal has for the constitutional status from which these rights derive. This thesis will not, however, focus only on the consequences of

[1] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (hereafter 'TEU'), art 50 .

[2] For analyses of the effect on legal rights see, *inter alia*, Stephanie Reynolds, 'May We Stay? Assessing the Security of Residence for EU Citizens Living in the UK' in Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017); Dimitry Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017); Oliver Garner, 'After Brexit: Protecting European Citizens and Citizenship from Fragmentation' (European University Institute 2016) EUI Law Department Working Paper No. 2016/22 <https://papers.ssrn.com/abstract=2871404> accessed 1 February 2017.

complete withdrawal. Instead, the scope of the phenomena analysed will broaden out to opt-outs from the Union legal order as a partial example of the withdrawal phenomenon.

The 23 June 2016 referendum did not occur within a vacuum. It was the Rubicon crossed after a complicated five-decade relationship of disrupted integration with the European Union. This interplay itself had taken place within the wider drama of the seven-decade history of political and legal integration within Europe. The scene that immediately preceded the referendum in the drama between the UK and the EU was David Cameron's attempts in February 2016 to renegotiate the United Kingdom's membership. The result of Cameron's attempts to entrench and bolster the United Kingdom's existing opt-outs from the EU constitutional order was seven 'arrangements' including a Decision of the Heads of State or Governments of the Member States, a draft Decision by the European Council, and Declarations by the European Commission.

The European Council conclusions outlining these arrangements contained a declaration by the Heads of State or Government that 'this Decision will take effect on the date the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union'.[3] This provides the jumping-off point for this thesis. The hypothesis is that transformational consequences for the European Union's constitutional order were inevitable regardless of the result. If 'Remain' had won, the commitments of the European Council would have led to the amendment of the Foundational Treaties that would have entrenched the United Kingdom's opt-outs regime.[4] In the actual event of the victory of 'Leave', the Article 50 process has led to the first example of disintegration through a Member State's complete withdrawal from the Union. This thesis seeks to explain and normatively critique these two phenomena through the conceptual lens of the role individuals play in constituting the European Union's supranational order.

II. Research Question and Theoretical Approach

The research question that this thesis seeks to answer is: How can a theoretical conceptualisation of the European Union and the role of individuals be utilised to explain and normatively critique the phenomena of Member State withdrawal and opt-outs?

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[3] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16.

[4] For further explanation see Part 3, section III, sub-section vi below.

The thesis applies a particular conception of constituent power to the European Union as a means to explicate and critique withdrawal and opt-outs. Theorists have reconstructed[5] European 'integration' as a process whereby individuals hold a dual-constituent status as nationals of the Member States and as citizens of the European Union.[6] The construction of EU citizenship reconstructs nationality of a constitutional state into nationality of a Member State of the European Union. The capacity to create EU citizenship and to construct a new supranational constitutional order has been labelled the 'levelling up' of constituent power.[7] As this enables the construction of a supranational constitutional order, this may be regarded as a 'constructive power'. The conclusion of the Treaty in Rome in 1957 is regarded as an original constructive exercise of constituent power as the original 6 Member States utilised public international law to create a new constitutional order. The treaty amendment capacity in Article 48 TEU has channelled this original constituent power into a constituted revisionary power. Article 49 TEU has constituted a mechanism to extend this 'levelling-up' capacity to all qualifying constitutional states in Europe.

The retention of original constructive power by the Member States means that they also retain the power of ultimate deconstruction and complete disintegration through a unanimous decision to terminate the Treaties.[8] More partially, the constitutional mechanisms of a withdrawal clause, and the unanimity requirement for Treaty amendment function as safeguards that preserve nationality as a constituent status despite levelling-up. Therefore, the exercise of the withdrawal clause is conceptualised as the 'levelling-down' of constituent power.[9] As the converse of the constructive power that catalyses and maintains European integration, this process is understood as the exercise of 'deconstructive power' that results in a species of European 'disintegration'.[10] Habermas and Patberg utilise the device of a hypothetical original constitutional convention to explicate levelling-up. By contrast, the very real process enacted under Article 50 TEU is conceptualised in the thesis as a 'deconstitutional convention'.

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[5] Markus Patberg, 'Supranational Constitutional Politics and the Method of Rational Reconstruction' (2014) 40 Philosophy & Social Criticism 501.
[6] Jürgen Habermas, *The Crisis of the European Union: A Response* (Polity 2013); Jürgen Habermas, 'Citizen and State Equality in a Supranational Political Community: Degressive Proportionality and the Pouvoir Constituant Mixte' (2017) 55 JCMS: Journal of Common Market Studies 171.
[7] Markus Patberg, 'The Levelling Up of Constituent Power in the European Union' (2017) 55 Journal of Common Market Studies 203.
[8] Markus Patberg, 'Can Disintegration Be Democratic? The European Union Between Legitimate Change and Regression' [2019] Political Studies <https://doi.org/10.1177/0032321719870431> accessed 23 January 2020.
[9] Oliver Garner, 'Reforming Withdrawal and Opt-Outs from the European Union: A Dual-Constituent Perspective' (DCU Brexit Institute 2018) DCU Brexit Institute Working Paper N.11 2018 <https://papers.ssrn.com/abstract=3303938> accessed 29 March 2020.
[10] Douglas Webber, *European Disintegration?: The Politics of Crisis in the European Union* (Red Globe Press 2018); Patberg, 'Can Disintegration Be Democratic?' (n 8).

Conceptualising opt-outs in relation to deconstructive power and disintegration is less straightforward. This phenomenon does not arise out of an explicit constitutional clause, but instead opt-outs are created through Protocols addended at the time of Treaty amendments. These Protocols are a result of resistance by Member States to the results of the reconstitution of levelling-up constructive power. Therefore, opt-outs are conceptualised as reservations of constituent power that lead to disrupted integration rather than disintegration *per se*.

III. Summary of the Argument

Part 1 delineates the theoretical foundations of the thesis. Section I provides an overview of the argument. Section II explicates each element of the concept of the supranational constitutional order of the European Union. Section III establishes the quadripartite role of individuals within this order as democratic subjects and juridical objects *qua* Member State nationals and *qua* EU citizens. Section IV concludes with an appraisal of the dual-constituent thesis as an explanatory and normative framework for how and why individuals have transferred constituent power from the national to the supranational level. The section concludes by presenting Article 48, Article 49 and Article 50 TEU as a triptych of constituted constituent power. Withdrawal and opt-outs arise from the functioning of the triptych.

Part 2 applies the theoretical framework to the phenomenon of disintegration arising from Member State withdrawal. Section I provides an overview of the argument. Section II outlines the origins and dual telos of the withdrawal clause. Section III analyses the Brexit case study in order to explain the operation of Article 50 TEU. Each subsection analyses the functioning of the specific clauses of the withdrawal clause within the theoretical framework of a deconstitutional convention. Section IV summarises the argument.

Part 3 expands the scope of enquiry to disrupted integration and Member State opt-outs. Section I provides an overview of the argument and an analysis of the normative foundations of differentiated integration. Section II delineates the legal form and operation of the existing Protocols enabling Member State opt-outs. The section concludes with an analysis of the United Kingdom's opt-in practices. Section III is a narrative of the reservation of constituent power by the United Kingdom, Denmark, and Ireland across treaty amendments in the Schengen *acquis*, Economic and Monetary Union, and the Area of Freedom, Security, and Justice. Section IV provides a summary.

Part 4 proposes reforms to disrupted integration and disintegration. Section I introduces the need for reform by explicating the normative deficiencies of opt-outs and withdrawal. Section II considers whether such reforms can take place within the current paradigm of treaty amendment under Article 48 TEU. Section III considers proposals to reform the opt-out Protocols and Article 50 TEU. The objective is not to remove the possibility of opt-outs and withdrawal, but to ensure they function in a manner that is more normatively consistent with the concept of a supranational constitutional order. The conclusion reappraises the explanatory and normative validity of the dual-constituent thesis and the relationship between constitutional disruption and disintegration.

1. Foundations – The Supranational Constitutional Order and Constituent Power

I. Summary of Foundations

The general object of study of this thesis is the Supranational Constitutional Order of the European Union. This concept and its constituent parts are delineated in section I below. The specific objects of study therein are the phenomena that are conceptualised as Member State withdrawal and Member State opt-outs. The broad epistemological terms used to conceptualise these constitutional phenomena are disintegration and disrupted integration. Disintegration may be understood as a graduated antithesis to constitutional integration with disruption as a point on the continuum between. The ultimate purpose of the thesis is to scrutinise normatively the legitimacy of disintegration and disruption in relation to the effects they have for individuals within the European constitutional and geographical space. A necessary anterior purpose is the concise description and explanation of the origins, existence, and consequences of the phenomena.

The specific sources of positive law studied are the Treaty law triptych of Article 48 TEU, Article 49 TEU and Article 50 TEU, and the addended Protocols (No 15), (No 16), (No 17), (No 19), (No 20), (No 21), (No 22), and (No 36). The broad method adopted for description, explanation, normative criticism, and normative prescription in relation to the above phenomena is constitutional theory. This is understood as a synthesis of political theory, used to explicate and scrutinise norm-creation processes, and juridical theory, used to explicate and scrutinise norm-appliance and -reliance processes. This bifurcation between the political and the juridical informs the conceptualisation of the Supranational Constitutional Order. Ultimately, this is derived from a similarly bifurcated definition of the individual within the constitutional order. When this is combined with the dual role of individuals as Member State nationals and citizens of the EU this leads to a quadripartite conception.

To analyse withdrawal and opt-outs it is necessary first to conceptualise the object of study within which these phenomena occur. These phenomena are specific to the nature of the European Union's constitutional order as supranational. Section II, subsection i will explicate what is meant by 'order' in this context. The argument is that legal *ordering* takes place orientated by the normative point of facilitating the conditions for the fulfilment of individuals as both nationals of a Member State and citizens of the Union.

Despite being a creature of international treaty law, the role of individuals as constituent citizens differentiates the European Union's order from the paradigm of international law. Within the international legal order, the ostensible condition for norms to be binding is state consent based on external sovereignty.[11] By contrast, in the European Union's constitutional order the sovereign state parties have delegated functions to institutions representing individuals in their dual-role. These institutions can create norms through majority voting in contravention of absolute unanimity of state consent. In section III, the concept of constituent power will be applied and adapted to this characteristic of the supranational constitutional order.

The European Union is constitutional by analogy to the paradigm of national constitutional orders in which individuals should be regarded as both the authors and addressees of norms.[12] The European Union's constituent subjects are empowered as democratic subjects and legal objects by norms that transcend national geographically limited boundaries, but without replacing them. The ultimate authority to participate in the construction of this order remains bound to the national level. This specific plural constellation is conceptualised as *supranational*. This is distinct from the phenomenon represented by the 'inter' prefix of international law. This signifies horizontal state relations demarcated from, rather than interconnected with, the boundaries of national legal orders. 'Supranational' is also distinct from what has been described as *transnational* law.[13] Here the prefix 'trans' indicates the interpenetration of the effects of norms throughout different national constitutional orders. However, the processes of norm-creation and norm-application do not have an independent constitutional basis that transcends the boundaries of national and international law.

The specific phenomena of Member State withdrawal and opt-outs can only occur in a supranational constitutional order. The supranational characteristic means that, unlike state secession and independence,[14] an exercise of deconstructive power and the termination of supranational citizenship can occur without the requirement for a concurrent exercise of constituent power and the creation of a new fundamental status. The European Union is not a polity of last resort, and instead preserves national citizenship as the fundamental source of self-determination. The constitutional characteristic of the European Union illustrates, however, that the processes of withdrawal and opt-outs are not analogous to reservations and treaty withdrawal

[11] Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green, and Company 1905).
[12] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (New Ed edition, Polity Press 1997).
[13] Terence C Halliday, *Transnational Legal Orders* (Cambridge University Press 2016).
[14] Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017).

in public international law.[15] Instead, specific rules for democratic authorisation are required due to the exercise of constituent and deconstructive power by individuals rather than just states. Finally, the characteristic of order manifests itself in the telos of Article 50. The clause mandates an 'orderly withdrawal',[16] rather than allowing an unconstrained exercise of state sovereignty. Opt-outs expose the limits of this order. The creation of opt-outs cannot be constrained by the EU legal order as they are authorised at times when this order is re-constituted under Article 48 TEU. Despite this, opt-outs are enshrined within the legal form of Protocols to the Treaties as a means to preserve the legal order once amendments are finalised.

A sufficient balance is required between the overarching yet derivative supranational order and the national orders. The perception of the scales being tipped too far towards the supranational means of norm-creation and norm-application incentivises national actors to pursue disruptive and disintegrative policies that result in withdrawal and opt-outs.

II. The Supranational Constitutional Order

i. 'Order'

The European Union has generated a legal order in the sense of a 'symbolic-normative phenomenon'.[17] The role of individuals in the dicta of the Court of Justice of the European Union has been crucial for this development. The 'new legal order' proclaimed in *Van Gend en Loos*[18] is distinct from international law because individuals are the direct recipients of legal rights. Furthermore, many of the defining cases that have 'positioned'[19] the autonomy of the Union's legal order have been driven by the rights claims of individuals. In *Costa v ENEL*[20] the Court of Justice held that norms deriving from the Treaties have 'supremacy' over the national legal order. In *Kadi,*[21] the Court stated that measures implementing a United Nations Security Council

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[15] Thomas Giegerich, 'Treaties, Multilateral, Reservations To', *Max Planck Encyclopaedia of International Law* (Oxford Public International Law 2010) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1680> accessed 30 March 2020; Anthony Aust, 'Treaties, Termination', *Max Planck Encyclopaedia of International Law* (Oxford Public International Law 2006) <https://opil-ouplaw-com.ezproxy.eui.eu/view/10.1093/law:epil/9780199231690/law-9780199231690-e1491?prd=MPIL> accessed 30 March 2020.
[16] Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2018] OJ C 445/10.
[17] Kaarlo Tuori, 'Transnational Law: On Legal Hybrids and Legal Perspectivism' [2014] Transnational Law: Rethinking European Law and Legal Thinking 11.
[18] Case 26/62 *Van Gend En Loos v Nederlandse Administratie Der Belastingen* [1963] ECR 1.
[19] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015).
[20] Case 6/64 *Costa v ENEL* [1964] ECR 1141.
[21] C-402/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351.

Resolution violated the rights protected for individuals under EU law. This decision confirmed the autonomy of EU law in relation to the international legal order from which it has originated. Finally, in Opinion 2/13[22] the Court of Justice emphasised the autonomy of the Union legal order from the other European legal regime generated by international Treaty – the European Convention on Human Rights. The context concerned the authority to adjudicate upon the fundamental rights of individuals. The assertion that norms deriving from the EU Treaties constitute a wider holistic order has been intimately predicated upon the status of individuals.

The European Union's legal order also exhibits hierarchical characteristics.[23] However, this hierarchy is uneasy and contested. From the perspective of the EU legal order, the primary law norms of the Treaties take precedence as the highest form of positive law. The telos of European integration in the pursuit of an 'ever closer union among the peoples of Europe' may function as the presupposed 'basic norm' through which this hierarchy derives its validity. However, this is beyond the scope of inquiry for this thesis.[24] The norms that are valid within the EU legal order through international agreements occupy the next level of the hierarchy; these agreements may invalidate secondary law but not the primary law of the EU legal order.[25] The next level is occupied by the secondary law found primarily in Regulations and Directives.[26] In the former case these norms are implemented automatically in the legal orders of the Member States, and through domestic legislation in the latter case. Finally, the claim could be made that the legal norms of the Member State legal orders form the bottom layer of the EU legal order's hierarchy. This claim would be substantiated by the fact that EU law norms claims primacy and direct effect over any national law norm, including provisions of constitutions that are supreme within the domestic order.

At this point the Kelsenian imposition of order breaks down. National law norms do not derive their ultimate validity from the EU legal order, but from the distinct founts of authority that constitute the separate domestic constitutional orders. Furthermore, all national norms are not necessarily part of the Union legal order; they may be created outside the areas of competence[27] that are mandated exclusively for the Union, or shared with the Member States.[28] As Kaarlo Tuori

[22] Opinion 2/13 on the accession of the EU to the ECHR, EU:C:2014:2454 (Grand Chamber, 18 December 2014).
[23] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, 2009).
[24] For a jurisprudential enquiry into EU law see Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012).
[25] See Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019).
[26] TFEU, art 288.
[27] TFEU, art 3, art 4, art 6.
[28] For a similar analysis see Tuori, *European Constitutionalism* (n 19) 12.

has argued, 'European law has never aspired to be a Kelsenian formal order where legal instruments would have been unambiguously arranged into a hierarchical pyramid…The order that European law has aimed at has been of a teleological nature: substantive coherence brought about by policies'.[29] However, this policy orientation should not be regarded as necessitating the view that the European legal order is a 'functionally differentiated transnational order',[30] as will be argued in subsection iii on the 'supranational' limb.

Hans Lindahl's conception of law as 'Institutionalised Authoritative Collective Action'[31] may provide a more fruitful explication of EU legal ordering around the orientation point of individuals.[32] Lindahl claims that law orders behaviour within a normative community by setting its spatial, temporal, material, and subject boundaries. This ordering cannot create the unity of a legal *order* unless the order is necessarily limited. Boundaries manifest themselves as 'limits' when they exclude certain phenomena as either 'legal' or 'illegal'.[33] Lindahl challenges this dichotomy between legal and illegal by introducing a third category – 'a-legality'. A-legal phenomena question how a legal order sets the boundaries that distinguish legality and illegality.[34] A-legality has both weak and strong dimensions. Phenomena of the former character emerge from the domain of the unordered, yet in principle they are orderable by the legal collective.[35] By contrast, the latter dimension concerns a normative challenge that a legal collective cannot accommodate either as legal or illegal by reformulating its limits.[36] Lindahl argues that, in its strong dimension, a-legality no longer summons a collective to shift the limit between legal (dis)order and the unordered, but instead lays bare a 'fault-line' between what a collective can order – the orderable – and what it cannot order – the unorderable.[37]

This conceptualisation of how legal orders constitute themselves through boundaries applies to the European Union. Delicate balancing is required to accommodate the EU legal order and the Member State legal orders which inhabit the same spatial and temporal boundaries. The Member States have set the constitutive boundaries by defining the explicit competences of the

[29] ibid 324.
[30] Tuori, 'Transnational Law' (n 17).
[31] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013); Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018).
[32] The following reproduces passages from Oliver Garner, 'The Borders of European Integration on Trial in the Member States : Dansk Industri, Miller, and Taricco' (2017) 9 European Journal of Legal Studies 1, 6.
[33] Lindahl, *Fault Lines of Globalization* (n 31) 174.
[34] ibid 158.
[35] ibid 164.
[36] ibid 165.
[37] ibid 175.

EU and the principle of conferral.[38] The pursuit of ever closer union may be interpreted as the 'normative point' that Lindahl identifies as the orientation point for legal ordering.

Kaarlo Tuori applies Lindahl's theory to conflict between the national and supranational legal orders: 'the principles of primacy, unity, and efficacy form part of the constitutional identity of EU law and, according to the Court restrict Member State competence to apply national…standards in the scope of EU law. Yet national courts may well consider these standards part of their national constitutional identity'.[39] This interplay is an essential feature of the order and ordering of EU law. Re-assessments of the limits between the two forms of orders inform decisions by the Member States regarding the desirability and necessity of pursuing opt-outs and withdrawal. The varying degrees of conflict over European integration manifest themselves as limits, borders, and fault-lines. This informs the perception of political actors as to whether a conflict can be accommodated within the boundaries of the national constitutional order during Treaty amendments, or whether disruption and disintegration are instead necessary.

A final salient point is the sectoral nature of the order. The Treaty on European Union's six titles focus on the procedural elements of common provisions,[40] provisions on democratic principles,[41] provisions on the institutions,[42] provisions on enhanced cooperation,[43] general provisions on the Union's external actions,[44] and final provisions.[45] This is followed by the Protocols and Declarations that are addended to both the TEU and the TFEU. This division is significant for the thesis, as Title VI on final provisions contains the triptych of constituted constituent power of Article 48, 49 and 50 TEU. The legal mechanisms which have positivised the reservations of constituent power arising out of Article 48 Treaty amendments are contained within the Protocols section.

By contrast, the Treaty on the Functioning of the European Union provides a division based on substantive policy areas. The Treaty is divided into seven parts. Part Three details 'Union Policies and Internal Actions', which are divided into 24 'Titles'. Part Five outlines the Union's external action, with a division into eight titles. These provisions represent the technical operation of the symbolic-normative chapters of the *acquis communautaire* outlined below. The opt-out Protocols utilise this means of dividing the legal order to precisely identify the specific norms that

[38] TEU, art 5.
[39] Kaarlo Tuori, 'Crossing the Limits but Stuck behind the Fault Lines?' (2016) 7 Transnational Legal Theory 133.
[40] TEU, Title I.
[41] TEU, Title II.
[42] TEU, Title III.
[43] TEU, Title IV.
[44] TEU, Title V.
[45] TEU, Title VI.

certain Member States are insulated from. Specifically, these sectors are Title VIII of Part Three on Economic and Monetary Policy,[46] Title I of Part Three on the internal market,[47] Title V of Part Three on Area of Freedom, Security and Justice,[48] and Title V of the Treaty on European Union on General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy and Title I of Part Five on General Provisions on the Union's External Action.[49]

A further sectoral breakdown is found in the *acquis communautaire*, which has developed across the course of the European Union's enlargement. For the accession of Croatia in 2013, the EU legal order was divided into 35 chapters,[50] evidencing Christophe Hillion's claim that accession can reveal the nature of the Union's legal order.[51] This particular demarcation reflects a more political understanding of the constitutional order. Consequently, the terminology of Chapter 17 of the *acquis* on Economic and Monetary Policy, and Chapter 24 on Justice, Freedom and Security have been the loci upon which Member State actors have focused their rhetoric concerning opt-outs.

Such division may be regarded as reductive in the same way as the division of domestic legal orders into different branches.[52] However, different sectors of the EU legal order have practical relevance due to the principle of conferral and the requirement that EU legislation must have an identified Treaty base. Different legislative procedures for norm-creation depend upon the sector and the substantive issue that is being regulated. A caveat to the ordinary legislative procedure in Article 289 TFEU confirms that '[i]n the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure'.[53] Article 289(4) TFEU reinforces that procedural

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[46] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; TEU and TFEU, Protocol (No 16) on certain provisions relating to Denmark.
[47] TEU and TFEU, Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union; TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.
[48] Protocol (No 19); TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland; TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; TEU and TFEU, Protocol (No 22) on the position of Denmark.
[49]TEU and TFEU, Protocol (No 22) on the position of Denmark..
[50] European Commission, 'Chapters of the Acquis' (*European Neighbourhood Policy And Enlargement Negotiations - European Commission*, 6 December 2016) <https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en> accessed 7 January 2020.
[51] Christophe Hillion, 'Negotiating Turkey's Membership to the European Union. Can the Member States Do As They Please?' (2007) 3 European Constitutional Law Review (EuConst) 269.
[52] See Tuori, 'Transnational Law' (n 17).
[53] TFEU, art 289(2).

rules in certain substantive sectors reflect either the predominance of the Member States or certain supranational institutions: '[i]n the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, or a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank'.[54] Part 3 will demonstrate that resistance to legislative rules in particular sectors has driven the pursuit of disruptive policies by certain Member States resulting in formal opt-outs.[55]

ii. 'Constitutional'

The EU legal order should be regarded as constitutional because individuals function as democratic subjects and juridical objects. These two roles and their nesting in the roles of national and citizen of the EU will be explicated in section III. Jürgen Habermas has outlined a 'dual-constituent thesis' whereby European individuals constitute the European Union's constitutional order through these two roles of democratic subjecthood.[56] This organising concept for the legitimacy of the supranational constitutional order will be appraised in section IV below. In their role as 'nationals of the Member State', individuals are represented in norm-creation by the Ministers sitting in the Council of the European Union. In their role as 'citizens of the Union', they are represented by the Members of the European Parliament.[57] National elections that lead to the appointment of Ministers, and European elections that directly appoint MEPs are the two 'norm-creator' processes in the European Union.

Habermas presents the dual-constituent thesis as a hypothetical reconstruction of the European Union if it had been founded in its current form rather than achieving this through incremental development. Habermas' constitutional reform prescriptions are aspirational foundations for the future realisation of the European Union as a fully-fledged constitutional democracy.[58] The extent to which dual-legitimation of the European Union's constitutional order may be understood as either an 'actuality' or a 'potentiality' depends upon one's perspective. A

[54] TFEU, art 289(4).
[55] See Part 3, Section III.
[56] Habermas, *The Crisis of the European Union* (n 6); Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 6).
[57] Habermas, *The Crisis of the European Union* (n 6).
[58] See Neil Walker, 'Habermas's European Constitution: Catalyst, Reconstruction, Refounding' (2019) 25 European Law Journal 508.

process-based view of constitutionalisation[59] emphasises the incremental evolution of the supranational institutions and their predominance in the legislative processes as sufficient conditions for the existence of a supranational constitutional order. By contrast an event-based view, which emphasises generative 'constitutional moments',[60] would require an explicit constitutional convention to make a dual-legitimated European constitutional order a reality. This thesis adopts the process-based view that the order may already be regarded as constitutional. However, it remains open to the event-based perspective that the constitutional order may be more perfectly realised through an explicit moment of reconstitution.

The perspective taken on the European Union as a constitutional order may be regarded as broadly aspirational. Much like European citizenship is defined as much by its potentiality as its actuality,[61] so too is the constitutional order. Jürgen Habermas' perspective is underpinned by his broader aspiration for the Union to be 'an important stage along the route to a politically constituted world society'.[62] This thesis does not aspire to such a broad ambit. However, in its focus on the constituent role of the individual, it takes a similarly thick normative viewpoint on constitutionalism.

Kaarlo Tuori uses the term 'European constitutionalism' in what he refers to as a 'normatively more neutral sense [of] the particularities of the European constitution and its theoretical foundations'.[63] By contrast, this thesis takes what Tuori refers to as the 'thick normative' perspective whereby "constitutionalism' is intimately linked to legitimacy'.[64] Such legitimacy is conceived of through the prism of individuals' sense of *belonging to* and *ownership over* the constitutional order. This evokes Habermas' 'constitutional patriotism' whereby allegiance to a polity is built through a foundational constitutional settlement promulgated based on shared values.[65] To avoid the inconsistencies of the etymological connection of 'patriotism' to 'Patria' and its allusions to nation and country, this aspect of the formulation may be omitted. Thus, the term 'European constitutionalism' in a thick sense denotes this allegiance to the constitutional settlement of the supranational community. The European Union's constitutional project may be

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[59] Massimo Fichera, *The Foundations of the EU as a Polity* (Edward Elgar Publishing 2018); Jo Shaw, 'Postnational Constitutionalism in the European Union' (1999) 6 Journal of European Public Policy 579.
[60] Bruce Ackerman, *We the People: Foundations v. 1* (Harvard University Press 1993); Neil Walker, 'After Finalité? The Future of the European Constitutional Idea' (Social Science Research Network 2007) SSRN Scholarly Paper ID 1022586 <http://papers.ssrn.com/abstract=1022586> accessed 13 January 2016.
[61] Dora Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 European Law Journal 623.
[62] Habermas, *The Crisis of the European Union* (n 6) 2.
[63] Tuori, *European Constitutionalism* (n 19) 3.
[64] ibid.
[65] Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 Praxis International 1.

regarded as unsettled and unfinished. The constant debates over the nature of the European Union mean that the Union's 60-year existence may be regarded, facetiously, as one long 'constitutional convention' akin to Patberg and Habermas' hypothetical founding moments. The conflict between European constitutionalism and national constitutional patriotism has been a crucial source of disintegration and disruption.

The argument is made that the current order is constitutional by analogy to the conceptual paradigm of national constitutional orders. Kaarlo Tuori argues that that '[i]n order to speak of 'constitutionalism beyond the state', we should be able to demonstrate that, for instance, the EU as a polity and a legal system displays sufficient similarities with its state counterparts to warrant a common constitutional approach and vocabulary'.[66] Tuori identifies in the prologue to the monograph the 'central features which European constitutionalism shares with its state equivalents and which justify employing constitutional language in the first place: such as the idea of constitutional law as a higher law'.[67]

Tuori argues that 'the formal reading of the superiority of a constitution is only intelligible against a substantive backdrop: a constitution is accorded formally superior status because of the substantive pertinence of its normative contents'.[68] Most pertinently to the concept of the supranational constitutional order, Tuori outlines that 'it is also evident that EU and national legal systems share the same 'deep culture' where the universalist values not listed in Art.2 TEU also find their place'.[69] This shared 'deep culture' may enable the sharing of constituent power between the nationals of the Member State and citizens of the Union. A schematic for principles that guide this process is provided by Markus Patberg,[70] as discussed in section IV below.

Tuori's analogy to the national constitutional orders explicates how the Union's legal order is upheld through adjudication on the constitutional text found in the Treaties, which is normatively underpinned by Union and national constitutional values. This analysis of European constitutionalism is a crucial orientation point for the thesis. However, the conceptualisation here departs from Tuori in three respects: (1) the relationship between the juridical and the democratic; (2) the sectoral nature of the constitution; (3) the predicative role of citizenship.

[66] Tuori, *European Constitutionalism* (n 19) 2.
[67] ibid.
[68] ibid 14.
[69] ibid 17.
[70] Markus Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte: Principles of Constitutional Politics in Supranational Polities' (2017) 23 European Law Journal 441.

Tuori, building upon Niklas Luhmann's systems theoretical conception of 'law as a social system',[71] argues that the European constitution possesses a juridical and a political dimension which are structurally coupled: '[I]n the juridical constitution, constitutional law relates to the EU legal system and in the political constitution to the EU as a polity'.[72] Tuori infers the presence of two 'framing' constitutions – the juridical constitution and the political constitution. However, I would argue that Tuori's conception demarcates these two relational concepts too distinctly. This misses the holistic feature that both the EU legal system and the EU as a polity are united by the role that individuals play as both democratic subjects and juridical objects. These roles construct a single holistic constitutional entity. The relationship is more intimate than 'structural coupling'. The juridical, as expressed through the operation of the rule of law, and the political, as exemplified through the operation of democracy, are mutually co-constitutive and interdependent.[73] Therefore, in this thesis the political and the juridical are regarded as the input and output dimensions respectively of the same object of study: the constitutional order of the Union. An over-emphasis on the juridical to the detriment of the democratic nature of constitutionalisation is explored below in the explication of the predicative role of citizenship.

The second departure concerns sectoralisation. Tuori builds upon the systems theoretical view of the EU as a functionally differentiated legal order to introduce the notion of *sectoral constitutions*: 'In a typical state setting, political and juridical constitutions frame sectoral policies and legislation which, however, are left to the province of ordinary politics and law-making. By contrast, in a functionally orientated transnational polity, such as the EU, with a substantively limited claim to political and judicial authority, even central sectoral policies are constitutionally anchored'.[74] Tuori goes beyond the sectoral demarcation of the legal order discussed in subsection i above, and claims that there are ontologically distinct sectoral constitutions. In addition to the framing juridical and political constitutions, Tuori identifies three sectoral constitutions in the European Union: the economic, sub-divided into macroeconomic and microeconomic; the social constitution, and the security constitution.[75] It may be conceded that the specific nature of the supranational constitutional order has led to such policy areas being heavily entrenched. This is a result of the combination of the principle of conferral requiring the competences of the Union to be explicitly textualised, and the juridical primacy that is afforded to this text. Indeed, these features

[71] Niklas Luhmann, *Law as a Social System* (Oxford University Press 2008).
[72] Tuori, *European Constitutionalism* (n 19) 9.
[73] Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3 European Journal of Philosophy 12.
[74] Tuori, *European Constitutionalism* (n 19) 9.
[75] Tuori, *European Constitutionalism* (n 19).

have been criticised as 'over-constitutionalisation'.[76] However, it is a step too far to argue that such heavy constitutionalisation has created ontologically distinct constitutions.

These sectors are still generated by the same democratic subjects and applied to the same juridical objects. The simple argument is that the presence and identity of a single constitution should be defined in relation to which individuals generate it and are addressed by it. Therefore, the economic, social, and security constitutions that Tuori identifies may be understood in this thesis simply as sectors of the same constitutional order. It may be argued that certain sectors can be regarded as more constitutionalised than others due to the prevalence of Qualified Majority Voting over unanimity, and/or the different institutional balances such as the role the European Parliament plays as the representative of individuals *qua* citizens of the Union.[77] But these procedural divergences do not change the identity of the authors and addressees of these norms.

The third and most significant departure from Tuori is the argument that the predicative analogic characteristic is not constitutional law as a higher law, but instead the role of citizenship of the European Union.[78] The constitutional adjudication of the Court of Justice is a predicative characteristic of the juridical system. Citizenship, however, underpins both juridical and democratic functioning. Tuori arguably confines the significance of the status to his framing political constitution: 'At the individual pole of the polity relationship, the political constitution establishes and defines European citizenship, with potential implications in all sectoral dimensions'.[79] The more holistic argument presented here is that the European Union aspires to construct individuals as both the authors, in the legislative process, and addressees, in executive and judicial processes, of the law that regulates their life-plans across the European territory.[80] The creation of the new status of democratic subjecthood and juridical objecthood of EU citizenship also recreates the existing status of nationality.

The Treaties create a status that is specific to the supranational order: 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'.[81] The direct connection between the status and norm-creation is evidenced in Article 10(1) and (2) TEU: 'The functioning of the Union shall be founded on

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[76] Dieter Grimm, Mattias Wendel and Tobias Reinbacher, 'European Constitutionalism and the German Basic Law' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports* (TMC Asser Press 2019).
[77] See TFEU, art 289.
[78] TFEU, art 20, art 21, art 22, art 23, art 24; TEU, art 3, art 9, art 10.
[79] Tuori, *European Constitutionalism* (n 19) 25.
[80] For analysis of the legal form of EU citizenship and its development see Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 Cambridge Yearbook of European Legal Studies 116.
[81] TEU, art 9; TFEU, art 20(1).

representative democracy…Citizens are directly represented at Union level in the European Parliament'.[82] The next sentences explicate the democratic subjecthood afforded by citizenship within the national constitutional paradigm: 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens'.[83]

The significance of EU citizenship for norm-application within the European Union is evidenced by the progressive and radical adjudication of the Court of Justice of the European Union in this area since the Treaty of Maastricht. The central example is the (in)famous dicta that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[84] The Court of Justice has used this aspiration as a normative orientation point for its interpretation, even when this leads to divergence from the ordinary meaning of positive law.[85] This is most evident from cases where claims are made that the actions of national authorities threaten EU citizenship: 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[86] EU citizenship functions as a constitutional orientation point for the Court when deciding upon the application of EU law norms. The normative desideratum is to ensure equality in norm-application between all those who have participated in the creation of EU law regardless of their diverse nationalities which operate as the original constituent status.

The explicit connection between citizenship of the Union and constitutionalism has been explicated in various pieces of secondary literature. These analyses can be utilised to demonstrate how constitutionalism manifests itself in the dimensions of democratic subjecthood and juridical objecthood elaborated above, and the further dimensions of nationality and EU citizenship.[87] The classic arguments regarding the 'constitutionalisation' of EU law have focused on the role played

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[82] TEU, art 10(1) and (2).
[83] ibid.
[84] Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193, para 31.
[85] Although the *Dano* and *Alimanovic* cases have seen a return to a more traditional interpretative approach. See Martijn Van den Brink, 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) <https://doi.org/10.1007/978-3-319-89905-3_27> accessed 9 January 2020.
[86] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177, para 42.
[87] See section III below for the synthesis of these roles into a quadripartite conception.

by the juridical institutions.[88] Kaarlo Tuori also emphasises the role of the Court of Justice of the European Union:

> [I]t guards the EU constitution as a higher law with regard to both lower-level EU law and the municipal law of Member States; it engages in protection of fundamental rights; it resolves conflicts of competence between the EU and the Member States in a way reminiscent of the role of a constitutional court in a federal state; and it settles disputes among the main EU institutions, such as the European Parliament, the Council and the Commission. Indeed, these functions of the ECJ are a major argument for applying constitutional concepts to the European level.[89]

Armin von Bogdandy has provided a sophisticated contemporary account of the European Union's juridical constitutionalism.[90] Von Bogdandy presents 'democracy' as one of the basic principles of the EU legal order that allow the ordering of legal material into a meaningful whole, rather than a constitutional practice which generates the order co-originally with the principles of the Rule of Law.[91] This analysis prejudices the role of individual *qua* juridical object to the detriment of the role of individual *qua* democratic subject within the constitutional understanding of EU citizenship.

Hanneke van Eijken explicitly presents citizenship as a 'constitutional concept': '[T]he status of being a citizen expresses the relationship between an individual and a state. Citizens are equal members of the polity and have basic rights to protect them from arbitrary use of public power…[and] safeguards against threats to their freedom and equality'.[92] This is a statement of the juridical value of citizenship as a status that ensures equality between individuals in the application of norms. Van Eijken's conceptualisation of European composite citizenship resembles Habermas' dual-constituent thesis: '[T]he European citizen can be defined as a composite legal subject within this multilevel legal order. The citizen in this context is regarded as having a status that consists of different qualifications, which can be activated by specific levels of the legal system'.[93] She states

[88] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1; JHH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403.
[89] Tuori, *European Constitutionalism* (n 19) 13.
[90] Armin Von Bogdandy, 'Founding Principles' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing/Beck 2009).
[91] Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (n 73).
[92] Hanneke van Eijken, *EU Citizenship & the Constitutionalisation of the European Union* (Europa Law Publishing 2015) 5.
[93] ibid 269.

that 'these two concepts, the national identities of Member States as well as European citizenship should be upheld and respected by the Court'.[94]

The focus on the activation of different legal rights, however, underplays the role of the status as a means to construct these 'qualifications' and indeed the 'specific levels of the legal system' themselves. Furthermore, the assertion that the Court of Justice of the European Union should adopt the guardianship of both statuses assumes the primacy of the supranational order. The prioritisation of the juridical risks upsetting the balance between the national and the supranational elements in the constitutional understanding of the functioning of the European Union. For example, van Eijken argues that a 'gap in the constitutional protection of Union citizens is the lack of political rights in national elections…Since citizenship entails full and equal membership and identity, it seems odd that European citizenship does not safeguard these rights when a European citizen exercises the right to move and reside freely in the European Union'.[95] This misses the point that the exclusive reservation of national voting rights to those who hold national citizenship ensures the continuing independent existence of the national system.[96] Van Eijken over-emphasises EU citizenship as a status that requires absolute juridical equality. Instead, this equality is tempered by the inherent pluralism arising from different nationalities being the co-equivalent constituent status for all individuals.

Alexander Somek is more sensitive to the effects of supranational constitutionalism upon the national orders. He criticises the position that the juridical action of the Court of Justice is sufficient to conceive of the EU as a constitutional order: 'the alleged 'constitutionalisation' of EU law amounted to a deconstitutionalisation of established understanding with regard to how constitutions and international agreements interact'.[97] This introduces the notion that constitutionalisation within the European Union is established in interplay with the pre-existing constitutionalism at the national level. An over-emphasis on the construction of EU citizens merely as objects of legal norms can undermine the role of nationality of the Member States as a means to exercise self-determination *qua* democratic subject and juridical object.[98] The perceived

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[94] ibid 266.
[95] ibid.
[96] For discussion of the rejected proposals during Maastricht negotiations to include national voting rights within the ambit of EU citizenship see Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29 Common Market Law Review 1137.
[97] Alexander Somek, 'Is Legality a Principle of EU Law?' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017).
[98] Joseph Weiler has updated his arguments to forward a similar claim. See JHH Weiler, 'Van Gend En Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 International Journal of Constitutional Law 94.

detriment to nationality created by constitutional understandings of the European Union is an important facet in the deconstructive narratives that lead to disintegration and disruption.

Jo Shaw muses upon the insufficiency of a purely juridical account of EU citizenship for an understanding of the European Union as a constitutional order that also vindicates democratic subjecthood: 'Citizenship – so easy to develop as a creature of the basic transnational character of the EU, where it operates in a positive relation with the EU's old legal constitutionalism – has not found a secure and comfortable position in the debates about a 'new' constitutionalism for the Union'.[99] The predominance of EU citizenship as a status of juridical objecthood means that 'in most respects, citizenship has had integrative rather than constitutive effects, despite the symbolic power of the membership concept'.[100] This suggests that EU citizenship has functioned as a means for individuals to bolster their self-fulfilment in integrating into other Member State polities through legal action without a concurrent regard for EU citizenship as a democratic status akin to national citizenship. The perceived democratic deficiencies of EU citizenship may be regarded as a driver of disintegration and disruption.

The constitutional nature of citizenship of the Union can be applied to the consequences for individuals *qua* EU citizens of the phenomena of withdrawal and opt-outs. The actions of the Member States as constituent powers during Treaty amendments lead to opt-outs that pose a threat to the equal application of norms irrespective of nationality. EU citizenship also determines the severity of the consequences of a Member State withdrawal. In addition to the withdrawal of their state from a Treaty regime of which they are the juridical objects as rights-holders, individuals are also subjected to the loss of the status of democratic subjecthood at the supranational level.

iii. 'Supranational'

The final limb of the concept concerns the characteristic which distinguishes the European Union as unique. This 'constitutional identity'[101] of the European Union's sense of order is rooted in the process of 'supranationalism' as opposed to any substantive core of legal norms or policies. This utilises an ontological approach to the concept of constitutional identity whereby the discrete and autonomous identity of a constitutional order is predicated upon the essential characteristic(s)

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[99] Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU law* (2nd edn, Oxford University Press 2011); for a more recent analysis of the topic see Jo Shaw, ''Shunning' and 'Seeking' Membership: Rethinking Citizenship Regimes in the European Constitutional Space' (2019) 8 Global Constitutionalism 425.

[100] Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (n 99).

[101] See Rosenfeld (n 8).

which distinguishes it from other similar orders. The predicate of the European Union's constitutional order is that it operates autonomously at a level *supra* the national constitutional orders; however, it does not subsume these orders nor is its existence ultimately independent therefrom. The European Union's constitutional order is distinct from the Member State constitutional orders because its constituent subjects do not constitute the order directly, but also do so as subjects of the separate autonomous constitutional orders which form the Union's 'composite constitution'.[102]

As the Union is constituted by its Member States, this identity means that it cannot exclude the 'nationality' of the Member State constitutional orders. If the European Union were to evolve into a traditional federal state with a unitary polity, its specific constitutional identity and that of the Member States would be transformed. The symbiotic relationship between the national and supranational constituent subjects means that Member State withdrawal is not only constitutionally legitimate, but a necessary condition to preserve supranationalism. Markus Patberg recognises that '[w]hile the member states are integrated into a new political system, they retain their status as sovereign entities, in the sense that they are free to leave the [supranational] constitutional order'.[103] However, the extent to which opt-outs are either necessary to or justified by the constitutional identity of supranationalism is less clear. On the one hand, opt-outs may be regarded simply as a legitimate partial means for the national element to maintain its distinct identity. On the other hand, this disruption may be regarded as inappropriate precisely because the Member States have recourse to withdrawal for this purpose.

The process of supranationalism manifests itself in both the 'democratic' and 'juridical' dimensions of the constitution. Kaarlo Tuori claims that 'the principles of primacy, unity and efficacy form part of the constitutional identity of EU law'.[104] These legal principles are predicated upon the existence of the national legal orders, and the identity of the EU legal order is dependent upon distinction therefrom. There would be no need to emphasise the primacy of EU law norms in the absence of norms from a separate legal order that may also be applied to the same juridical issue.[105] The place of individuals in the juridical relationship between the national and supranational will be examined in section III, subsection ii below.

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[102] Leonard FM Besselink, *A Composite European Constitution* (Europa Law Publishing 2007).
[103] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 452.
[104] Tuori, 'Crossing the Limits but Stuck behind the Fault Lines?' (n 39).
[105] For detailed analyses of primacy see Michael Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 Common Market Law Review 931; Michael Dougan, 'Primacy and the Remedy of Disapplication' (2019) 56 Common Market Law Review 1459.

Supranationalism also predicates the primary and secondary norm-creation processes of, respectively, Treaty amendment[106] and the ordinary legislative procedure.[107] The democratic legitimation of EU law supports the thesis of supranational constitutional identity. As outlined in subsection ii, the creation of secondary legislative would not be possible without the input of the nationals of the Member States represented by their Ministers in the Council of the European Union.[108] The demarcation of the democratic roles of nationality and EU citizenship is preserved by the exclusion of the right of non-national EU citizens to vote in the national elections of another Member State.[109] On the other hand, Article 20(2)(b) TFEU ensures the direct representation of EU citizens by empowering them to vote in European Parliament elections in Member States other than their country of origin. These juridical mechanisms for the expression of democratic subjecthood ensure that the boundaries between the national and the Union constitutional orders are maintained. Habermas justifies the bounded nature of supranationalism: 'the citizens of the Union are justified in having an interest in their respective nation-states continuing to perform their proven role as guarantors of law and freedom also in their roles as Member States'.[110] The imperative to preserve this traditional role of the Member States has asserted itself most obviously in the context of judicial review by national apex courts of the validity of EU law.[111] The purpose of such review may be justified to preserve a characteristic of the constitutional order that distinguishes the national from the supranational. In the absence of a mechanism mandating such judicial review in the Treaties, however, these decisions are at best 'a-legal' and at worst illegal from the perspective of EU law.[112] Clashes between the national and EU judiciaries have not been a direct causal factor in withdrawal and opt-outs. However, the same logic of constitutional preservation may be applied to analyse disruption and disintegration arising through political action.

Supranationality manifests itself in the legal fact that, unlike federal states,[113] the Member States' claim to both internal and external sovereignty has not been foreclosed by membership of

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[106] TEU, art 48.
[107] TFEU, art 288.
[108] TEU, art 16; TFEU, art 237-243.
[109] TFEU, art 20(2)(b).
[110] Habermas, *The Crisis of the European Union* (n 6).
[111] Federico Fabbrini and András Sajó, 'The Dangers of Constitutional Identity' (2019) 25 European Law Journal 457.
[112] Michał Krajewski, 'A Way Out for the ECJ in Taricco II: Constitutional Identity or a More Careful Proportionality Analysis?' (*European Law Blog*, 22 November 2017) <https://europeanlawblog.eu/2017/11/23/a-way-out-for-the-ecj-in-taricco-ii-constitutional-identity-or-a-more-careful-proportionality-analysis/> accessed 31 March 2020.
[113] In *Texas v White,* 74 US 700 (1868) the United States Supreme Court held that US states do not have the right to unilateral secession because the United States constituted an 'indestructible union'. However, some sub-state units do

the European Union. The primacy of Member States in Treaty amendment under Article 48 TEU evidences this retained sovereignty. This is the constitutional process that most approximates traditional public international law within the European Union. From this perspective, these acts are amendments of the international legal source of a treaty.[114] Concurrently, within the supranational constitutional order, these acts are reconstructions of the constitutional settlement generated and legitimated by the representatives of nationals of the Member State. Kaarlo Tuori uses the term 'constitutional legislators' to describe the role of the Member States under Article 48 TEU.[115] In section IV below the terminology of original constructive constituent power and constituted revisionary constituent power is used to distinguish between the creation of the constitutional order at the Treaty of Rome and its subsequent revisions.

Kaarlo Tuori has used the term 'transnational' rather than supranational constitutional order to refer to the European Union.[116] This reflects Gunther Teubner's distinction between state legal orders, which claim universal jurisdiction and are territorially differentiated, and functionally differentiated legal orders, which operate beyond and throughout the spatial boundaries of national legal orders in their pursuit of a particular subject matter.[117] Tuori supports this through a distinction between legal orders that are *principle-orientated* and *policy-orientated.* The former function as all-purpose legal orders, whereas the latter pursue only particular substantive objectives.[118]

Tuori recognises that EU law may have transcended a policy-orientation and adopted a principle-orientation after 'the latest developments in EU fundamental rights law'.[119] Lindahl doubts the veracity of a distinction between such forms of legal order. He claims that all orders constitute themselves by setting boundaries in four dimensions; the spatial boundary is only one such element.[120] Analysis of the constituent elements of transnational legal orders reveals that they do not fulfil the criteria of constitutionalism discussed in subsection ii above. The efficacy and legitimacy of these orders is dependent upon established national and international orders. The autonomous regimes for the democratic creation and juridical application of norms in the European Union means that it should not be considered a transnational order.

retain some form of external sovereignty in international law. For example the Swiss Cantons have a limited capacity to conclude treaties. Roland Portmann, 'Foreign Affairs Federalism in Switzerland' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019).

[114] Statute of the International Court of Justice, art 38(2).

[115] Tuori, *European Constitutionalism* (n 19).

[116] ibid 2.

[117] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[118] Tuori, 'Crossing the Limits but Stuck behind the Fault Lines?' (n 39) 150.

[119] ibid.

[120] Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (n 31).

Greg Shaffer and Terence C. Halliday have provided a comprehensive overview of the predicative elements of Transnational Legal Orders.[121]

> 1) A Transnational Legal Order seeks to produce *order* in an issue area that relevant actors construe as a 'problem';
>
> 2) It is *legal*, insofar as it adopts legal form to address the problem, its norms are produced or conveyed in connection with a transnational body or network, and it directly or indirectly engages national legal bodies; and
>
> 3) It is *transnational*, insofar as it transcends and permeates state boundaries in one way or another.[122]

The first criterion may be synthesised with Tuori's conception of 'policy-orientated' legal order. The transformation of the European Union's legal order towards a 'principle-orientation' means that it is no longer limited to this first criterion of problem resolution. Although European integration may have arisen as a response to the 'problem' of economic co-ordination,[123] its scope has long ceased to be restricted to market integration. Rather than a mere vehicle to co-ordinate problem-solving capacities, the EU has been constituted as a symbolic-normative order. The Treaty of Rome's claim to establish a Union 'unlimited in duration' further challenges the notion that the original European Economic Community was ever functionally limited. Instead, the Treaty of Rome represented an exercise of constituent power on the international plane by sovereign states to create a new order that transcends yet preserves the boundaries of the Member States.

The European Union fulfils the second limb of the definition. The Treaties, Regulations, and Directives certainly 'adopt legal form', the Council and European Parliament may be regarded as a 'network or body' that produces these norms, and the specific juridical characteristics of EU law 'directly…engage national bodies'. However, the European Union goes beyond the basic requirements of legality. Transnational legal orders do not aspire to normative coherence whereby the intended 'addressees' of the norms are also the 'authors' thereof.[124] The absence of constituent

[121] Greg Shaffer and Terence C. Halliday, 'Researching Transnational Legal Orders' in Halliday (n 13).
[122] ibid.
[123] See Chapter 6 'Mutation of the macroeconomic constitution' in Tuori, *European Constitutionalism* (n 19).
[124] See Habermas, *Between Facts and Norms* (n 12).

statuses akin to Member State nationality and EU citizenship distinguishes the European Union's supranational constitutional order from Shaffer and Halliday's definition of transnational legal orders. The latter take a legal form in their regulation of problems without aspiring to a holistic constitutionalism. These regulatory orders can only achieve their aims because they are permitted to do so by established constitutional orders on an ad hoc basis. By contrast, following the initial authorisation of 'levelling up' constituent power, the European Union's legitimacy functions autonomously.

Concerning the third criterion, the EU legal order does transcend and permeate state boundaries. But this occurs within the supranational constitutional order because EU law operates through the extension of constitutional structures beyond spatial boundaries. The defining characteristic is not the *horizontal* ('trans') permeation of EU law into areas of regulation of state constitutions. The predicative feature is the *vertical* ('supra') extension beyond the state of the creation, reliance upon, and application of norms. The distinction between the transnational and the supranational is salient to understand and appraise how constituent actors may challenge such norms. Member States are legally bound to utilise specific supranational mechanisms to pursue withdrawal and opt-outs; exclusively national or international law mechanisms are insufficient. This insight explains why alternative forms of withdrawal beyond Article 50 TEU are illegitimate.[125]

In conclusion, the European Union is a supranational constitutional order because it creates the new constituent status of EU citizenship, with the concurrent recreation of the status of nationality of a Member State; this dual-status acts as the orientation point for legal ordering at a level that is autonomous from yet interdependent with the national constitutional orders.

III. The Quadripartite Role of Individuals in the Supranational Constitutional Order

As alluded to throughout section II, individuals function both as *democratic subjects* in the creation of norms by the constituted legislative institutions, and as *juridical objects* in their reliance upon norms, and the application by the constituted juridical institutions. In combination with the dual-constituent thesis, there are four distinct roles for individuals in the EU: (1) EU citizen *qua*

[125] See the introduction to Part 2, section III below.

democratic subject; (2) EU citizen *qua* juridical object; (3) national of a Member State *qua* democratic subject; (4) national of a Member State *qua* juridical object.

The terminology of 'subjects and objects' of EU law has been utilised by *inter alia* Joseph Weiler,[126] and Elaine Fahey and Samo Bardutzky.[127] Päivi Johanna Neuvonen[128] and Susanna Lindroos-Hovinheimo[129] have advanced recent interpretations of the subject of European integration. Weiler's starting-point is the Court of Justice's dicta that individuals are 'subjects' of the EU legal order: '[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.[130] Weiler uses the term 'objects' to criticise the potential de-politicisation resulting from the juridical empowerment of individuals: 'In the European Union with its defective democratic machinery where the individual has far less control over norm creation, direct effect has the paradoxical effect of objectifying him or her – an object of laws over which one has no effective democratic control'.[131]

The nature of Bardutzky and Fahey's endeavour to 'reframe' the objects and subjects of EU law means that they investigate numerous iterations of these concepts, including the 'object' being the law itself. One specific instance coheres with Weiler's understanding: '[I]ndividuals are, or should be, both subjects (the source of the law) and objects (objects of the law). In other words, they are all *both* subjects *and* object *at one and the same time*'.[132] Bardutzky and Fahey's contribution confirms that the same physical individuals are the root of these processes, just as Habermas confirms that the dual-constituent subject does not refer to ontologically separate individuals. The processes themselves, however, are qualitatively distinct. Weiler uses the term 'object' in a critical sense to describe law application with deficient democratic input. By contrast, here it will be used in a normatively neutral sense to capture the qualitative distinction for individuals between adjudicative processes and legislative processes.

Weiler recognises that the juridical architecture of the EU legal order empowers individuals as juridical objects through *inter alia* the preliminary reference procedure, direct standing rules, the

126 Weiler (n 98).
127 Samo Bardutzky and Elaine Fahey (eds), *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar Publishing 2017).
128 Päivi Johanna Neuvonen, 'Retrieving the 'Subject' of European Integration' (2019) 25 European Law Journal 6.
129 Susanna Lindroos-Hovinheimo, 'There Is No Europe - On Subjectivity and Community in the EU' (2017) 18 German Law Journal 1229.
130 Case 26/62, *Van Gend En Loos v Nederlandse Administratie Der Belastingen* [1963] ECR 1.
131 Weiler (n 98) 102.
132 Bardutzky and Fahey (n 124) 9 (emphasis in the original).

doctrines of direct effect, primacy, *effet utile*, and Francovich damages.[133] He argues that 'as a socio-legal phenomenon, direct effect harnesses the *private* economic, political, and social interests of the individual in vindicating those rights to the public interest of ensuring the rule of law at the transnational level. With each individual effectively becoming in that way a 'legal vigilante' of the public rule of law, an effective civil society monitoring system is put in place'.[134] Individuals can vindicate their own private interests against the manifestations of domestic and European constituted power. This decentralised role as 'Private Attorney Generals'[135] empowers individuals to rely upon norms to enact their plans for self-fulfilment within the territory of the European Union.

Mattias Kumm develops this further and argues that such juridical empowerment promotes *democratic* self-determination.[136] This may be a step too far if we wish to preserve a separation of powers between legislative and judicial institutions, and the role of individuals as democratic subjects and juridical objects. Kumm captures the interdependence when he claims that 'judicial review of rights is not in tension with democratic legitimacy but a necessary complement to it'.[137] However, he conflates the different forms of legitimacy that legislation and adjudication represent. The value of adjudication and democracy should be complementary rather than identical. Kumm's claim may instead be interpreted as a holistic statement on the role of adjudication in social and personal self-actualisation.[138] This claim functions as a foundational principle of the levelling-up of constituent power explicated by Patberg.[139] Democratic legitimation and juridical empowerment are the two dimensions of constitutional self-determination, but remain qualitatively distinct.

Weiler claims that the present structure of the Union's constitutional order is misbalanced towards output legitimacy and does not make sufficient provision for democratic self-determination. This perceived democratic deficit is one of the prime motivations for Habermas' use of the dual-constituent thesis to propose prescriptive reforms. To delineate the multi-faceted

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[133] Weiler's description of the empowering juridical architecture is similar to Tuori's characteristics of the EU's constitutional identity discussed in section II, subsection ii above.
[134] Weiler (n 98) 96. See section II, subsection iii above for why this should be understood to ensure the rule of law at the *supranational* level rather than the *transnational* level.
[135] ibid.
[136] Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 European Journal of Legal Studies.
[137] ibid 4.
[138] See Mark Dawson and Floris De Witte, 'Self-Determination in the Constitutional Future of the EU' (2015) 21 European Law Journal 371.
[139] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70).

role of individuals here it suffices to establish the role of democratic subjecthood, regardless of its imperfect realisation.

i. Democratic subjects

Democratic subjecthood empowers the EU legislative institutions to create binding legal norms following the election of representatives. European Parliament elections held under Article 223 TFEU, and national elections that lead to the appointment of Ministers are the 'norm-creator' processes. Following their appointment, the 'norm-creation' process is mandated by Article 289 TFEU. Individuals *qua* Member State national and *qua* EU citizen are recognised as equal democratic subjects through the co-equivalence of the Council and the European Parliament in the ordinary legislative procedure. Article 289(2) TFEU also recognises 'special' legislative procedures in which the European Parliament does not have the power to amend proposals, and which are determined on an ad hoc basis within the Treaty. This shows that the predominance of the Member States in the creation, amendment, and termination of the Treaties can spill over into the ordinary functioning of the constitutional order.

The (conditional) equality of the statuses also explains some unusual features of the supranational legislative processes: Qualified Majority Voting (QMV) within the Council and the degressive proportionality of the European Parliament. According to Peter Niesen, 'what appears as anomaly at first sight may in fact provide the key to deciphering the normative logic'.[140] Habermas argues that 'when there are extreme differences in size between the participating states, the principle of state equality must not be invalidated by the legitimation requirement of democratic equality'.[141] This is rooted in the retention of nationality as a constituent status in the hypothetical constituent convention.[142] Habermas states that 'the prejudice in favour of the member states anchored in the structure of the constituent convention itself now impacts upon the design of all the institutions'.[143] These features may also result from the balance sought between the institutions following their input under Article 48 TEU.[144]

The representation of individuals balances the principle of equality of Member State nationals and the principle of equality of EU citizens. Markus Patberg presents a thought

[140] Peter Niesen, 'The 'Mixed' Constituent Legitimacy of the European Federation' (2017) 55 JCMS: Journal of Common Market Studies 183, 187.
[141] Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 6) 177.
[142] See Section IV, subsection ii below.
[143] Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 6) 178. (Emphasis removed).
[144] For further analysis see Section IV, subsection iii on the triptych of primary law on constituent power.

experiment to explain the creation of these roles and the normative guidelines that would guide this process.[145] Patberg recognises the potential schism between the roles: 'In emphasizing the role of the (future) members of the supranational polity, the last step of the thought experiment seems to contradict the results of the previous step, which put the citizens of the states involved in the driver's seats'.[146] The principles underpinning the roles may come into conflict with one another. The role of democratic subject is one of formal co-equivalence, but this equality is founded on the shifting sands of uncertain foundations as to which role takes primacy within the constitutional order. The interplay between the two roles can combust into contradiction and conflict and arguments that mutual accommodation is not possible.[147] In these disruptive and disintegrative scenarios, the retention of constituent power by the Member States and the prospect of withdrawal suggests that that the original status of Member State nationality ultimately takes precedence.

ii. Juridical objects

Individuals are juridical objects of EU law because they are the addressees of the norm-application processes by EU and national judiciaries. Habermas focuses his attention on the hypothetical creation of the legislative institutions. He places less emphasis on why it would make 'best sense' for the hypothetical constituent subject to form the Court of Justice of the European Union. Habermas does, however, include the 'primacy of supranational law over the national law of the monopolists on the means for the legitimate use of force'[148] as the first innovation enabling supranational democracy. He ties this explicitly to the rational reconstruction of the dual-constituent subject: 'the subordination under European Law can be understood as a result of the fact that, from the very beginning, two different subjects were involved who cooperated in bringing about a supranational political community'.[149]

The historical equivalent of Habermas' hypothetical is the Court of Justice's iterative empowerment of individuals *qua* EU citizens.[150] This story of the subordination of national norms

[145] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70).
[146] ibid 452.
[147] Margaret Thatcher, 'House of Commons Statement: Rome European Council, Hansard HC 178/869-92 ('No No No')' (*Margaret Thatcher Foundation*, 30 October 1990) <https://www.margaretthatcher.org/document/108234> accessed 1 April 2020.
[148] Habermas, *The Crisis of the European Union* (n 6) 20.
[149] ibid.
[150] Garner, 'The Existential Crisis of Citizenship of the European Union' (n 80).

has been told extensively in the dicta of the Court,[151] and secondary commentary thereupon.[152] These narratives justify the legal doctrines and principles that enable the uniform application of EU law throughout the Member States.[153] These principles aspire to formal equality between all individuals who hold EU citizenship regardless of their nationality. The distinct roles performed through EU citizenship and Member State nationality *qua* juridical object are harder to establish than the democratic roles.

One interpretation is that the supremacy claim of EU law means that the individual *qua* citizen of the Union and *qua* national of a Member State are not co-equivalent; instead the former takes precedence over the latter. On the one hand, this position may be justified by emphasising the greater 'quantity' of input into EU law norms by each individual through two channels, and in turn by individuals of all the Member States rather than just one. On the other hand, it may be argued that primacy is unjustified due to the more proximate representative link and greater quality of domestic norm-creation through national legislatures.

A more salient distinction focuses not on status but on the source of law. Individuals may be conceived as the juridical objects of EU law, and the juridical objects of national law. The former role will (conditionally) take precedence over the latter in cases of conflict.[154] The crucial caveat is provided by the roles of national courts: 'in their interpretation of the European Treaties, [they] can conceive of themselves as legitimate guardians of the democratic legal substance of the constitutions of their respective member countries'.[155] As outlined above, the primacy of EU law may be justified because it has been legitimated by other individuals beyond the scope of any one constitutional order. To ensure these individuals can rely upon this law effectively throughout the territory of the European Union, the norms must have a uniform scope of application. However, the national constitutional orders may empower their courts to protect the 'democratic legal substance' – the greater quality of the legislative process – when specific characteristics are threatened by EU law.[156]

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[151] Opinion 2/13 of the Court on the accession of the EU to the ECHR, EU:C:2014:2454 (Grand Chamber, 18 December 2014*)*.

[152] See, *inter alia*, Stein (n 87); Karen J Alter, 'Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice' (1998) 52 International Organization 121; Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution : A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998); Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018); Justin Lindeboom, 'Why EU Law Claims Supremacy' (2018) 38 Oxford Journal of Legal Studies 328.

[153] TEU, art 19.

[154] On conditional primacy of EU law see Garner, 'The Borders of European Integration on Trial in the Member States' (n 32).

[155] Habermas, *The Crisis of the European Union* (n 6) 27.

[156] See discussion of constitutional identity review in Section II, subsection iii above.

The national and supranational judiciaries do not operate in hermetically sealed vacuums. Instead, a 'symbiotic relationship' exists.[157] The Treaties determine that all Member State courts are also EU courts.[158] The innovation of the preliminary reference procedure[159] enables individuals with standing as juridical objects of domestic law a pathway to vindicate claims as juridical objects of EU law.[160] The continuing application of the preliminary reference procedure during the Article 50 process ensures that nationals of the withdrawing state can continue to rely upon their juridical objecthood so that the EU Treaties cease to apply in a legally valid manner.[161] This is complemented by the fast-track of direct standing before the Court of Justice when the role as object of EU law is activated by acts 'of direct and individual concern'.[162] Weiler argues that '[t]he member states' courts 'are not alone' when confronted with the higher norm of the international Treaty. The symbiotic relationship works also in the opposite direction. The European Court 'needs' the national courts not only to 'activate' and initiate the European norm. But also for the compliance pull issue'.[163]

The juridical architecture of the supranational constitutional order is available to all individuals *qua* juridical objects, regardless of whether they hold the constituent status of EU citizenship or not. The residual juridical objects of the order, third country nationals, are also able to vindicate legal claims if they fulfil the objective standing criteria. The core of the unique value of EU citizenship as a juridical status is the right to free movement and associated rights to enable integration into any of the Member States of the Union.[164] Article 21 TFEU declares that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.[165] This juridical core of free movement rights has been a key arena for the Court of Justice's development of the supranational constitutional order. The development of free movement has also exposed cleavages between individuals who identify more

[157] Weiler (n 98) 97.
[158] TEU, art 19.
[159] TFEU, art 267.
[160] See Part 2, section III, subsection ii for how the preliminary reference procedure enabled UK nationals *qua* objects of EU law to ensure the legal validity of the Article 50 withdrawal process in the *Wightman* litigation.
[161] See the discussion of the *Wightman* judgment in Part 2, Section III, subsection iii.
[162] TFEU, art 263.
[163] Weiler (n 98) 97.
[164] Floris De Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019).
[165] TFEU, art 20(2)(a), art 21. For the 'limitations and conditions laid down…by the measures adopted to give them effect' see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

with their nationality or their EU citizenship in the pursuit of self-fulfilment.[166] The rights that underpin EU citizenship as a status of democratic subjecthood and juridical objecthood are mutually reinforcing. The physical integration of individuals in the territory of other nations requires that they have a form of local and supranational representation, and the outcome of these democratic processes informs the development of the juridical free movement and residence rights.

The physical situation of the norm-creation processes in Brussels and Strasbourg has no territorial significance in constitutional terms.[167] By contrast, traditionally norm-application is predicated more upon territory than the identification of individual objects to whom it applies.[168] Territorial legal orders within the Union in which norms cannot be relied upon undermines the central telos of individuals as juridical objects in the foundational case-law. This raises a further point of normative significance regarding the relationship between the roles of democratic subject and juridical object. As Habermas outlines: 'Democratic self-government means that the addressees of mandatory laws are at the same time their authors. In a democracy, citizens are subject only to the law which they have given themselves in accordance with a democratic procedure'.[169] Member State opt-outs disrupt the equality of all individuals *qua* juridical objects by demarcating national legal orders in which individuals cannot rely upon certain EU law.[170] Withdrawal represents a full disintegration of the role of individual *qua* juridical object of EU law through the disapplication of this legal source in the territory of a former Member State.[171]

IV. The Dual-Constituent Thesis and Levelling-up Constituent Power

i. The dual-constituent thesis

In *The Crisis of the European Union*, Jürgen Habermas proposes the 'dual-constituent thesis' of the foundational legitimacy of the European Union.[172] As alluded to in section II, subsection ii, Habermas proposes a hypothetical constituent moment in which nationals of constitutional states create a supranational constitutional order through the joint exercise of constituent power with

[166] Garner, 'The Existential Crisis of Citizenship of the European Union' (n 80).
[167] There is, however, geopolitical significance in vindicating French state interests through sharing the European Parliament between Strasbourg and Brussels.
[168] See the discussion of 'spatial boundaries' in section II, subsection i above.
[169] Habermas, *The Crisis of the European Union* (n 6) 14.
[170] See Part 3, Section IV for the full argument on the normative deficiencies of opt-outs.
[171] See Part 2, Section IV for the full argument on the normative deficiencies of withdrawal.
[172] Habermas, *The Crisis of the European Union* (n 6).

the new role of citizen of the European Union. Habermas argues that 'the EU citizenry as a whole shares the constitution-building power with a limited number of 'constituting states' which acquire a mandate from the peoples to collaborate in founding a supranational political community'.[173]

This position's academic origins can be excavated from the work of Jean Cohen on federations.[174] A similar conception arose during the 2002-2003 Convention on the Future of Europe. Robert Badinter claimed that 'the sovereignty from which…[the European Union] proceeds is of double origin: First, the delegations of sovereignty granted by the Member States, through successive Treaties…Added to this sovereignty delegated by States is another source, less obvious but more direct: the citizens of the Union'.[175] The dual-constituent thesis has subsequently been developed and critiqued by numerous scholars.[176] This subsection will reconceptualise the dual-constituent thesis, which operates hypothetically, into a dual-legitimation thesis, which can be applied to actual constitutional practice. In Part 2 and Part 3 this is applied to explain and critique the disintegration and disruption caused by withdrawal and opt-outs.

Habermas conducts his thought experiment through the method of 'rational reconstruction': a practice is reconstructed on the basis of its immanent normative essence, which identifies presuppositions that all participants can agree upon.[177] Habermas asserts that the popular sovereignty founding the supranational order is split at its root into a *pouvoir constituant mixte*. The autonomous status of EU citizenship is reconstructed to evidence a desire for binding legal regulation of problems that transcend the boundaries of existing constitutional states.[178] Similarly, reconstruction of the prevalence of sovereign states reveals the intention of the original hypothetical constituent convention to preserve the states as guarantors of a particular level of freedom and justice.[179] These historical achievements could be undermined by constituting the

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[173] ibid 11.
[174] Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012).
[175] Patberg, 'Supranational Constitutional Politics and the Method of Rational Reconstruction' (n 5).
[176] See *inter alia* Markus Patberg, 'Constituent Power beyond the State: An Emerging Debate in International Political Theory' (2013) 42 Millennium 224; Patberg, 'Supranational Constitutional Politics and the Method of Rational Reconstruction' (n 5); Markus Patberg, 'Against Democratic Intergovernmentalism: The Case for a Theory of Constituent Power in the Global Realm' (2016) 14 International Journal of Constitutional Law 622; Patberg, 'The Levelling Up of Constituent Power in the European Union' (n 7); Markus Patberg, 'Constituent Power: A Discourse-Theoretical Solution to the Conflict between Openness and Containment' (2017) 24 Constellations 51; Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70); Niesen (n 140); Peter Niesen, 'Reframing Civil Disobedience: Constituent Power as a Language of Transnational Protest' (2019) 15 Journal of International Political Theory 31; Walker, 'Habermas's European Constitution' (n 58); George Duke, 'European Constitutionalism and Constituent Power' (2019) 44 European Law Review 49; Vlad Perju, 'The Asymmetries of Pouvoir Constituant Mixte' (2019) 25 European Law Journal 515.
[177] Patberg, 'Supranational Constitutional Politics and the Method of Rational Reconstruction' (n 5).
[178] ibid.
[179] Habermas, *The Crisis of the European Union* (n 6).

European polity as a sovereign state entity *de novo*.[180] Perju has criticised Habermas' reification of the nation-state as an impediment to a radical re-structuring of European integration.[181] Although this criticism may be normatively cogent, the place for Member States assigned by Habermas has explanatory validity when considering Member State withdrawal and opt-outs.

Habermas utilises the dual-constituent thesis to propose prescriptive reform of the EU institutions. This could pose a methodological challenge for using the concept to analyse existing legal phenomena. As Patberg details, 'constituent power merely appears as a hypothetical assumption that highlights the discursively justifiable core of the existing construction, while the political processes in which the EU polity is shaped are not subjected to a rational reconstruction'.[182] Nevertheless, Patberg's development of Habermas' thesis primes the ground for a real-world application. Patberg argues that '[i]n Habermas' account, the EU's constituent power only appears as a hypothetical assumption that abstracts from the fact that the EU polity 'is the work of political elites'. However, the notion of levelling up demonstrates that political communities organized in states, which have set themselves the goal of founding (or reorganizing) a supranational democracy, can actually install a dual constituent power'.[183] Patberg argues that the normative aspirations of the dual-constituent thesis can be realised through institutional reform of revisionary constituent power.[184] The argument here is that the dual-representation of individuals can be applied to analyse pre-existing phenomena without the need to take a stance on whether this dual-representation should extend to primary law creation and recreation.

This thesis is not intended as a critique of the efficacy of the dual-constituent thesis as an explanation for European constitutionalism. However, a particular criticism is relevant to how the legal possibility of withdrawal became a reality. Niesen clarifies that the dual-constituent thesis is primarily a justificatory account of the European constitutional order: 'A rational reconstruction asks under which presuppositions a particular set-up of institutions makes *best sense* to those who participate in it'.[185] The meta-presupposition of this 'idealized participant's perspective' is that individuals will accept a constitutional order through the exercise of pure reason.[186] The

[180] For the legitimacy dilemma of creating polities *ex nihilo* see Hannah Arendt, *On Revolution* (Penguin Classics 2009).
[181] Perju (n 176).
[182] Patberg, 'The Levelling Up of Constituent Power in the European Union' (n 7) 211.
[183] ibid 209–210. Patberg cites Habermas, *The Crisis of the European Union* (n 6) 30.
[184] He proposes assigning amendment competence to the new institution of a 'Permanent Constitutional Assembly' composed of elected representatives of Member State nationals and EU citizens. See Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 452–3.
[185] Niesen (n 140) 187.
[186] Immanuel Kant, *Critique of Pure Reason* (Bohn 1855).

presumption is that extending democratic constitutionalism beyond the nation-state, but without eschewing its freedom guaranteeing function, makes the 'best sense' for constituent individuals.

However, this seems to downplay the crucial role that *emotion* plays in the acceptance of a framework for the exercise of public power. András Sajó uses the term 'constitutional sentiments' to capture this idea.[187] This is necessary for participants to have an 'internal perspective'[188] upon the order generated, and for them to identify with and perceive themselves as belonging to the constitutional order.[189] Legitimacy is not an exogenous quantifiable substance that can be 'produced'. Heuristic devices such as 'input and output legitimacy'[190] are useful barometers for analysis but are not ultimately determinative of a system's acceptance. Instead, emotional narratives are internalised by each member of a polity as the justification for the norms which are applied to them by those imbued with legal authority. Rejections of these narratives have been understood as exercises of 'destituent power'.[191] Legitimacy derives from a shared intersubjective narrative that explains how things are, why they ought to be this way, and why they must continue to be. These narratives may be understood as 'foundation myths', but more accurately they are continuing serial narratives because they support the iterative development of a polity.[192]

Examples of these justificatory narratives can be found in existing constitutions.[193] The constitutional leitmotif of the United States of America is 'We the People', whereby a people created itself through a documentary constitution to transform a confederation of separate states into a federal state order, but with the safeguard of political powers being distributed between various branches.[194] In the United Kingdom, the narrative is 'Parliamentary Sovereignty', in which public power has gradually dissipated from one sovereign Monarch to a democratically elected assembly without internal revolution or external occupation, regardless of how accurately this depicts major political ruptures throughout British history.[195] In the Federal Republic of Germany,

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[187] András Sajó, 'Emotions in Constitutional Institutions' (2016) 8 Emotion Review 44; see also András Sajó, 'Emotions in Constitutional Design' (2010) 8 International Journal of Constitutional Law 354.
[188] HLA Hart, *The Concept of Law* (3rd edition, Oxford University Press 2012).
[189] This may be considered in relation to Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 The Modern Law Review 567.
[190] Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).
[191] Giorgio Agamben and Stephanie Wakefield, 'What Is a Destituent Power?' (2014) 32 Environment and Planning D: Society and Space 65; Kolja Möller, 'From Constituent to Destituent Power beyond the State' (2018) 9 Transnational Legal Theory 32.
[192] A parallel may be drawn to Ronald Dworkin's 'chain novel' metaphor for precedents in case-law. See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).
[193] See Sajó, 'Emotions in Constitutional Institutions' (n 187) 47–48.
[194] Arendt (n 180); Sajó, 'Emotions in Constitutional Institutions' (n 187) 48.
[195] Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press 2013); Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).

the unamendable and eternal protection of human dignity within the *Grundgesetz* (Basic Law)[196] reflects the repentant narrative of 'Never Again' following the human tragedies of the Third Reich.[197]

These distinct narratives of legitimacy inform 'constitutional identity'.[198] Michel Rosenfield identifies seven distinct constitutional 'models',[199] and six different models of 'constitution-making'.[200] This categorisation of different legitimacy narratives is analogous to Habermas' rational reconstruction of the foundations of the European Union. Rosenfeld's brief account of the 'European transnational model'[201] resembles the dual-constituent thesis and other accounts of the European Union from the theory of federations: 'Instead, the EU model would have to promote novel vertical and horizontal apportionments of powers allowing supranational, national, and infranational governance to work in harmony without being constrained by traditional forms of federalism or confederalism.'[202] Constitutional identity concerns the predicative characteristics of the intersubjective narrative of legitimacy that individuals internalise as a justification for the constitution. This must be preserved, including through adjudication,[203] to enable individuals to exercise their self-determination to participate in this shared endeavour.

Habermas' constituent thesis may be perfectly compelling as a 'rational' justification for the European Union's constitutional order. However, the dual-constituent thesis may be too convoluted for individuals to internalise as an emotional narrative of belonging to entrench 'constitutional patriotism'[204] towards the EU. Patberg recognises this possibility: 'one might still think that the notion of *pouvoir constituant mixte* runs the risk of scaring off citizens with excessive 'EUphoria'.'[205] Patberg's rebuttal continues the appeal to reason: "split' popular sovereignty

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[196] Christoph Enders, 'Human Dignity in Germany' in Paolo Becchi and Klaus Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2018).
[197] Christoph Möllers, ''We Are (Afraid of) the People': Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008).
[198] Rosenfeld (n 101). See Section II, subsection ii above for introduction of the concept.
[199] Rosenfeld identifies (1) the German; (2) the French; (3) the American; (4) the British; (5) the Spanish; (6) the European; and (7) the post-colonial models.
[200] These are (1) the revolution-based model; (2) the invisible British model; (3) the war-based model; (4) the pacted transition model; (5) the transnational model; and (6) the internationally grounded model.
[201] See Part II section iii above for why this would better be understood as the 'European *supranational* model'.
[202] Rosenfeld (n 101).
[203] Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).
[204] Habermas, 'Citizenship and National Identity' (n 65).
[205]Markus Patberg, 'After the Brexit Vote: What's Left of 'Split' Popular Sovereignty?' (2018) 40 Journal of European Integration 923, 933.

appears as a reasonable middle ground between regional cosmopolitanism and demoicracy, the most prominent stories of political membership in the EU.'[206]

European integration has been driven by the political executives of the Member States and European institutions, with constitutional legitimacy grafted thereupon *ex post-facto*. Neil Walker refers to "the original (and still uncorrected) sin' of a weak grounding in terms of popular legitimacy'.[207] Conceptions such as the dual-constituent thesis are necessarily reductive devices. The focus on reason rather than emotion, however, obscures the dynamics of not only the acceptance of the Union's constitutional order, but also its rejection. This argument may be reflected within one of the campaign declarations of one of the *Spitzenkandidat* candidates for the European Commission Presidency in 2019: 'Europe is a rational choice, but it needs to feel good'.[208]

One reading of the United Kingdom referendum is that the remain campaign argument for Europe as a 'rational choice' in terms of economic consequences[209] was rejected for a vague but emotionally powerful appeal to 'Take Back Control' that 'felt good'.[210] This may indicate rejection of 'split' sovereignty.[211] The division of constituent power is incompatible with the narrative of Parliamentary Sovereignty whereby the absolute power of Parliament to make and change law is legitimated by the democratic representation of individuals *qua* nationals. Such a narrative represents a zero-sum game approach to constitutional identity.[212]

The critique from emotion may also inform reform of the dual constitution of the European Union. Niesen envisages such a possibility: '[D]ependence on already existing political forms should not be thought to take away either *pouvoir's* freedom to re-invent themselves (in a process of co-evolution with their other *persona*)'.[213] Patberg claims that '[a]s the method of rational

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[206] ibid 934.
[207] Neil Walker, 'The EU's Constitutional Overabundance?' (University of Edinburgh 2016) Edinburgh School of Law Research Paper No.2016/14 <https://papers.ssrn.com/abstract=2776800> accessed 28 January 2020.
[208] Alexander Stubb, 'Stubb: 'Europe Is a Rational Choice, but It Needs to Feel Good'' (*@alexstubb*, 12 October 2018) <https://twitter.com/alexstubb/status/1050707810605039618> accessed 23 January 2020.
[209] UK Government, 'Why the Government Believes That Voting to Remain in the EU Is the Best Decision for the UK - with References' (*GOV.UK*, 6 April 2016) <https://www.gov.uk/government/publications/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk> accessed 23 January 2020.
[210] For a comprehensive overview of the reasons for the leave vote see Harold D Clarke, Matthew Goodwin and Paul Whiteley, *Brexit: Why Britain Voted to Leave the European Union* (Cambridge University Press 2017) 146–174; see also Jack Black, 'From Mood to Movement: English Nationalism, the European Union and Taking Back Control' (2019) 32 Innovation: The European Journal of Social Science Research 191.
[211] Patberg, 'After the Brexit Vote' (n 205).
[212] Thomas Bryant, 'How the British Conception of Sovereignty Makes EU Membership Untenable' (*BrexitCentral*, 27 September 2019) <https://brexitcentral.com/how-the-british-conception-of-sovereignty-makes-eu-membership-untenable/> accessed 2 April 2020.
[213] Niesen (n 140) 190.

reconstruction examines practices from within, the argument for the *pouvoir constituant mixte* applies not only to processes of polity formation but also to forms of constitutional politics that would take the EU and its Member States in the direction of new forms of political organisation—and certainly it does not foreclose such a development.'[214] Member State withdrawal reveals the fault-line within the dual-constituent foundations of the European Union whereby it is no longer sustainable for certain individuals to retain the perspective of both national of a Member State and citizen of the Union. It remains to be seen whether Brexit's rejection of EU citizenship in favour of an absolute nationality will lead to a counter-rejection of nationality in favour of an autonomous EU citizenship.[215] Reconstitution of Europe and the Member States may occur through separation of the dual-subject rather than 'co-evolution' between the two personae.[216]

The equality of the dual role in the creation and application of norms has explanatory validity for the ordinary functioning of the supranational constitutional order. However, the creation and successive amendments of the constitutional order are more difficult to attribute to a dual-constituent power. The constituted institutions of the European Parliament and the Council have an informative role through participation in the Convention established under Article 48 TEU.[217] However, the final executory power to construct and reconstruct the order lies with the plenipotentiaries of the High Contracting Parties acting through the conference of representatives.[218]

Original constituent power was exercised by states in international law to create the European Union's constitutional order. Subsequently, these High Contracting Parties have constituted revisionary constituent power to reconstruct the order. This power has been utilised to create the new democratic subject and juridical object of citizen of the EU. The Member States' control over constructive and revisionary constituent power enables reservation by certain Member States and the creation of opt-outs. Furthermore, exercises of power to deconstruct the order through withdrawal lie solely with the nationals of each Member States.

ii. The principles of levelling-up constituent power

[214] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 453..
[215] Garner, 'The Existential Crisis of Citizenship of the European Union' (n 80).
[216] See the Conclusion for a brief redux of this idea.
[217] See subsection iii for further discussion of the triptych of constituted constituent power.
[218] For a classic state-centric 'intergovernmental' explanatory account, see Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998).

Markus Patberg disaggregates Habermas' hypothetical convention into three stages, and extrapolates concrete principles informing each stage.[219] Patberg builds upon the basic principle of equality between citizens to explicate the 'levelling up' of constituent power from the national to the supranational level. This concept is adapted to propose the converse 'levelling-down'[220] of constituent power leading to disintegration, and the intermediary retention of constituent power at Treaty amendments leading to disruption.[221] These principles may be appropriated to analyse the functioning of the supranational constitutional order following its construction. This extends to the role of EU institutions and the constituent Member States in the withdrawal and opt-out processes.

A. The 'intra-demos' stage: The conditions to guarantee the status of national of a constitutional state

This first stage establishes basic principles for a constitutional polity to prepare levelling-up before constitutional dialogue with the nationals of other states. These principles guarantee the optimal functioning of nationality of a constitutional state before the transformation into Member State. Patberg first appropriates four principles formulated by Habermas:

> (i) basic rights (whatever their concrete content) that result from the autonomous elaboration of the right to the greatest possible measure of equal individual freedom of action for each person;
>
> (ii) basic rights (whatever their concrete content) that result from the autonomous elaboration of the status of a member in a voluntary association of legal consociates;
>
> (iii) basic rights (whatever their concrete content) that result from the autonomous elaboration of each individual's right to equal protection under law, that is, that result from the actionability of individual rights;
>
> (iv) basic rights (whatever their concrete form) that emerge from the autonomous elaboration of the right to equal opportunity to participate in political law-giving.[222]

[219] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70).
[220] Garner, 'Reforming Withdrawal and Opt-Outs from the European Union' (n 9).
[221] For further elaboration see the discussion of the triptych of constituted constituent power in subsection iii below.
[222] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 448; Habermas, *Between Facts and Norms* (n 12) 777.

Through the conceptual lens of the quadripartite role of individuals, principles (i) and (iii) concern the role of individuals *qua* juridical object within national constitutional orders. Principle (iv) enables individuals to be democratic subjects of constitutional states. Principle (ii) guarantees that both of these roles fall under one unifying status of equality – 'member in a voluntary association of consociates'. The legal definition of citizenship and the conditions for acquisition and loss are manifestations of this principle. Patberg adds further principles to Habermas' list:

> (v) basic rights (whatever their concrete content) that result from the autonomous elaboration of the right to an equal opportunity to participate in revisions of the constitution that are in accordance with the system of rights within the national constitutional order.[223]

The 'equal opportunity to participate in political law-giving' is not limited to the role of individuals as legitimators of the norm-creator process through elections and the norm-creation process through legislation. The role also extends to alteration of these norm-creator and norm-creation processes. This right guarantees '*pouvoir constituant constitué*' or 'constituted constituent power'.[224] Once a constitutional order has been generated, the original constructive force can only be activated again after an exercise of deconstructive power.[225] A constitutional order can avoid such extra-legal destructive force[226] being the only means for individuals to express resistance. The constitutional order can create the means for its own amendment to contain the forces that drive constituent power.

Levelling-up and levelling-down of constituent power may require the concurrent amendment of the national constitutional order. The principle of citizen participation in revisions manifests itself through specific constitutional mechanisms in the United Kingdom, Ireland and Denmark. In the latter two states provisions of a formal constitution mandate amendment.[227] Specific provisions also enables the levelling-up of power to the supranational level.[228] In the

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[223] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 448; Patberg, 'Constituent Power' (n 176) 58.

[224] I thank Lucia Rubinelli for drawing my attention to this concept. See further Lucia Rubinelli, *Constituent Power: A History* (Cambridge University Press 2020).

[225] Agamben and Wakefield (n 191); Möller (n 191); Markus Patberg, 'Destituent Power in the European Union: On the Limits of a Negativistic Logic of Constitutional Politics' (2019) 15 Journal of International Political Theory 82.

[226] Hans Lindahl's 'a-legality' may be understood as a prelude to this destructive force. See discussion in Section II, subsection i above.

[227] Constitution of Ireland enacted by the People on 1st July 1937 in operation as from 29th December 1937 art 46.; The Constitutional Act of Denmark of 5 June 1953 art 88.

[228] Constitution of Ireland art 29(4). The Constitutional Act of Denmark art 20.

former case of the United Kingdom revisions and authorisation of levelling-up are achieved through ordinary law-making in statutes passed by Parliament.[229] These mechanisms have played their role in realising disruption and disintegration at the national level.

Patberg formulates a final principle:

> (vi) basic rights (whatever their concrete content) that results from the autonomous elaboration of the right to an equal opportunity to participate in revisions of the construction *or processes of supra-state constitutional politics* that are in accordance with the system of rights.[230]

This principle concern revisionary constituent power at the supranational level. Treaty amendment through Article 48 TEU is predicated upon the legitimation of state actors by individuals *qua* nationals. Principle (vi) provides these guarantees independently from the means for self-determination at the national level. This guarantees the ultimate power for the Member States as constituent powers to engage in the deconstruction of the supranational constitutional order. The individual *qua* EU citizen cannot interfere to prevent such processes. In addition to the power to level-down constituent power contained within Article 50 TEU, this principle ensures an ultimate right for all Member States to terminate the Treaties and completely disintegrate the European Union.[231]

The right to participate in the revision of supra-state constitutional politics at the national level has also provided Member State executives with the legitimate authority to reserve the transfer of constituent power within certain sectors. Member State opt-outs are guaranteed their legitimacy by principle (vi) for individuals *qua* Member State nationals. However, enshrining the right to legitimate opt-outs before the construction of the dual-subject displaces the role of the individual *qua* EU citizen in their acceptance.

B. The 'inter-demoi' stage: The reconstruction of the individual *qua* national of a Member State

[229] European Communities Act 1972. This statute authorised the domestic consequences of levelling-up of constituent power. The European Union (Withdrawal) Act 2018 arguably is a constitutional amendment as it repeals the 'constitutional statute' of the European Communities Act 1972.
[230] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 449.
[231] Patberg, 'Can Disintegration Be Democratic?' (n 8).

The hypothetical representatives of the states assume that their interlocutors fulfil the democratic conditions of the first step. This enables the discursive interaction of the 'inter-demoi' stage. In reality, these principles were assumed to be fulfilled by the original six Member States, before the progressive iteration of accession conditions culminating in the Copenhagen Criteria for accession.[232] Mutual recognition of democratic subjecthood is the necessary condition to construct the status of national of a Member State. Patberg asserts that the hypothetical representatives would engage in a rational discourse to determine the necessary conditions to enter into the collaborative process of supranational construction. These principles continue to enable Member State nationals to act democratically together once the supranational constitutional order is functioning. Patberg extrapolates four principles:

> (a) *Political autonomy of the members of the state demoi*: Constitutional decisions are expressions of the political self-determination of the citizens of the political communities involved.
>
> (b) *Equality of the state demoi*: In the process of constitutional opinion and will formation, the political communities involved interact in formally equal terms.
>
> (c) *Pluralistic representation of the state demoi*: In the process of constitutional opinion and will formation, competing positions from the domestic arenas are represented.
>
> (d) *Discursive interaction of representatives*: The representatives at the supra-state level determine the content of the constitutional order on the basis of an exchange of reasons.[233]

Beyond the hypothetical convention, these principles may also inform functioning of the legislative institution of the Council of Ministers. The 'political self-determination of the citizens of the political communities involved' is ensured through their representation by Ministers of their governments in the various Council configurations. Formal equality is ensured through the principle of unanimity for primary law and certain secondary law; this formal equality is tempered in the vote weighting rules for Qualified Majority Voting. This illustrates that the principles may

[232] 'Accession Criteria' (*European Neighbourhood Policy and Enlargement Negotiations – European Commission*, 6 December 2016) <https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en> accessed 5 January 2020.

[233] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 450.

evolve in response to dual-representation once the constitutional order is functioning.[234] Pluralistic representation in will formation is also a less salient element in the Council; the degree of plurality depends upon whether Ministers come from a coalition government or a majority government in particular Member States. Finally, the requirement for discursive interaction of representatives is fulfilled through the physical exchange of reasons between Ministers in the Council during the legislative process. These principles apply when the Council acts during exercises of 'constituted constituent power' through the triptych of Article 48 TEU, Article 49 TEU, and Article 50 TEU.

C. The 'across-demoi' stage: The construction of the individual *qua* citizen of the European Union

At the 'across-demoi' stage, the hypothetical representatives establish the further principles to construct and maintain the new status of citizenship of the Union. Patberg extrapolates two further principles:

> (e) *Political autonomy of the members of the cross-border demos*: Constitutional decisions are expressions of the political self-determination of the citizens of the (future) supranational polity.
>
> (f) *Equality of the members of the cross-border demos*: In the process of constitutional opinion and will formation, the citizens of the (future) supranational polity interact on formally equal terms.[235]

These principles may be applied for the legitimate functioning for the European Parliament. Political self-determination is ensured through the direct elections to the European Parliament held in all of the Member States. Formal equality is ensured through the representation in debates of all EU citizens by Members of the European Parliament; however, similarly to Qualified Majority Voting the principle of 'degressive proportionality' tempers numerical equality between all citizens.[236] The principles can be used to explain and critique the direct representation of EU citizens in levelling-up, reconstruction, and levelling-down of constituent power. Formal equality per principle (f) may be guaranteed through the democratically constituted European

[234] See the discussion of Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 6) in Section III, subsection i .
[235] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 452.
[236] Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 6).

Parliament serving as the means to represent individuals *qua* EU citizens under Article 50 TEU. However, the limited role of the European Parliament in Treaty amendment means that individuals *qua* EU citizens cannot regulate the reservation of constituent power by Member States. A tentative claim is that opt-outs violate principle (e) as they do not reflect an expression of democratic self-determination by individuals *qua* EU citizens.[237]

Patberg's principles can be condensed into a normative statement that, in the ordinary functioning of the supranational constitutional order, and the decisions concerning its construction, individuals *qua* Member State nationals and *qua* citizens of the Union should be able to express their will autonomously and co-equivalently through representative institutions. The desiderata of equality should also be utilised to assess whether the application and reliance of EU law norms for individuals *qua* juridical objects vindicates their self-determination.[238]

iii.The triptych of constituted constituent power (and the ad hoc anomalies)

The conclusion of the Treaty of Rome by the states of Germany, France, Italy, Belgium, Netherlands and Luxembourg was an exercise of original constituent power through the source of international treaty law. Complete disintegration is similarly possible if all of the constituent powers of the Member States so agree.[239] This would be legitimated in public international law by the Vienna Convention rules on termination of treaties.[240] To prevent disintegration being the only means for legitimate change, the constituent powers have established a triptych of Treaty articles in 'Title VI – Final Provisions' of the Treaty on European Union. This triptych constitutionalises the procedures for the exercise of constituent power following the initial levelling-up of construction. The principles that guide Patberg's hypothetical convention should also apply to the functioning of these provisions.

Article 48 TEU functions as a means of constituted revisionary power.[241] This mandates the reconstruction of the supranational constitutional order. The principles of levelling-up are reactivated through the representation of individuals by national and supranational institutions. The ordinary revision procedure empowers the Government of any Member State, the European

[237] See Part 2, Section IV for further discussion of this point.
[238] See Section III, subsection ii.
[239] Patberg, 'Can Disintegration Be Democratic?' (n 8).
[240] Vienna Convention on the Law of Treaties (1969), art 54 (hereafter cited as 'VCLT').
[241] See discussion in subsection ii, sub-subsection B. above on the normative requirements for revisionary constituent power.

Parliament or the Commission to propose to the Council amendment of the Treaties.[242] The simplified revision procedure is limited to Part Three TFEU on internal policies and actions.[243] In the ordinary procedure, the Council submits the proposals to the European Council, notifying national parliaments. The European Council, after consultation with the European Parliament and the Commission, may then adopt a simple majority decision to establish a Convention to examine the amendments.[244] In the simplified procedure, the European Council may adopt the decision for amendment by unanimity without the need for a Convention after consultation with the European Parliament and Commission, and the European Central Bank if relevant.[245] There are substantive and formal safeguards to compensate for the lack of Convention: the decision may not increase Union competences,[246] and any national parliament may veto the decision within six months.[247] To adopt the decision, the European Council acts by unanimity with the consent of the European Parliament.[248]

In the ordinary procedure the Convention is composed of national parliament representatives, the Heads of State or Government of the Member States, the European Parliament, the Commission, and the European Central Bank if relevant.[249] However, consensus in the Convention does not lead to amendment, but only a recommendation to a conference of representatives of the governments of the Member States. This conference determines by common accord the amendments to be made.[250] The unanimity of the Member States recognises the necessity of consent of all of the original constituent powers. The amendments may then only enter into force if ratified by all Member States in accordance with their respective constitutional requirements.[251] This provides a final filter whereby all individuals *qua* nationals of the constitutional states must approve exercises of revisionary power.

Article 49 TEU functions as a means to replicate the original levelling-up of constituent power for any European State which respects and is committed to promoting the EU's Article 2 values.[252] This reconstructs the constituent nationals of the candidate state into holders of the quadripartite role. The accession application is addressed to the Council, which acts unanimously

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[242] TEU, art 48(2).
[243] TEU, art 48(6).
[244] TEU, art 48(3).
[245] TEU, art 48(6).
[246] TEU, art 48(6).
[247] TEU, art 48(7).
[248] TEU, art 48(7).
[249] TEU, art 48(3).
[250] TEU, art 48(4).
[251] ibid.
[252] TEU, art 49.

after consulting the Commission and receiving the consent of the European Parliament. The European Council establishes conditions of eligibility to be taken into account. This stage allows the input of the pre-existing individuals *qua* Member State nationals and *qua* EU citizens.

The conditions of admission and the necessary adjustment to the Treaties are the subject of an agreement between the Member States and the applicant state. This legal structure, rather than an agreement between the EU and the applicant state, recognises that the conferral of the status of EU citizenship upon a new class of nationals requires the agreement of all of the constituent powers. Further consent is required at the national level through the requirement of ratification by all contracting states in accordance with their constitutional requirements. Article 50 TEU provides a deconstructive power for each Member State. Part Two fully explicates the telos and operation of this clause. Finally, the a-constitutional anomalies of the Protocols legally enshrine the reservation of constituent power by certain Member States.[253] The requirement of unanimity in Article 48 TEU enables this resistance, and the unravelling of the supranational constitutional order allows for amendment despite such reservations. These Protocols, the object of study in Part Three, are afforded legal validity through Article 51 TEU: 'The Protocols and Annexes to the Treaties shall form an integral part thereof'.[254]

[253] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; TEU and TFEU, Protocol (No 16) on certain provisions relating to Denmark; TEU and TFEU, Protocol (No 17) on Denmark; Protocol (No 19); TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland; TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; TEU and TFEU, Protocol (No 22) on the position of Denmark; TEU and TFEU, Protocol (No 36) on transitional provisions.

[254] TEU, art 51.

2. Withdrawal – Deconstructive Power and Disintegration

I. Overview of Argument

This part of the thesis analyses the withdrawal clause of Article 50 TEU. Section II presents the telos of the withdrawal clause as a legitimate means for individuals to exercise deconstructive power. This telos is illustrated through a reconstruction of the origins and development of the withdrawal clause, and relevant case-law. The first limb of the dual objective of Article 50 TEU ensures a democratic right for individuals *qua* Member State nationals. The second limb ensures that this power respects individuals *qua* EU citizens as juridical objects. Section III analyses Article 50 TEU's operation within the conceptual framework of deconstructive power. This proposes a deconstitutional convention that is conversely analogous to Habermas and Patberg's hypothetical constitutional assemblies, and the actual constitutional assemblies under Article 48 TEU and Article 49 TEU. The functioning of the five sub-sections is delineated from this perspective. The factual context of the Brexit case-study is utilised as the only example of a Member State withdrawal through Article 50 TEU.

II.The Origins and Telos of the Withdrawal Clause

i. Origins and strategic purpose

One must reconstruct why individuals as democratic subjects have legitimated norms that will apply to them as juridical objects in order to assess whether such norms are functioning optimally. Telos is crucial to determine exactly why and how individuals have exercised their capacity for individual and collective self-determination in the pursuit of individual and collective self-fulfilment. In the case of withdrawal, the objective must be to reconstruct why individuals have legitimated a mechanism that will extinguish the norm-creation and norm-application processes at the supranational level. Telos is especially relevant to the quadripartite role, as the purpose of deconstructive power to re-establish nationality as the sole constituent status extinguishes the supranational status of citizenship of the European Union.

A. The partial precedents for withdrawal

Article 50 does not create the legal possibility of withdrawal *ex nihilo*. Instead it codifies and provides an EU law framework for a pre-existing right in public international law. This international law framework provided the means for the partial precedents for withdrawal of Algeria in 1962 and Greenland in 1985. However, these do not fit the paradigm of a withdrawal under the Vienna Convention in the Law of Treaties because none of these entities were 'parties' to the Treaties.[255] Instead they are and were territories of Member States. The acceptance by the European Economic Communities of the United Kingdom holding a membership referendum in 1975 serves as evidence that the Vienna Convention would have provided the legal means for withdrawal. This consensus may be construed from the renegotiation of membership between the United Kingdom and the European Economic Community before the referendum.[256]

Algeria ceased to be a constituent territory of the EEC upon its independence from France in 1962.[257] The Greenland case was a less dramatic rupture. The territory voted in favour of 'home rule' and greater autonomy from the Kingdom of Denmark in 1979. It followed this up through a referendum on 'membership' of the EEC in 1982, after 70% had voted against accession in the Danish nationwide referendum in 1972. 53% voted in favour of leaving the EEC; this was realised through the Greenland Treaty of 1985.[258] Kiran Klaus Patel highlights that in June 1963 a European Community Council of Ministers document noted that Algeria was treated 'de facto as a Member State of the Community'.[259] A further document from 1968 details that relations with Algeria lacked a clear legal basis and that the African state was treated as if it were part of the common market.[260] The Greenland case provided more legal clarity, as an agreement was negotiated quickly, with Protocols providing extensive fishing rights for European Community Member States.[261] Contrary to arguments advanced during the Convention on the Future of Europe that the Vienna Convention on the Law of Treaties provided an adequate legal framework for withdrawal, the fall-out from these partial precedents suggests that a constitutional clause

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[255] VCLT, art 54, art 56.

[256] Adam Evans, 'Planning for Brexit: The Case of the 1975 Referendum' (2018) 89 The Political Quarterly 127; KR Simmonds, 'The British Referendum' (1975) 12 Common Market Law Review.

[257] Kiran Klaus Patel, 'Something New under the Sun? The Lessons of Algeria and Greenland' in Benjamin Martill and Uta Staiger (eds), *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press 2018) 114.

[258] Treaty amending, with regard to Greenland, the Treaties establishing the European Communities [1985] OJ No L 29/1.

[259] Patel (n 257) 116.

[260] ibid 118.

[261] ibid.

regulating withdrawal is necessary in the interests of legal certainty. Such a mechanism was first proposed at the 2003 Convention.

A final counter-factual precedent concerns the situation of Denmark after the population rejected the ratification of the Maastricht treaty. Deirdre Curtin suggests that the other High Contracting Parties considered a form of *de facto* withdrawal for Denmark by concluding a separate treaty excluding the recalcitrant Member State.[262] The rupture in continuity means that this would have represented a form of complete disintegration of the pre-existing treaty basis for the supranational constitutional order and its reconstruction through a *de novo* exercise of constituent power in international law.

B. The 2003 Convention on the Future of Europe

Article 50 TEU came into force with the Treaty of Lisbon on 1 December 2009.[263] The text of the provision was adopted from the failed draft Treaty establishing a Constitution. The 2003 Convention on the Future of Europe acted as a constitutionalist break from the paradigm of 'Intergovernmental Conferences'.[264] The Convention produced the legal text that would become Article 50 TEU. The process for its creation is the closest approximation to Habermas' hypothetical constitutional convention in the EU's actual history. Documents from the Convention suggest a self-understanding amongst certain Convention members regarding dual representation.[265] The Convention was the most explicit attempt to follow the narrative of constituent power being wielded by representatives of individuals. However, the retention by the High Contracting Parties of the ultimate authority to conclude the Treaty, and the international law treaty paradigm remaining the source of the law,[266] suggest that the states did not entirely cede their constituent power.

Nevertheless, the Convention structure provides an insight into telos through the publication of deliberations and amendment proposals by the participants. This feature of the

[262] Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17, 67–8. See further discussion in Part 3, Section III, subsection iv, subsubsection B.
[263] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.
[264] TEU, art 48(3).
[265] Alternative Convention member Robert Badinter's contribution to the Convention argued that 'Two sources of legitimacy are…reunited through the Union: that of the Member States and that of the people of the Union, composed of all its citizens, without any distinction as to nationality'. Contribution from M.Robert Badinter, Alternative Member of the Convention, 'A European Constitution' CONV 317/02 CONTRIB 105, Brussels, 30 September 2002 (OR. Fr).
[266] Bruno de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 Zeitschrift für öffentliches Recht 141, 144.

Convention coheres with Habermas' method of rational reconstruction. The members of the Convention were invited to submit amendments to draft text prepared by the Praesidium of the Convention. This ensured a confrontation of the presuppositions of individuals as to the normative validity of constitutional provisions. The proposed amendments to the withdrawal clause indicate the perceptions of the constitutional actors. This allows excavation of strategic purposes for the clause beyond its *de jure* constitutional telos.

The withdrawal clause was included within 'Title IX: Union membership' of the draft Constitution.[267] This title more clearly indicates that these provisions concern the levelling-up and levelling-down of constructive power than the 'Title VI: Final Provisions' terminology of the Lisbon Treaty. This is reinforced by the inclusion of 'Article 57: Conditions and procedure for applying for Union membership' in the title.[268] However, the constituted constituent power to amend the Constitution was not included in the title. Instead, the predecessor to Article 7 TEU on enforcing the values of the EU was included under the title 'Article 58: Suspension of Union membership rights'.[269] The draft text of 'Article 59: Voluntary withdrawal from the Union' of the Constitution reads:

> 1. Any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements.
>
> 2. A Member State which decides to withdraw shall notify the Council of its intention. Once that notification has been given, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the assent of the European Parliament.
>
> The withdrawing State shall not participate in the Council's discussions or decisions concerning it.
>
> 3. This Constitution shall cease to apply to the State in question as from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, decides to extend this period.

[267] Treaty establishing a Constitution for Europe [2004] OJ C 310/1 (herein cited as 'Constitutional Treaty').
[268] Constitutional Treaty, art 57.
[269] Constitutional Treaty, art 58.

4. If a State which was withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 57.[270]

47 amendments proposed by members of the Convention are publicly accessible.[271] These provide valuable insights into the legislative intention behind the clause, and the earliest examples of contestation. 8 of the amendments proposed the complete deletion of the withdrawal clause. The tenor is that an explicit legal means to enable disintegration is contrary to the nature and telos of the supranational constitutional order. The amendment moved by Ernâni Lopes and Manuel Lobo Antunes argues that 'the nature of the Union is not compatible with such an exit clause' and that 'no one questions their [Member States'] right to withdraw from the Union. The 1969 Vienna Convention on the 'Law of Treaties' provides already for this situation'.[272]

The Farnleitner amendment reflected this argument: 'The provisions of the Vienna Convention on the Law of Treaties provide a sufficient basis for termination of membership'.[273] In a similar vein G.M. de Vries and T.J.A.M de Bruijn, representatives of the Dutch government, argued that 'facilitating the possibility to withdraw from the Union is contrary to the idea of European integration'. [274] The two arguments that such a clause was unnecessary and unconstitutional were reflected further in the amendment proposed by Santer, Fayot, and Schmit. The Luxemburgish representatives claimed that the inclusion of a withdrawal clause would undermine the fundamental engagement that makes the Member States adhere to the Union and the values it represents. They argued such a clause was also legally unnecessary as nothing impeded a Member State from withdrawing from the Union through international law.[275] Joschka Fischer echoed this argument, by claiming that there is no need for a provision on withdrawal.[276] Jürgen Meyer claimed that individual Member States deciding to leave would be contrary to the idea of a

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[270] Constitutional Treaty, art 59.
[271] 'Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe' (*European Convention*, 2003) <http://european-convention.europa.eu/EN/amendments/amendmentsdfd1.html?content=46&lang=EN> accessed 3 April 2020.
[272] Ernâni Lopes and Manuel Lobo Antunes, 'Suggestion for Amendment of Article: Article I-59º' (*European Convention*, 2003) <http://european-convention.europa.eu/docs/Treaty/pdf/46/46_ArtI%2059%20Lopes%20EN.pdf> accessed 3 April 2020.
[273] Hannes Farnleitner, 'Suggestion for Amendment of Article I-59' (*European Convention*, 2003) <http://european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20Farnleitner%20EN.pdf> accessed 3 April 2020.
[274]GM De Vries and TJAM De Bruijn, 'Suggestion for Amendment of Article: 59' (*European Convention*) <http://european-convention.europa.eu/docs/Treaty/pdf/46/46_Art%20I%2059%20de%20Vries%20EN.pdf> accessed 3 April 2020.
[275] Jacques Santer, Ben Fayot and M Schmit, 'Proposition d'amendement à l'Article : Article 46 (Titre X)' (*European Convention*, 2003) <http://european-convention.europa.eu/docs/Treaty/pdf/46/Art46SanterFR.pdf> accessed 3 April 2020.
[276] Joschka Fischer, 'Suggestion for Amendment of Article: 46' (*European Convention*, 2003) <http://european-convention.europa.eu/docs/Treaty/pdf/46/Art46fischerDE.pdf> accessed 3 April 2020.

Union based on the solidarity of citizens and states. He also warned of the risk of the clause being misused by anti-Europeans in the Member States.[277]

The amendment arguments allude to the strategic purposes underpinning the constitutional project. The detriment to European integration is advanced against 'facilitating' withdrawal. However, fulfilling unanimity requirements may incentivise mechanisms to reassure representatives who are reticent about transferring constructive power. Legal norms are created not for their ostensible constitutional purpose, but as a means to overcome intergovernmental impasses. Statements by two drafters of the withdrawal clause, John Kerr and Giuliano Amato, corroborate this claim. The latter has stated that the clause was created 'to prevent the British government complaining that there was no way for them to leave the bloc'.[278] He states that the intention was that 'it should be a classic safety valve that was there, but never used'.[279]

Kerr imagined that a backsliding Member State might pursue exit only after the EU had suspended its voting rights.[280] This functional connection reflects the original situation of Article 7 TEU's predecessor[281] in the same title as the withdrawal clause. Amato's understanding of withdrawal as a strategic safety valve, and Kerr's opinion that it would only be used after legal sanctions for values infringement, are removed from the *de jure* telos of Article 50 TEU as enshrining a voluntary and unilateral right for any Member State.[282] These intentions undermine the conception that the withdrawal clause provides democratic control for nationals of a Member States over the levelling-down of constituent power.

C. Secondary literature on the purpose of withdrawal

Academic scholarship also considers the strategic purposes of Article 50. These analyses draw a connection between disruption through opt-outs and disintegration. Christophe Hillion's analysis corroborates Amato and Kerr's perspective upon withdrawal as a precautionary measure. He argues that withdrawal is a 'safety valve to reassure Member States who would always be

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[277] Jürgen Meyer, 'Vorschlag Für Die Änderung von: Art 46, Teil I, Titel X Des Verfassungsentwurfs (CONV 648/03)' <http://european-convention.europa.eu/docs/Treaty/pdf/46/Art46Meyer(DEFREN).pdf> accessed 3 April 2020.
[278] Christopher Hooton, 'EU's Article 50 Was Not Designed to Actually Be Used, Says the Man Who Wrote It' (*The Independent*, 26 July 2016) <http://www.independent.co.uk/news/uk/politics/brexit-eu-referendum-britain-theresa-may-article-50-not-supposed-meant-to-be-used-trigger-giuliano-a7156656.html> accessed 4 April 2020.
[279] ibid.
[280] Andrew Gray, 'Article 50 Author Lord Kerr: I Didn't Have UK in Mind' (*POLITICO*, 28 March 2017) <https://www.politico.eu/article/brexit-article-50-lord-kerr-john-kerr/> accessed 17 December 2018.
[281] The Constitutional Treaty, art 58.
[282] *Wightman* (n 16).

allowed to leave, should they be uncomfortable with the integration path envisaged'.[283] Conversely, 'the Member States' choice *not* to leave arguably entails a firm pledge to pursue the 'ever closer union' goal'.[284] This suggests that Member States who do not pursue withdrawal should refrain from reserving constituent power at treaty amendments and disrupting integration. Withdrawal 'confirms that participation in the European integration process is essentially voluntary and that the continental vocation of an 'ever closer union' cannot trump its democratic foundations'.[285] However, this gesture did not prevent rejection of the draft Treaty establishing a Constitution by the Dutch and French electorates. These strategic narratives present Article 50 as an affirmation of the European Union's democratic grounding. However, the ultimate purpose is not the democratic self-determination of individuals *per se*, but the continuation of European integration. One may interpret the 'safety valve' perspective on withdrawal as furthering the self-determination of individuals *qua* EU citizens rather than being a realistic means to enable individuals *qua* Member State nationals to level-down constituent power.

Hillion explicates his reading of the relationship between opt-outs and withdrawal: '[t]he right to withdraw may…be interpreted as the ultimate elaboration of constitutional devices conceived to cater to the needs of less integrationist states'.[286] Similarly, Carlos Closa argues that '[i]n the EU partial exits (opt-outs)…fulfilled the function of alleviating tensions within membership'.[287] Closa warns that, rather than disincentivising the reservation of constructive power, an explicit withdrawal clause may incentivise the proactive creation of opt-outs outside of amendment. He argues that '[t]he newly formalised exit constructs a different voice[288] mechanism: 'voice' acquires the sense of acquiring some right for calling for the renegotiation (meaning *ex post* derogation) of the EU *acquis* and/or terms of membership in the EU'.[289]

Rather than neutralising the High Contracting Parties' creation of opt-outs at Treaty revisions, Article 50 displaces the contestation that informs such exercises to moments of national constitutional importance. This could explain how Brexit arose in the context of a General Election manifesto promise rather than an EU Treaty amendment. As Closa recognises,

[283] Christophe Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017) 230.
[284] ibid.
[285] ibid 231.
[286] ibid.
[287] Closa, *Secession from a Member State and Withdrawal from the European Union* (n 14) 2.
[288] Closa utilises the application of Hirschmann's 'exit, voice, and loyalty' mechanism by JHH Weiler. Crudely, one may propose an analogy between the exercise of 'voice' and the use of constituent power. Carlos Closa, 'Interpreting Article 50: Exit, Voice and...What About Loyalty?' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017).
[289] ibid 212.

'withdrawal provisions…grant legal certainty (next to facticity) to the full exit option and, because of this, also make it a more credible option'.[290] This reading recognises that the creation of an explicit withdrawal clause was a decision by the High Contracting Parties wielding constructive power to recognise a legal path for the democratic repudiation of this power.

The strategic perceptions of the withdrawal clause at its origin, and during its development, reflect the dominant paradigm of (disrupted) integration at that time. A more detailed constitutional telos was only recognised after the paradigm shift to disintegration following the Brexit referendum result. This transition from political deterrent to framing the deconstruction process necessitated this development. Individuals exercising their juridical objecthood before courts regarding the functioning of Article 50 required the authoritative statement of its dual-constitutional telos in *Wightman*.

ii. The dual-telos of Article 50 TEU

This subsection excavates a determinative statement of the constitutional telos of Article 50 TEU from the perspective of the quadripartite role of individuals. The authoritative source is Case C-621/18, *Wightman v. Secretary of State for Exiting the European Union*.[291] By contrast to the opt-out Protocols discussed in Part 3, Article 50 applies to the entire supranational constitutional order. This is realised through the statement that 'the Treaties shall cease to apply to the State in question.'[292] The object to which the withdrawal clause applies is the framing telos of the supranational constitutional order itself. This telos is the extension of the status of democratic subjecthood in the creation of norms, and the status of juridical subject in the reliance thereupon, beyond the boundaries of the constitutional order of nationality through the levelling-up of the means to construct norms.[293]

The telos of the withdrawal clause is contradistinct: to enable the repatriation of democratic subjecthood and juridical objecthood through the levelling-down of constructive power regulated by a supranational legal process. The democratic will of any constituent people to cease their participation in European integration is tempered by legal requirements that benefit all individuals *qua* juridical objects.

At paragraph 56 of the *Wightman* judgment, the Court of Justice states that:

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[290] ibid 207.
[291] *Wightman* (n 16).
[292] TEU, art 50(3).
[293] See Part 1.

> Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion.[294]

This statement is paradigmatic of the Court's teleological approach towards constructing the EU legal order. At paragraph 44 the Court of Justice reprises the foundational case law that reconstructed the nationals of the Member States as the juridical objects of the supranational constitutional order.[295] The following paragraph provides a succinct overview of the predicative characteristics of the legal order, the Union's juridical 'constitutional identity'.[296]

Paragraph 46 derives the conclusion from these characteristics that a holistic approach must be adopted: 'the question referred must therefore be examined in the light of the Treaties taken as a whole'.[297] This move broadens the scope of sources to encompass all written and unwritten EU law norms. Paragraph 47 reinforces this move through the delineation of the teleological method of interpretation. The Court of Justice evokes its 'settled case-law' to require account of the wording, objectives, context, and provisions of EU law as a whole.[298] Separately, the Court claims that 'the origins of a provision of EU law may also provide information relevant to its interpretation'.[299]

The Court of Justice thereby empowers itself to use a wide range of sources. The Court makes references to the Treaty declarations that 'indicate that those Treaties have as their purpose the creation of an ever closer union among the peoples of Europe'.[300] This is supplemented by references to liberty and democracy and their Treaty bases; these values are argued to 'form part of the very foundations of the European Union legal order'.[301] These two values, respectively, correspond to the roles of individuals as juridical objects and political subjects. This dichotomy informs the understanding of the telos of Article 50 presented here.

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[294] *Wightman* (n 16) para 56.
[295] ibid para 44, referencing Case 294/83, *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR-01339; Opinion 2/13 on the accession of the EU to the ECHR EU:C:2014:2454 (Full Court, 18 December 2014) (n 21).
[296] See discussion of Tuori, 'Crossing the Limits but Stuck behind the Fault Lines?' (n 38) in Part 1, Section II, subsection i.
[297] *Wightman* (n 16) para 46.
[298] ibid para 47.
[299] ibid.
[300] ibid para 62.
[301] ibid referencing C-402/05 *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351 (n 20) paras 303, 304.

The Court of Justice introduces citizenship of the Union as a component of its holistic method: 'any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, *inter alia*, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States'.[302] The final source from EU law as a whole is the 'counterpart'[303] provision of Article 49 TEU, the accession clause.[304] This establishes a juridical connection between the levelling-up and levelling-down of constituent power. The Court presents this through a public international law framing: 'As is apparent from Article 49 TEU…the European Union is composed of states which have freely and voluntarily committed themselves to those values'.[305] This 'free and voluntary commitment' from an international law perspective should be understood as the supranational levelling-up of constructive power from a constitutional law perspective.[306]

The two objectives of Article 50 TEU are presented as the conclusion of the textual analysis. The first objective is the 'enshrining' of the sovereign right of a Member State to withdraw from the European Union. 'Enshrining' defines an important feature compared to public international law. Rather than creating *ex nihilo* the legal right of withdrawal, Article 50 instead constructs a specialised framework for the pre-existing power in public international law. This establishes conditions to vindicate the role of individuals. From a public international law perspective, Article 50 TEU operates as *lex specialis* in relation to the *lex generalis* of the Vienna Convention on the Law of Treaties.[307] From a constitutional perspective, Article 50 constructs a democratic means for individuals *qua* nationals of the Member State to use this power.

The second important feature of the first objective is the language of sovereignty. Armin Cuyvers states that *Wightman* places an 'unusual emphasis on sovereignty'.[308] He notes that this is limited to the 'specific and unique context of withdrawal'.[309] The wording of *Wightman* obscures a specific facet of this context. The language of a 'sovereign right of a Member State' only reflects action on the international plane. This may derive from Article 50(2), which concerns the

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[302] *Wightman* (n 16) para 64.
[303] See Part 1, section IV, subsection iii for a similar conceptualisation of Article 49 TEU and Article 50 TEU as two limbs of a 'triptych' of constituted constituent power.
[304] ibid para 63.
[305] ibid.
[306] See Section III, subsection iii below for criticism of this public international law framing.
[307] '[T]he termination of a Treaty or the withdrawal of a party may take place: (a) In conformity with the provisions of the Treaty; or (b) At any time by consent of all the parties after consultation with the other contracting States' VCLT, art 54.
[308] Armin Cuyvers, 'Wightman, Brexit, And the Sovereign Right To Remain' 56 Common Market Law Review 1303, 1321.
[309] ibid.

notification of an intention to withdraw by a Member State to the European Council, being the specific clause in question. This action occurs in the realm of international relations.

The wording misses that the notification communicates a decision to withdraw in accordance with the Member States' 'constitutional requirements'.[310] The Copenhagen criteria for accession ensures that Member States are constitutional democracies. The commitment to the values of democracy and the rule of law in Article 2 TEU means that such a decision must be a manifestation of democratic will-formation by individuals *qua* nationals of that Member State.[311] Beyond the sovereign rights of the state in international law, the first objective of Article 50 must also be understood as a means for democratic subjects to initiate legitimate disintegration.[312]

The second objective of an 'orderly procedure' constrains democratic disintegration within a supranational legal procedure. The orderly procedure is a 'deconstitutional convention' that operates analogously to Article 48 and Article 49 TEU.[313] This guarantees that withdrawal complies with norms that preserve the position of individuals *qua* juridical objects. Furthermore, the convention also ensures the representation of individuals *qua* democratic subjects by supranational and national institutions.

The telos of Article 50 TEU balances the conflict that emerges between the co-constitutive foundations of democratic will at the Member State level and the rule of law at the supranational level.[314] The two objectives also seek to balance the transformation from co-existence to mutual exclusivity between nationality of a Member State and citizenship of the Union.[315] Ultimately, the telos of Article 50 TEU seeks to resolve the conflict between integration and disintegration. The withdrawal clause aims for a compromise whereby neither of these opposing forces obviates its counterpart. The evaluation of Article 50's operation in Section III will assess the extent to which this objective has been realised during the Brexit case-study.

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[310] TEU, art 50(1).

[311] Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283) 217–218.

[312] Patberg, 'Can Disintegration Be Democratic?' (n 8).

[313] See Part 1, Section IV, subsection iii.

[314] Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (n 73). See further the discussion in Part 1, Section II.

[315] See further Part 1, Section II, subsection iii.

III.Operation of Article 50 TEU: The Deconstitutional Convention

i. Introduction

A. The text of Article 50 TEU

Article 50 TEU creates a series of conditions for withdrawal at the national and supranational level. Paragraph 1 details the necessary first step of a decision made by a Member State. [316] This must be legitimate by reference to conditions established within its own constitutional order. Paragraph 2 delineates the second necessary condition is the notification of the intention to withdraw to the institution of the European Council.[317] This act provides the necessary bridge from the national to the supranational arena to commence the deconstitutional convention. The European Council first provides 'guidelines' for the negotiation of a Withdrawal Agreement. The negotiations are subject to the general framework for the creation of international agreements.[318] The specific institutional conditions are Qualified Majority within the Council[319] and the consent of the European Parliament. Individuals of the remaining Member States *qua* nationals and *qua* EU citizens are both represented in the withdrawal process.

Paragraph 3 explicates the primary condition to realise withdrawal. [320] The Treaties cease to apply to the Member State on the date of entry into force of the withdrawal agreement. A temporal deadline, two years after the date of notification, is established as a residual condition. This period may be extended by unanimous agreement of the European Council and the withdrawing Member State. The consequences of these temporal conditions in the Brexit case-study shall be considered below.

Paragraph 4 and 5 provide safeguarding mechanisms to ensure the integrity of the deconstitutional convention. [321] The former excludes the representatives of the withdrawing Member State from discussions within the Council and the European Council concerning withdrawal. This does not exclude the representatives of individuals *qua* EU citizens from the Member State within the European Parliament. Article 50(5) ensures the transformation from

[316] TEU, art 50(1).
[317] TEU, art 50(2).
[318] TFEU, art 218(3).
[319] TFEU, art 238(3)(b).
[320] TEU, art 50(3).
[321] TEU, art 50(4) and (5).

Member State to Third Country by confirming Article 49 TEU is the only means for re-accession.[322]

B. Article 50 TEU: The exclusive means for withdrawal?

The initial legal question is whether the supranational clause provides the exclusive means for a legally valid and constitutionally legitimate withdrawal. Possible alternative means are withdrawal through the Vienna Convention of the Law of Treaties and/or domestic measures, or through amendment of the EU Treaties. Neil MacCormick stated that 'one can say with reasonable confidence that this power of repeal [of the European Communities Act 1972], that is of unilateral and valid secession…subsists in the constitution of the United Kingdom and is exercisable by an Act of Parliament expressly enacted to that end'.[323] MacCormick was writing before the creation of Article 50 TEU. However, arguments for unilateral secession through repeal or amendment of the European Communities Act 1972 were revived during the 2016 referendum campaign.[324] Steve Peers and Darren Harvey consider withdrawal through Treaty amendment: '[I]t would still be possible for the Member States to provide for the withdrawal of one or more members by amending the Treaties in order to remove references to the withdrawing State from the preamble and other relevant sections of the Treaties'.[325]

These alternative means for withdrawal are deficient from the three perspectives of domestic constitutional law, public international law, and the EU's supranational constitutional order. They fail to ensure that a withdrawal decision is legitimate and authoritative for all of the roles of the quadripartite subject. Any proposal to withdraw through the Vienna Convention, including through amendment of the Treaty, would not be valid from the perspective of public international law. Article 54(a)'s statement that a withdrawal may take place by consent of all the parties is the residual condition. The primary condition is that withdrawal occurs 'in conformity with the provisions of the Treaty'.[326] The language of state sovereignty indicates that Article 50

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[322] TEU, art 50(5).
[323] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999) 88.
[324] John Redwood, 'What Does Brexit Look like? A Lot Better than Staying In.' (*John Redwood's Diary*, 1 February 2016) <http://johnredwoodsdiary.com/2016/02/01/what-does-brexit-look-like-a-lot-better-than-staying-in/> accessed 6 April 2020.
[325] Steve Peers and Darren Harvey, 'Brexit: The Legal Dimension' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, Oxford University Press 2017) 820.
[326] VCLT, art 54.

fulfils this function in international law, in addition to national and supranational constitutional law.

Withdrawal via repeal of domestic implementing law would be valid from the national perspective, but not from the international or supranational perspective. Such repeal is a necessary but not sufficient step. The United Kingdom has repealed the European Communities Act 1972 in tandem with the Article 50 deconstitutional convention. [327] Without the supranational procedure, EU law will continue to apply *to* the Member State on the international and supranational planes, even if the norms no longer apply *in* the Member State's constitutional order. The Member State will be open to infringement proceedings for breach of the Treaties in such a situation.

These alternative methods are also constitutionally improper. Exclusively domestic and international means of withdrawal would see the democratic representation of individuals only as nationals of that constitutional state. Excluding the roles of the European Parliament and the Council would preclude the representation of all individuals *qua* citizens of the European Union and *qua* nationals of the other Member States. When the High Contracting Parties ratified the Treaty of Lisbon, they levelled-up the means to level down constituent power. This commitment binds the representatives to follow the process established in Article 50 TEU. The self-determination of individuals in their quadripartite roles is guaranteed; democratic representation is ensured by the relevant Member State and EU institutions, and juridical objecthood is ensured by both domestic courts and the Court of Justice.[328] The following sub-sections will analyse the provisions of Article 50 in depth.

ii. Article 50(1) TEU: The domestic decision to repatriate constituent power

The two crucial features of Article 50(1) are the provision made for a 'decision' to withdraw, and the condition that the decision must be in accordance with the 'constitutional requirements' of that Member State. This supranational text merely declares a process that must be internal for the Member States. The supranational institutions have no authority to prescribe what these constitutional requirements are, nor what legal or democratic form the 'decision' should take. Article 50(1) mandates an exercise of democratic subjecthood by nationals before a bridge is

[327] European Union (Withdrawal) Act 2018; European Union (Withdrawal Agreement) Act 2020.
[328] See *C-327/18 PPU - R O [2018] ECLI:EU:C:2018:733*; *Case T-458/17 Shindler v Council of the European Union [2018] ECLI:EU:T:2018:838*; *Wightman* (n 16).

crossed to the supranational order. This leads to an analogy, explicated further below, with Patberg's 'intra-demos' stage of the levelling-up of constituent power.[329]

The 'Member State' decision should be understood through the prism of Member State nationals *qua* democratic subjects. Article 50(1) is not addressed exclusively to executive actors but also to the state's constituent citizens. The assumption is that, for an issue as important as EU membership, the 'constitutional requirements' must enable maximum democratic participation. The constitutional requirements also constrain this will-formation to a legal procedure that serves individuals *qua* juridical objects. The reflexive interaction between these two roles has been demonstrated in the Brexit case.

A. The EU Referendum Act 2015

Brexit raises the question of whether the United Kingdom's constitutional requirements guaranteed self-determination for nationals *qua* democratic subject, whilst ensuring certainty of process *qua* juridical objects. Interaction between political and judicial processes informed the decision to withdraw. The Conservative Party 2015 General Election manifesto promised that '[w]e will legislate in the first session of the next Parliament for an in-out referendum to be held on Britain's membership of the EU before the end of 2017'.[330] This promise enabled democratic subjects to use the orthodox norm-creator process – a General Election – to express a preference for the constitutionally unorthodox mechanism of a referendum.[331] The manifesto recognises this process: 'it is time for the British people – not politicians – to have their say'.[332]

The exercise of direct democracy may conform to Patberg's arguments that constituted powers should be excluded from decisions concerning the levelling-up of constituent power.[333] If one accepts that the referendum was a legitimate expression of constituent power, this may address a democratic lag from the Treaty of Maastricht onwards. The delayed ratification of the Treaty by Parliament precipitated a vote of confidence in the government.[334] This incentivised the

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[329] See Part 1, Section IV, subsection ii, subsubsection A.
[330] 'Conservative Party Manifesto 2015 - the Full Pdf' *The Guardian* (14 April 2015) <https://www.theguardian.com/politics/2015/apr/14/conservative-party-manifesto-2015-the-full-pdf> accessed 7 April 2020.
[331] Michael Gordon, 'Brexit: The Relationship between the UK Parliament and the UK Government' in Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017).
[332] Conservative Party Manifesto (n 328).
[333] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70).
[334] Stephen Goodwin, 'The Vote of Confidence: Major Wins Gamble on Social Chapter Vote | The Independent' *The Independent* (24 July 1993) <https://www.independent.co.uk/news/uk/the-vote-of-confidence-major-wins-gamble-on-social-chapter-vote-1486708.html> accessed 7 April 2020.

Parliamentary majority to continue a Conservative government rather than represent constituents' interests on EU membership.[335] In the following years, intimations that the Labour governments of Tony Blair and Gordon Brown would hold referendums on the UK's membership of the euro, the Constitutional Treaty, and the Lisbon Treaty did not come to fruition.[336]

The 2016 referendum was subject to constitutional deficiencies.[337] The authorising legislation did not confirm whether the vote was legally binding or politically advisory.[338] The result was subject to a simple majority requirement, rather than establishing requirements such as a majority of all the UK's constituent nations.[339] These factors challenge the assumption that the referendum was a legitimate expression of constituent power.[340] Opening this simple channel for political will-expression provoked tension with the constitutional orthodoxy of parliamentary representation.[341]

The unorthodox method had the valid legal base of an Act of Parliament. Section 1 of the European Union Referendum Act 2015 creates the obligation that '[a] referendum is to be held on whether the United Kingdom should remain a member of the European Union'.[342] Section 6 and section 7 include duties to publish information on the outcome of renegotiations and membership of the European Union. The Act omits any statutory obligation for the Prime Minister to notify an intention to withdraw if a leave vote is returned. The legislation was silent on exactly *what* would constitute a decision to withdraw and *how* the constitutional requirements would be fulfilled. A House of Commons Library Briefing Paper suggests that parliamentarians were aware that the referendum was 'pre-legislative or consultative'.[343] The legislation underdetermined the legal nature of the referendum prompting uncertainty for individuals *qua* juridical objects over the initiation of the deconstitutional convention.

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335 See further discussion in Part 3, Section II, subsection iv, subsubsection B.

336 Stuart Smedley, 'A Missed Opportunity? Revisiting the Euro Referendum That Never Was from a Historical Perspective' (*LSE BREXIT*, 3 December 2019) <https://blogs.lse.ac.uk/brexit/2019/12/03/a-missed-opportunity-revisiting-the-euro-referendum-that-never-was-from-a-historical-perspective/> accessed 7 April 2020.

337 See Jo Shaw, 'The Quintessentially Democratic Act? Democracy, Political Community and Citizenship in and after the UK's EU Referendum of June 2016' (2017) 39 Journal of European Integration 559; AC Grayling, 'The EU Referendum Was Gerrymandered' (*LSE BREXIT*, 28 September 2017) <https://blogs.lse.ac.uk/brexit/2017/09/28/the-eu-referendum-was-gerrymandered/> accessed 7 April 2020.

338 European Union Referendum Act 2015.

339 Shaw, 'The Quintessentially Democratic Act?' (n 337).

340 I thank Marise Cremona for reminding me of these points.

341 Oliver Garner, 'After Article 50 and Before Withdrawal: Does Constitutional Theory Require a General Election in the United Kingdom Before Brexit?' (*Verfassungsblog*, 24 March 2017) <https://verfassungsblog.de/after-article-50-and-before-withdrawal-does-constitutional-theory-require-a-general-election-in-the-united-kingdom-before-brexit/> accessed 7 April 2020.

342 European Union Referendum Act 2015, s 1(1).

343 House of Commons Library Briefing Paper (No 07212, 3 June 2015).

A further concern is that the referendum did not enfranchise all affected by the decision. Section 2(1)(a) made those entitled to vote as electors in parliamentary elections as the referendum franchise, and section 2(1)(b) extended this franchise to include members of the House of Lords who are usually disqualified. Section 2(1)(c) extended the scope to those entitled to vote in European Parliament elections in Gibraltar. Section 2(2) confirms that the franchise includes Commonwealth citizens and citizens of the Republic of Ireland. The franchise omitted EU citizens from other Member States entitled to vote in local and European Parliament elections,[344] and UK citizens who have not been resident within the UK for more than 15 years.[345]

Ruvi Ziegler has argued that this franchise is both 'over- and under-inclusive'.[346] The rights that EU citizens have relied upon to settle in the UK are directly affected by withdrawal, yet they were excluded from participating in the democratic decision. The exclusion of resident EU citizens may be justified as they do not hold the constituent status of national of the Member State which is contemplating withdrawal. The exclusion of those who do hold this status but have been deprived of democratic subjecthood through exercising their EU citizenship *qua* juridical object is harder to justify.

This raises a problem with the analogy to the 'intra demos' phase of the hypothetical constitutional convention. At this stage, individuals act as nationals of constitutional states before their agreement to bestow the new status of EU citizenship upon themselves and nationals of other Member States.[347] In the actual deconstitutional convention, nationals approach the withdrawal decision holding the status of EU citizenship, and decide upon the extinction or retention of the supranational status.[348] This means that the principles that inform the second and third stages of Patberg's hypothetical process are also relevant to the initial domestic decision to withdraw. This theoretical consideration manifested itself juridically in the *Shindler* litigation. The UK courts were called upon to determine whether the domestic constitutional requirements for withdrawal were affected by potential detrimental effects on EU law rights.

[344] European Parliamentary Elections (Franchise of Relevant Citizens of the Union) Regulations 2001; Representation of the People Act 1983
[345] Representation of the People Act 1985.
[346] Reuven Ziegler, 'GLOBALCIT Report on Political Participation of Mobile EU Citizens: United Kingdom' (2018) Country Report 2018/14 19.
[347] See Part 1, Section IV, subsection ii.
[348] See subsection iv and v below.

B. The *Shindler* judgments on the decision to withdraw

In the absence of legislative clarity, the parameters of the 'decision' and the domestic 'constitutional requirements' under Article 50(1) TEU have been determined through individuals exercising their role as juridical objects before domestic courts. The first example of this litigation occurred before the referendum. In *Shindler v. Chancellor of the Duchy of Lancaster,*[349] the claimants argued that their exclusion from the referendum franchise, through not being on the electoral register for 15 years, restricted their directly effective EU law rights of freedom of movement.[350] The claimants argued that the franchise was 'incompatible with EU law because it…discourages them from continuing to exercise their free movement rights by requiring them to return home to the United Kingdom in order to be able to vote in the EU referendum'.[351]

This claims that the national withdrawal decision is subject to limitations established by the juridical face of the supranational status. The UK government counter-claimed that the national decision is untouched by EU law: '[The defendants] submit that it would be surprising if EU law were to constrain the decision by the United Kingdom whether it wishes to be bound by EU law. Accordingly, they submit that it is only once a decision has been taken to leave the EU that EU law, in the shape of Article 50(2)-(5) TEU applies in order to determine the procedure and timescale for disengagement.'[352] On appeal, the government added that 'the UK cannot sensibly be said to have a sovereign right to decide to withdraw from EU Treaties, the exercise of which is constrained by the rule of the very Treaties from which it wishes to withdraw'.[353]

The government's perspective is that the text of Article 50(1) is merely declaratory of internal constitutional processes. The supranational constitutional order only becomes relevant after the Member State provides notification under Article 50(2). Article 50(1)'s status – either hermetically sealed within domestic constitutional law or subject to the supranational constitutional order – determines whether the national decision and constitutional requirements continue to inform the supranational deconstitutional convention until the Treaties cease to apply. The Divisional Court at first instance held that the domestic decision is subject to EU law conditions: 'we do not consider that Article 50(1)…confers on a Member State a total exemption

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[349] *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWHC 957 (Admin).
[350] ibid [2].
[351] ibid [27].
[352] ibid [23].
[353] *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 649 (Court of Appeal) [11].

from EU law… If such a striking departure from established principles of EU law were intended very clear words would be required'.[354]

The Court of Appeal overturned the decision. The Master of the Rolls argued that 'it would have been surprising if the Member States had agreed that a Member who wishes to withdraw from the EU altogether could only do so if the decision to withdraw did not infringe one or more fundamental EU rules…If this had been the intention of the Member States, this would surely have been expressly agreed'.[355] Lord Justice Elias supplements this conclusion from a domestic perspective: 'I doubt whether, purely as a matter of domestic law, Parliament would have intended section 2(1) [European Communities Act 1972] to apply so as to give primacy to EU law when the very question in issue is whether the UK should remain bound by EU law…Parliament agreed to join the EU by exercising sovereign powers untrammelled by EU law and I think it would expect to be able to leave the EU in the exercise of the same untrammelled sovereign power'.[356] Elias LJ concludes on an alternative reading that '[e]ven if it [Article 50] is EU law as a result of section 2(1), the EU has chosen to exercise its power so as to refer sovereignty back exclusively to the UK'.[357]

There are normative reasons to prefer this alternative position that EU law applies but the supranational constitutional order has deferred to the domestic constitutional level. The Court of Appeal rejects the claimant's argument that exclusion from the franchise restricts their juridical free movement rights. It would have been more appropriate to argue that the exclusion restricted not their rights as juridical objects, but their rights as democratic subjects.

The domestic courts endorse the European Court of Human Rights authority that the 15-year exclusion rule is a proportionate means to achieve the legitimate objective of 'testing the strength of a citizen's links with the United Kingdom over a significant period of time'.[358] This fails to recognise that General Elections are not only norm-creator processes at the domestic level. These elections also indirectly appoint the members of the Council of Ministers as norm-creator processes for the supranational level. The 15-year exclusion may be justified as a bright-line rule to test whether individuals are sufficiently affected by norm-application at domestic level. However, it is not justified with regard to the supranational level. Article 20 TFEU only confers the right to vote in local and European Parliament elections in the Member State of residence. The exclusion of non-individuals from national elections in the state of residence and the state of nationality

[354] *Shindler* (Admin) (n 347)[24].
[355]*Shindler* (AC) (n 351) [16].
[356] ibid [58].
[357] ibid [60].
[358] *Shindler* (Admin) (n 347) para 43; *Shindler* (AC) (n 351) [116]–[118].

means they have no representation in the Council. This means they are only represented *qua* EU citizens in the creation of EU law norms to which they are subject.

The focus on juridical rights misdirects the court's distinction between national elections and the referendum on EU membership: 'if the inability to vote in Parliamentary elections occurring at relatively regular intervals…could not reasonably be considered liable to dissuade or deter British citizens from exercising their rights of free movement, it is difficult to see how the inability to vote in a once occurring referendum on membership of the EU could be considered to be capable of having such an effect either'.[359] This prioritises exclusion from General Elections due to their frequency as opposed to the rarity of an EU referendum. From the perspective of democratic subjecthood, however, this one-off referendum is existentially more important than national elections. It concerns the decision by individuals *qua* nationals to retain or extinguish the supranational constituent status which the concerned individuals have relied upon. Beyond discrete elections, the referendum decides whether individuals will continue to have the capacity to participate in supranational democratic and judicial processes.

The Divisional Court does state that '[w]e acknowledge the very real and personal interest which these claimants have in the outcome of the EU referendum. If the United Kingdom leaves the European Union, they… will certainly be deprived of their EU citizenship and the important rights which accompany that status'.[360] The framing of the question around juridical free movement rights, and the silence of Article 50 on EU citizenship, limited the courts to consider whether mobile UK nationals would 'pick up sticks and return'[361] because of the possibility of a referendum.

The *Shindler* judgments present the Article 50(1) TEU decision as ungoverned by EU law. Democratic participation is left to the determination of the domestic legislature. This may lead to an arbitrary restriction on who is enfranchised as a democratic subject in the decision. The court's decision results from the wording of Article 50 reflecting only the public international law perspective, rather than the supranational constitutional perspective. The reference to the right of a Member State enables the court to conclude that the decision concerns 'untrammelled sovereign power'.[362] This is true regarding the Member State as a High Contracting Party to the foundational Treaties. This fails to capture that, through the same decision, the individuals who hold EU citizenship by virtue of nationality of this Member State will decide whether to retain or to

[359] *Shindler* (Admin) (n 347) [43].
[360] ibid [51].
[361] *Shindler* (AC) (n 351) [45].
[362] ibid [58].

extinguish this constituent status. Withdrawal is a dual process that occurs at the public international level for the state in question, but also at the supranational and national level for constituent individuals. Contra *Shindler*, all those who hold EU citizenship through nationality of the Member State contemplating withdrawal should participate in the democratic decision.

C. The *Miller* judgment on constitutional requirements

The definition of the domestic 'constitutional requirements' for the decision was touched upon in *Shindler*.[363] This question would re-emerge explosively in the *Miller* litigation after the referendum.[364] Residual ambiguity over the 'decision' to withdraw and its relationship to notification was eventually resolved in the *Webster* judgment.[365] The dicta in *Shindler*, *Miller*, and *Webster* established that there are no conditions established by the juridical constitution of the United Kingdom for a decision to withdraw. The conditions for the decision are entirely determined through democratic processes. This precipitated legal uncertainty over what were the constitutional requirements, whether they had been fulfilled, and what action precisely constituted the decision to withdraw. The practical consequence was an elongated legal vacuum before notification under Article 50(2). This exposed a lacuna within the text of the withdrawal clause.

The Master of the Rolls held in *Shindler* that '[t]he 2015 Act contains part of the constitutional requirements of the UK as to how it may decide to withdraw from the EU. These include the holding of a referendum'.[366] This expression of direct democracy is presented as a contingent feature based on circumstances rather than an immutable predicate: 'In theory, Parliament could decide to withdraw without waiting for the result of the referendum…. But…the reality is that it has decided that it will withdraw only if that course is sanctioned by the referendum [which]…is an integral part of the process of deciding to withdraw from the EU'.[367]

The Supreme Court in *Miller* held that the referendum had no legal effect: 'But that in no way means it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal'.[368] Mark Elliott, Jack Williams, and Alison Young resolve the discrepancy between the cases by arguing that the dicta is cumulative in effect: 'the EU referendum

[363] ibid [13].
[364] R *(Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); R *(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[365] R *(Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1542 (Admin).
[366] *Shindler* (AC) (n 351) [13].
[367] ibid [19].
[368] *Miller* (UKSC) (n 362) [124].

'contains part' of the UK's 'constitutional requirements'…The *Miller* case concerned the remaining requirements'.[369] Another interpretation is that, whereas *Shindler* concerns the constitutional requirements for a 'decision' under Article 50(1), *Miller* concerns the requirements for the 'notification' thereof under Article 50(2). The *Webster* judgment precluded this interpretation by eliding the decision and the notification into a single legal act.[370]

The ambiguous status of the referendum exemplifies the lack of constitutional codification regarding levelling-up and levelling-down of constituent power within the United Kingdom. Parliament remains free to determine the democratic channels, representative or direct, for such a decision. These channels may be altered from decision to decision without any legal requirement for consistency, even if the precedent of the 1975 referendum informed Parliament's decision to mandate a similar referendum in 2015.[371] Vernon Bogdanor argues that a constitutional convention has arisen through a precedent that referendums are necessary in matters of the devolution of power from Westminster, and in matters of particular 'constitutional significance': 'With these referendums – so the argument goes – political actors have created a precedent. They have generated a public expectation that certain pivotal issues of constitutional relevance remain the preserve of popular sovereignty.'[372] The normative essence of this convention was codified in the 'referendum lock' of the European Union Act 2011 for reconstruction of the supranational constitutional order.[373] This may have been a further influence on the decision to hold a referendum on the deconstruction of European Union membership. The privileging of individuals *qua* democratic subjects over individuals *qua* juridical objects is inherent to how the Supreme Court presented the status of EU law in the *Miller* judgment.[374]

The referendum result had no effect in domestic or EU law. An argument could be made that it did have legal consequences in public international law. David Cameron's renegotiation of

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369 Mark Elliott, Alison L Young and Jack Williams, 'The Miller Tale: An Introduction' in Mark Elliott, Alison L Young and Jack Williams (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) 3.

370 *Webster* (n 363) [15].

371 Vernon Bogdanor, 'After the Referendum, the People, Not Parliament, Are Sovereign' (9 December 2016) <https://www.ft.com/content/9b00bca0-bd61-11e6-8b45-b8b81dd5d080> accessed 8 April 2020; see further Vernon Bogdanor, *Beyond Brexit: Britain's Unprotected Constitution* (I B Tauris, Limited 2019).

372 Gabriele Ruberto, 'When Does the British Constitution Require a Referendum? – V. Bogdanor's Opinion on the Place for the Referendum in the UK' (*The Constitution Unit Blog*, 26 February 2013) <https://constitution-unit.com/2013/02/26/when-does-the-british-constitution-require-a-referendum-v-bogdanors-opinion-on-the-place-for-the-referendum-in-the-uk/> accessed 21 April 2020.

373 European Union Act 2011, s 6. See Paul Craig, 'Brexit: A Drama in Six Acts' (2016) 41 European Law Review 447, 448–9.

374 Oliver Garner, 'Conditional Primacy of EU Law: The United Kingdom Supreme Court's Own 'Solange (so Long as)' Doctrine?' (*UK Constitutional Law Association*, 31 January 2017) <https://ukconstitutionallaw.org/2017/01/31/oliver-garner-conditional-primacy-of-eu-law-the-united-kingdom-supreme-courts-own-solange-so-long-as-doctrine/> accessed 8 April 2020.

the UK's membership of the EU resulted in a 'Decision of the heads of state or government of the Member States acting through the European Council' in the form of a simplified international Treaty. The condition for that Treaty to come into force is detailed in paragraph 2 of Section E of the European Council conclusions containing the Decision: 'This Decision shall take effect on the same date as the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union'.[375] This may suggest that the agreement coming into force was predicated upon a remain vote being delivered in the referendum.

However, the referendum result would have been a legally contingent factor. No reference is made to the referendum result in the text; the decision is left to the executive discretion of the Prime Minister. Although politically unfeasible, nothing would have legally prohibited the Prime Minister from making such a notification to the Council even after a leave result.[376] Despite the lack of legal effect, the referendum result and the New Settlement not coming into force may have precipitated the Union institutions' pre-emptive action to prepare the deconstitutional convention before notification.[377]

Both the Divisional Court and the Supreme Court in *Miller* held that the government could not use the foreign affairs prerogative power to notify the intention to withdraw. An Act of Parliament was necessary. Notification through the prerogative would violate the rule that this executive power cannot be used to alter domestic law. This conclusion was predicated upon the conceptualisation of EU law as an 'independent and overriding source of domestic law'.[378] The Supreme Court outlines two different perspectives on EU law: '[i]n one sense, of course, it can be said that the 1972 Act is the source of EU law, in that, without that Act, EU law would have no domestic status. But in a more fundamental and…realistic sense, where EU law applies in the United Kingdom, it is the EU institutions which are the relevant source of that law'.[379]

This recognises the different roles that individuals play with regard to EU law. As juridical objects *qua* nationals, EU law applies purely by virtue of the European Communities Act 1972. This statute has been legitimated by individuals *qua* democratic subjects through parliamentary representation. As democratic subjects *qua* EU citizens, however, individuals directly legitimate

[375] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16.
[376] I thank Marise Cremona for this argument.
[377] See discussion in subsection iv below.
[378] *Miller* (UKSC) (n 362) [65].
[379] ibid [61].

EU law norms at the supranational level. Furthermore, the standing rules in Article 263 TFEU enable individuals to function *qua* juridical objects of the EU legal order without any mediation through the domestic constitutional order.[380]

The condition for EU law to remain an overriding source of UK law reveals the balance between democratic and juridical requirements in the withdrawal decision. The Supreme Court holds that 'this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute'.[381] The consequence of the ECA 1972 acting as a 'conduit pipe' is 'a dynamic process by which, without further primary legislation…EU law…actually takes precedence over all domestic sources of UK law, including statutes'.[382] This is conditional acceptance of the Court of Justice's supremacy claims.[383] By contrast to other Member States, however, this conditionality is formal rather than substantive. [384]

The Supreme Court states that so long as the European Communities Act 1972 remains in force all EU law will take supremacy regardless of its substance. The most prominent example of substantive conditionality is provided by the German Constitutional Court, which has held that EU law will have primacy only so long as its content does not violate numerous predicates of German constitutional identity.[385] Whereas the German court has only 'barked',[386] the Danish Supreme Court has bitten on substantive counter-limits to the supremacy of EU law. In *Dansk Industri*, the court held that there was no basis for the primacy of the EU law general principle of non-discrimination on the basis of age over the domestic law on salaried employees.[387] The UK Supreme Court came close to substantive conditional supremacy in its *HS2* judgment.[388] Lord Mance and Lord Neuberger held that 'there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the

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[380] See detailed discussion in Part 1, Section III, subsection ii.
[381] *Miller (UKSC)* (n 364) para 61.
[382] ibid [60].
[383] Garner, 'Conditional Primacy of EU Law' (n 374).
[384] Garner, 'The Borders of European Integration on Trial in the Member States' (n 32).
[385] *Maastricht,* German Constitutional Court decision from 12 October 1993, BVerfGE 89, 155*; Brunner v European Union Treaty* CMLR [1994] 57; *'Lisbon'* BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08.
[386] Christoph U Schmid, 'All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana Decision'' (2001) 7 European Law Journal 95.
[387] Danish Supreme Court case 15/2014 *Dansk Industri, acting on behalf of Ajos A/S v Estate of A*; Mikael Rask Madsen, Henrik Palmer Olsen and Urška Šadl, 'Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation' (2017) 23 European Law Journal 140.
[388] Mark Elliott, 'Reflections on the HS2 Case: A Hierarchy of Domestic Constitutional Norms and the Qualified Primacy of EU Law' (*UK Constitutional Law Association*, 23 January 2014) <https://ukconstitutionallaw.org/2014/01/23/mark-elliott-reflections-on-the-hs2-case-a-hierarchy-of-domestic-constitutional-norms-and-the-qualified-primacy-of-eu-law/> accessed 8 April 2020.

abrogation'.[389] Perhaps facilitated by the fact that such a possibility could never arise after Brexit, the Supreme Court in *Miller* did not follow this obiter dicta.

A corollary to formal conditional supremacy of EU law is that there can be no substantive conditions for the repeal of the UK's authorising legislation. In Member State constitutional orders that set substantive limits, a violation could be established as a substantive 'constitutional requirement' for an Article 50(1) decision to withdraw. For example, the German legislature could make transgression of the *Maastricht* and *Lisbon* judgment characteristics a constitutional requirement. A determination by the German Constitutional Court of such violation would then be a necessary condition to overcome the Basic Law's commitment to European integration.[390]

The absence of any such substantive limitations in the United Kingdom means that the decision to level-down constituent power is determined entirely by individuals *qua* democratic subjects. Domestically, the European Union (Withdrawal) Act 2018 mandated the repeal of the European Communities Act 1972. At the supranational level, the 'decision' was taken through the authorisation of the EU (Notification of Withdrawal) Act 2017. The UK's decision to withdraw concerned individuals' role *qua* democratic subjects without any additional legal conditions for the benefit of individuals *qua* juridical objects.

D. The EU (Notification of Withdrawal) Act 2017 and the *Webster* judgment

The Article 50(1) process concluded on 29 March 2017 when the Prime Minister exercised the statutory power to notify the European Council of the United Kingdom's intention to withdraw from the European Union.[391] The time-lapse of 9 months from the referendum is the temporal evidence of a lacuna in Article 50 TEU. The unregulated vacuum between Article 50(1) and Article 50(2) arises through the distinct terminology of 'decision' in the former clause and 'notification' in the latter. This informed the rejected government submissions during the *Miller* case that using the prerogative power would merely give effect to a decision already made in the referendum.

[389] R *(on the application of HS2 Action Alliance Limited) v Secretary of State for Transport and another* [2014] UKSC 3 [207].
[390] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 28 March 2019 (Federal Law Gazette I p. 404), art 23.
[391] Theresa May, 'Prime Minister's Letter to Donald Tusk Triggering Article 50' (*GOV.UK*) <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> accessed 8 April 2020.

The government continued its logic of treating the referendum as the decision after the judgment compelled it to propose legislation. The two clause EU (Notification of Withdrawal) Act 2017 provided only the technical means to notify the intention to withdraw under Article 50(2).[392] There is no textual evidence that the Act, or the exercise of power under it, constitutes the Article 50(1) decision to withdraw. Commentators recognise the decision-notification lacuna at both the domestic and supranational level. Robert Craig identifies 'a lacuna that was arguably left slightly open in *Miller*…who is responsible for dealing with the Article 50 process'.[393] Steve Peers and Darren Harvey highlight that '[Article 50] provides no guidance as to the form (or indeed timing) that this notification must take'.[394]

The paucity of the Notification of Withdrawal Act led to a new judicial review claim that the Prime Minister had acted *ultra vires* in providing notification in the absence of a prior authorising decision.[395] Lord Justice Gross dispensed with the claim by eliding the 'decision' and 'notification': 'authorisation to the Prime Minister to notify under Art.50(2), plainly contemplated and encompassed the power to take a decision to withdraw and conferred that power expressly on the Prime Minister'.[396] Gross LJ confirms that the Prime Minister's letter on 29 March contained 'the language of <u>decision</u> not of <u>notification</u> alone, *in vacuo*, so to speak'.[397] The elision of decision and notification resolves the legal gap in Article 50. The judgment implies that the 'decisions' by the government to hold the referendum and the referendum result were purely political.[398] Therefore the provisions of Article 50 were not triggered until the Prime Minister's actions on 29 March 2017. The letter constituted both a decision and notification for the purposes of Article 50(1) and (2) respectively. This endorses *Shindler* and insulates the pre-notification exercise of deconstructive power from the supranational constitutional order. These domestic constitutional events are held to take place outside of the framework established by Article 50.

The ambiguity over the United Kingdom's withdrawal decision may prompt a more open-ended interpretation. The wording of the 'intention' to withdraw in the 2017 Act may suggest that the Article 50(1) decision is not fully realised until the 'Treaties cease to apply'.[399] The 'Three

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[392] European Union (Notification of Withdrawal) Act 2017.
[393] Robert Craig, 'New Article 50 Case Resoundingly Rejected by the Divisional Court' (*UK Constitutional Law Association*, 26 June 2018) <https://ukconstitutionallaw.org/2018/06/26/robert-craig-new-article-50-case-resoundingly-rejected-by-the-divisional-court/> accessed 8 April 2020.
[394] Peers and Harvey (n 325) 824.
[395] *Webster* (n 365).
[396] ibid [13].
[397] ibid [15].
[398] Craig (n 393).
[399] TEU, art 50(3).

Knights Opinion' claims that the UK government could have provided a notification conditional upon the Article 50(1) 'decision' being Parliament's approval of the final terms of withdrawal.[400]

This moment represents the culmination of the levelling-down, the extinction of EU citizenship, and the end of the validity of EU law norms within the territory of the withdrawing state.[401] An analogy to the levelling-up of constituent power illustrates the contingent nature of the 'decision to withdraw'. Neil Walker presents the supranational limb of the dual-constituent power as existing in an embryonic state of self-construction: '*pouvoir constituant mixte*, made up of individual citizens in their dual identity as members of the already constituted states as well as the in-the-process-of-constituting European Union'.[402] Conversely, withdrawal commences through communication of a decision that does not immediately actualise disintegration, but sets in train a convention to realise the 'in-the-process-of-deconstituting' Member State.

The bridge to the supranational level activates the representation of individuals *qua* EU citizens. The EU institutions have predicated an orderly withdrawal upon preservation of the levels of freedom and equality guaranteed for EU citizens *qua* juridical objects.[403] This is conversely analogous to individuals retaining nationality of their Member State in levelling-up to preserve these protections.[404] The UK judiciary determined that the decision to withdraw was made by the Prime Minister on 29 March 2017. However, this decision is not ultimately realised until the conclusion of the deconstitutional process under Article 50(3). Developments both exogenous and endogenous mean that this decision may alter over the course of the 2 or more years. The judgment that notification may be revoked in *Wightman* recognises this instability. The fluctuations that occur throughout the deconstitutional process inform the reform proposals in Part 4 concerning the legal structure of the Article 50(1) decision.[405]

[400] Sir David Edward and others, 'In the Matter of Article 50 of the Treaty on European Union: Opinion' paras 39–40.
[401] The 'transition period' creates some uncertainty over this point. See discussion in subsection v, subsubsection F below.
[402] Walker, 'Habermas's European Constitution' (n 58) 5.
[403] 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/> accessed 17 December 2018.
[404] Habermas, *The Crisis of the European Union* (n 6).
[405] See Part 4, Section III, subsection ii.

iii. Article 50(2) TEU: The bridge to the supranational deconstitutional convention

The *Miller* and *Wightman*[406] cases frame the constitutional issues arising from the first sentence of Article 50(2) TEU: 'A Member State which decides to withdraw shall notify the European Council of its intention'.[407] This clause creates a bridge from the domestic decision to the supranational deconstitutional convention. The *Miller* judgment determined the necessary requirements to legitimate the creation of this bridge. The *Wightman* judgment determined the characteristics of the supranational deconstitutional convention and the requirements to retract the bridge. The judgment on revocation confirmed whether the domestic decision acts as a foundation stone, or whether it is subsumed by the multilateral negotiations. This defines whether the prerogative of the withdrawing Member State's nationals dominates, or whether termination or confirmation of the deconstitutional convention must be executed jointly with all individuals *qua* EU citizens. Following analysis of the two leading judgments, this subsection concludes with an alternative to the *Wightman* reasoning which would have allowed a multilateral process for revocation.

A. *Miller* and notification of intention to withdraw

The dispute in *Miller* may be framed as disagreement over whether notification functions purely in public international law or whether it also has consequences for, and must be regulated by, domestic constitutional law. The former position is endorsed in the minority judgment of Lord Reed.[408] He concludes that the principle of Parliamentary supremacy over domestic law 'does not…require that Parliament must enact an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU law in our domestic law…is inherently conditional on the application of the EU Treaties to the UK…The Act imposes no requirement, and manifests no intention, in respect of the UK's membership of the EU'.[409]

Lord Reed endorses a conception of EU law as a species of public international law rather than supranational constitutional law: 'The Act simply creates a scheme under which the effect given to EU law in domestic law reflects the UK's international obligations under the Treaties'.[410] This position rejects the notion that EU law is domestic law: 'If the Treaties do not apply to the

[406] *Wightman* (n 16).
[407] TEU, art 50(2).
[408] *Miller* (UKSC) (n 362) [153]–[243].
[409] ibid [177].
[410] ibid [187].

UK, then there are no rights, powers and so forth which, in accordance with the Treaties, are to be given legal effect in the UK'.[411] This rejects the notion that individuals exercise a role as juridical objects *qua* EU citizens independently of their role as juridical objects *qua* Member State nationals. Lord Reed's interpretation sees the Member States in public international law as the only objects of EU law; legal effects for individuals *qua* nationals only occur through authorising domestic legislation. This position understands notification's legal effects as limited to the international plane between the High Contracting Party of the United Kingdom and the international organisation of the European Union as subjects of the public international legal order.

By contrast, the majority judgment is predicated upon the conception of EU law as an 'entirely new, independent and overriding source of domestic law'.[412] Section 2 of the European Communities Act 1972 created a 'conduit pipe' whereby EU law is given the status. The Bill of Rights of 1688 establishes the settled constitutional norm that the executive cannot change domestic law or the rights flowing from it without parliamentary approval.[413] The executive could not use the foreign affairs prerogative power to provide notification under Article 50(2) as this would change domestic law through rendering the European Communities Act and the rights flowing through it nugatory.

The majority judgment held that 'major change to the UK constitutional arrangements must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation'.[414] The recognition of the 'independence' of EU law indicates implicit recognition of the autonomy of EU law regarding the 'more fundamental and….realistic sense' in which the EU institutions are the source of law.[415] This position appreciates that individuals can directly fulfil the role of juridical objects of the EU legal order. Notification under Article 50(2) operates not merely as a legal relation between a sovereign state and an international organisation, but also as an action in the supranational constitutional order that has direct consequences for all individuals *qua* juridical objects. The regulation of these consequences occurs through the supranational convention mandated by the notification.

The domestic aspect of notification as a constitutional event manifests itself in the legal requirement for an Act of Parliament. For individuals *qua* democratic subjects, the direct deconstructive expression of the referendum is not sufficient. It must be supplemented by a further democratic expression of will by the constituted institution of Parliament. The duplication

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[411] ibid [191].
[412] ibid [80].
[413] ibid [40]-[45].
[414] ibid [81].
[415] ibid [61].

could only have been avoided if the European Union Referendum Act 2015 had provided a specific legislative power for the Prime Minister to notify in the event of a leave vote. A precedent is provided in section 8 of the Parliamentary Voting System and Constituencies Act 2011.[416]

The segregated approach to the legislation mandating the referendum and the legislation implementing its result arguably strengthens input legitimacy. Individuals legitimated the decision to withdraw both directly in the referendum and indirectly through the passage of the Act of Parliament providing the power to notify. This extra channel of democratic decision-making also created tension between the constituent will-expression and the constituted power of Parliament. Parliament had the discretion to disregard the referendum result and vote against endowing the Prime Minister with the power to provide notification. This course of action was promoted soon after the referendum by Members of Parliament opposed to Brexit.[417]

This tension evokes Patberg's normative support for separation between constituent power and constituted power in the authorisation and de-authorisation of supranational levelling-up.[418] The underdetermined constitutional status of referendums in the United Kingdom means that it does not include institutions whose only purpose is to facilitate the exercise of constituent power. The conditions for levelling-up and levelling-down of this power in the United Kingdom are not 'legally codified' beyond Acts of Parliament. The normative desiderata to prevent public authorities from making self-referential constitutional decisions was legally impossible for the notification of intention to withdraw.

The absence of a separation of constituent and constituted power is predicated on popular sovereignty not being the ultimate normative foundation of the United Kingdom constitution.[419] The EU referendum returned the first result that did not accord with the positions of the constituted powers of the legislature and executive. The referendum opened up a new source of popular sovereignty as a social fact that conflicts with the orthodoxy of Parliamentary Sovereignty as a legal fact.[420] The potential for a clash between these two streams was avoided, however, through the passage of the EU (Notification of Withdrawal) Act 2017.[421]

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[416] Parliamentary Voting System and Constituencies Act 2011. Section 8 of the Act created a statutory duty for a Minister to bring into force 'the alternative vote provisions' if more votes had been cast in the referendum on adopting the Alternative Voting system in favour of the answer 'Yes'.

[417] David Lammy, 'We Need a Second Referendum. The Consequences of Brexit Are Too Grave | David Lammy' *The Guardian* (26 June 2016) <https://www.theguardian.com/politics/commentisfree/2016/jun/26/second-referendum-consequences-brexit-grave> accessed 9 April 2020.

[418] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70) 452–3.

[419] Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' (n 195).

[420] Garner, 'After Article 50 and Before Withdrawal' (n 341).

[421] EU (Notification of Withdrawal) Act 2017.

Despite the lack of formal legal constraints, the executive treated the referendum result as quasi-legal through its political imperative to vindicate the 'will of the people'. This recognises the priority of democratic subjecthood in the 'political constitution' of the United Kingdom.[422] The House of Commons voted overwhelmingly to endorse the *de minimis* approach in the Bill. This avoided the potential clash between constituted power and constituent will. This tension re-emerged at the point at which Parliament debated and passed the EU (Withdrawal) Act 2018.

Although the purpose of this legislation was to prepare the United Kingdom constitution for the juridical situation after withdrawal, the House of Commons included an amendment that the Withdrawal Agreement had to be approved by Parliament in a 'meaningful vote' before coming into force. Such a condition would have been more appropriate in the 2015 referendum Act or the 2017 notification Act, as evidenced by the 'meaningful vote' mechanism first being proposed in an amendment to the 2017 Bill by the House of Lords.[423] After numerous failed attempts to pass a Withdrawal Agreement through the 'meaningful vote' mechanism, the passage of the EU (Withdrawal Agreement) Act 2020 repealed the requirement.[424] The passage of the Act came after the General Election in December 2019 returned an overwhelming pro-Brexit majority of Parliamentarians. This resolved the tension between the deconstructive power of the referendum and Parliament through a return to the constitutional orthodoxy of norm-creator processes ending constitutional impasse.

B. *Wightman* and revocation of notification

The 'meaningful vote' mechanism was the juridical hook for the *Wightman* judgment. Parliamentarians sought confirmation of its full range of options beyond approval or rejection of the draft Withdrawal Agreement.[425] The Prime Minister states in the notification letter 'I am writing to give effect to the democratic decision of the people of the United Kingdom. I hereby notify the European Council in accordance with Article 50(2)…of the United Kingdom's intention to withdraw from the European Union'.[426] *Webster* confirmed that '[t]he Prime Minister's letter itself contains a decision; backed by the authority of the 2017 Act, that decision complies with the

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[422] JAG Griffith, 'The Political Constitution' (1979) 42 The Modern Law Review 1.
[423] 'Lords Examines European Union (Notification of Withdrawal) Bill - News from Parliament' (*UK Parliament*) <https://www.parliament.uk/business/news/2017/february/lords-debates-european-union-notification-of-withdrawal-bill/> accessed 9 April 2020.
[424] EU (Withdrawal Agreement) Act 2020, s 31.
[425] *Andy Wightman MSP and others v Secretary of State for Exiting the EU - Judgments & Sentences - Judiciary of Scotland* [2018] CSIH 62.
[426] May (n 391).

requirements of *Miller*'.[427] The foreclosure of the domestic level is supplemented by the United Kingdom's preferences for the supranational level. Notification is implicitly irrevocable, as evidenced through the reference to leaving the European Union without an agreement.[428]

This irrevocability assumption originated in *Miller*. Arguments emerged that the Supreme Court was obliged to refer the question of revocation to the Court of Justice of the European Union. Sanchez Graells argued that under the *CILFIT*[429] requirements for preliminary references 'it is inconceivable…to argue that the…(ir)revocability of a notice is irrelevant for the adjudication of this case'.[430] The applicants argued that 'when ministers give Notice they will be 'pulling…the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply'.[431] The government 'did not challenge much if any of the factual basis of these assertions'[432] meaning that there was consensus between the parties on irreversibility.

The Supreme Court did not submit a preliminary reference. The majority stated that 'we are content to proceed on the basis that [the common ground on irreversibility] is correct, without expressing any view of our own on either point'.[433] For the purposes of UK constitutional law, the consequences remained binary: if notice were not revoked then the consequences relied upon would proceed, and if notification were revoked then these consequences would not occur. This does not change the prior question of how exactly these consequences should be initiated.

Rather than the proposition being wrong, the famous analogy of the bullet leaving the chamber is inapposite. A more salient analogy is setting a timer on a bomb that may be defused at any point before the explosion. The possibility to defuse the bomb does not change the fact that only someone with the requisite competence may start the timer. As Jack Williams states, '[t]he triggering of Article 50 sets in motion a series of events which, without more, would result –

[427] *Webster* (n 363) [15].
[428] 'If, however, we leave the European Union without an agreement the default position is that we would have to trade on World Trade Organisation terms'. May (n 391).
[429] Case 238/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR-03415.
[430] Albert Sanchez-Graells, 'UK Supreme Court Miller Judgment Seeks to Reassert Parliamentary Sovereignty, but It Does so in Breach of EU Law and in Disservice to the UK Parliament' (*How to Crack a Nut*, 24 January 2017) <https://www.howtocrackanut.com/blog/2017/1/24/uk-supreme-court-miller-judgment-seeks-to-reassert-parliamentary-sovereignty-but-it-does-so-in-breach-of-eu-law-and-in-disservice-to-the-uk-parliament> accessed 9 April 2020; for the counter-argument see Oliver Garner, 'Referring Brexit to the Court of Justice of the European Union: Why Revoking an Article 50 Notice Should Be Left to the United Kingdom' (*European Law Blog*, 14 November 2016) <https://europeanlawblog.eu/2016/11/14/referring-brexit-to-the-court-of-justice-of-the-european-union-why-revoking-an-article-50-notice-should-be-left-to-the-united-kingdom/> accessed 9 April 2020.
[431] *Miller* (UKSC) (n 362) [36].
[432] ibid [37].
[433] ibid [26].

without Parliamentary authorisation – in statutes being made defunct on the Supreme Court's analysis…the foreign relations Treaty prerogative cannot be used to have this effect'.[434]

The *Miller* case concerned the internal constitutional requirements of the United Kingdom. The question did not yet fall within the Court of Justice's interpretative authority because the relevant EU law – Article 50 TEU – had not yet been activated.[435] This is justified through the conception that notification is the bridge from the internal constitutional decision that activates the procedural law governing the supranational deconstitutional convention. Christophe Hillion provides an alternative interpretation: '*formal* compliance with domestic constitutional requirements might not suffice…if that decision was taken in the midst of internal constitutional turmoil…and the appropriateness of such requirements was in doubt in relation to EU standards'.[436]

The facts in *Wightman* arose once the bridge from the national to the supranational had been crossed. The crucial question is whether the representation of all individuals *qua* Member State nationals and *qua* EU citizens in the supranational deconstitutional convention means that these individuals should be represented in a revocation decision that nullifies the convention and its output.

On 21 September 2018, Scotland's Court of Session sent a preliminary reference to the Court of Justice of the European Union. It asked for confirmation of whether EU law permits notification under Article 50(2) to be revoked unilaterally, and if so subject to what conditions.[437] The first instance judge on 8 June 2018 found that the conditions for a referral under EU law had not been met as the facts were not ascertainable and the issue was hypothetical. The creation of the 'meaningful vote' mechanism for when the European Union (Withdrawal) Act received Royal Assent made the issue a live legal reality. Lord Menzies stated that '[the issues] have been rendered less hypothetical…as a result of the coming into force of the European Union (Withdrawal) Act 2018, section 13 of which sets out the procedures necessary before any withdrawal agreement can be ratified…it appears to me that it will be legitimate for those who are involved in that vote to know, by means of a judicial ruling, the proper legal meaning of Article 50'.[438]

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[434] Jack Williams, 'Does Wightman Mean That Miller Was Decided Incorrectly?' (*Monckton Chambers*, 10 December 2018) <https://www.monckton.com/does-wightman-mean-that-miller-was-decided-incorrectly/> accessed 9 April 2020.
[435] Garner, 'Referring Brexit to the Court of Justice of the European Union' (n 430).
[436] Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283) 218.
[437] *Wightman v Secretary of State for DexEU* [2018] CSIH 62.
[438] ibid [37].

The case further illustrates the inter-connection between democratic subjecthood and juridical objecthood in illuminating the architecture of withdrawal. The decision by Parliamentary representatives of democratic subjects to create the meaningful vote mechanism imbued them with sufficient interest *qua* juridical objects to seek clarity on the legal question. The determination by the Court of Justice then clarifies the legal situation for all EU citizens *qua* juridical objects. This interaction between legality and democratic will expression is expressed in the petitioner's grounds of appeal: 'In the normal situation, where MPs are voting upon a change in domestic law, issues concerning the legality of their decisions would not arise because of the sovereignty of Parliament. Different considerations arose where EU law was involved. MPs were entitled to know whether their decision to vote, on the basis that the notification could be revoked, was sound in law'.[439] This informed the decision that the matter was not outside of the court's jurisdiction for encroachment upon Parliamentary Sovereignty.

The judgment highlights the failure of Parliament to ensure legal clarity when it empowered the Prime Minister to notify withdrawal in March 2017. This delayed reaction meant that over 18 months passed after notification before confirmation of revocability. This period included the General Election in June 2017. The legal ambiguity precluded political parties from offering democratic subjects a legally valid revoke option, as the Liberal Democrats party did in their December 2019 General Election manifesto.[440]

The political significance of the judgment prompted the Court of Justice to adopt the expedited procedure for the case.[441] The referring court made this request, as it emphasised 'the two-year timetable…which…is imposed on that withdrawal procedure, and…the fact that the parliamentary consideration and voting on that subject…must of necessity take place well in advance of 29 March 2019'.[442] The President of the Court of Justice accepted that the grounds 'undeniably' indicated the need to make a ruling before Parliament voted on the Withdrawal Agreement. He also forwarded the general justification that 'the implementation of Article 50 TEU is of fundamental importance for the United Kingdom and for the constitutional order of the European Union'.[443]

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[439] ibid [12].

[440] 'Liberal Democrat 2019 Manifesto' (*Liberal Democrats*) <https://www.libdems.org.uk/liberal-democrats-2019-manifesto> accessed 10 April 2020.

[441] *Wightman* (n 16) para 18.

[442] Order of the President of the Court of 19 October 2018 in Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:851 para 8.

[443] ibid para 11.

The President fixed the date for the judgment as 10 December 2018, one day before the scheduled 'meaningful vote' in Parliament that was eventually postponed. Expedition demonstrates that the two-year timetable for withdrawal creates a temporal emergency that necessitates extraordinary constitutional procedures at the domestic and supranational level. These distortions became more acute as the deconstitutional convention approached, and then moved past, the initial deadline of 29 March 2019.

The Judgment followed the Advocate General Opinion in finding the preliminary reference admissible. The judgment endorsed the line of case law that confirms that 'questions relating to EU law enjoy a presumption of relevance'.[444] The Court also rejected the argument that the referring court was seeking an advisory opinion, thus circumventing the procedure in Article 218(11) TFEU. The dispute did not concern the compatibility of an international agreement with the Treaties, but instead related to the interpretation of a provision of EU law.[445] The importance of the question for UK nationals *qua* democratic subjects was emphasised: 'it is required to rule on that question of law, which represents a genuine and live issue, of considerable practical importance…those Members of the United Kingdom Parliament have an interest in the answer…since that answer will clarify the options open to them in exercising their parliamentary mandates'.[446]

The Court of Justice's pre-emptive approach to admissibility should be welcomed. If the legal question were only addressed after an attempt to revoke, this could cause an accidental withdrawal if the time-limit for negotiations were reached in the interim period when a Member State believes it has revoked its notification. The extinction of EU citizenship means that the only means for individuals to remedy this outcome would be the rigorous accession procedures mandated by Article 50(5) TEU. The existential consequences of withdrawal and the temporal limitation framework justifies the Court's pre-emptive approach. This approach is corroborated by the Advocate General's Opinion: 'the Court is being asked to give judgment in order to interpret a provision which is actually in the course of being applied and the future legal consequences of which are drawing inexorably closer'.[447] Consequently, 'the relevant time to dispel doubts as to whether the notification…is revocable is before, not after, Brexit has occurred and the United Kingdom is inexorably immersed in its consequences'.[448]

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[444] *Wightman* (n 16) para 27.
[445] ibid para 35.
[446] ibid para 29.
[447] Opinion of Advocate General Campos Sánchez-Bordona in Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2018] ECLI:EU:C:2018:978, para 40.
[448] ibid point 42.

On the substance, the Court of Justice found that a Member State may revoke an Article 50(2) notification unilaterally. Revocation must be unequivocal and unconditional, and addressed in writing to the European Council. The notice must be sent before a Withdrawal Agreement comes into force, or before the two-year period terminates. The revocation decision must also be in accordance with the state's constitutional requirements. [449]

The judgment may be influenced by a public international law perspective rather than a supranational constitutional perspective. This is most prevalent in the Advocate General Opinion. Rather than starting with the text and purpose of Article 50 TEU, the substance commences with the rules of the VCLT, customary rules and practice of States on the right of withdrawal.[450] The Advocate General only considers after the question of whether the VCLT is applicable to withdrawal of a Member State from the European Union.[451] The Opinion attempts to adopt both the international law and supranational perspectives: 'The Treaty on European Union is an international treaty between States and, at the same time, the constituent instrument of an international organisation (the European Union)'.[452] The conflation of the two perspectives is also evident in academic commentary. Auriel Sari argues that the VCLT is relevant as an 'additional basis' because 'the right to revoke a withdrawal notification which the Member States enjoy under customary international law exists and applies in parallel to the corresponding right that they derive from Article 50'.[453]

This leads to the claim in the Opinion that the 'express clause on withdrawal (Article 50 TEU)…entails a *lex specialis* in respect of the convention rules (Article 54, 56 and 64 to 68 of the VCLT) of international law on the subject'.[454] Although such statements may be true from a public international law perspective, it is inappropriate for a representative of a supranational institution to adopt this perspective when addressing a lacuna in the autonomous legal order. The Advocate-General's discussion of state practice in relation to other treaties is particularly insensitive to the specific telos of Article 50. [455]

The Court of Justice judgment ostensibly adopts an explicitly constitutional approach. The judgment reiterates that the founding Treaties 'constitute the basic constitutional charter of the

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[449] *Wightman* (n 16).
[450] *Wightman Opinion* (n 447) points 63-76.
[451] ibid point 77.
[452] ibid point 78.
[453] Aurel Sari, 'Reversing a Withdrawal Notification under Article 50 TEU: Can a Member State Change Its Mind?' [2017] European Law Review 451.
[454] *Wightman Opinion* (n 447) point 81.
[455] *Wightman Opinion* (n 447).

European Union'.[456] This is supplemented by recognition of the 'autonomy of EU law with respect both to the law of the Member States and to international law'.[457] These paragraphs delineate the predicative characteristics of the Court's conception of the constitutional identity of the European Union. The Court of Justice considers the public international law sources in the more appropriate context of persuasive authority in order to 'corroborate' the conclusions derived from the supranational constitutional sources.[458] Nevertheless, the residue of the public international law perspective utilised by the Advocate General remains. This is epitomised by notification and revocation being presented as 'sovereign' decisions by the withdrawing Member State.[459] The *ratio decidendi* emerges prematurely without detailed argumentation following the delineation of the two objectives of Article 50: 'As the Advocate General stated in points 94 and 95 of his Opinion, the sovereign nature of the right of withdrawal…supports the conclusion that the Member State concerned has a right to revoke'.[460]

One may infer two predominant grounds for the judgment. The first is a coherence argument. In light of Article 50's silence on revocation, the Court constructs a position that most closely coheres to the framework for the original action of notification: 'In the absence of an express provision governing revocation of the notification of the intention to withdraw, that revocation is subject to the rules laid down in Article 50(1) TEU for the withdrawal itself'.[461] This adopts the Advocate General's conception of the deconstitutional convention whereby notification functions as the predicative foundation stone for negotiations: '[If] the Member State's initial decision is reversed and the judicial and constitutional basis on which it was sustained subsequently disappears…the first phase of the procedure loses its foundation…Logically, the second phase of the procedure must also be affected, since the premiss [sic] upon which it is based has fallen away'.[462] The Points of the Opinion that the Court cites show that an emphasis on Member State sovereignty informs this conception: 'unilateral revocation would…be a manifestation of the sovereignty of the departing Member State…the unilateral nature of the first phase extends also… to the second stage of the Article 50 procedure'.[463]

The Advocate General's focus on sovereignty only emphasises the constitutional role of individuals *qua* nationals. This democratic subjecthood is expressed through the external sovereign

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456 *Wightman* (n 16) para 44.
457 ibid para 45.
458 *Wightman* (n 15) para 70.
459 ibid para 50, para 59, para 72.
460 ibid para 57.
461 ibid para 58.
462 *Wightman Opinion* (n 447) point 106.
463 ibid points 94–95.

will of the Member State executive. Eleni Frantziou and Piet Eeckhout argue that '[t]he reference to constitutional requirements in Article 50(1) suggests that, in order to revoke the notification, the withdrawing State would simply need to show that the decision to withdraw is no longer compatible with its constitutional requirements in that a new decision has been taken'.[464] This position provides a domestic constitutional perspective upon the unilateral revocation argument. Rather than the sovereign will of the state in public international law being the predicate for the deconstitutional convention, the continuing fulfilment of the domestic constitutional requirements functions as the foundation stone.

The Advocate General recognises that the Member State's sovereign will may be mitigated during the deconstitutional convention: 'It is true, however, that in that second phase that unilateral nature appears to be counteracted by the EU institutions' actions'.[465] The Commission and the Council presented an alternative conception of the Article 50 assembly. 'In their view… the intermediate phase (the negotiation) is bilateral or multilateral in nature, so that the powers of the EU institutions take precedence. As soon as the second phase is activated, the notifying Member State loses control over the procedure'.[466] Prior arguments for multilateral revocation support the EU institutions' position. Stephen Weatherill argues that '[t]he primary concern which underpins Article 50 is to ensure that, once a Member State has chosen to submit its notification of intention to withdraw, the interests of the 27 Member States and the EU institutions then come to the forefront and are protected'.[467] Stijn Smismans states that '[t]he power balance created by Article 50 implies that the UK has no right to revoke but will depend on the willingness of the other Member States to allow such revocation'.[468]

The Court of Justice's rejection of this conception was predicated upon the second normative ground for its decision: 'that requirement [for unanimous approval of the European Council] would transform a unilateral sovereign right into a conditional right subject to an approval procedure… [this] would be incompatible with the principles…that a Member State cannot be forced to leave the European Union against its will'.[469] The Court concludes that 'in those

[464] Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017) 54 Common Market Law Review 695, 712–713.
[465] *Wightman Opinion* (n 447) point 95.
[466] ibid point 119.
[467] Stephen Weatherill, 'EU Law Analysis: Can an Article 50 Notice of Withdrawal from the EU Be Unilaterally Revoked?' (*EU Law Analysis*, 16 January 2018) <http://eulawanalysis.blogspot.com/2018/01/can-article-50-notice-of-withdrawal.html> accessed 13 April 2020.
[468] Stijn Smismans, 'About the Revocability of Withdrawal: Why the EU (Law) Interpretation of Article 50 Matters' (*UK Constitutional Law Association*, 29 November 2016) <https://ukconstitutionallaw.org/2016/11/29/stijn-smismans-about-the-revocability-of-withdrawal-why-the-eu-law-interpretation-of-article-50-matters/> accessed 13 April 2020.
[469] *Wightman* (n 16) para 72.

circumstances, given that a state cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will'.[470] The judgment corroborates this argument with the rejection of amendments during the 2003 Convention advocating expulsion of Member States.[471]

The levelling-down of constituent power as a voluntary endeavour is crucial for this to be an exercise of democratic self-determination. The Council and Commission arguments identify situations in which there is no genuine will to reverse withdrawal. Their submissions raise concerns over revocation as a negotiating strategy rather than a reversal of the process: 'the Member State concerned could use its right of revocation shortly before the end of the period…and notify a new intention to withdraw…the Member State would enjoy, de facto, a right to negotiate its withdrawal without any time-limit'.[472] The further claim is made that 'a Member State could at any time use its right of revocation as leverage in negotiations...it could threaten to revoke its notification and thus put pressure on the EU institutions in order to alter the terms of the agreement to its own advantage'.[473] The extensive discretion afforded to a notifying Member State may undermine Article 50's objectives. Revocation may not reflect the 'sovereign will' of individuals *qua* nationals. The consequences may undermine the second objective of certainty for all EU citizens over the structure and outcome of the process.

The Advocate General recognises abuse of the procedure as 'the most substantial argument in support of the position that unilateral revocation is not possible'.[474] However, he dismisses the concerns: 'the possibility that a right may be abused or misused is, generally speaking, not a reason to deny the existence of that right. Rather the abuse must be prevented through the use of the appropriate legal instruments'.[475] The general principle that EU law cannot be relied on for abusive or fraudulent ends is advanced as this instrument.[476] The Advocate General also claims that the principles of good faith and sincere cooperation impose limits on revocation.[477] Regarding tactical revocations, the Advocate General indicates that 'the obligation that a revocation must be carried out in accordance with the Member State's constitutional requirements is…a filter which

[470] ibid para 65.
[471] See discussion in Section II, subsection i above.
[472] *Wightman* (n 16) para 40.
[473] ibid para 41.
[474] *Wightman Opinion* (n 447) point 151.
[475] ibid point 152.
[476] ibid point 153.
[477] TEU, art 4(3).

acts as a deterrent in order to prevent abuse', because these legal and political requirements mean that it would be 'extremely difficult for tactical revocations to proliferate'.[478]

The judgment does not muse upon preventing abuse or tactical revocations. The Court concludes that an approval procedure would be incompatible with the principle that a Member State cannot be forced to leave the European Union against its will. The only echo of the Advocate General's argument is that revocation must be 'unequivocal and unconditional…the purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end'.[479]

The Advocate General's approach runs into practical and legal problems. First, a revoking Member State may use *Wightman*'s extraordinary emphasis on its sovereignty as a shield to repel the jurisdiction of the Court of Justice. Secondly, the problem of accidental withdrawal arises again. The Advocate General indicates correctly that 'any abuse could occur only when a *second* notification of the intention to withdraw is submitted, but not by unilaterally revoking the first'.[480] A determination that revocation was invalid could mean that an unintentional and disorderly withdrawal had already occurred. Finally, the constitutional requirements filter argument has less force for the United Kingdom. Constitutional minimalism means that a simple majority vote of parliamentarians may be sufficient. The emergency situation of impending Brexit deadlines saw such Acts of Parliament on Article 50 extension passed in under a day through unorthodox procedural arrangements.[481]

The *Wightman* judgment mimics the requirements for notification in order to provide a coherent solution to a lacuna within Article 50 TEU. This approach underplays the objective of orderliness. The representative role of the EU institutions after notification is subordinate to the sovereign will of the withdrawing Member State. Individuals *qua* withdrawing Member State nationals are prioritised over individuals *qua* EU citizens regarding a revocation decision. The deconstitutional convention is a norm-creation process as the Withdrawal Agreement functions as EU law. Supranational norm-creation requires legitimation by representatives of the dual subject. Arguably the termination of this process should also require input by all individuals *qua* Member State nationals and EU citizens.

[478] *Wightman Opinion* (n 447) point 156.
[479] *Wightman* (n 16) para 74.
[480] *Wightman Opinion* (n 447) point 155.
[481] European Union (Withdrawal) Act 2019; European Union (Withdrawal) (No.2) Act 2019.

C. A multilateral alternative to *Wightman*?

A role for the Union institutions in a revocation would enable *ex ante* regulation of its authenticity in the service of all individuals *qua* EU citizens. The *Wightman* decision overemphasises the objective of enshrining the sovereign right of a Member State to withdraw to the detriment of the second objective of an orderly procedure. Subjecting withdrawal to a constitutional clause seeks to ensure a legally certain process to mitigate the seismic consequences of disintegration. The withdrawing Member State's capacity to terminate the deconstitutional convention unilaterally through a simple notification to the European Council undermines order. An alternative approach could provide a coherent legal answer whilst ensuring that a Member State cannot be expelled against its will. Instead of merely seeking to cohere with Article 50(1) on notification, the Court could have constructed revocation through analogy to Article 50 TEU as a whole.

Notification of the intention to withdraw is an inherently unilateral action. The process it mandates is multilateral, and the primary condition for the conclusion of negotiations is a multilateral agreement. Withdrawal at the end of the 2-year period if this multilateral agreement cannot be reached ensures that the original unilateral intention is ultimately vindicated. The notification of an *intention* to revoke could also initiate a multilateral process whereby the Union institutions assess the authenticity of the notification and make provision for an orderly termination of the deconstitutional convention. This negotiated revocation would determine how actions taken in anticipation of withdrawal, such as a missed Presidency of the Council, may be rectified.

To prevent judicial construction of institutional requirements, a minimalist approach would use Article 50 to determine the requirements for a multilateral revocation. One option is the requirement of unanimity in the European Council to issue the negotiation guidelines. This may be sufficient for symmetry between the conclusion of the deconstitutional convention and its commencement. The alternative is the approval by Qualified Majority Voting in the Council and consent of the European Parliament that is necessary for a Withdrawal Agreement. This would ensure symmetry with Article 50 as a whole, and it would also ensure the representation of individuals as both nationals and EU citizens in the revocation decision.

If multilateral agreement cannot be reached, the end of the Article 50 two-year period could be the point at which revocation takes place unilaterally. This would operate as a 'no deal revocation' in contrast to a 'negotiated revocation'. This alternative approach to revocation would impose constraints upon the sovereign will of the Member State, but it would ensure greater

orderliness and democratic representation than the *Wightman* judgment. The representation in the European Parliament would also include nationals of the withdrawing Member States, a point missed in the emphasis on state sovereignty in the *Wightman* Opinion and Judgment. The reform proposals in Part 4 will consider more extensive revision of the architecture of revocation in tandem with amendment of the decision process under Article 50. The reconstructive process of treaty amendment would be free from the constraints that were placed upon the Court of Justice in determining the question to this legal gap in *Wightman*.

iv. Article 50(2) and Article 50(4) TEU: The structure of the deconstitutional convention

Habermas recognises the significance of the supranational procedure for withdrawal: 'the modalities which must be taken into account before the decision to leave comes into effect shows that the right of exit is not founded on a supreme constitutional authority beholden to no other law than its own free choice'.[482] These modalities are analogous to the principles of the 'across-demoi' stage of Patberg's elaboration of the hypothetical constitutional convention.[483] The withdrawal negotiations are therefore conceptualised as a 'deconstitutional convention'. The deconstitutional convention should operate as a manifestation of Patberg's principles.[484] The convention should ensure the expression of political self-determination of democratic subjects *qua* Member State nationals and EU citizens, on formally equal terms, with pluralistic representation, and within a forum that enables discursive interaction to determine the orderly withdrawal of a Member State.

A. The roles of the supranational institutions

The opening of the deconstitutional convention requires the consent of the nationals of all the High Contracting Parties acting through the European Council. This reflects the primacy afforded to individuals *qua* Member State in supranational construction, reconstruction, and deconstruction.[485] This mandate is sufficient to legitimate the action of the other Union institutions within the boundaries of the Article 50 procedure. Extension of the 2-year framework, however,

[482] Habermas, The Crisis of the European Union (n 9) 40–41.
[483] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 10).
[484] See Part I, Section IV, subsection ii.
[485] See Part 1, Section IV.

requires reactivation of the European Council mandate.[486] The European Council guidelines ensure that the political communities of all the Member States are represented in formally equal terms, and that the deconstitutional procedure is established on the basis of a discursive exchange of reasons.[487]

One feature of the Brexit deconstitutional convention is the initiative seized by the institutions that represent individuals *qua* EU citizens. The Commission established itself as the Union negotiator despite no explicit references to the institution in Article 50 TEU. This role was confirmed even before the formal processes commenced through notification by the United Kingdom. Following notification, the European Parliament issued a resolution with its own guidelines for the negotiations.[488]

The Commission's actions during deconstruction are a manifestation of its role as the 'guardian of the Treaties'. Whereas this role benefits all individuals in their quadripartite role, the European Parliament exclusively represents individuals *qua* EU citizens. It focused on the protection of the status and rights of EU citizens *qua* juridical objects during negotiations.[489] This developed the minimal obligation under Article 50(2) that the European Parliament must consent to the Withdrawal Agreement. To execute this protective role, the European Parliament pursued the claim to be kept informed of the progress of the negotiations.

The European Parliament's own guidelines and self-empowerment are manifestations of the 'across-demoi' principles. These actions ensure that the deconstitutional convention outcomes are an expression of self-determination by EU citizens on the basis of formal equality through European Parliament plenary, steering group, and committee sessions. Article 50(4) TEU excludes representatives of the withdrawing Member State from Council and European Council deliberations. The distinction between the democratic roles of individuals for withdrawing state nationals continues even during the process of extinguishing EU citizenship. The European Parliament continues to represent these individuals *qua* EU citizens up to the point that the treaties cease to apply. Despite these roles, the secondary condition for withdrawal of the 2-year 'guillotine clause' means that the supranational institutions may not be involved at all in the final withdrawal.

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486 See further discussion on extension in subsection v, subsubsection B below.
487 See Part 1, Section IV, subsection ii.
488 European Parliament, 'European Parliament Resolution of 5 April 2017 on Negotiations with the United Kingdom Following Its Notification That It Intends to Withdraw from the European Union (2017/2593(RSP)' <https://www.europarl.europa.eu/doceo/document/TA-8-2017-0102_EN.html> accessed 13 April 2020.
489 ibid paras 16–20.

B. The pre-notification actions

The European Union's institutions commenced preparations for the supranational deconstitutional convention before official notification by the United Kingdom. Both the legal basis for these actions and their constitutional legitimacy are questionable. On 29 June 2016, there was an 'informal meeting at 27' of the Heads of State or Government of the 27 Member States and the Presidents of the European Council and European Commission in Brussels.[490] The catalyst for this communication may have been a response to the condition for the Decision concerning the United Kingdom's New Settlement to come into force. Following the referendum result, notification that the UK would remain a Member State was not forthcoming. The communique was a pre-emptive political statement by the Heads of State or Government who hold legal authority under Article 50(2) TEU. This provided an early indication of withdrawal as a process concerning the exercise of constructive and deconstructive power of the supranational order. Representatives of individuals *qua* Member State nationals assert their primacy, and the supranational institutions play supplementary roles.

The statement clarified some of the framework principles of the convention before their confirmation in the European Council guidelines. The communication outlines the commitment to this procedure: 'Once the notification has been received, the European Council will adopt guidelines for the negotiations of an agreement with the UK. In a further process, the European Commission and the European Parliament will play their full role in accordance with the Treaties'.[491] This summarises the interaction between the institutions representing individuals *qua* nationals and *qua* EU citizens in the deconstitutional process.

The communication asserts that 'Until the UK leaves the EU, EU law continues to apply to and within the UK, both when it comes to rights and obligations'.[492] This political statement of the continuing status of UK nationals *qua* juridical objects, and the United Kingdom legal order as territory for the application of these norms, was confirmed by the Court of Justice in Case C-327/18 *PPU, Minister for Justice and Equality v RO*.[493] The EU-27 communique plants the seeds for the judicial confirmation of the objectives of Article 50: 'There is a need to organise the withdrawal

[490] EU-27, 'Informal Meeting at 27 - Brussels, 29 June 2016 - Statement' <http://www.consilium.europa.eu/en/press/press-releases/2016/06/29/27ms-informal-meeting-statement/> accessed 13 April 2020.
[491] ibid para 3.
[492] ibid para 1.
[493] *C-327/18 PPU - R O [2018] ECLI:EU:C:2018:733.* (n 328).

of the UK from the EU in an orderly fashion'.[494] An initial attempt is made to ameliorate disorderliness by addressing the lacuna between the democratic yet legally unbinding decision in the referendum and formal notification: 'It is up to the British government to notify the European Council of the UK's intention to withdraw from the Union. This should be done as quickly as possible. There can be no negotiations of any kind before this notification has taken place'.[495]

The final sentence confirms that the levelling-down of constituent power can only take place legitimately through prescribed legal means. This distinguishes disintegration theoretically and pragmatically from the reservation of constituent power contained within opt-outs. The latter are not expressly regulated by an article of primary supranational constitutional law.[496] The statement distinguishes the withdrawal process from the pre-referendum negotiations on the 'New Settlement' for the UK.[497] This was a prior agreement on the reservation of constituent power conducted extraneously from, and in anticipation of, the amendment procedure of Article 48 TEU.[498]

In the same breath that the EU-27 insist on compliance with Article 50, they risk undermining the Article 50(2) notification process. The political pressure placed upon the United Kingdom government to notify 'as quickly as possible' goes beyond prospectively stating the Article 50 legal framework. *Miller* shows that if the United Kingdom government had acquiesced to such pressure in June 2016 then it would have issued a legally invalid notification. The communication risked illegitimate influence before the proper stage at which the institutions fulfil their constitutional role. As Christophe Hillion makes clear 'as long as such a message [of notification] has not been conveyed to the EU, and so long as the Member State continues to fulfil its membership obligations completely, the withdrawal process cannot be deemed to have been triggered.'[499]

Despite the potential for constitutional impropriety of the EU-27 statement, its legal validity as a political statement does not seem to be in question. Graver concerns may be raised over the Commission's appointment as the Union negotiator before notification. On 27 July 2016, a press release confirmed that the Commission President had appointed Michel Barnier as the Chief Negotiator in charge of the Preparation and Conduct of the negotiations with the United

[494] EU-27 (n 490) para 2.
[495] ibid.
[496] See Part 1, Section IV, subsection iii above.
[497] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16.
[498] See further discussion in Part 3, section III, subsection iv below.
[499] Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283) 219.

Kingdom.[500] The negotiator would 'report directly to the President'[501] of the Commission, hold the status of Director-General, and would be advised by a group of Director-Generals comprising the Commission Taskforce for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU (Taskforce Article 50).

Both the Council and the European Parliament also commenced internal preparations before notification. Brigid Laffan details that '[w]ithin two days of the referendum, the Council appointed…[the] Head of the Council's Brexit Task Force'.[502] The European Parliament established a Brexit Steering Group of six members on 8 September 2016.[503] Laffan argues that 'the creation of the [Council] Task Force was initially regarded as a pre-emptive strike by the Council to retain control over the negotiations. In fact, it contributed to the ease of engagement between the Council and the Commission and to the effectiveness of EU negotiations'.[504] The Council and European Parliament's internal preparations, although pre-dating notification, may be justified on the basis of the defined roles of both institutions under Article 50. The Council's early action is particularly appropriate as it needs to adopt a decision to open negotiations. The extent to which the European Parliament's Brexit Steering Group extended its temporal role will be considered further below.

The Commission appears to have authorised itself to act as Union negotiator without any explicit legal basis. Article 50 TEU merely states that 'the Union' shall negotiate the agreement. Furthermore, no institution is authorised to act before notification to the European Council other than the Member State which makes the decision to withdraw. The Commission Press Release appointing the negotiator refers to the Informal meeting on 29 June 2016 in the 'Background' section: '[i]n line with the principle of 'no negotiation without notification', the task of the Chief Negotiator in the coming months will be to prepare the ground internally for the work ahead. Once the Article 50 process is triggered, he will take the necessary contacts with the UK authorities and all other EU and Member State interlocutors'.[505]

The only textual basis authorising such a role for the Commission is found in the statement by the EU-27 that 'the European Commission…will play [its] full role in accordance with the

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500 Andrea Scorcia, 'President Juncker Appoints Michel Barnier as Chief Negotiator in Charge of the Preparation and Conduct of the Negotiations with the United K' <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2652> accessed 14 April 2020.
501 ibid.
502 Brigid Laffan, 'How the EU27 Came to Be' (2019) 57 JCMS: Journal of Common Market Studies 13, 18–19.
503 ibid 19.
504 ibid.
505 Scorcia (n 500).

Treaties'.[506] The reference to the Treaties as a whole rather than Article 50 TEU specifically would justify its position as withdrawal negotiator as a manifestation of its role as 'guardian of the Treaties'. Article 50(2)'s appropriation of the general framework for the conclusion of international agreements under Article 218(3) TEU could provide the basis for the Commission exercising the same role in relation to withdrawal. Article 218(3) states that 'The Commission…shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and…nominating the Union negotiator or the head of the Union's negotiating team'.[507] The reference to 'the Treaties' in the 29 June 2016 statement could be a reference to this article.

Adam Łazowski endorses this position: '[A] cross-reference to Article 218(3) TFEU suggests that this [the key role of the European Commission] was the intention of the drafters'.[508] Even on this reading the Commission's unilateral decision on 27 June would still have pre-empted the discretion of the Council to nominate the Union negotiator. The Commission should have limited itself to the narrower permission to submit 'recommendations' to the European Council including the recommendation that it should be appointed negotiator. This reading is supported by Hillion's statement that '[t]he reference to Article 218(3) TFEU indicates that, the Commission could be involved in drafting the negotiating mandate alongside the European Council, and entrusted by the Council with the task of negotiating the withdrawal agreement, or, at the very least, be part of the negotiating team'.[509]

The Commission was still not explicitly approved as the Union negotiator in the European Council guidelines. The only possible reference is the broad statement that '[t]he Union will approach the negotiations with unified positions, and will engage with the United Kingdom exclusively through the channels set out in these guidelines and in the negotiating directives'.[510] The Commission's role was finally confirmed in the Council Decision authorising the opening of negotiations on 15 May 2017: 'The Commission is hereby authorised to open negotiations, on behalf of the Union, for an agreement…and is hereby nominated as the Union negotiator'.[511] At

[506] EU-27 (n 490).
[507] TFEU, art 218(3).
[508] Adam Łazowski, 'Be Careful What You Wish for: Procedural Parameters of EU Withdrawal', *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017) 242.
[509] Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283) 225.
[510] 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' (n 401).
[511] Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union Brussels, 15 May 2017 XT 21016/17 LIMITE BXT 24.

the very most this legal act, adopted nearly a year after the Commission's initial decision, is *ex post facto* validation of an exercise of executive discretion.

The actions of the EU-27 and the Commission could have prejudiced the initial exercise of deconstructive power by the United Kingdom. The exhortation to send notification as soon as possible, and the decision to prepare a negotiating team could have compelled the UK government to commence the process before legal permission was enacted through an Act of Parliament. This could have undermined the first objective of Article 50 TEU to vindicate the sovereign right of a Member State to commence withdrawal unilaterally. In reality, the United Kingdom government treated the referendum result as democratically binding in the same way as the European Union institutions. It is unlikely that these actions had a material effect on the domestic Brexit position.

The pre-emptive actions did have a material effect on the roles of the supranational institutions during the deconstitutional convention. The pre-emptive actions of the Commission arguably contravened the text of Article 218(3) TFEU. In turn, this undermines the second objective of Article 50 to ensure an orderly withdrawal. A prerequisite for orderliness is that the EU institutions comply with the withdrawal clause's prescriptions. The irony is that the Commission's 'a-legal' approach occurred within the context of statements to the United Kingdom that the legal process must be followed. The Commission ensured a centralised withdrawal process that provided a monolithic conception of the Union's interests to guide negotiations. From the quadripartite perspective, this ensured disintegration was conditioned upon the interests of individuals *qua* EU citizens, rather than allowing the interests of individuals *qua* particular Member States to guide the process as may have happened if, for example, the European Council had adopted the negotiating role.

C. The European Council guidelines and the European Parliament resolution

The deconstitutional convention officially commenced with the notification letter delivered by the United Kingdom to the European Council on 29 March 2017.[512] The European Council fulfilled its mandated role under Article 50 by issuing guidelines for the negotiations on 29 April 2017.[513] The guidelines established the substantive principles, and some of the structural framework which is not regulated by Article 50, that guided the negotiations. This added substantive flesh to the procedural bones of Article 50 TEU. As Hillion suggests 'the TEU only

[512] See discussion in subsection iii above.
[513] 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' (n 401).

sets out the basic elements of the withdrawal process. Much had indeed to be clarified once the process was activated'.[514] This procedural scarcity prompted the criticism from Hannes Hofmeister that 'the procedural provisions lack clarity and – perhaps even worse – are incomplete'.[515] The European Council was left with the task through its guidelines not only to define the European Union's substantive priorities, but also to provide for the 'detailed procedural legal framework' that Hofmeister argues is 'essential to avoid the risk of deadlock'.[516]

The Guidelines state in their introduction that 'the Union's overall objective in these negotiations will be to preserve its interest, those of its citizens, its businesses and its Member States'.[517] The Guidelines may provide evidence that the two objectives of Article 50 identified in *Wightman* are chronologically ordered. Once the prior objective of enabling the sovereign right of withdrawal is enabled by the operation of Article 50(1) and the first sentence of Article 50(2) TEU, the second objective of ensuring an orderly withdrawal comes to the fore. This is evidenced further by the statement in the Guidelines that '[t]he main purpose of the negotiations will be to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change'.[518]

The Union institutions' desire to preserve the unity of the constitutional order may be inferred as a driving consideration. The core principles section of the European Council's guidelines details that '[p]reserving the Single Market excludes participation on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member'.[519] The further objectives of the first phase of the negotiations are outlined as settling the disentanglement of the United Kingdom from the Union and from all of its rights and obligations, and to provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners. This may be regarded as a negotiating objective of ensuring the preservation of the supranational constitutional order at this moment of seismic upheaval. This is further bolstered by the statement that '[t]he Union will preserve its autonomy as regards its decision-making as well as the role of the Court of Justice of the European Union'.[520]

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[514] Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283) 226.
[515] Hannes Hofmeister, "Should I Stay or Should I Go ?'—A Critical Analysis of the Right to Withdraw from the EU' (2010) 16 European Law Journal 589, 595.
[516] ibid 594.
[517] 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' (n 401).
[518] ibid para 4.
[519] ibid para 1.
[520] ibid.

The guidelines' arrangements for an orderly withdrawal establish the three substantive principles that would drive the EU's position in the negotiations: the protection of EU citizens' rights,[521] a single financial settlement to cover the UK's liabilities, and solutions to avoid a hard border between Northern Ireland and Ireland.[522] The guidelines also establish the structural principle that drove the deconstitutional convention of a 'phased approach to negotiations' which meant that 'an agreement on a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country'.[523] This demarcated the Withdrawal Agreement as a *sui generis* form of EU international agreement distinct from the traditional agreements with Third Countries regulated by Article 208, 217 and 218 TFEU. This is predicated upon the retention of the constituent status of EU citizenship for UK nationals up to the date of its extinction when the treaties cease to apply.

The protection of EU citizens, and thus the supranational constitutional order they generate, may be regarded as the telos of the European Council's approach. The objective of citizens' rights seeks to address the specific situation of EU citizens *qua* juridical objects in the territory of the United Kingdom, and UK nationals *qua* former EU citizens in the territory of the EU. The European Parliament, as the direct representative of these individuals, also explicitly made their protection its objective in negotiations through a resolution on 5 April 2017.[524] The resolution goes further than the European Council guidelines as it '[t]akes note that many citizens of the United Kingdom have expressed strong opposition to losing the rights they currently enjoy pursuant to Article 20 of the Treaty on the Functioning of the European Union [and] proposes that the EU-27 examine how to mitigate this within the limits of Union primary law whilst fully respecting the principles of reciprocity, equity, symmetry and non-discrimination'.[525] Beyond the preservation of citizens' rights in the Withdrawal Agreement,[526] this opposition would also eventually lead to the Amsterdam case on EU citizenship and withdrawal.[527]

The European Council managed to avoid deadlock by establishing clear structural principles and substantive objectives for the negotiations. These choices have implications for the objectives of Article 50 TEU. In order to ensure that the objective of an orderly withdrawal was not undermined, sequencing required the transition period and the Protocol on Ireland/Northern

521 ibid para 8.
522 ibid para 11.
523 ibid paras 4–7.
524 European Parliament (n 488).
525 ibid para 27.
526 See further subsection v, subsubsection A below.
527 *C/13/640244 / KG ZA 17-1327* of the Rechtbank Amsterdam. See discussion in subsection v, subsubsection B below.

Ireland.[528] Such transitional arrangements were unforeseen in the drafting of the text of Article 50 TEU. An international agreement between the withdrawing Member State and the EU cannot be legally concluded before the treaties cease to apply. Article 50(3) TEU does not, however, require the resolution of all withdrawal issues before any discussions on the framework for future relations. This was a political decision taken by the European Council and agreed to by the UK government.

The EU enforced this phased approach by making 'sufficient progress' a condition for movement to the discussions of the future relationship. The only regulation of this condition is found in the Guidelines: 'The European Council will monitor progress closely and determine when sufficient progress has been achieved to allow negotiations to proceed to the next phase'.[529] This was achieved in the joint report of the UK and the EU in December 2017. The sequencing of negotiations fell within the legal discretion of the European Council under Article 50(2). The legitimacy of this discretion may be questioned with regard to a lack of sufficient clarity over the conditions for 'sufficient progress', and the exclusion of input from the European Parliament.

Dennis Dixon has argued that the phased approach to negotiations creates a hostile environment for the withdrawing Member State, and undermines the objective to enable a sovereign decision.[530] This analysis misses the practical point that the UK government made no attempt to reach internal consensus on the future relationship until the 'Chequers proposal' in July 2018.[531] This plan led to great fractures amongst the government and the resignations of the Foreign Secretary and the Secretary of State for Exiting the European Union. The hostile environment was generated as much by internal UK disunity as external imposition by the supranational institutions. Early political consensus on the model for a future relationship could have enabled clarity on the Irish border arrangements. Certainty over the sovereign preferences of the United Kingdom could have ensured a smoother transition to discussions of the future relationship.

Rather than sequencing *per se,* the legitimacy problem is the discretion of the European Council to determine and regulate the phases of the negotiations. The EU institutions must necessarily identify the substantive areas for resolution as these are not prescribed in Article 50 TEU. There is less clarity on the permissible boundaries for the EU institutions to determine the procedure for negotiations within their discretion under the withdrawal clause. Greater clarity

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528 See detailed discussion in subsection v, subsubsection C below.
529 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' (n 401) para 4.
530 Dennis Dixon, 'Article 50 and Member State Sovereignty' (2018) 19 German Law Journal 901, 903.
531 'The Future Relationship between the United Kingdom and the European Union' (*GOV.UK*, 17 July 2018) <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> accessed 16 April 2020.

could be enshrined on the procedure for the negotiations, and what institutions are legitimated to enforce the conditions of this procedure.

Sequencing may also be challenged by the wording 'taking account of the framework for…future relations'.[532] The hasty conclusion and renegotiation of a 'Political Declaration'[533] at the end of the second phase of negotiations may call into question the extent to which the negotiation of the Withdrawal Agreement itself take into account this framework. If one interprets 'taking account' to require a constant process of determining separation issues with regard to the framework for future relations, then the Political Declaration falls short. This interpretation would require the creation of the framework at the onset of the negotiations. Such an interpretation would preclude the political option of sequencing negotiations. This is a feasible but not necessary interpretation of the wording 'taking account'. In the Brexit case, there has been no challenge to the legal validity of the conclusion of such a Political Declaration before the point at which the Treaties cease to apply.

v.Article 50(3) TEU: The finalité of withdrawal

Article 50(3) TEU states the *finalité* of the withdrawal process: 'the Treaties shall cease to apply to the State in question'. The primary condition is 'the date of entry into force of the withdrawal agreement', and the secondary residual condition is 'two years after the notification referred to in paragraph 2' if the primary condition is unfulfilled. These withdrawal conditions are qualified by the derogative clause 'unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.'[534]

A. The primary and secondary conditions

The primary condition ensures that the EU institutions represent interests of all individuals *qua* nationals and *qua* EU citizens through shaping the content of a Withdrawal Agreement.[535] Although the initial domestic decision may be insensitive to the interests of any individuals beyond the Member State nationals, the final implementation of this decision is multilateral and may

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532 TEU, art 50(2).

533 HM Government, 'New Withdrawal Agreement and Political Declaration' (2019) <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> accessed 16 April 2020.

534 TEU, art 50(3)

535 See Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283); Łazowski (n 508).

preserve the interests of the remaining constituent subjects of the supranational constitutional order. The negotiating guidelines of the European Parliament[536] and the European Council[537] emphasise this objective.

The residual two-year condition has been interpreted as a 'cooling-off period' which provides the withdrawing Member State with an opportunity to reverse its decision before it is made final.[538] This comparison to withdrawal clauses in other international treaties has been forwarded as an argument for unilateral revocation of notification.[539] An alternative purpose is to ensure that withdrawal cannot be delayed indefinitely by a failure to find consensus with the Union institutions. This vindicates the ultimate self-determination of the constituent subjects of the withdrawing state if there is an absolute failure to negotiate an orderly withdrawal.

This period may only be extended with the agreement of the withdrawing Member State, further vindicating the self-determination of its nationals. The unanimity requirement in the European Council ensures the representation of the nationals of the High Contracting Parties as individual peoples. A more rigorous standard is applied for extension than the conclusion of a Withdrawal Agreement, which is effected by Qualified Majority Voting in the Council. This discrepancy is justified because a decision to extend the period is an amendment to the fundamental framework for the negotiations, whereas the Withdrawal Agreement is a natural conclusion to the course set by the guidelines. The ordinary rules of representation of all individuals *qua* Member State nationals in the Council suffices for the former, whereas amendment of the structure of the deconstitutional convention requires legitimation by every High Contracting Party. Arguably, the reconstruction of the Brexit deconstitutional convention following extensions after 29 March 2019 provided the necessary legitimacy for the renegotiation of the Irish Protocol in October 2019.[540]

B. The Withdrawal Agreement: Transforming the quadripartite role

This commentary will focus on the transformation of the quadripartite role of individuals enacted by the Withdrawal Agreement.[541] This will focus on the substantive provisions covering

536 European Parliament (n 488) para 18.
537 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' (n 401) para 8.
538 Closa, 'Interpreting Article 50: Exit, Voice and...What About Loyalty?' (n 288).
539 Carlos Closa, 'Is Article 50 Reversible? On Politics Beyond Legal Doctrine' (*Verfassungsblog*, 4 January 2017) <https://verfassungsblog.de/is-article-50-reversible-on-politics-beyond-legal-doctrine/> accessed 16 April 2020.
540 See discussion in subsubsection B below.
541 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ C 384/1.

citizens' rights and the means created to vindicate democratic subjecthood and juridical objecthood. Parts of the new legal regime function as a microcosm of the supranational constitutional order. The substance and relational structure of legal norms are replicated. The method for the creation and maintenance and the basis for the validity of these norms has been transformed from supranational constitutionalism to public international law.

The preamble to the Agreement establishes the purpose of the citizens' right chapter: to provide reciprocal protection in the situation of the exercise of free movement rights before a date set by Agreement and to ensure that the rights are enforceable and based on the principle of non-discrimination. The temporal starting point for protection is that free movement rights have been exercised before the end of the transition period. However, this is complicated by additional temporal exceptions provided for in the text, in addition to the complexities of the scope of who is protected by the agreement.

The Withdrawal Agreement defines 'Union citizen' and 'United Kingdom national' separately.[542] The former is defined paradigmatically as 'any person holding the nationality of a Member State',[543] and the list of Member States excludes the United Kingdom.[544] The latter is defined by reference to the New Declaration by the UK Government of 31 December 1982 on the definition of nationals, together with the Treaty of Lisbon's Declaration No 63.[545] The provision disaggregates nationals of the United Kingdom from the wider class of EU citizens. This is the first definition of the juridical objects of the new regime of public international law created between the Union and a former Member State.

Defining these objects preserves a semblance of legal 'ordering' around the new normative point governing EU and UK relations.[546] In specific areas, this is achieved by reference to the formerly authoritative EU legal regime. For example, Title III of Part Two on the coordination of social security systems defines one class of 'persons covered' as 'United Kingdom nationals who are subject to the legislation of a Member State at the end of the transition period, as well as their family members and survivors'.[547] UK nationals are transformed from quadripartite subjects of the supranational constitutional order to residual juridical objects.

Part Two of the Agreement addresses the issue of citizens' rights, identified as a predicate for an orderly withdrawal. The provisions preserve a partial version of EU citizenship as a juridical

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[542] Withdrawal Agreement, art 2.
[543] ibid art 2(c).
[544] ibid art 2(b).
[545] ibid art 2(d).
[546] See discussion of legal ordering around a normative point in Part 1, Section II, subsection ii.
[547] Withdrawal Agreement, art 30(1)(b).

status. Withdrawal extinguishes the right to free movement for UK citizens into and through EU territory, and for EU citizens into UK territory. Legal protection is limited to preserving the rights of individuals who have already exercised free movement to be present within either UK territory or the territory of a Member State. The only partial rights of movement preserved for UK nationals are for those who fulfil the definition of 'frontier worker'.[548] The rights are limited to this territory, which means that UK citizens do not retain free movement rights to other EU Member States other than their state of residence. Part Two preserves the legacy rights for individuals, and a limited category of current and future family members, in order to vindicate the guarantees of EU citizenship that they relied upon before the UK's withdrawal. This protection is limited to juridical rights; Part Two does not preserve the voting rights that enable political self-determination *qua* EU citizen.

The Withdrawal Agreement duplicates the text of supranational legal sources. Part Two, Title II, Chapter 1 replicates the provisions of Directive 2004/38 on citizens' free movement and residence rights.[549] Chapter 2 transposes Regulation No 492/2011 on the free movement of workers.[550] Chapter 3 covers Directive 2005/36/EC on the recognition of professional qualifications.[551] Title III is dedicated to duplicating Regulation No 883/2004 on the coordination of social security systems.[552] The degree of replication is so extensive that Stijn Smismans has used the term 'copy and paste'.[553] These Chapters partially preserve the substance and objectives of EU law within the new source of an international treaty. A particular moment of United Kingdom's nationals' constitutional input into the development of these norms is ossified. The formerly dynamic process of development of the rights of juridical objects is converted into a static legal source with a pre-defined expiration. This is the external analogue to the ossification of 'retained EU law' in the United Kingdom's constitutional order.[554] The Withdrawal Agreement and the domestic legislation are the juridical means to repatriate constituent power to the domestic level. The termination of EU citizenship as a democratic and juridical status means that the

[548] ibid art 9(b).
[549] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.
[550] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.
[551] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255/22.
[552] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.
[553] Smismans (n 468).
[554] European Union (Withdrawal) Act 2018, s 6.

processes of norm-formulation and alteration become the exclusive domain of UK institutions at the domestic and international level.

The definition of 'host State'[555]establishes the new default temporal grounding for the retention of residence rights. The exercise must come before the end of the transition period, and residence must continue thereafter. Periods of legal residence or work in accordance with Union law both before and after the end of the transition period are included in the calculation of the qualifying period of 5 years necessary to acquire a right of permanent residence.[556] Certain categories of individuals will be protected by the provisions even if they exercise their rights after the end of the transition period.[557] These are direct relations of an EU national in the UK or a UK national in the EU who resided outside the host State before the end of the transition period and fulfil the conditions in Directive 2004/38,[558] and individuals who are born to or legally adopted by covered individuals after the end of the transition period.

This functions as a generational clause which ensures the continuing protection of offspring so as to ensure continuity of legal rights in order to preserve family unity. Article 39 confirms that '[t]he persons covered by this Part shall enjoy the rights provided for in the relevant Titles of this Part for their lifetime, unless they cease to meet the conditions set out therein.'[559] The rights may only be revoked if the restrictions of the rights of residence and entry are fulfilled. This confirms that the hereditary nature of citizenship rights, whereby family members inherit rights regardless of their acquisition of EU citizenship,[560] is henceforth terminated.

The Withdrawal Agreement protects the juridical objecthood of the new status for individuals. The juridical architecture of the supranational constitutional order is extended beyond the date of withdrawal. Preliminary reference procedure from United Kingdom courts to the Court of Justice of the European Union continue for cases that commenced at first instance within a period of 8 years after the end of the transition period.[561] A new independent 'Authority' is established within the United Kingdom to monitor the implementation and application of Part Two.[562] This authority has powers equivalent to the European Commission to conduct enquiries, receive complaints from affected individuals, and the right to bring legal actions before a

[555] Withdrawal Agreement, art 9(c).
[556] ibid art 15.
[557] ibid art 10(e)(ii).
[558] Directive 2004/38, art 2(2).
[559] Withdrawal Agreement, art 39.
[560] *Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi [2011] ECR I-01177.* (n 86).
[561] Withdrawal Agreement art 158.
[562] ibid art 159.

competent court.[563] The 'Authority' may only be disbanded by a decision of the Joint Committee overseeing the Agreement. The Withdrawal Agreement establishes a specialised Committee on Citizens' Rights as one of the constituent parts of this Joint Committee overseeing the 'interpretation and application' of the Agreement and meeting at least once a year.[564] Finally, Part Two is exempt from the remedy of temporary suspension of obligations by one of the parties to the Agreement following a failure to implement a ruling of the Joint Committee.[565] The protection of citizens' rights forms the substantive 'core' of the new legal regime established by the Withdrawal Agreement. Accordingly, these provisions must be afforded comprehensive judicial protection and cannot be the subject of coercive remedial measures in public international law.

The Withdrawal Agreement does not preserve the political rights to vote and stand as candidates in European Parliament and municipal elections.[566] UK nationals, therefore, lose their democratic subjecthood *qua* EU citizens, and EU citizens lose this democratic capacity within the territory of the United Kingdom. The former Member State has a discretion whether to enfranchise EU nationals in local elections, and individuals EU Member States have the discretion to enfranchise UK nationals to vote in local elections as Third-Country Nationals. The silence of the Withdrawal Agreement on political rights may ossify the conception of the status as one that individuals utilise for the passive acquisition and exercise of legal rights, rather than a status that empowers individuals to engage in self-determination through participation in democratic procedures.

A practical problem arises beyond this theoretical deficiency. A lacuna may arise in Northern Ireland.[567] All UK nationals born in Northern Ireland have the option to adopt the nationality of Ireland by virtue of the Good Friday Agreement[568] and subsequent amendments to the Irish Constitution.[569] UK nationals born in this territory can retain their EU citizenship through this channel. Theoretically, all national residents in Northern Ireland could be EU citizens, but unable to vote in European Parliament elections within their territory of residence. This situation

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[563] See European Union (Withdrawal Agreement) Act 2020 sch 2 for the domestic implementation of the Independent Monitoring Authority.
[564] Withdrawal Agreement art 165(1)(a).
[565] ibid art 178(2)(a).
[566] TFEU art 20(2)(b), art 22.
[567] Reuven Ziegler, 'Part I Mini-Symposium on EU Citizenship in the Shadow of Brexit: The Brexit Effect – European Parliamentary Elections in the UK' (*European Law Blog*, 19 December 2018) <https://europeanlawblog.eu/2018/12/19/part-i-mini-symposium-on-eu-citizenship-in-the-shadow-of-brexit-the-brexit-effect-european-parliamentary-elections-in-the-uk/> accessed 16 April 2020.
[568] 'The Belfast Agreement' (*GOV.UK*, 10 April 1998) <https://www.gov.uk/government/publications/the-belfast-agreement> accessed 17 April 2020.
[569] Nineteenth Amendment to the Constitution Act 1998.

would be analogous to that of citizen residents of Gibraltar who, before the *Matthews* decision,[570] were not enfranchised in European Parliament elections despite holding EU citizenship. This could prompt litigation and may require further unilateral or bilateral legislative action beyond the scope of the Withdrawal Agreement.

The Withdrawal Agreement does not preserve the status of EU citizenship for UK nationals. Both the United Kingdom and European Union negotiations relied implicitly on an interpretation that the withdrawal of a Member State automatically leads to the extinction of EU citizenship for those holding the nationality of that state.[571] This assumes that loss of the condition for the acquisition of EU citizenship, nationality of a Member State, functions as the condition for its revocation. This assumption was challenged in an action before the Dutch courts for a preliminary reference to the Court of Justice to determine whether EU citizenship is necessarily lost with Member State withdrawal or not.[572]

The first instance preliminary reference request was reversed on appeal due to the issue being 'insufficiently concrete' and hypothetical. The Withdrawal Agreement coming into force in February 2020 means that the legal claim is live again. This possibility was recognised by the General Court in its dismissal of the claim that the European Council's recommendation for a decision to commence withdrawal negotiations directly affected the legal situation of UK citizens.[573] The Court of Justice states that '[i]t is only at the end of the procedure laid down in Article 50 TEU that the rights of the applicants are liable to be affected, to an extent which is not, however, possible to predict'.[574] On 30 March 2020 and 23 April 2020 legal actions challenging the loss of EU citizenship as a result of the Withdrawal Agreement were filed before the Court of Justice of the European Union.[575]

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570 *Matthews v United Kingdom* (1999) 28 EHRR 361 (ECHR).

571 For full argumentation see Oliver Garner, 'Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam ('The Amsterdam Case')' (*European Law Blog*, 19 February 2018) <https://europeanlawblog.eu/2018/02/19/does-member-state-withdrawal-from-the-european-union-extinguish-eu-citizenship-c13640244-kg-za-17-1327-rechtbank-amsterdam-the-amsterdam-case/> accessed 17 April 2020.

572 *C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam* (n 527).

573 *Case T-458/17 Shindler v Council of the European Union [2018] ECLI:EU:T:2018:838* (n 328).

574 ibid para 23.

575 Julien Fouchet, 'DON'T TOUCH MY EU CITIZENSHIP' (*CrowdJustice*) <https://www.crowdjustice.com/case/dont-touch-my-european-citizenship/> accessed 17 April 2020; Stephen Hocking, David Harrison and Alexandra von Westernhagen, 'DAC Beachcroft Files Landmark Case with General Court of the EU on Behalf of a Group of UK Nationals' (*DAC Beachcroft*) <https://www.dacbeachcroft.com/en/gb/news/2020/april/dac-beachcroft-files-landmark-case-with-general-court-of-the-eu-on-behalf-of-a-group-of-uk-nationals> accessed 25 April 2020.

The Protocol on Ireland/Northern Ireland nuances the status of UK nationals *qua* juridical objects after withdrawal.[576] The Protocol addresses the substantive negotiation goal to find 'flexible and imaginative solutions…with the aim of avoiding a hard border [in Ireland]'.[577] It ensures an orderly withdrawal by protecting the Good Friday settlement and the integrity of the EU internal market. The Protocol mandates a substantial retention of the Union legal order within a devolved territory of the former Member State.

Article 6 of the original Protocol stated that '[u]ntil the future relationship becomes applicable, a single customs territory between the Union and the United Kingdom shall be established. Accordingly, Northern Ireland is in the same customs territory as Great Britain'.[578] A broad range of EU internal market law is also applicable within Northern Ireland by virtue of the Protocol.[579] The renegotiated Protocol of October 2019 no longer mandates a single customs territory between the whole of the United Kingdom and the EU. Instead, the application of the *acquis* in Northern Ireland is dependent on the condition that 'a good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing'.[580]

The previous Protocol operated as an insurance policy in the event that no satisfactory arrangements were established for the Irish border in a future relationship: '[T[he Union and the United Kingdom shall use their best endeavours to conclude, by 31 December 2020, an agreement which supersedes the Protocol in whole or in part'.[581] By contrast, the new Protocol merely states that 'any subsequent agreement between the Union and the United Kingdom shall indicate the parts of this Protocol which it supersedes'.[582] The Protocol operates as the default mode of regulating the relationship between Northern Ireland and the European Union after the transition period.

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[576] These paragraphs reproduce extracts from Oliver Garner, 'The New Irish Protocol Could Lead to the Indefinite Jurisdiction of the EU Court of Justice within the UK' (*LSE BREXIT*, 23 October 2019) <https://blogs.lse.ac.uk/brexit/2019/10/23/the-new-irish-protocol-could-lead-to-the-indefinite-jurisdiction-of-the-court-of-justice-of-the-european-union-within-the-united-kingdom/> accessed 17 April 2020.

[577] 'European Council (Art 50) Guidelines for Brexit Negotiations - Consilium' (n 401) para 11.

[578] Protocol on Ireland/Northern Ireland, art 6, Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2018] CI 66/1 ('Original Withdrawal Agreement').

[579] ibid annex 5.

[580] HM Government, 'New Protocol on Ireland/Northern Ireland and Political Declaration' (2019) art 5 <https://www.gov.uk/government/publications/new-protocol-on-irelandnorthern-ireland-and-political-declaration> accessed 17 April 2020.

[581] Original Irish Protocol art 4.

[582] HM Government (n 580) art 13.

The Protocol also maintains the EU's juridical architecture for norm application. EU institutions have the power conferred upon them by Union law in relation to the Protocol.[583] This article states that 'in particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect'.[584] This confirms that the Article 267 TFEU preliminary reference procedure shall apply to and in the United Kingdom by virtue of the Protocol. There are only two means to terminate this jurisdiction: The Northern Irish Assembly may refuse to consent to the ongoing operation of the Protocol, or a future relationship agreement may supersede the Protocol. If neither of these conditions comes to pass, the Court of Justice of the European Union will have indefinite jurisdiction within the United Kingdom in relation to the actions of UK nationals *qua* juridical objects within the scope of the Protocol.

The Protocol on Ireland/Northern Ireland preserves the juridical objecthood of individuals in relevant situations. The United Kingdom's withdrawal may not be regarded as a full and unconditional restoration of nationality as a constituent status because a sub-set of nationals remain objects of EU norms without retaining democratic subjecthood. Rather than continual input into the creation of applicable norms through representation in the EU legislative institutions, democratic self-determination becomes a one-off event 4 years after the end of the transition period when the Northern Irish Assembly will be asked to consent to the continuing operation of the Protocol.[585] This raises the unique situation of the final decision resting with individuals *qua* democratic subjects of a sub-state devolved region.

This preservation of juridical objecthood may be justified by the unique relationship between the United Kingdom, Northern Ireland and Ireland and their respective constituent statuses. This is recognised in the preamble to the Protocol, 'having regard to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom'.[586] This relationship has been a crucial feature of disrupted integration as well as disintegration. The same concerns relating to the border between Ireland and Northern Ireland that have driven Schengen and Area of Freedom, Security and Justice opt-outs are the drivers behind the Protocol.[587] The opt-out of both Member States from the Schengen zone, in favour of their own regime of border-

[583] ibid art 12.
[584] ibid.
[585] ibid art 18.
[586] HM Government (n 580).
[587] See further discussion in Part 3 of the thesis.

liberalisation in the Common Travel Area,[588] explains why the Protocol is limited to the triggering condition of free movement of goods.

The continuation of juridical objecthood in Northern Ireland may be justified by the unique constituent status in this region. Individuals born in Northern Ireland can choose whether to be citizens of the United Kingdom, citizens of Ireland, or citizens of both states.[589] All these individuals have the inherent capacity to continue their status as EU citizens. Their status as continuing juridical objects of EU law can, therefore, be legitimated by their status as potential nationals of the Irish state and as potential EU citizens. The actions of the Irish government throughout the deconstitutional convention are also legitimate to protect individuals who are already nationals of the state, and individuals in Northern Ireland who are potential nationals.

The resolution of the Irish border issue was a key substantive objective in the initiation of the deconstitutional convention. This made Ireland a unique constituent player amongst the High Contracting Parties. Ireland exercised this role in the determination of 'sufficient progress' to move on to Phase 2 of the withdrawal negotiations in December 2018,[590] and in breaking the impasse on the renegotiation of the Protocol in October 2019.[591] The Protocol on Ireland/Northern Ireland is a caveat to the theoretical purity of the model of withdrawal as levelling-down constituent power. This exceptional disintegrative phenomenon arises from the practical exigencies of the United Kingdom's constitutional status. Nevertheless, the Protocol benefits from the input legitimacy of the governments of Ireland and the United Kingdom in the deconstitutional convention. Output legitimacy is evidence through the protection of the juridical rights of individuals in the territories of Ireland and Northern Ireland. Finally, the explicit inclusion in the European Council guidelines of the Irish border as a key issue for resolution in the Withdrawal Agreement generates throughput legitimacy.

C. The residual conditions: Transition, extension and no deal

Article 50(3) TEU defines the residual conditions for withdrawal. Failing the entry into force of a Withdrawal Agreement, the Treaties shall cease to apply 'two years after the notification

[588] Graham Butler, 'Europe's 'Other' Open-Border Zone: The Common Travel Area under the Shadow of Brexit' (2018) 20 Cambridge Yearbook of European Legal Studies.
[589] 'The Belfast Agreement' (n 568); Nineteenth Amendment to the Constitution Act 1998.
[590] Kevin O'Rourke, *A Short History of Brexit: From Brentry to Backstop* (Pelican 2019).
[591] Department of the Taoiseach, 'Gov.Ie - Joint Statement by An Taoiseach Leo Varadkar and Prime Minister Boris Johnson' <https://www.gov.ie/en/news/e3a113-joint-statement-by-an-taoiseach-leo-varadkar-and-prime-minister-bori/> accessed 17 April 2020.

referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'.[592] The constitutional propriety of the two-year time-limit, no deal withdrawal, and the legitimacy of extension have been challenged by the Brexit case-study. The transition period is a creature of the Withdrawal Agreement rather than Article 50(3)'s residual conditions for withdrawal. Nevertheless, is analysed here due to its relationship with extension and no deal. The transition period is a mechanism that obviates a prolonged extension period in which the United Kingdom would remain a Member State. In turn, the telos of extension is to avoid the constitutional disorder of withdrawal without an agreement upon the conclusion of the Article 50 time-period.

Part Four of the Withdrawal Agreement provides the legal basis for the transition period. Article 126 states that '[t]here shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020'.[593] Article 132 confirms that 'the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to 1 or 2 years'.[594] Some ambiguity arises over the temporal limits due to the reference in Article 132(2)(c) to an extension that is 'not a multiple of 12 months'.[595] Article 127(1) outlines that 'Union law shall be applicable to and in the United Kingdom during the transition period'.[596] Paragraph 3 clarifies that 'Union law…shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union'.[597] Article 128 further confirms that the United Kingdom will not retain 'institutional rights…to submit proposals, initiatives or requests to the institutions'.[598] Transition preserves juridical objecthood without democratic subjecthood.

Article 127 confirms that EU law within the scope of the opt-out Protocols[599] remains inapplicable during transition. This is a form of 'differentiated disintegration'[600] that preserves the constitutional status quo. However, the United Kingdom does not retain its capacity to opt-in to

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592 TEU, art 50(3).
593 Withdrawal Agreement, art 126.
594 ibid art 132.
595 ibid art 132(2)(c).
596 ibid art 127(1).
597 ibid art 127(3).
598 ibid art 128.
599 TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland 15; Protocol (No 19); TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland; TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; TEU and TFEU, Protocol (No 36) on transitional provisions.
600 Frank Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' (2018) 25 Journal of European Public Policy 1154.

Area of Freedom, Security and Justice and Schengen measures during the transition period.[601] The only new norms that will apply in these areas are those that amend, replace, or build upon a measure which the United Kingdom opted-in to before the Withdrawal Agreement came into force. The exclusion of the United Kingdom from enhanced cooperation further confirms that the United Kingdom's differentiation during this period is disintegrative.[602]

Article 128(2) states that '[f]or the purposes of the Treaties, during the transition period, the parliament of the United Kingdom shall not be considered to be a national parliament of a Member State'.[603] This confirms the removal of the representative institutions of individuals *qua* nationals of the United Kingdom from the supranational constitutional order. The transition period replicates the juridical but not the democratic constitutional functions of the European Union. Article 128 on supervision and enforcement confirms the functioning of the juridical mechanisms: 'the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties. The first paragraph shall also apply as regards the interpretation and application of this Agreement.'[604]

One may conceptualise transition in two ways. First, these provisions may be an extension of the supranational constitutional order to the United Kingdom for a limited time period. Alternatively, one may argue that the transition period creates a simulacrum of EU law *de novo*. This would be analogous to the EEA Agreement.[605] This interpretation is supported in the United Kingdom's domestic implementation of the Withdrawal Agreement, which creates a new source of 'relevant separation agreement law'.[606] This has primacy over other domestic law by virtue of the 'after-life' of the European Communities Act 1972.[607] Conceptualising the source of law that applies to and within the United Kingdom during transition is relevant to determine whether the transition period complies with Article 50's text and objectives.

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[601] Withdrawal Agreement, art 127(5).
[602] ibid art 127(4).
[603] ibid art 128(2).
[604] ibid art 128.
[605] Agreement on the European Economic Agreement [1994] OJ L 1/3. I thank Marise Cremona for this analogy.
[606] European Union (Withdrawal Agreement) Act 2020.
[607] Kenneth Armstrong, 'Reincarnation and Resurrection – the Afterlife of the European Communities Act 1972 in the Withdrawal Bill' (*Brexit Time*, 22 October 2019) <https://brexittime.com/2019/10/22/reincarnation-and-resurrection-the-afterlife-of-the-european-communities-act-1972-in-the-withdrawal-bill/> accessed 18 April 2020.

Michael Dougan conceptualises transition as a 'wholesale extension of EU law' to a third country.[608] Extending EU law to a withdrawn state contravenes the explicit wording of Article 50 that the 'the Treaties cease to apply'. Dougan argues that the EU and the UK have used a 'hierarchically inferior' instrument to amend the operation of the Treaties.[609] Dougan observes that 'the range of possible dates upon which the Treaties should cease to apply to the UK has been clearly identified by Article 50 TEU and could only be amended by changing the Treaties themselves'.[610] It is crucial that political outcomes are realised through orthodox legal provisions rather than secondary law constructions that do not have an explicit primary law base. If one accepts that the transition period continues the application of primary law, then this undercuts the requirement of unanimity for Article 50 extension as only a Qualified Majority is required for the conclusion of the Withdrawal Agreement.

The alternative conceptualisation of transition as a simulacrum of EU law provides a counter-argument. On this reading, the transition period serves a different qualitative objective to extension. The crucial predicate is that transition operates *after* the Treaties cease to apply. The disqualification of UK nationals from input into the creation of norms distinguishes the new source of law from the supranational constitutional order. Domestically, democratic subjecthood over this law is limited to the national level and the creation of the implementing legislation of the European Union (Withdrawal Agreement) Act 2020. From the international perspective, the former Member State's transformation into a third country means that this period can be used for the negotiation and finalisation of a Future Relationship Agreement. The simulacrum concept illustrates how transition operates as the initial transformation for EU-UK relations from supranational constitutional law to the public international law source of the Withdrawal Agreement. This source can then be replaced by the more distinct Future Relationship Agreement(s), which represents the move to traditional public international law-creation and maintenance.

The transition period also providing time for adjustment before EU law ceases to apply to the former Member State. This function may encroach upon the purposes of extension. If the United Kingdom had applied for an early extension for this explicit purpose, the normative problems of numerous extension requests to avoid no deal exit could have been avoided.[611]

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[608] Michael Dougan, 'An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal Status Quo Transitional Regime under Article 50 TEU' (2018) 55 Common Market Law Review 57.
[609] ibid.
[610] ibid 93.
[611] See Federico Fabbrini and Rebecca Schmidt, 'The Extension of UK Membership in the EU : Causes and Consequences' [2019] European Journal of Legal Studies 87.

Despite the transition period forming part of the draft Withdrawal Agreement, the repeated rejections by the House of Commons compelled the Theresa May government to seek extensions in March and April 2019. The only legal conditions for extension are procedural: the unanimous agreement of the European Council heads of state or government, and the agreement of the withdrawing Member State. There is complete discretion for the European Council to decide how long an extension may last. The European Council is also free to determine what conditions may be imposed on the withdrawing Member State, so long as these are in accordance with the Treaties.[612] Fabbrini and Schmidt outline that Article 50(3) 'provides a fairly rudimentary framework and…does not clearly indicate the possible purposes of an extension'.[613] Furthermore, it is 'silent on the substantive regulation of extension'.[614] The only constraints are political. If an extremely long extension were proposed with politically sensitive conditions, it seems likely that the withdrawing Member State would withhold its agreement.

The complete discretion for the European Council concerning extension means that only national citizens who have elected their heads of state or government are represented in the decision. There is no representation of individuals in their role as EU citizens as the European Parliament has no role in the extension decision. The European Parliament may only exercise a political role through expressing its opinion on extension, as it did in its September 2019 resolution on the progress of negotiations.[615] The opaque intergovernmental working method of the European Council means that there is no transparency, no obligation to provide reasons, and no opportunity for scrutiny of this executive decision by national parliaments or the European Parliament.

These deficiencies in input and throughput legitimacy are exacerbated by the output legitimacy implications of extension. The European Council has the unilateral power to decide the time-frame for the application of EU law within a domestic constitutional order, the continuing application of obligations and rights to this state in international law, and the continuation of EU citizenship for individuals holding the nationality of the withdrawing state. The ordinary constitutional mechanisms for these issues are Article 49 and Article 48 TEU.[616] These articles mandate a complex procedure with specific roles for all the EU institutions representing

[612] ibid.
[613] ibid 5.
[614] ibid.
[615] European Parliament resolution of 18 September 2019 on the state of play of the UK's withdrawal from the European Union (2019/2817(RSP).
[616] See Part 1, Section IV, subsubsection iii.

individuals in their multiple roles. It, therefore, seems incongruous that the European Council alone exercises an analogous role under Article 50.

Extension also has the potential to distort the functioning of the EU's constitutional order. Federico Fabbrini and Rebecca Schmidt have identified short-term consequences for the EU arising from the two Brexit extensions in Spring 2019. The second extension to 31 October was subject to the condition that the United Kingdom hold European Parliament elections on 23-25 May. [617] If it did not, the Decision stipulated that the United Kingdom would automatically withdraw on 31 May. The European Parliament had adopted a new decision on the configuration of the European Parliament in 2018 whereby the number of seats was reduced, and the UK's seats were redistributed to other Member States. [618] The consequence of the United Kingdom's participation in the 2019 European Parliament elections was that the fall-back clause had to be employed whereby the configuration for the 2015 election was used.

This meant that the mandate of the 27 MEPs elected to replace the UK MEPs was held in abeyance, and the mandates of the 73 UK MEPs terminated at the point that the treaties ceased to apply on 1 February 2020. This has consequences for the balance between the supranational representative and executive institutions. The Commission is directly approved by the European Parliament. A relationship of accountability and confidence exists with the institution that endows the unelected College of Commissioners with its democratic legitimacy. Fabbrini and Schmidt argue that 'modifying the composition of the EP in the course of the 9th term… would unsettle the inter-institutional relation between the EP and the Commission, potentially affecting the confidence in the Commission itself'.[619]

The termination of the mandate of the UK MEPs also poses problems for the dual-legitimation thesis. The other democratic institutions of the Commission, the European Council, and the Council are constituted through the representation of individuals as nationals of the Member States. This preserves the intergovernmental limb of the supranational constitutional order. By contrast, the European Parliament is elected directly by EU citizens who have the right to vote and stand in elections held in any Member State. This is reflected by Article 50's non-exclusion of representatives elected within the withdrawing Member State in the European Parliament. The logic of the mandate of UK representatives being automatically does not apply as

[617] European Council Decision taken in agreement with the United Kingdom extending the period under Article 50(3)TEU Brussels, 11 April 2019 (OR. en) EUCO XT 20013/19 BXT 38.
[618] European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament [2018] OJ L 165 I/1.
[619] Fabbrini and Schmidt (n 611) 19.

clearly to the European Parliament. A similar issue has been raised in relation to the mandate of the UK Advocate-General at the Court of Justice of the European Union.[620]

The UK's allocation of MEPs is also legitimated by the votes of nationals from other Member States in the United Kingdom who retain their EU citizenship and role as democratic subject. The allocation also consists of MEPs who hold the nationality of other Member States and thus retain their EU citizenship.[621] The text of the European Council decision on the composition of the European Parliament and Article 14(2) TEU potentially clash. Article 2 of the Decision states that 'once the United Kingdom's withdrawal from the Union becomes legally effective, the number of representatives in the European Parliament elected in each Member State shall be the one provided for in paragraph 1 of this Article'.[622] However, Article 14(3) TEU states that '[T]he members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot'.[623] This suggests that MEPs elected in the UK have a right Treaty right to execute a mandate term of five years. Arguably, at the point when the 'Treaties cease to apply' to the United Kingdom, this provision has already been executed and will continue to have its effects until the end of the current legislature in 2024.

The Decision refers to Article 10 TEU, which details that the 'functioning of the Union shall be founded on representative democracy'.[624] Fabbrini and Schmidt argue that the text of the Decision may also undermine this statement. The termination of the mandate of MEPs in the UK who are EU citizens and/or represent EU citizens could undermine the statement that 'every citizen shall have the right to participate in the democratic life of the Union'.[625] These consequences may flow from the framing of withdrawal. The condition for withdrawal being the 'Treaties ceasing to apply' presents a public international law perspective. This neglects the supranational perspective on the constitutional order and its constituent subjects.[626] The absence of any reference to the termination of EU citizenship in the withdrawal clause leads to the ambiguities discussed above. Extension is not only deficient regarding democratic input and the process, and it has deleterious consequences for the functioning of the EU constitutional order.

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620 Benedikt Pirker and others, 'In Support of the EU Rule of Law and Advocate General Eleanor Sharpston – An Open Letter' (*European Law Blog*, 18 March 2020) <https://europeanlawblog.eu/2020/03/18/in-support-of-the-eu-rule-of-law-and-advocate-general-eleanor-sharpston-an-open-letter/> accessed 18 April 2020.
621 TFEU, art 22.
622 European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament [2018] OJ L 165 I/1.
623 TEU, art 14(3).
624 TEU, art 10.
625 TEU, art 10(3).
626 See Part 1, Section II, subsection iii.

The ultimate cause of these distortions is the emergency situation that is created by the deadline of 2 years.

The deadline also distorted constitutional processes at the domestic level within the United Kingdom. The two-year period insulated the parliamentarians who voted for the notification of Article 50 from the immediate consequences of this action.[627] This provided full discretion to the government to negotiate and finalise the Withdrawal Agreement. As the 29 March deadline drew nearer, the House of Commons inserted a 'meaningful vote' condition for ratification of the Agreement.[628] The three rejections by the House of Commons of the eventual draft Withdrawal Agreement starkly contrasted the overwhelming majority for notification in 2017. As the deadline of a no deal withdrawal approaches, the usual constitutional proceedings are distorted by the temporal emergency artificially constructed by Article 50(3). These distortions included innovations such as the House of Commons taking control of the executive's role of proposing legislation to create the Act of Parliament that requested an extension of membership.[629] Constitutional orthodoxy was only restored by the usual channels of a General Election in December 2019. These phenomena arguably undermine the objective of Article 50 TEU to vindicate the sovereign right of the Member State. The original purpose of the two-year period to prevent a Member State's withdrawal being delayed had unintended negative consequences in the domestic order.

The cliff-edge of automatic withdrawal without an agreement exposes a disequilibrium between the two objectives of Article 50. All EU law ceasing to apply to and within the withdrawing Member State means that democratic sovereign decision obviates the orderly regulation of disintegration. The legal vacuum and political emergency that this creates would require the extensive exercise of executive power to maintain order. In the UK, extensive use of delegated legislation to cope with no deal contingencies, along with the possible use of the powers contained within the Civil Contingencies Act 2004 were mooted.[630] The principles of accountability and proper legislative scrutiny are restricted through the time-pressure on the legal regulation needing to come into force. The Commission's no deal Brexit communication of 4 September states that '[t]he Commission calls on the co-legislators to ensure the swift adoption of

[627] European Union (Notification of Withdrawal) Act 2017.
[628] European Union (Withdrawal) Act 2018 s 13.
[629] European Union (Withdrawal) (No.2) Act 2019.
[630] Civil Contingencies Act 2004.

the proposed legislative acts so that, where necessary, they are in force by the date of the withdrawal of the United Kingdom.'[631]

No deal withdrawal may be an existential threat to the values of the European Union,[632] and its commitment to promote these values in external relations.[633] The operation of Article 50(3) could lead to dire consequences for a state and for individuals that have only just ceased to be constituent partners in European integration.[634] No deal undermines the functional potential to secure an orderly withdrawal. The extreme consequences mean that on three separate occasions both the United Kingdom and the European Union were unwilling to countenance this scenario. This has led to repeated requests and grants of extensions, as discussed above. The cliff-edge of no deal in concert with the potential for extension restricts the likelihood of orderly withdrawal through a Withdrawal Agreement coming into force. Contestation over domestic ratification in the UK led to extension, which in turn incentivised attempts to revise the agreement and new contestation and extension requests in a vicious cycle.

By contrast to the detailed procedure to conclude a Withdrawal Agreement, there is no procedure for what happens in a no deal scenario and no provision is made for the role of the supranational institutions. This is a particular vacuum with for legal orderliness as there is no adjudicative forum for the resolution of disputes. Although the EU would probably insist on the jurisdiction of the Court of Justice in a no deal scenario, the United Kingdom would not be bound to recognise this jurisdiction. If no alternative dispute resolution can be agreed, the final forum which might be called upon to resolve issues such as the UK's financial obligations to the EU could be the International Court of Justice. This threatens the EU's self-understanding of autonomy as precluding any other body from ruling upon the interpretation and application of EU law. Reform should seek to ameliorate the dire consequences of no deal withdrawal for individuals by addressing this procedural lacuna.

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[631] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank Finalising preparations for the withdrawal of the United Kingdom from the European Union on 1 November 2019 Brussels, 4.9.2019 COM(2019) 394 final.

[632] TEU, art 2.

[633] TEU, art 21.

[634] 'Operation Yellowhammer HMG Reasonable Worst Case Planning Assumptions As of 2 August 2019' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831199/20190802_Latest_Yellowhammer_Planning_assumptions_CDL.pdf> accessed 5 May 2020; 'No Deal Brexit: Issues, Impact, Implications' (UK in a Changing Europe 2019) <https://ukandeu.ac.uk/research-papers/no-deal-brexit-issues-impact-implications/> accessed 18 April 2020.

Article 50(5) TEU states that '[i]f a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.'[635] This guarantees the complete levelling-down of constituent power from the supranational level to the national level. Article 50(3)'s confirmation that the 'Treaties cease to apply' to the withdrawing Member State is not merely a statement that the Member State and its constituent individuals cease to function as juridical objects of EU law. It also confirms the extinction of the Member State's and its nationals' status as constituent subjects of the supranational constitutional order. The reference to the levelling-up limb of the triptych, Article 49 TEU, confirms that a withdrawn Member State reverts to the status of a Third Country that is entitled to apply for accession as a European state. Proposals forwarded by Markus Patberg and Peter Niesen to reform this guarantee of the levelling-down of constituent power will be considered in Part Four.[636]

Reactivation of membership requires the full constitutional process for levelling-up of constituent power, and the approval of this process at the supranational level. This has implications for the hard case of the EU membership of regions of Member States that secede and become independent European states.[637] If secession occurs outside of the frame of withdrawal, the Article 48 amendment process can be utilised to enable continuing membership of the independent state, so long as this mechanism is created before independence is finalised.[638] Revisionary constituent power could even be used to construct such an inheritance mechanism if secession occurs during the withdrawal of a Member State. Both of these situations are legitimate as the constituent subjects of the seceding state will hold EU citizenship through nationality of the existing Member State.

However, after the Treaties cease to apply in accordance with Article 50(3) TEU, the extinction of Member State nationality and EU citizenship in conjunction with Article 50(5) TEU means that the membership of an independent state after a future secessions would require re-

[635] TEU, art 49.

[636] Patberg, 'Can Disintegration Be Democratic?' (n 8); Markus Patberg and Peter Niesen, 'After Brexit, the UK Should Have a Democratic Right of Return' (*LSE BREXIT*, 30 October 2018) <https://blogs.lse.ac.uk/brexit/2018/10/30/after-brexit-the-uk-should-be-able-to-re-enter-the-eu-if-it-wishes-to-do-so/> accessed 24 January 2020.

[637] For further consideration of the inter-relation between Member State withdrawal and state secession see Closa, *Secession from a Member State and Withdrawal from the European Union* (n 14).

[638] St Andrew's House Scottish Government, 'Scotland's Future' (26 November 2013) <https://www.webarchive.org.uk/wayback/archive/20170701074158oe_/http://www.gov.scot/Publications/2013/11/9348> accessed 24 January 2020.

accession to the European Union through the normal constitutional procedure for levelling-up constituent power contained within Article 49 TEU.

IV. Summary

Withdrawal from the European Union was regulated by the international law of treaties before the 2003 Convention on the Future of Europe. The rejected Constitutional Treaty proposed a specific constitutional clause to regulate disintegration through Member State withdrawal. Proposed amendments to the clause revealed the opinions of certain Convention members that a withdrawal clause was constitutionally inappropriate. Statements made by the drafters suggest that the clause was promulgated for the strategic purpose of reassuring recalcitrant Member States. The triggering of Article 50 TEU has required the Court of Justice to delineate the dual telos of the withdrawal clause. Article 50 enshrines a sovereign right of withdrawal whilst ensuring an orderly process. The text and telos of Article 50 TEU reflect a predominantly international rather than supranational perspective.

The clauses of the withdrawal clause are conceptualised as a deconstitutional convention. The first example of the operation of Article 50 has arisen with the Brexit case study. Article 50(1) TEU mandates a domestic constitutional decision by the nationals of a Member State to repatriate constituent power. The under-determination of the 'constitutional requirements' of the United Kingdom has prompted litigation to resolve legal uncertainty. The *Shindler* decision established that the franchise for the membership referendum was a sovereign prerogative of the United Kingdom legislature. *Miller* confirmed that an Act of Parliament is necessary as a constitutional requirement for the decision. *Webster* elided the legal effect and consequences of decision and notification under Article 50(2). Article 50(2) TEU functions as a bridge between the national deconstructive decision and the supranational deconstitutional convention. The *Wightman* judgment established that the foundation for the deconstitutional convention is the sovereign will of the withdrawing Member State. The Article 50 process can be extinguished by a unilateral revocation in accordance with the constitutional requirements of the withdrawing Member State.

Article 50(2) and (4) TEU define the conditions for initiating the supranational deconstitutional convention. The roles of the institutions representing Member State nationals and EU citizens are defined as are the rules determining decision-making. The European Council's guidelines for the negotiations defined the procedure and substantive issues that shaped negotiations. Article 50(3) TEU defines the *finalité* of the deconstitutional convention. The EU

Treaties ceased to apply to the United Kingdom on 31 January 2020 after the Withdrawal Agreement came into force. This Withdrawal Agreement confirmed the extinction of the constituent status of United Kingdom nationals, and the transformation of the status of EU citizens within the territory of the United Kingdom. The peculiarities of the United Kingdom and Ireland's relationship required a Protocol to define a special regime on the island of Ireland. The Withdrawal Agreement also created a transition period that overlaps in telos with the mechanisms of extension of the Article 50 period. The three extensions agreed upon by the United Kingdom and the European Union exposed the extensive discretion for the European Council to determine the continuing application of EU law to and within a withdrawing Member State. The residual condition for withdrawal is the expiry of the two-year period without an agreement. Preparations for this eventuality in the Brexit case study indicate the deleterious consequences of this outcome. Article 50(5) confirms the extinction of supranational constituent power as a result of withdrawal. A former Member State is subject to the full requirements of Article 49 TEU in order to re-establish the levelling-up of constituent power to the supranational level.

3. Opt-Outs – Reservation of Constituent Power and Disrupted Integration

I. Overview and Normative Foundations

i. Overview of argument

This Part of the thesis analyses the phenomenon of disrupted integration contained within the legal Protocols enabling Member State opt-outs. Subsection ii below lays the normative foundations of differentiation. This considers the legal acceptability of the practice of opt-outs, the normative justifications advanced for the practice, and the potential conditions of legitimacy for disrupted integration.

Section II explicates the legal form and operation of the opt-out Protocols that have resulted from disruption. The constitutional sectors in which at least two of the Member States have opt-outs are Economic and Monetary Union, the Schengen *acquis*, and the Area of Freedom, Security and Justice (AFSJ). This compares the different methods of operation of Protocol (No 15), (No 16), (No 17), (No 19), (No 20), (No 21), (No 22), and (No 36). The overall theme is the increasing juridical detail of these devices. The development has also witnessed the spill-over of executive choice of the High Contracting Party amendment procedures into the ordinary legislative practice. Section II, subsection iv concludes with an analysis of the practice and normative justifications for the United Kingdom's practice of flexible opt-ins to EU legislation.

Section III delineates the origins and developments of the current opt-outs. This narrative is intertwined with the numerous Treaty amendments adopted between 1987 and 2009. The United Kingdom, Ireland, and the Kingdom of Denmark have reserved constituent power to create Protocols addended to the Treaties that disapply the validity of EU law norms. As the Member State that has opted-out from all three of these sectors, and the only Member State that has also pursued disintegration, the narrative will focus upon the United Kingdom. Analysis of Ireland's opt-outs from Schengen and AFSJ, and Denmark's opt-outs from Schengen and EMU, will be utilised to complement this narrative. The historical case of the United Kingdom's Social

Policy opt-out demonstrates that opt-outs can be reversed. The 'quasi' opt-out from the Charter of Fundamental Rights illustrates the threshold for a Protocol to disapply EU law rather than merely clarify its operation. This section will summarise the reasons advanced by Member State representatives as to why they have chosen not to level-up constituent power in certain areas. The section concludes with consideration of the 'New Settlement for the United Kingdom' as a new paradigm for the creation of opt-outs.

The origins and development of these opt-outs show that the driving logic is not the necessity to preserve equality between the democratic subjects of the supranational order on the basis of the precept to 'treat different cases differently'. Instead, the opt-outs have been driven by executive attempts to secure state interests and preferences at Treaty amendments. The overview will also consider whether Member State actors have been unwilling or unable to level-up constituent power because of the constraints of the national constitutional order.

ii. The normative foundations of differentiation

The theoretical framework of levelling-down constituent power does not apply as clearly to opt-outs as withdrawal. Opt-outs are not created through a single constitutional clause. Instead, they arise from the reservation of constituent power at Treaty amendments under Article 48 TEU. Nevertheless, the consequences of opt-outs are comparable to withdrawal as individuals of the opt-out Member State will not participate in the creation of norms *qua* nationals, and these norms will not apply to EU citizens *qua* juridical objects in this territory. Rather than disintegration, opt-outs are an example of disrupted integration. Protocols to the Treaties enable this non-uniform application of EU law. The opportunity for disrupted integration derives from the extensive authority retained by the High Contracting Parties. The states unravel and rework the constitutional fabric of the European Union during amendment.

This legal form distinguishes opt-outs and disrupted integration from the differentiated integration that occurs through enhanced cooperation.[639] Article 20 TEU and Articles 329-344 TFEU ensure that enhanced cooperation is subject to conditions established by the supranational constitutional order with specific roles for the representative institutions. The Court of Justice

[639] See *inter alia* Daniel Thym, ''United in Diversity' — The Integration of Enhanced Cooperation into the European Constitutional Order', *The Unity of the European Constitution* (Springer, Berlin, Heidelberg 2006); Sebastian Zeitzmann, 'A Rather Strange Animal, This 'Enhanced Cooperation' – May It Serve as King of the European Zoonion? Or: Is Enhanced Cooperation Anywhere Near a Constitutional Principle?' in Thomas Giegerich, Desirée C Schmitt and Sebastian Zeitzmann (eds), *Flexibility in the EU and Beyond: How Much Differentiation Can European Integration Bear?* (Nomos/Hart 2017).

remains the final arbiter of the constitutionality of such differentiated measures.[640] Opt-outs are subject to no such constitutional safeguards for individuals *qua* democratic subjects and *qua* juridical objects.

If individuals are from a Member State which has an opt-out then they are not represented by their national Ministers in the norm-creation process in this area, although they are represented *qua* EU citizen by Members of the European Parliament. This undermines the co-determination of norms by individuals relying equally upon the statuses of nationality and EU citizenship. The consequences for individuals *qua* juridical objects are that, if they are a national of an opt-out Member State, they are unable to reply upon or be subject to norms created in this area within the territory of the opt-out state. This is particularly egregious for individuals from Member States that do not opt-out, as they have legitimated these norms in both their role as Member State national and EU citizens.

Divergences in the democratic self-determination and juridical self-fulfilment of individuals arise on the basis of their nationality. Inequality is not based upon the perception and construction of 'objective' differences between Member States. Instead, inequality derives from the executive discretion of the representatives of individuals *qua* nationals. These consequences may be regarded as illegitimate because individuals in their dual roles have not consented to an explicit Treaty mechanism to regulate Member States reserving the levelling-up of constituent power.[641] From the supranational perspective, the normative desiderata is that Member State should only pursue opt-outs if the self-actualisation of individuals *qua* Member State nationals is compromised by the levelling-up of constituent power in certain areas of norm-creation. This normative critique provides a bridge towards the reform proposals for how the reservation of constituent power could be brought within the triptych of constituent power, and how the existence of such opt-outs could be subjected to conditions established within the supranational constitutional order.

As opposed to the focus on explaining differentiation within political science literature,[642] legal literature has been more explicitly normative. The focus has been on whether the creation of

[640] For example see Case C-274/11 *Spain and Italy v Council* [2013] ECLI:EU:C:2013:240.
[641] See Part 4, section III, subsection i for a reform proposal to create such a Treaty mechanism.
[642] See inter alia Alexander Stubb, 'A Categorization of Differentiated Integration' (1996) 34 JCMS: Journal of Common Market Studies 283; Alkuin Kölliker, *Flexibility and European Unification: The Logic of Differentiated Integration* (Rowman & Littlefield 2006); Dirk Leuffen, Berthold Rittberger and Frank Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave 2012); Frank Schimmelfennig and Thomas Winzen, *Ever Looser Union?: Differentiated European Integration* (Oxford University Press 2020).

opt-out mechanisms is constitutionally acceptable as well as legally feasible.[643] The disquiet over opt-outs concerns the essential characteristics of EU law as established by the Court of Justice of the European Union. This indicates a focus upon distortions in the capability for all individuals *qua* EU citizens to rely upon EU law norms in the pursuit of their life-plans without variation. The capacity for Member States to determine which norms will apply in their legal orders challenges the ideal of a uniform and autonomous juridical constitution.

The critical strain in the literature immediately followed the creation of the opt-out Protocols at the Maastricht Treaty. Deirdre Curtin warned of the implications of it 'being possible for an individual Member State to plead and obtain a 'ring-fence' of unlimited duration around, inter alia, specific national constitutional provisions'.[644] This critical strain continued in reaction to the development of the opt-out Protocols at the subsequent Treaty amendments.[645] Daniel Thym bridges the explanatory political science perspective and the normative perspective from legal scholarship. He explicates the dominant conceptual ideal types of differentiation: 'multi-speed Europe', 'Federal core Europe', and 'flexibility *à la carte*'.[646]

Constituent power being split with the derivative, yet autonomous subject of EU citizen informs which conception of differentiated integration is compatible with this the dual-constituent thesis. The '*à la carte*' conception of European integration and differentiation, whereby Member State executives should be free to choose their participation in the *acquis communautaire* on the basis of their conception of the national interest, undermines the constituent role of EU citizenship. Similarly, a 'multi-level' or 'core' Europe conception of permanently differentiated membership and participation on a 'club' basis undermines the underpinning equality of individuals *qua* EU citizens This conception precludes future generations of EU citizens from participation in further European integration due to a decision made in one moment of time whether to join the core Europe or not. The United Kingdom's proposed opt-outs from 'ever closer union' during the February 2016 renegotiation fall within the auspices of this normative concern.

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643 Bruno De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (European University Institute 2019) Working Paper EUI RSCAS, 2019/47 <http://cadmus.eui.eu//handle/1814/63604> accessed 26 April 2020.
644 Curtin (n 262) 49.
645 Patrick Twomey and David O'Keefe, *Legal Issues of the Amsterdam Treaty* (Bloomsbury 1999); Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000); Bruno De Witte, Dominik Hanf and Ellen Vos, *The Many Faces of Differentiation in EU Law* (Intersentia 2001); Bruno De Witte, Andrea Ott and Ellen Vos, *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017).
646 Daniel Thym, 'Competing Models for Understanding Differentiated Integration' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017).

The only legitimate model of differentiation within the dual-constituent thesis is 'multi-speed' Europe. Differentiation may only be legitimate as a means to establish a vanguard of constituent subject nationals who are willing and able to level up more constituent power to the European level. The choice should remain open to other constituent subjects to follow suit at a time when they themselves are willing and able to transfer this power. This conception does not preclude the capacity of all individuals to participate in further integration as EU citizens, but instead limits it to conditions which are set clearly by the supranational constitutional order. The conditions to determine the willingness and capacity for levelling-up constituent power become crucial within this conception.

Permanently differentiated membership in a core Europe would permanently undermine equality amongst individuals *qua* EU citizens. Unconditional discretion for Member State executives to choose participation on the basis of national interests would iteratively undermine EU citizenship as a constituent status. The dual-constituent thesis leans towards 'multi-speed Europe' as the only legitimate model for differentiation. When applied to opt-outs as a reservation of constituent power, the argument is that disrupted integration is only legitimate as a temporary deferral of levelling-up constituent power rather than a permanent reservation. Opt-outs may be created on the basis of strict conditions to vindicate the self-determination of individuals *qua* nationals. The purpose of restoring convergence if feasible is necessary to prevent a permanent cleavage in the supranational constituent status.

Thym states that '[d]ifferentiated integration may stabilise the rule of law by accommodating internal tensions and heterogeneities, while it may, at the same time, undermine the infrastructure of the European project'.[647] The accommodation of internal tensions and heterogeneity vindicates the inherent differences in the constituent role of nationality of a Member State. Such accommodation may create cleavages in the co-equal constituent status of citizenship of the Union. A balance must be found for the legitimate provision of differentiation that vindicates both constituent roles. This balance informs the normative conditions legitimating the creation of opt-outs.

Bruno de Witte provides an overview of the legal parameters within which opt-outs must operate.[648] Law plays the double role of providing the tools to translate political will into binding form, but also sets the constraints on that political action.[649] The specific characteristics of the

[647] ibid 28–29.
[648] Bruno De Witte, 'The Legal Feasibility and Constitutional Acceptability of Differentiated Integration' (Kick-off Meeting H2020 Project InDivEU Integrating Difference in the European Union, European University Institute, 24 January 2019); De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (n 643).
[649] De Witte, 'The Legal Feasibility and Constitutional Acceptability of Differentiated Integration' (n 648).

Union's juridical system also, however, provide the constraints upon how far the law may be used as a tool to achieve these political goals. De Witte argues that three concepts of the EU legal order achieve this constraining function: (1) hierarchy through primary law prevailing over secondary law, which remains most relevant to enhanced cooperation; (2) primacy of EU law over national law; and (3) autonomy whereby the EU legal order may not be eroded by external agreements. The Protocols addended to the Treaties enshrine the political will of Member States to reserve constituent power. This context means that the principles of EU law function only to constrain the operation of the Protocols rather than their creation. These constraints are evident in the cases preventing divergent understandings of the scope of the United Kingdom's Area of Freedom, Security and Justice opt-out.[650]

De Witte expresses further constraints upon opt-outs as 'things that may be formally possible but would affect the integrity of the EU constitutional system'.[651] Differentiated and disrupted integration could regress the European Union to a more primitive state. This would have deleterious effects for the standards of democracy and accountability, and the representation of individuals by the supranational institutions.[652] The acceptance of opt-outs suggests that it is more conducive to the integrity of the EU legal order for a Member State to be exempt from the application of EU law norms than the situation in which EU law is formally adopted but not enforced in practice. Legitimate derogation prevents illegitimate breaches and primacy challenges.[653] Historically the United Kingdom pursued formal opt-outs and treaty declarations amidst concern over breaching EU law by not applying measures relating to the elimination of border controls.[654]

This question arises as to whether legal constraints require particular sectors to be insulated from the possibility of opt-outs. The key characteristics of what Tuori calls the 'framing' juridical and political constitutions may be regarded as fault-lines.[655] De Witte corroborates this precept with the argument that there should be no differentiation on values contained in Article 2 TEU, fundamental rights, nor on the rule of law.[656] This explains why formal opt-outs from the Charter of Fundamental Rights, as opposed to declarative clarifications, would not have been constitutionally acceptable.[657] A sacrosanct constitutional space is demarcated within which

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[650] See Section III, subsection vi, subsubsection C.
[651] De Witte, 'The Legal Feasibility and Constitutional Acceptability of Differentiated Integration' (n 648).
[652] ibid.
[653] See discussion of primacy challenges in Part 1, Section II, subsection iii.
[654] See Section III, subsection iii, subsubsection A.
[655] Tuori, *European Constitutionalism* (n 19).
[656] De Witte, 'The Legal Feasibility and Constitutional Acceptability of Differentiated Integration' (n 648).
[657] See Section III, subsection i.

fundamental structural principles and values cannot be the subject of Member State opt-outs. This is justified because these values and principles enable individuals to function as the democratic subjects and juridical objects of the supranational constitutional order.[658] The United Kingdom's attempts to renegotiate its commitment to ever closer union among the peoples of Europe challenged this demarcation. The New Settlement declared that 'The United Kingdom… is not committed to further political integration into the European Union'.[659] This may have jeopardised the Member State's commitment to vindicate democratic subjecthood in the supranational constitutional order.

Any similar fault-lines within the EU's substantive policies would establish further constraints on opt-outs. The implication is that differentiation is less acceptable in the Union's 'core' policies.[660] No *de jure* distinction has been drawn between core and peripheral policies. A *de facto* distinction may be inferred from constitutional practice. Procedurally, 'core' policies may be indicated by treaty bases with an amplified role for the supranational institutions through Qualified Majority Voting. The policies in which Member State unanimity is required may indicate more peripheral supranational policies. The United Kingdom's renegotiation of membership pushed the limits of substantive core policies. The original proposal to seek concessions on free movement of people were rejected on the basis that they would not be acceptable to the European Council.[661] This accords with de Búrca conceptualisation of the Single Market as the 'core' of the EU legal order,[662] and Floris de Witte's argument that free movement is the 'core' of EU citizenship as a juridical status.[663]

The *de facto* core and periphery thesis on the basis of norm-creation rules is supported by the Schengen and Area of Freedom, Security and Justice opt-outs. These sectors were formerly Third Pillar policies in which Member States retained more autonomy.[664] A pathway dependence led to the creation of opt-outs as policies were supranationalised. This analysis is challenged by the Economic and Monetary Union opt-outs. This is the most highly centralised core policy with extensive executive roles for the European Central Bank and the Commission. The validity of the core-periphery analysis may therefore be limited to the incorporation origin of opt-outs. Pathway

[658] See Part 1, Section III.
[659] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16 16.
[660] Gráinne De Búrca, 'Differentiation within the Core: The Case of the Internal Market' in Gráinne De Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000).
[661] See Section III, subsection vi, subsubsection A.
[662] De Búrca (n 660).
[663] De Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship' (n 164).
[664] See detailed explanation in Section III, subsection iv, subsubsection A.

dependence is not applicable to the creation of constitutional sectors *de novo*. Substantively, the core-periphery argument is challenged by the intimate connection between the Schengen *acquis* and free movement as a benefit for individuals *qua* juridical objects. This also holds for the Area of Freedom, Security and Justice insofar as these norms concern significant issues such as access to justice and the migration rights of Third-Country Nationals.

The core-periphery dynamic may be a more appropriate explanation and justification from the perspective of national constitutional orders. The perspective and reasoning of national executive actors rather than supranational actors drive the creation of opt-outs. One may consider whether the national sectoral policies that are levelled up to the supranational level and excluded from exclusive national competence are sufficiently sensitive to justify a demand for opt-outs. Leuffen, Ritberger, and Schimmelfennig argue that differentiation has increased as European integration has moved into more politically and socially sensitive areas.[665] Jachtenfuchs and Genschel claim that differentiation increases when integration moves into areas regarded as 'core state powers'. These powers concern the twin monopolies over force and taxation and have high visibility and high symbolic value.[666]

Within the dual-constituent thesis, core state powers are the constitutional sectors that are most relevant for the exercise of self-determination by individuals *qua* Member State nationals. As Jachtenfuchs and Genschel indicate, these areas are crucial because they are constitutive of the state.[667] Within Habermas' explication of the dual-constituent thesis, the state's operation as the guarantor of the hitherto achieved levels of freedom and security is the *raison d'être* for the retention of nationality as a constituent status.[668] Supranational attempts to level-up these areas are most likely to generate resistance. The normative task is to scrutinise the validity of these self-determinative claims.

A. Normative justifications for opt-outs

A synthesis of pre-existing normative justifications can be used to establish a model of legitimate opt-outs. Bellamy and Kröger identify normative justifications within the schemata of

665 Leuffen, Rittberger and Schimmelfennig (n 642).
666 Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press 2013)..
667 ibid.
668 See Part 1, Section IV, subsection i.

institutional, constitutional, and legislative differentiation.[669] The third category is inapplicable to opt-outs as primary law. Schimmelfennig and Winzen provide a similar distinction between institutional and constitutional differentiation.[670] Institutional differentiated integration for Bellamy and Kröger involves 'opt-outs or exclusions from participating in policies designed to produce collective goods at the EU level'.[671] Constitutional differentiated integration involves 'an opt-out from a given policy or measure because it conflicts with a domestic constitutional norm or cultural practice'.[672] Schimmelfennig and Winzen contend that institutional differentiation is 'motivated by efficiency and distributional concerns'[673] whereas constitutional differentiation is 'motivated by concerns about national sovereignty and identity'.[674] These authors also identity different origins for the two forms of differentiation. Whereas institutional differentiation arises at times of enlargement, constitutional differentiation emerges at times of Treaty revision.

Opt-outs have arisen exclusively at Treaty amendments. They may equally be motivated by the desire not to participate in certain collective policies on the basis of efficiency concerns as by concerns for sovereignty and national identity. The reasons for their creation encompass both institutional and constitutional logic. From the perspective of the dual-constituent thesis and normative justification, constitutional differentiation provides the most compelling fit. Issues of 'national sovereignty', 'identity', and 'domestic constitutional norms' identified by Bellamy and Kröger and Schimmelfennig and Winzen are directly related to the exercise of self-determination by individuals in their role as nationals of a Member States. The consideration of normative justifications and limitations upon the creation of opt-outs will be considered through this lens.

Bellamy and Kröger identify the democratic grounds of fairness, impartiality, and equity as benchmarks for assessing legitimacy in a homogenous polity. These principles may be regarded as the desiderata for the legitimate functioning for a constituent status. In a heterogeneous, composite, and dual-constituted polity such as the European Union these grounds are augmented. This is because of the proportionality, partiality, and difference problems: 'the proportionality problem […] can justify excluding, temporarily or permanently, some member states from participation in certain club goods…the partiality problem…allows for those who conceive of themselves as a distinct public with divergent public norms to make their own decisions as to what collective goods

[669] Richard Bellamy and Sandra Kröger, 'A Demoicratic Justification of Differentiated Integration in a Heterogeneous EU' (2017) 39 Journal of European Integration 625.
[670] Frank Schimmelfennig and Thomas Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) 52 JCMS: Journal of Common Market Studies 354.
[671] Bellamy and Kröger (n 669).
[672] ibid.
[673] Schimmelfennig and Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (n 670).
[674] ibid.

they should support…the difference problem suggests that when groups with different interests and values belong to a club, then collective rules need to accommodate these differences to some degree'.[675] Bellamy and Kröger outline how these problems can justify the pursuit of opt-outs by Member States. They define the effects of opt-outs as 'an asymmetric retention of power by certain Member States in matters that most countries agree can be EU competences.[676]

Through the dual-constituent lens, the partiality and the difference problems are the most relevant issues. The persistence of diverse publics with divergent public norms and different conceptions of the telos of constitutionalism arises through the retention of the constituent status and orders generated through nationality of the Member States. The Member State executives and legislatures retain an obligation to preserve these divergent partialities in the representation of their nationals. The differences in interests and values justify collective rules allowing differentiation as a means to ensure that the constituent status of nationality is not subsumed by the constituent status of EU citizenship. This is recognised by Bellamy and Kröger: 'So far as the Treaty-making and accession processes are concerned, the EU remains a union of Member States and their peoples rather than straightforwardly of European citizens'.[677] This is factually correct and highlights how the conditions for the creation of unilateral opt-outs arises. Normatively, it raises the question of whether the Treaty-making and accession processes are deficient in ensuring the representation of individuals in their dual-roles.[678]

The proportionality problem arises through objective differences in 'population size, varieties of capitalism, economic specialisation and wealth…leading to different stakes'.[679] These characteristics indicate a characteristic for assessing the legitimacy of opt-outs: 'objective' differences in the material constitution of each state leading to distinct relationships between the demoi of the Member States and the telos of European integration. Regarding instrumental differentiation, these differences are not utilised as a justification for why a Member State may be constrained from participation. Instead, the differences are utilised to forward divergent bargaining preferences through the logic of economic utility. Hence the claim that 'it becomes rational to employ instrumental forms of DI that reduce the club involved in producing a given collective good to a smaller group than the whole so as to overcome the proportionality problem'.[680] Bellamy and Kröger point towards a normative limit to instrumental forms of derogation: 'an injustice

[675] Bellamy and Kröger (n 669).
[676] ibid.
[677] ibid.
[678] See discussion in Part 4, Section II.
[679] Bellamy and Kröger (n 669).
[680] ibid.

might be thought to be committed where the stake an excluded country has in a collective arrangement is greater than those that are included'.[681] This raises the possibility of a role for either national or supranational institutions to make an objective assessment of the stake of each Member State

The intergovernmental analysis of European integration tends to neglect individuals as subjects of the supranational constitutional order. Such justifications for the pursuit of opt-outs may only be justified if coupled with 'constructivist' arguments. These arguments hold not only that it may be rational for the welfare of the nationals of that Member State to pursue such a policy, but also that a retention of national competence is crucial for the exercise of self-determination of the collective as nationals.[682] The UK's opt-out from EMU is such an example: economic rationality arguments and constructivist identity and sovereignty arguments coalesced.[683] It is problematic to argue for a multi-speed Europe of those who are willing because this creates divergences between individuals *qua* EU citizens on the basis on the basis of instrumental concerns.

The issues surrounding the interests of individuals *qua* Member State nationals emerge more clearly in the partiality problem. Bellamy and Kröger recognise that since Maastricht the Treaties have recognised constitutional differentiation to address the partiality problem. The rationale forwarded by Bellamy and Kröger provides a compelling fit with the dual-constituent thesis: 'the different demoi of the Member States have already developed their own constitutional and juridical orders that reflect the distinctive and diverse public cultures of their citizens. As a result, impartiality in the application of constitutional norms may not be possible at the EU level. Even if all the Member States endorse broadly the same set of rights and democratic principles, they may have legitimately different views about their scope and relative weighing with regard to both each other and other important values and interests that reflect valid cultural differences'.[684]

This goes to the heart of the hypothetical process of 'levelling up' of constituent power explicated by Markus Patberg. The partialities arise from the diverse manners in which the constitutional orders of the Member States manifest the principles for constitutional politics at the first 'intra-demos' step.[685] These divergences continue to inform the interaction between the polities of these Member States even beyond the mutual recognition of the necessary preconditions to construct EU citizenship for themselves at the 'across-demoi' stage.[686] The crucial

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[681] ibid.
[682] Leuffen, Rittberger and Schimmelfennig (n 642).
[683] See discussion in Section III, subsection iv, subsubsection B.
[684] Bellamy and Kröger (n 669).
[685] See Part 1, Section IV, subsection ii, subsubsection A.
[686] See Part 1, Section IV, subsection ii, subsubsection C.

question is whether it is legitimate for these divergences to continue after the construction of the supranational order. Should Member States be able to evoke distinct constitutional identities to justify opt-outs from the *acquis communautaire*?

One view is that the 'levelling down' of constituent power provided by Article 50 TEU should displace any other forms of contestation once levelling up has occurred.[687] A more nuanced view holds that, in order to avoid this nuclear option, a graduated response to such claims can be envisaged. The conception of treaty amendments as part of a triptych of constituted constituent power legitimates these challenges: Article 48 TEU provides for a reconstruction of the supranational constitutional order in which the principles of levelling-up are reactivated.[688] This provides procedural legitimacy for Member State executives to revive the partiality problem. These national interests should lay dormant during the ordinary constitutional functioning of the Union as Member State executives act as supranational legislators.[689] The national divergences could legitimate opt-outs on the basis that the levelling-up of constituent power would undermine the self-determination of nationals, but not to the extent that continuing participation in supranational constitutional politics is untenable. Justifications for opt-outs may be constructed between the two extremes of homogeneity and disintegration. Bellamy and Kröger echo legal commentators[690] in establishing juristic limitations on this process: 'basic rights if not EU law can limit how much constitutional differentiation is justifiable'.[691]

Bellamy and Kröger discuss the difference principle in relation to legislative differentiation. 'The formulation of specific EU secondary law has allowed for flexibility that acknowledges the need on grounds of equity to recognise relevant differences'.[692] These differences are also relevant to the demand for opt-outs at Treaty revisions. The differences that inform legislative differentiation involve both economic and social factors that inform the proportionality problem and constitutional differences concerning the partiality problem. The authors utilise Aristotle's equitable maxim that one should treat like cases alike, and unalike cases differently: 'a difficulty arises in deciding when a difference is relevant or not with regard to the policy at hand'.[693] Bellamy and Kröger label this difficulty the difference problem. The initial question is whether the Member States should have to advance relevant differences to justify opt-outs. If so, the next question is

[687] See Part 2.
[688] See Part 1, Section IV, subsection iii.
[689] This is why the United Kingdom's and Ireland's opt-out from the Area of Freedom, Security and Justice is normatively egregious. See Part 4, Section I, subsection A.
[690] See subsubsection A above.
[691] Bellamy and Kröger (n 669).
[692] ibid.
[693] ibid.

how to establish the barometer of relevance. The final question is what institutions should be given the competence to make such a decision.[694] The authors conclude their own normative survey with a principled argument for differentiation. A constitutional order that 'addresses the problems by sharing the costs and benefits of differential treatment reciprocally…will only operate in a fair and impartial manner that respects difference to the extent the proportionality and partiality problems are taken into account'.[695]

Bellamy and Kröger's most recent statement on the normative justifications for differentiated integration intersects more closely with the dual-constituent thesis.[696] The objectives of excavating the philosophical foundations of differentiated integration are to develop an account of input (procedural) and output (substantive) legitimacy of participation in a fair scheme of co-operation. These dimensions cohere specifically to the dual role played by individuals as democratic subjects and juridical objects respectively. The objective is to establish the conditions in which the three models of differentiation – multi-speed Europe, variable geometry, and Europe *à la carte* – could be justified.[697] The authors claim that the justifications for differentiation, and thus opt-outs, vary depending on the model of EU integration theory.

The authors identify two possible constituent subjects and corresponding models: (1) states (statism); (2) citizens (cosmopolitanism). The statist model holds that, in terms of procedural or input legitimacy, if the creation of opt-outs involves the elected representatives of the states it is acceptable. With regard to substantive or output legitimacy, opt-outs are legitimate so long as they are Pareto optimal, address morally obligatory global goods and respect human rights. The cosmopolitan model emphasises that opt-outs will be procedurally fair so long as their creation involves the elected representatives of individuals *qua* EU citizens. Substantively, they are legitimate so long as they promote equality among all individuals.[698]

The conceptions of legitimacy depend on the theoretical approach adopted, a key component of which is identifying different actors as the constituent power. This poses a challenge for the augmented approach to the dual-constituent thesis. This recognises that the legitimacy of the EU's legislative process is shared between individuals as nationals of their state and citizens of the EU. However, the explanatory validity of mixed constituent power is challenged by the primacy

[694] See Part 4, Section III, subsection i for engagement with these questions.
[695] Bellamy and Kröger (n 669).
[696] Richard Bellamy and Sandra Kröger, 'Differentiated Integration as a Fair Scheme of Cooperation' (European University Institute 2019) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2019/27.
[697] See also Thym (n 799) in which 'core Europe' is used instead of 'variable geometry' discussed in subsubsection A above.
[698] Bellamy and Kröger (n 696) 8–11.

of states' representatives in the Treaty amendment process. This requires a more nuanced approach to ensuring the vindication of individuals *qua* Member State nationals and *qua* EU citizens that recognises these different roles in primary and secondary law-creation. A synthesis of the statist and cosmopolitan justifications is necessary to establish the conditions for legitimacy of opt-outs in a dual-constituted supranational constitutional order.

B. The conditions for legitimacy of opt-outs

The minimum baseline for an opt-out to be created is for the elected representatives of the Member States to be involved. This requires the involvement of representatives of all Member States, rather than solely the resistant Member State. Substantively, the bare minimum requirement is the need to respect the basic rights established in the Treaties and the Charter of Fundamental Rights. Although the creation of opt-outs may be acceptable within the conditions for Treaty amendment, they create normatively problematic effects for the ordinary functioning of the supranational constitutional order. Procedurally, this arises from the insufficient representation of individuals *qua* EU citizens in the creation process. This may be legally justifiable whilst constitutionally unacceptable.

The application of the principles of levelling-up constituent power further condition legitimacy.[699] Opt-outs undoubtedly functioning as 'expressions of the political self-determination' of the nationals of the Member State in question. The formal equality of the demoi in this process is doubtful due to the unilateral proposal of opt-outs. There is no means to approve or reject opt-outs that is independent from approval of the entire treaty amendment. A counter-argument is that so long as any Member State is empowered to pursue such opt-outs the principle of equality is fulfilled. However, statements from the European Commission and European Parliament regarding ending the era of opt-outs suggests that this is precluded.[700]

A further condition is that the creation of the opt-out is predicated upon a pluralistic representation of the state demoi. This would require discursive interaction at the national level between multiple stakeholders beyond the government at times of the creation and appraisal of opt-outs. In the United Kingdom, the executive has dominated the process with little opportunity

[699] See Part 1, Section IV, subsection ii.
[700] Jean-Claude Juncker, 'State of the Union 2017' (*European Commission - European Commission*) <https://ec.europa.eu/commission/priorities/state-union-speeches/state-union-2017_en> accessed 27 April 2020; European Parliament, 'European Parliament Resolution of 16 February 2017 on Possible Evolutions of and Adjustments to the Current Institutional Set-up of the European Union (2014/2248(INI)' (European Parliament 2017).

afforded to actors from across the political spectrum.[701] The Danish experience more closely coheres with this vision of pluralistic representation due to the national compromise following the rejection of the Maastricht Treaty.[702] This has been bolstered by reaffirmation in referendums on the EMU and AFSJ opt-out Protocols.[703]

There are serious doubts as to whether opt-outs respect the condition of the discursive interaction of state representatives. Nothing has prevented the text of opt-out Protocols being presented at the final hour of negotiations. This limits the opportunity for 'representatives at the supra-state level to determine the content of the constitutional order on the basis of an exchange of reasons'.[704] This failure to pursue opt-out and opt-in policies on the basis of an exchange of reasons has informed the United Kingdom's approach to the maintenance of opt-outs. The approach of treaty negotiations has spilt over into the ordinary legislative procedures through the discretion to opt-in to Area of Freedom, Security and Justice measures without the need to provide reasons.

These problems are even more acute when regarded from the 'across demoi' perspective.[705] The exclusion of the European Parliament from decisions to create opt-outs undermines the political autonomy of individuals *qua* EU citizens whereby 'constitutional decisions are expressions of the political self-determination of the citizens of the (future) supranational polity'.[706] The equality of individuals *qua* EU citizens in the processes of constitutional opinion and will formation is undermined by whether their Member State of nationality pursues opt-outs are not. This leads to inequality between individuals *qua* EU citizens regarding the territory within which they can rely on EU law norms.

Substantively, the barometers established in Bellamy and Kröger's conceptions of European integration can be utilised to consider the legitimacy of opt-outs for individuals *qua* juridical objects. Opt-outs may be scrutinised on the basis that they promote or inhibit equality among individuals. The dual-constituent conception is distinct from the cosmopolitan conception because equality only pertains as an obligation and ideal to be achieved between individuals who hold the same status. The objective should be the promotion of democratic and juridical equality for all those who hold the status of EU citizenship. The conception that those holding the status do form a polity, albeit a supplementary one, is distinct from Bellamy's republican view that

701 See Section III.
702 See Section III, subsection iv, subsubsection B.
703 See Section III, subsection v, subsubsection B, and subsection vi, subsubsection C.
704 Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70).
705 See Part 1, Section IV, subsection ii, subsubsection C.
706 Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 70).

Member State institutions are subject only to an obligation of non-discrimination between individuals.[707]

The dual-legitimation perspective argues for an equal stake for all EU citizens in the creation of norms, and equality in the application of these norms. The legitimacy of differentiated participation and application must be evaluated against whether such inequality is justified by an overriding objective reason arising from the needs of individuals *qua* nationals of a Member State. The condition is that these objective reasons makes certain nationals so 'unalike' from other EU citizens that their case must be treated differently.

II. The Legal Form and Operation of the Opt-Outs

i. Economic and Monetary Union

A. Protocol (No 15): The United Kingdom's tailored opt-out from EMU

Protocol (No 15) of the Treaties on certain provisions relating to the United Kingdom contains the norm which enables derogation from Economic and Monetary Union. The Preamble recognises that the constitutional requirements for the United Kingdom to adopt the euro are 'a separate decision to do so by its government and parliament'.[708] The preamble records the historical notification by the United Kingdom to the Council in 1996 and 1997 of its intention not to participate in the third stage of Economic and Monetary Union.

Paragraph 1 reads that 'Unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under *no obligation* to do so'.[709] This represents a reservation and deferral of the choice to level-up constituent power that usually occurs at Treaty amendments. Paragraph 3 confirms that the United Kingdom retains its powers in the field of monetary policy according to national law. This confirms that the individuals *qua* national of the United Kingdom remains the only democratic subject and juridical object for the creation and application of norms establishing and regulating monetary policy. The individual *qua* EU citizen is not afforded a role in this sector.

[707] Richard Bellamy, *A Republican Europe of States* (Cambridge University Press 2019).
[708] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, preamble.
[709] ibid para 1 (emphasis added).

Paragraph 4 provides a detailed overview of the Treaty articles from the Economic and Monetary Policy chapter which do not apply to or within the United Kingdom.[710] The object of the opt-out is the substance of the norms rather than the mechanisms by which they are promulgated and enforced. The continuing functioning of the juridical constitutional ensures that the United Kingdom is able to bring claims regarding the scope of the opt-out before the Court of Justice.[711] The paragraph ensures institutional separation by clarifying that 'references to the Union or the Member States shall not include the United Kingdom and references to national central banks shall not include the Bank of England'.[712]

Paragraph 5 creates a soft obligation for the United Kingdom to 'endeavour to avoid an excessive government deficit'.[713] This contrasts to the quantitatively precise hard obligation for Members States within the eurozone to 'avoid excessive government deficits'.[714] Accordingly, the application of oversight mechanisms regarding deficits and balances of payment are limited to those which apply to the Member States with a derogation that have not fulfilled the economic criteria.[715]

Paragraph 6 declares that '[T]he voting rights of the United Kingdom shall be suspended in respect of acts of the Council referred to'.[716] This confirms that United Kingdom citizens do not exercise democratic subjecthood *qua* Member State nationals in the creation of norms within the constitutional sector of Economic and Monetary Union. The principles of political autonomy, equality of state demoi, pluralistic representation, and discursive interaction do not apply to the United Kingdom in relation to the EMU. United Kingdom nationals will not have participated in the formation of norms that apply to all individuals *qua* EU citizens within the Eurozone. UK nationals will, however, be represented *qua* EU citizens by the Members of the European Parliament that they elect. They exercise one form of input into the norms that will apply to them when they are within the territory of the eurozone.

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[710] 'Articles 119, second paragraph, 126(1), (9) and (11), 127(1) to (5), 128, 130, 131, 132, 133, 138, 140(3), 219, 282(2), with the exception of the first and last sentences thereof, 282(5), and 283 of the Treaty on the Functioning of the European Union shall not apply to the United Kingdom. The same applies to Article 121(2) of this Treaty as regards the adoption of the parts of the broad economic policy guidelines which concern the euro area generally.' ibid.
[711] See T-496/11 *United Kingdom vs ECB* [2015] ECLI:EU:T:2015:133.
[712] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland para 4.
[713] ibid para 5.
[714] TFEU, art 126.
[715] 'Articles 143 and 144 of the Treaty on the Functioning of the European Union shall continue to apply to the United Kingdom. Articles 134(4) and 142 shall apply to the United Kingdom as if it had a derogation.' TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland para 5.
[716] ibid para 6.

Paragraph 7 contains the norms by which the United Kingdom derogates from participation in the institution of the European Central Bank. This ensures further isolation from the supranational constitutional order due to the unique character of the ECB as a highly centralised executive supranational institution. The Articles of the Protocol on the Statute of the European Central Bank that do not apply to the United Kingdom are listed.[717] Paragraph 8 clarifies that Article 141(3) TFEU and Articles 43-47 of the Statute will still take effect in relation to tasks that need to be performed in the third stage owing to the UK decision not to adopt the euro, and to provide a basis for ECB advice for the preparation of a Council decision on the United Kingdom's reversal of the opt-out.

Paragraph 9 contains the means by which the opt-out may be extinguished: 'The United Kingdom *may* notify the Council at any time of its intention to adopt the euro…provided only that it satisfies the necessary condition…The Council shall decide whether it fulfils the necessary conditions'.[718] The use of the permissive language indicates that it is a conditional sovereign right of the United Kingdom executive to participate in the EMU *acquis*. The imposition of Council conditions that must be determined by all individuals *qua* Member State nationals means that the United Kingdom's decision to revoke its reservation of constituent power is not entirely unshackled. It is submitted to the control of the supranational constitutional order and its democratic subjects.

Article 9(a) and (c) clarify that the default constitutional clause of Article 140 TFEU for assessing whether a Member State has made sufficient progress to adopt the euro applies.[719] Article 140(2) ensures that individuals *qua* EU citizens will have input into this process through the consultation of the European Parliament.[720] The procedure includes reports provided to the Council by the European Central Bank and the Commission on the compatibility between the national legislation and the statutes of its national central bank with the Statute of the ESCB and the ECB, and examination of whether the Member State has achieved a high degree of sustainable convergence with reference to the criteria of price stability, the sustainability of the government financial position, the observance of normal fluctuation margins in the exchange-rate mechanism, and the durability of convergence achieved by the Member State.

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[717] 'Articles 3, 4, 6, 7, 9.2, 10.1, 10.3, 11.2, 12.1, 14, 16, 18 to 20, 22, 23, 26, 27, 30 to 34 and 49 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank ("the Statute")' TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.
[718] ibid para 9 (emphasis added).
[719] ibid para 9(a) and (c).
[720] TFEU, art 140(2).

This raises the legal question of whether the United Kingdom would be obliged to join the Exchange-Rate Mechanism before it could proceed to the third stage of EMU, particularly as Article 140(1) makes reference to these fluctuation margins being maintained for at least 'two years'. This would provide an additional time-constraint amongst the conditions for adoption. The Council is obliged to consult the European Parliament and discuss with the European Council before deciding on a proposal from the Commission whether to abrogate the derogation. The Council would then make a decision within six months on the basis of a qualified majority of those among its members representing Member States whose currency is the euro.[721] If this is fulfilled, unanimity is required amongst the Member States whose currency is the euro for the Council to irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned.[722]

Supranational conditionality contrasts sharply to the United Kingdom's opt-out Protocol from the Area of Freedom, Security and Justice, which imposes no conditions upon participation beyond temporal limits. This unshackled permission for the United Kingdom, and Ireland, to level-up constituent power is selective as it allows participation on a piecemeal legislation-by-legislation basis. By contrast, paragraph 9 of Protocol (No 15) preserves the integrity of the constitutional sector of the EMU. The extinction of the opt-out is ensured through the final sentence of paragraph 9: 'If the United Kingdom adopts the euro pursuant to the provisions of this Protocol, paragraphs 3 to 8 shall cease to have effect'.[723]

B. Protocol (No 16) and (No 17): Denmark's EMU opt-out by reference to the derogation states

Protocol (No 16) of the Treaties on certain provisions relating to Denmark is the legal basis for this Member State's opt-out from Economic and Monetary Union. The Preamble notes the historical activation of these provisions 'given that, on 3 November 1993, the Danish Government notified the Council of its intention not to participate in the third stage of economic and monetary union'.[724] The Preamble also makes note of the constitutional requirements at the

[721] TFEU, art 140(2).
[722] TFEU, art 140(3).
[723] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland para 9.
[724] TEU and TFEU, Protocol (No 16) on certain provisions relating to Denmark preamble.

national level for reversing the opt-out: 'the Danish Constitution contains provisions which may imply a referendum in Denmark prior to Denmark renouncing its exemption'.[725]

Paragraph 1 of the Protocol outlines that in view of the notice given to the Council by the Danish government notifying its intention not to participate in the third stage of economic and monetary union, 'Denmark shall have an exemption. The effect of the exemption shall be that all Articles and provisions of the Treaties and the Statute of the ESCB referring to a derogation shall be applicable to Denmark'.[726] In contrast to the United Kingdom's tailored declarations, the nature of Denmark's opt-out places it in the same position as a 'derogating Member States' which has not yet fulfilled the conditions for participation.

Paragraph 2 outlines that 'the procedure referred to in Article 140 shall only be initiated at the request of Denmark'.[727] The Danish government retains executive discretion to reverse its reservation of constituent power. The legal structure of the Protocol is more conducive to the integrity of the supranational constitutional order. Denmark is placed within a regulatory structure of derogation that is generally applicable on the basis of conditions established by the supranational constitutional order. However, the legal fiction of Denmark as a 'Member State with a derogation' despite fulfilling convergence criteria undermines the equal application of these conditions to all individuals *qua* juridical objects. Paragraph 3 of the protocol makes provision for its own invalidation following such a decision to abrogate the exemption status. Protocol (No 17) clarifies the competence of the National Bank of Denmark to carry out existing tasks with regard to the territory of Denmark that is not part of the Union, namely Greenland, following its 'withdrawal' from the Union in 1985.[728] The differences in the form of the United Kingdom and Danish opt-outs reflect the different degrees of resistance of these Member States in the Maastricht negotiations.[729]

[725] ibid. See Section III, subsection v, subsubsection B for discussion of the referendum on reversing the EMU opt-out.
[726] ibid para 1.
[727] ibid para 2.
[728] See Part Two, Section II, subsection I, subsubsection A.
[729] See discussion in Section III, subsection iv, subsubsection B.

ii. The Schengen acquis

A. Protocol (No 19): The United Kingdom and Ireland's flexible opt-out from Schengen

Protocol (No 19) makes provision for the United Kingdom and the Republic of Ireland's derogation from the Schengen *acquis*. This derogation is given effect by exclusion from the list of Member States in Article 1 who are 'authorised to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen acquis'.[730] The effect of this paragraph incorporated the provisions of an international agreement within the institutional and legal framework of the European Union.[731] The legal text reflects the origins of Schengen as the use of international law to pursue integration excluding other constituent powers.

Article 4 of the Protocol makes provision for the two Member States to opt-in to Schengen measures on an iterative basis: 'Ireland and the United Kingdom…may at any time request to take part in some or all of the provisions of the Schengen acquis. The Council shall decide on the request with the unanimity of the members referred to in Article 1 and the representative of the Government of the State concerned'.[732] This provides a mechanism for the United Kingdom and Ireland selectively to reverse their reservation of constituent power. Protocol (No 19) ensures that selective applications of constituent power must be approved by all individuals *qua* Member State nationals represented in the Council. This echoes the unanimity requirements for the original reconstructions of constituent power at Treaty amendments that legitimated the creation of norms in the Schengen *acquis*.

Article 5(2) contains further provisions that enable the Member States to notify the Council in writing, within three months, that it does not wish to take part in such a proposal or initiative. The Protocol provides a great degree of flexibility for the two Member States in whether they decide to participate or not in the sector. The Council, and residually the European Council, regulate the procedures of participation and non-participation.[733] Four declarations are attached to the Treaty in relation to the operation of the Protocol. Schutte provides a pithy cricket analogy to summarise this complex procedure.[734]

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[730] TEU and TFEU, Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union, art 1.
[731] See Section III, subsection v, subsubsection A for detailed explanation.
[732] ibid art 4.
[733] ibid art 5(3), art 5(4).
[734] 'First the UK is out, but it can request to be in, and when authorized, it is in. For proposals building on where it is in, it is deemed to be in, but it may notify its wish to be out, in which case it is out unless it withdraws its notification,

B. Protocol (No 20): The United Kingdom's and Ireland's national powers

Protocol (No 20) further defines the scope of the United Kingdom and Ireland's Schengen opt-out by reference to the national measures which the opt-out Member States are entitled to maintain.[735] This Protocol covers derogation from norms created through a Treaty base contained within Chapter 2 of Title V of Part Three TFEU. This evidences the overlap and inter-dependence between the Schengen and AFSJ opt-outs. The Area of Freedom, Security and Justice now covers the substance of the original Schengen Convention with regard to border controls. Protocol (No 20) could be considered as part of the United Kingdom and Ireland's general opt-out from the political area of Justice and Home Affairs.

The Schengen opt-out is not only defined negatively by reference to the supranational norms that these Member States are not obliged to apply; it is also positively defined through identifying norms that may be applied at the national level. The Member States are entitled, notwithstanding Articles 26 and 77 TFEU, to exercise at its frontiers with other Member States controls on persons seeking to enter the United Kingdom and Ireland. The conditions are that the government considers these controls necessary for the purpose of verifying the right to enter the United Kingdom or Ireland of citizens of Member States and their dependents, and for determining whether or not to grant Third Country Nationals permission to enter the United Kingdom or Ireland.[736]

Article 2 extends the scope of the Protocol to Ireland. This is conditional upon the maintenance of the Common Travel Area regime of reduced border controls with the United Kingdom: 'so long as they maintain such arrangements, the provisions of Article 1 of this Protocol shall apply to Ireland under the same terms and conditions as for the United Kingdom'.[737] The requirement is that these arrangements respect the rights of EU citizens referred to in Article 1 of the Protocol. The Common Travel Area displaces the operation of Articles 26 and 77 TFEU in relation to Ireland and the United Kingdom. Article 2 is a juridical manifestation of the claim that

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in which case it is in. If it notifies its wish to be out, it is out of the whole game if that is so decided by the other players. But the other players should discuss the matter seriously and try to keep it in, so that it can remain in while it is out. If they do not know what to do, another team of players may be brought in. If that team cannot decide whether it is in, it shall be out, unless it withdraws its wish to be out in which case it is in again. But when it is definitely out it shall pay a round of beer to all the other players.' Julian Schutte, 'UK v. EU: A Continuous Test Match' (2011) 34 Fordham International Law Journal 1346, 1363.

[735] TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

[736] TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland, art 1.

[737] ibid art 2.

Ireland's reservation of constituent power was compelled by the United Kingdom's position.[738] Article 3 raises a legal question as to how Ireland's permission to implement border controls will be enshrined after the United Kingdom's withdrawal. The constituent powers may decide that Ireland's maintenance of the Common Travel Area with the former Member State is a sufficient condition, despite Protocol (No 20) no longer being the legal basis for the United Kingdom's border controls over EU citizens and Third Country Nationals.

Article 3 provides a permission to the other Member States to reciprocate in the exercise of border controls of anyone entering their territory from the United Kingdom or Ireland. This distinguishes the Schengen opt-out Protocol from the EMU and AFSJ opt-out Protocols. In these areas, the United Kingdom, Irish, and Danish nationals will still be subject to EU law norms when in the territory of Member States without an opt-out. Article 3, by contrast, empowers these Member States not to apply EU law in relation to individuals of the opt-out Member States *qua* juridical objects.

The Protocol deactivates the juridical component of EU citizenship that enables movement through the frontiers of the constituent Member States without administrative formalities. The capacity for the United Kingdom and Ireland to determine whether or not to grant Third-Country Nationals permission to enter their territory undermines the equality of this residual juridical status as determined by the Treaties. The corollary is that United Kingdom and Irish nationals *qua* democratic subject have the capacity to determine the conditions for the entry of Third-Country Nationals into their territory. This determination is not shared with all other individuals from other Member States *qua* nationals and EU citizens. However, United Kingdom and Irish nationals do still legitimate Schengen norms through their representation in the European Parliament.

C. Protocol (No 22): Denmark's national and international law implementation of Schengen

Article 3 of Protocol (No 19) determines the international law basis for Denmark's implementation of the Schengen *acquis* by reference to Protocol (No 22): 'The participation of Denmark in the adoption of measures constituting a development of the Schengen acquis, as well as the implementation of these measures and their application to Denmark, shall be governed by the relevant provisions of the Protocol on the position of Denmark'.[739] Denmark opts out from

[738] See discussion in Section III, subsection v, subsubsection A.
[739] Protocol (No 19) art 3.

the method of supranational constitutionalism, rather than the substance of the Schengen norms. The Protocol does not provide for Denmark's participation in the supranational constitutional order, but for the replication of the effects through national and international law.

Article 4 of Protocol (No 22) provides for Denmark's participation in Schengen acquis measures within six months after a decision is made. The government ostensibly has discretion whether to implement this measure in national law, thus creating an obligation under international law between Denmark and the other Member States. However, this discretion is restricted by the statement in Article 4(2) that 'if Denmark decides not to implement a measure of the Council as referred to in paragraph 1, the Member States bound by that measure and Denmark will consider appropriate measures to be taken'.[740]

Article 4(1) of Protocol No (22) states that if Denmark decides to participate 'this measure will create an obligation under international law between Denmark and the other Member States bound by the measure'.[741] Bruno de Witte argues that this statement is 'either legally redundant…as all Member States are bound by all parts of EU law on the basis of international law, or it assumes that the Schengen Agreement…will continue to exist as an international agreement…governing the relations between Denmark and the other [Member States]'.[742] De Witte's first scenario seems to ignore the supranational means of norm-formulation and norm-application which are an additional layer upon the skeleton of obligations binding in international law. Denmark's Protocol may be regarded as a threat to this process of supranational constitutionalism. Rather than accepting the legitimacy of norm-creation and norm-application by the supranational legislature and judiciary, Denmark instead re-establishes the traditional international and national law model of implementation.

iii. The Area of Freedom, Security and Justice

The legal mechanisms which allow the United Kingdom, Ireland and Denmark to opt-out from measures promulgated under Title V of Part Three TFEU are Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, Protocol (No 22) on the position of Denmark, and Protocol (No 36) on transitional

[740] TEU and TFEU, Protocol (No 22) on the position of Denmark, art 4(2).
[741] ibid art 4(1).
[742] Bruno De Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 33.

provisions. The specific structure of Protocol (No 21) allow the United Kingdom and Ireland to decide whether to participate in specific new measures without the caveat from Protocol (No 19) that the Council must unanimously agree. These 'tailored' opt-in mechanisms are qualitatively distinct from the United Kingdom's opt-out from Economic and Monetary Union, and Denmark's opt-out from the AFSJ in Protocol (No 22), on the basis that they enable selective participation in the creation and application of norms.

These mechanisms are also qualitatively distinct from the opt-out and opt-in mechanisms enabled by Article 10 of Protocol (No 36). This mechanism enabled the United Kingdom to notify the Council that it did not accept the powers of the supranational institutions over police and judicial co-operation after the Treaty of Lisbon amendments. The consequence of this decision was the 'wholesale' disapplication of the measures regarding police and judicial co-operation in force before Lisbon. The United Kingdom was allowed to opt-in to police and judicial co-operation measures that ceased to apply to it, but subject to the conditions of practical operability and coherence.[743] No such substantive conditions are imposed on decisions to opt-in under Protocol (No 21). This crosses the Rubicon to full executive discretion for Member States to decide whether to participate in the ordinary legislative procedure.

A. Protocol (No 21): The United Kingdom and Ireland's flexible opt-in mechanism

The overlap in the subject-matter regulated by Protocol (No 21) and the Protocols enabling opt-outs from the Schengen *acquis* is evidenced in the Preamble: 'having regard to the Protocol on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland'.[744] Article 1 establishes the default opt-out position of the United Kingdom and Ireland. Democratic subjects *qua* Member State nationals are excluded from the norm-creation process: 'The United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures'.[745] The Protocol does not de-authorise the exercise of constituent power by representatives of UK and Irish nationals *qua* EU citizens in the European Parliament.[746]

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[743] TEU and TFEU, Protocol (No 36) on transitional provisions art 10(5).
[744] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice preamble.
[745] ibid art 1.
[746] See arguments regarding this feature in Deirdre Curtin and Cristina Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017).

The scope of application of the Protocol is measures adopted pursuant to Title V of Part Three TFEU. The final two sentences of Article 1 ensure the continuing functioning of the decision-making rules. Unanimity in the Area of Freedom, Security and Justice is determined 'with the exception of the representatives of the governments of the United Kingdom and Ireland'.[747] A qualified majority is still defined in accordance with Article 238(3) TFEU. The fact that the United Kingdom and Ireland's population will still be accorded weight when determining a qualified majority evidences Habermas' claim that the qualified majority voting rule functions as a means of residual representation of individuals *qua* EU citizens in the decisions of the Council.[748] The first clause of the Article – 'Subject to Article 3' – points towards the exception to this de-authorisation. Article 3 provides for the selective and discretionary re-authorisation of legislative power by representatives of the United Kingdom and Ireland.

Article 2 establishes the effects of the opt-out mechanism for individuals *qua* juridical objects. The relevant EU law 'shall [not] be binding upon or applicable in the United Kingdom or Ireland'.[749] The conjunction denotes the dual-character of EU law that will be disapplied: EU law as international treaty law with binding effects upon the relevant states, and EU law as domestic public law within the constitutional orders of the relevant states. The latter means that it is not necessary for the United Kingdom and Ireland to make explicit provision in domestic constitutional law for the non-application of EU law deriving from Title V. As the 'conduit pipe' of the European Communities Act 1972 specifies that 'any' provisions of the Treaties are directly applicable as an independent and overriding source of law, this includes the particular sentence of Article 2 of the Protocol.

The non-application of the EU law listed in Article 2 is stated to occur 'in consequence of Article 1 and subject to Articles 3, 4 and 6'.[750] This confirms that the legitimate application of EU law norms in the territory of a Member State is predicated upon democratic legitimation by individuals in their dual-roles. The fact that United Kingdom and Irish nationals are not represented in the Council in norm-creation means that the application of these norms would be illegitimate. Article 2 lists the sources of law that are not applicable to the United Kingdom and Ireland by virtue of the Protocol: (1) None of the provisions of Title V of Part Three TFEU; (2) no measure adopted pursuant to that Title; (3) no provision of any international agreement

[747] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice art 1.
[748] Habermas, 'Citizen and State Equality in a Supranational Political Community' (n 6).
[749] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice art 2.
[750] ibid.

concluded by the Union pursuant to that Title; and (4) no decision of the Court of Justice interpreting any such provision or measure.

The categorisation broadly coheres to the constitutional hierarchy of primary law, international agreements, secondary law, delegating acts, and judge-made common law. This functions to ensure a coherent conception of the relationship between norms in the area. Nevertheless, the exact scope and meaning of the term 'adopted pursuant to' Title V has been a rich vein of litigation between the United Kingdom and the Union institutions.[751] A further practical issue is the extensive regime of executive delegating acts in Title V. Although this source of law is not explicitly covered in the categorisation, it may be inferred that these acts are covered by the concept of 'measures'. This is broader than the corpus of Directives, Regulations and Decisions which form the main body of secondary law.

The final sentence of the Article delineates the autonomy that the opt-out Member States have secured through the Protocol: 'no such provision, measure, or decision shall in any way affect the competences, rights and obligations of those States'.[752] There is a question over whether this refers narrowly to the competences, rights and obligations of the United Kingdom and Ireland as *Member* States of the Union, or more holistically to their role as States in public international law and national constitutional law. The fact that the 'Member' qualifier is not used points towards the latter interpretation.

The respect for the autonomy of the opt-out Member States is supplemented by the statement that 'no such provision, measure or decision shall in any way affect the Community or Union *acquis* nor form part of Union law as they apply to the United Kingdom or Ireland'.[753] This ensures respect for the legal order that is generated for individuals *qua* EU citizens. It is ambiguous how measures taken pursuant to the Area of Freedom, Security and Justice or decisions thereupon could affect the EU legal order. One interpretation is that this provision seeks to preserve the integrity and autonomy of the EU legal order in the face of the authorisation for certain Member States not to create nor apply this law. As with EMU, this confirms that the effect of the opt-out Protocol does not alter the legal character of these norms. A further argument could be that this qualification insulates the scope of the opt-out from interference from measures promulgated on another legal basis. This was a practical issue that informed the United Kingdom's attempts to renegotiate the operation of the Protocol in February 2016.[754]

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[751] See discussion in Section III, subsection vi, subsubsection C.
[752] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice art 2.
[753] ibid.
[754] See discussion in Section III, subsection vi, subsubsection C.

Article 3 predicates Protocol (No 21) as an innovative prospective opt-in mechanism. Paragraph 1 provides for the abrogation of the opt-out and *à la carte* participation in Title V measures. This opt-in mechanism operates *after* a measure has been proposed but *before* it has been formally adopted and promulgated as EU law. The executive discretion for the governments of the United Kingdom and Ireland is confirmed in the wording that they 'may notify' their intention to participate. The legal formality is notification to the President of the Council in writing. The procedural condition is that this notification is provided 'within three months after a proposal or initiative has been presented to the Council'[755]. The Member States express their intention to participate in the 'adoption and application of any such proposed measures'.[756] These two terms cover the norm-creation process and the norm-application process. The condition for such an intention to take effect is automatic, as indicated by the final clause: 'whereupon [the notification is made in writing of the intention to participate] that State shall be entitled to do so'.[757]

The next paragraph clarifies the decision-making rules in light of the United Kingdom's and Ireland's potential opt-ins: '[t]he unanimity of the members of the Council, with the exception of the member which has not made such a notification, shall be necessary for decisions of the Council which must be adopted unanimously'.[758] This is supplemented by the confirmation again that qualified majority is defined in accordance with Article 238(3) TFEU. The next sentence confirms the legal effect that any measures adopted 'under this paragraph' shall be binding upon all Member States which took part in its adoption. This confirms the abrogation of Article 1 and Article 2, and that EU law will have binding effect for individuals *qua* juridical objects in the territory of that State.

The third paragraph of Article 3(1) is the only provision that indicates that the UK and Ireland's opt-ins could be subjected to further substantive conditions. For measures promulgated on the basis Article 70 TFEU, there is an obligation for the Commission and the Council to 'lay down the conditions for the participation of the United Kingdom and Ireland in the evaluations concerning the areas covered by Title V of Part Three'.[759] Article 70 TFEU outlines these conditions as 'objective and impartial evaluation[s] of the implementation of the Union policies

[755] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice art 3(1).
[756] ibid.
[757] ibid.
[758] ibid.
[759] ibid.

referred to in this Title by Member States' authorities, in particular to facilitate full application of the principle of mutual recognition'.[760]

The European Parliamentary Research Service has conceptualised this clause as a 'peer review mechanism'.[761] The obligation for the legislative institutions to set the conditions for the United Kingdom and Ireland to participate in these evaluations recognises the status of these Member States as only partial adherents to the constitutional purpose of the Area of Freedom, Security and Justice. It would be inappropriate for the United Kingdom and Ireland to have executive discretion to participate in these peer review mechanisms and to evaluate the practice of other Member States from the perspective of mutual trust. The exercise of this obligation manifested itself in the Commission proposal for a Regulation on the establishment of an evaluation mechanism to verify application of the Schengen acquis.[762] The Regulation stated that, because the United Kingdom and Ireland do not participate in the policy to maintain an area without internal border controls, they 'will not participate in adoption of this Regulation and will not be bound by it or subject to application thereof.'[763] This suggests that the United Kingdom and Ireland will only be entitled to engage in peer review evaluation of the areas in which they participate. This may prevent holistic evaluation of measures adopted pursuant to the Area of Freedom, Security and Justice.

Article 3(2) of the Protocol is a safeguard clause in the event that the United Kingdom and/or Ireland have activated their opt-in power, but the adoption process has been obstructed. The clause states that 'If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland'.[764] This clause ensures that the Council can ensure the coherent functioning of the norm-creation process whilst accommodating differentiated participation. In contrast to the defined period of three months to notify participation, the timeframe to trigger the clause remains under-

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760 TFEU, art 70.

761 Wouter Van Ballegooij and Tatjana Evas, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights - Think Tank' (*European Parliament Think Tank*, 27 October 2016) <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)579328> accessed 23 January 2020. For criticism that this mechanism excludes the European Parliament, and thus the representation of individuals qua EU citizens, see 'Schengen: MEPs Angry at Council Attack on Democratic Powers | News | European Parliament' (*European Parliament News*, 12 June 2012) <https://www.europarl.europa.eu/news/en/headlines/security/20120612STO46654/schengen-meps-angry-at-council-attack-on-democratic-powers> accessed 23 January 2020..

762 Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen acquis, Brussels, 16.11.2010 COM(2010) 624 final.

763 ibid.

764 TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, art 3(2). (emphasis added).

determined as a 'reasonable period'. This affords considerable flexibility to the Council to determine what is reasonable, and to consider the background context and purpose of the provision in question.

The opt-in mechanism provided by Article 4 of the Protocol is the sister provision to Article 3. The clause enables opt-ins *after* the adoption of a measure pursuant to Title V of Part Three TFEU. In contrast to the three-month window under Article 3, the United Kingdom and Ireland are given complete discretion as to when they may decide to adopt a provision.[765] In the case that this notification is given 'the procedure provided for in Article 331(1) of the Treaty on the Functioning of the European Union shall apply *mutatis mutandis*'.[766] This is a legal transplant of the procedure provided for under Article 20 TEU for the participation of Member States in an enhanced cooperation that is already in progress. This procedure affords primacy to the EU institutions, in particular the Commission and residually the Council, to determine whether the conditions for the participation of a Member State in EU law have been fulfilled. The provision establishes a timeframe of four months from the date of receipt of the notification to confirm this participation, and a discretion to set a deadline for the re-examination of the request in the event of a negative decision.

One issue with this *mutatis mutandis* transplant is that the Commission is authorised under Article 331 TFEU to assess whether the conditions of participation for enhanced cooperation have been fulfilled. By contrast to Article 20 TEU,[767] Article 3 of Protocol (No 21) sets no substantive conditions for UK and Ireland participation in AFSJ measures before their promulgation. After their promulgation, the decision is not entirely unilateral. Such conditionality is necessary to ensure the coherence of the EU legal order and its uniform application when opt-out Member States have not participated in the creation of these norms. There is no coherent reason for why the Commission is the dominant institution to determine AFSJ opt-ins whereas the Council is the dominant institution to determine Schengen opt-ins. This was demonstrated most starkly in the United Kingdom's Protocol (No 36) opt-ins requiring separate decisions by the institutions.

Article 4a was an addition to the Protocol made at the Treaty of Lisbon.[768] Paragraph 1 extends the scope of opt-out mechanisms 'also to measures…*amending* an existing measure by

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[765] ibid art 4.
[766] ibid.
[767] TEU, art 20. See Federico Fabbrini, 'Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary' (2013) 40 Legal Issues of Economic Integration 197.
[768] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010), 199.

which they are bound'.[769] This represents an inroad into the situation whereby Article 3 and Article 4 re-established the status quo of membership for such measures. This contrasts to Protocol (No 19). Instead, the United Kingdom and Ireland retain the capacity to re-activate their dissident constituent power when norms undergo amendment.

Paragraph 2 provides a caveat to the discretion to opt-out from amendments. The Council can determine if an opt-out 'makes the application of that measure *inoperable* for other Member States or the Union'.[770] If this condition is fulfilled the Council is empowered to 'urge [the United Kingdom and/or Ireland] to make a notification under Article 3 or 4 [to opt-in]'.[771] This triggers a two-month extension to the three-month period from the date of this determination. The concept of 'operability' was also used to regulate the United Kingdom's decision to opt-in to police and judicial co-operation measures under Protocol (No 36). Operability functions as a structural principle to ensure that opt-ins and opt-outs do not undermine the constitutional integrity of the Area of Freedom, Security and Justice. Article 4a(2) goes on to clarify the consequences of the expiry of this two month period: 'the existing measure shall no longer be binding upon or applicable… unless the Member State concerned has made a notification under Article 4 before the entry into force of the amending measure'.[772] The final sentence of the paragraph clarifies that the de-application of the measure will take effect from the date of entry into force of the amending measure, or the expiry of two months.

The fact that the Council has no power to compel a Member State to adopt a measure even when it determines that this will make the measure inoperable underlines the ultimate sovereignty that is reserved for the opt-out Member States. This situation may create deleterious effects for individuals *qua* juridical objects where it has been identified that an Area of Freedom, Security and Justice measure will inoperable.

B. Protocol (No 22): Denmark's simple Area of Freedom, Security and Justice opt-out

Protocol (No 22) on the position of Denmark provides for a simple opt-out from both Area of Freedom, Security and Justice and Common Security and Defence Policy measures. The Preamble premises the creation of the Protocol as a resolution to the situation created by the

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[769] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, art 4a (emphasis added).
[770] TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, art 4a(2).
[771] ibid art 4a(2).
[772] ibid.

Edinburgh Agreement that enabled Denmark to ratify the Maastricht Treaty: [773] 'the continuation…of the legal regime originating in the Edinburgh decision will significantly limit Denmark's participation in important areas of cooperation of the Union, and that it would be in the best interests of the Union to ensure the integrity of the *acquis* in the area of freedom, security and justice'.[774] The Preamble also clarifies that the preference is to establish a legal framework that will provide an option for Denmark to participate in Area of Freedom, Security and Justice measures.

Article 1 clarifies simply that 'Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three'.[775] Article 2 replicates the list Article 2 in Protocol (No 21) to identify the EU law measures that do not apply to Denmark. However, there is no analogue to Article 3 of that Protocol whereby Denmark may iteratively opt-in to AFSJ measures. Article 5 of the Protocol establishes Denmark's derogation from measures adopted pursuant to Article 26(1), Article 42 and Articles 43-46 TEU. Denmark does not participate in the elaboration and implementation of decisions and actions of the Union which have defence implications. Article 7 makes provision for Denmark's reversal of the opt-out 'in accordance with its constitutional requirements'.[776] The national constitution is recognised as the area for the decision to reverse the reservation of constituent power. This familial resemblance with the 'constitutional requirements' conditions in Article 48, Article 49 and Article 50 TEU is further evidence that the Protocols are interconnected with the triptych of constituted constituent power.[777]

Article 7 states that Denmark may inform the other Member States that it no longer wishes to avail itself of all or part of the Protocol. The consequence is that Denmark will apply in full all relevant measures in force.[778] This constitutes a complete reversal. Denmark also has the option to transfer to a flexible opt-in mechanism. The final annex to the Protocol contains 9 Articles which mirror the flexible opt-out from held by the United Kingdom and Ireland. Article 8(1) of the Protocol establishes that Denmark may decide in accordance with its constitutional requirements to notify the other Member States that Part I of the existing opt-out will be replaced by the provisions in the annex. Article 8(2) also stipulates that in this event all Schengen measures that are binding upon Denmark in international law would become binding upon Denmark in EU

[773] See Section III, subsection iv, subsubsection B.
[774] TEU and TFEU, Protocol (No 22) on the position of Denmark preamble.
[775] TEU and TFEU, Protocol (No 22) on the position of Denmark, art 1.
[776] ibid art 7.
[777] See Part 1, Section IV, subsection iii.
[778] TEU and TFEU, Protocol (No 22) on the position of Denmark art 7.

law. This would extinguish the Schengen 'opt-out' and fully integrate Denmark into the supranational constitutional order in this sector. In December 2015, the Danish government attempted to fulfil these constitutional requirements through a national referendum. However, the population rejected the replacement of Part I with the annex and thus the Member State retains its rigid opt-out.[779]

C. Protocol (No 36): The United Kingdom's retrospective opt-out

A final provision of relevance to the Area of Freedom, Security and Justice is Article 10 of Title VII of Protocol (No 36) on Transitional measures after the Treaty of Lisbon came into force. Paragraph 1 established a transitional regime whereby the enforcement powers of the Commission under Article 258 TFEU would not apply to police and judicial cooperation measures adopted before the entry into force of Lisbon for five years.[780] The Court of Justice's jurisdiction would remain the same as the old intergovernmental regime.[781]

Paragraph 4 determines the right specifically for the United Kingdom to notify the Council that it does not accept the powers of the supranational institutions in the field of police cooperation and judicial cooperation in criminal matters.[782] The consequence of this notification is that all police and judicial cooperation acts referred to in paragraph 1 of the Article cease to apply to the Member States from the date of expiry of the transitional period of 5 years. This functions as a *de facto* capacity for a Member State to disapply the binding force of EU law norms that it has already exercised its constituent power to create and apply. *De jure* the integrity of the supranational constitutional order is preserved by the disapplication being a mandated reaction to the rejection of the supranational institutions by the United Kingdom.[783] The Protocol is comparable to Denmark's opt-out from Schengen under Protocol (No 22) as reservation of constituent power in relation to the method of supranational constitutionalism.

Paragraph 5 then creates a flexible opt-in mechanism for the United Kingdom. The Member State 'may, at any time afterwards, notify the Council of its wish to participate in acts which have ceased to apply to it pursuant to paragraph 4'.[784] This provides an ostensibly unlimited

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[779] See Section III, subsection vi, subsubsection C.
[780] TEU and TFEU, Protocol (No 36) on transitional provisions art 10(1).
[781] See explanation in Section III, subsection iv, subsubsection C.
[782] TEU and TFEU, Protocol (No 36) on transitional provisions art 10(4).
[783] See Section III, subsection vi, subsubsection C for discussion of the extent to which this represents deconstructive power.
[784] TEU and TFEU, Protocol (No 36) on transitional provisions art 10(5).

time discretion akin to Article 4 of Protocol (No 21). The decision to opt-in activates the relevant opt-in provisions of Protocol (No 19) or Protocol (No 21) depending on whether the measure is part of the Schengen acquis or the Area of Freedom, Security and Justice beyond Schengen. By contrast to these provisions, decisions to opt-back in are subject to substantive conditions of operability and coherence: 'the Union institutions and the United Kingdom shall seek to re-establish the widest possible measure of participation in the United Kingdom in the acquis of the Union in the area of freedom, security and justice without seriously affecting the practical operability of the various parts thereof, while respecting their coherence'.[785]

On 24 July 2013, the UK government formally notified the European Council under Article 10(4). The Council adopted a Decision on the consequential and transitional arrangements of this action on 27 November 2014.[786] The Decision identifies 59 police and judicial cooperation measures which ceased to apply to the United Kingdom. The United Kingdom also activated the opt-in provisions of Article 10(5). The application to these opt-ins of Protocol (No 19) for Schengen measures and Protocol (No 21) for non-Schengen measures required separate decisions of the Council[787] and the Commission.[788] The United Kingdom opted back into 29 police and judicial cooperation measures on this date.

iv. The functioning of the United Kingdom's opt-in mechanisms

The United Kingdom government has published an annual report to the UK Parliament since 2010 for its decisions to opt-in to Schengen and Area of Freedom, Security and Justice measures under Protocol (No 19) and Protocol (No 21). Since 2011 these annual reports have included an explanation for why the Minister decided to opt-in or not. Protocol (No 19) and (No 21) do not impose supranational duties to give reasons for or justify opt-out decisions to the

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785 TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice art 10(5).

786 Council Decision 2014/836/EU of 27 November 2014 determining certain consequential and transitional arrangements concerning the cessation of the participation of the United Kingdom of Great Britain and Northern Ireland in certain acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon [2014] OJ L 343/11.

787 Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen acquis which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC [2014] L 345/1.

788 Commission Decision 2014/858/EU of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen acquis [2014] OJ L 345/6.

Council nor to the European Parliament. The legitimacy lacuna in Protocol (No 21) is mitigated by the practice of accountability at the national level.

The decision whether to participate in measures that are dual-legitimated within the supranational constitutional order are only justified to individuals *qua* nationals of the opt-out state. The United Kingdom and Ireland are not obliged to consider the interests of all the nationals of the Member States through engaging in argumentation in the Council. This undermines the principle of discursive interaction.[789] Even without formally notifying participation, the United Kingdom has been known to engage in discussions in an attempt to influence the development of measures before making a decision to opt-in or not. One consequence of the justifications practice is that it enables assessment of the reasons given by an opt-out Member State, in contrast to the traditional opt-outs in which these reasons can only be reconstructed *ex post facto*.

The practice of justifications allows a number of hypotheses that can be tested by reference to the UK government documents: (1) exclusive executive accountability at the national level means that the intergovernmental bargaining logic prevalent in treaty negotiations will prevail in decisions whether or not to opt-in or opt-out; (2) language that reflects the 'preferences' and 'interests' of the state in question will predominate; the arguments will not engage with whether participation would in the best interests of individuals *qua* EU citizens; (3) the Member States will opt-in to measures which they perceive will provide them with more rights or power in their representation of nationals; they will opt-out from measures that are perceived to impose more obligations or constraints in the interests of all individuals *qua* EU citizens, and Third Country Nationals.

The initial normative hypothesis is this behaviour undermines the Council as a representative forum for deliberation by representations. The lack of supranational oversight means that government representatives are not required to take into account the interests of any Member State nationals other than their own. The discretion to choose measures also skews the integrity and coherence of the policy area. Compensatory measures counterbalance the control that Member States surrender over internal security and border control. The United Kingdom and Ireland may opt-in to these compensatory measures without applying the initial obligations. The consequences for the juridical order were exacerbated by the United Kingdom's attempt to enforce a broad interpretation of the scope of its opt-out.

The analysis of the justifications advanced by the government focuses on the second annual report of decisions taken between 1 December 2010 and 30 November 2011. This covers

[789] See Part 1, Section IV, subsection ii, subsubsection B.

a period after the Treaty of Lisbon and the new Protocol fully came into force, but before the announcement by David Cameron in 2013 that a referendum on membership would take place. The assumption is that this represents a period in which ministerial decisions were focused on the endogenous merits of the particular legislative procedure, rather than exogenous concerns over the wider political palatability of European integration.

The report from 2010-2011 identifies key opt-in decisions.[790] In relation to the opt-in to the EU Passenger Names Records Directive, the government argued that such records 'help our law enforcement agencies to prevent, detect, investigate and prosecute terrorists and other serious criminals',[791] emphasising the increased powers. It concludes by arguing that 'the draft directive as it stands is not perfect, but it is right that we work with our European partners to get a directive that best serves Britain's interests'.[792] This is a paradigmatic intergovernmental bargaining approach to the supranational constitutional process of legislation. This approach is reiterated by the statement that 'the Home Secretary pressed the argument for it at the…Justice and Home Affairs Council meeting, where 15 member states supported the UK's position to include intra-EU data'.[793] This United Kingdom is relieved from the obligation to deliberate on the basis of the exchange of reasons and compromises within the Council because if its preferences are not fulfilled it can simply opt-out from the legislation in question.

The second and third identified key opt-in decision pertain to the Directive on establishing minimum standards on the rights, support and protection of victims of crime and a Regulation on civil protection measures. In relation to the former, the government is explicit that 'the proposed Directive will benefit UK citizens who are victims in other EU member states'[794] without any mention of reciprocity for EU citizens in the United Kingdom. The effects on the legislative process are evidenced by the statement that 'by opting into this directive the UK will have the opportunity to strongly influence the text and ensure that the minimum standards victims can expect throughout the EU are clear, appropriate and affordable'.[795] In relation to the latter Regulation on civil protection measures, the government advanced the reasoning that 'it will benefit vulnerable people in Britain who may now feel more confident to travel within the EU due

[790] Ministry of Justice and Home Office, 'Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs Matters (1 December 2010 – 30 November 2011)' (2012) 5–6.
[791] ibid 11.
[792] ibid.
[793] ibid.
[794] ibid 14.
[795] ibid.

to greater protection'.[796] Again, the reciprocal situation for all other individuals *qua* EU citizens is omitted.

The fourth key decision concerned the decision to opt-out from the Directive on the right of access to a lawyer in criminal proceedings. The government based this on the reasoning that 'a number of provisions…go beyond the requirements of the European Convention on Human Rights and would have an adverse impact on our ability to investigate and prosecute offences effectively and fairly'.[797] This comes despite the recognised 'benefit [for] UK nationals subject to the criminal justice systems of other Member States'.[798] The government prioritises the powers of the executive within the national legal order over the extension of protection for UK nationals when they exercise their rights *qua* EU citizens.

Attempts to influence the legislation from a position of non-participation are evident again: 'we are working very closely with our European partners to develop an improved text…. If our concerns are met, we will consider whether to apply to opt in once it has been adopted'.[799] This exposes a particularly egregious asymmetry for the quadripartite role. Individuals *qua* Member State nationals will still be represented through *de facto* influence on the creation of norms even though officially these representatives have excluded themselves from exercising this role. This influence is exercised even though it is uncertain whether these norms will eventually be applied to these individuals *qua* juridical objects due to the retention of the decision into the first three months after adoption.

The final key decisions from the report are the UK government's decision not to opt in to the Directive on the minimum standards on procedures in Member States for granting and withdrawing international protection, and the Directive laying down minimum standards for the reception of asylum seekers. The justification regarding both Directives displays some generalised concern rather than pure only self-interest: 'the Government was concerned that the Directive would subject Member States' asylum systems to unjustified regulation and focus excessively on enhancing the rights of all asylum seekers where their claims are valid or not'.[800] This prioritises the national legal systems of all the Member States over the rights of residual juridical objects who do not fulfil the role of democratic subject either as national or EU citizen. This is further evidenced by the concerns expressed in relation to the former Directive that the 'proposals…would allow asylum seekers to work after six months if a decision at first instance had

[796] ibid.
[797] ibid 16.
[798] ibid.
[799] ibid.
[800] ibid 15.

not been reached and would place stringent restrictions on Member States' ability to detain asylum seekers when necessary'.[801] In relation to the latter Directive, the government expressed its concern about 'the proposed restrictions on accelerated procedures and on the making of asylum appeals non-suspensive (where a right of appeal can be exercised out of country only)'.[802]

In both instances, the UK insisted that national administrative procedures obviated the requirement for supranational oversight. In the former case, the government considered the 'restrictions on detention to be unnecessary in a system such as the UK's where detainees have the right to apply to the Courts for release on bail, or to bring a legal challenge against their detention'.[803] In the latter case, the government expressed concern for the endangerment of 'a number of systems that the UK operates to manage straightforward asylum claims effectively – in particular the UK Border Agency's Detained Fast Track which provides speedy but fair decisions for any asylum seekers whose claims are capable of being decided quickly'.[804] The United Kingdom's opt-out decisions in relation to the protection of third country nationals are predicated upon the perception that the domestic constitutional order provides superior mechanisms to ensure the protection of these individuals *qua* residual juridical objects.

A theme that emerges from the United Kingdom government's justifications is the belief it may unilaterally pursue an opt-out if it believes a legislative measure concerns Justice and Home Affairs. This policy is detailed in the second annual report as a means of 'protecting the application of the opt-in Protocol': 'It is vital for UK interests that the opt-in Protocol is applied in a consistent manner. The Government has, during the past 12 months, noted the publication of measures in non-JHA policy areas which include provisions imposing JHA obligations, but which do not cite a Title V legal base (the normal TFEU legal base for a JHA proposal). It is the Government's position that the UK is not bound by such measures, unless it has opted into them pursuant to the Protocol'.[805] This policy is predicated upon a 'political' understanding of the sectors into which the European Union legal order is divided. The 'JHA' has ceased to be a formal sector of the Treaties and instead is a configuration for the Council. The constitutional propriety and legality of this practice has been scrutinised by the House of Lords European Union Committee.[806] Legal

[801] ibid.
[802] ibid.
[803] ibid.
[804] ibid.
[805] Ministry of Justice and Home Office, 'Fifth Annual Report to Parliament on the Application of Protocols 19 and 21 to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) ("the Treaties") in Relation to EU Justice and Home Affairs (JHA) Matters (1 December 2013 – 30 November 2014)' (2015).
[806] House of Lords European Union Committee, 'The UK's Opt-in Protocol: Implications of the Government's Approach' (House of Lords European Union Committee 2015) 9th Report of Session 2014-2015 HL Paper 136.

certainty over the norms an opt-out Protocol covers is crucial to ensure that the reservation of constituent power does not undermine the uniform application of EU law.

An interpretative disagreement arose concerning the meaning of the wording 'pursuant to' in Article 1 and Article 2 of Protocol (No 21) in relation to provisions in international agreements between the European Union and Third Countries.[807] The UK government argues that 'pursuant to' Title V is 'a broader test which…extends to any provision in an international agreement that contains content where the EU competence for negotiating, signature and conclusion of that agreement flows from Title V…that is JHA content'.[808] By contrast, the European Commission advances the interpretation that the phrase 'pursuant to' means 'that the measure in question must have a provision in Title V of Part Three of the Treaty as its legal basis'.[809] The Commission argues that there is 'a logical connection between not taking part in the adoption of a measure and not being bound by it. Yet the Government's position implies that the United Kingdom, after having taken part in the adoption of a measure, may subsequently consider itself not to be bound by some of its provisions'.[810] This threatens the purpose of the opt-out Protocol to ensure legal certainty for individuals *qua* juridical objects.

The Commission recognises this argument: 'It [the UK government's interpretation] would create considerable uncertainty as to when and whether Protocol No 21 applies'.[811] The House of Lords European Union Committee concluded that 'the potential of the Government's policy to create real legal uncertainty is very considerable indeed. The unilateralism of the Government's approach also raises serious questions about the UK's acceptance of the uniform application of EU law, the defining trait of the rule of law in the European Union'.[812] The Committee report also raises the issue of whether the unilateral interpretation of 'pursuant to' undermines the duty of sincere co-operation under Article 4(3) TFEU. The expert witness Damian Chalmers argued that 'the Court has held that unilateral action dissociating a State from a common agreed strategy which grants a mandate to the EU institutions to negotiate violates that duty'.[813] The inroads into the ordinary legislative practice represented by Protocol (No 21) and Protocol (No 19) have encouraged the United Kingdom to assert its sovereign right to decide unilaterally despite the efforts to provide legally bounded parameters to the opt-in procedure. This exacerbates

[807] See discussion of the cases in Section III, subsection vi, subsubsection C.
[808] House of Lords European Union Committee (n 806) 19.
[809] ibid 20.
[810] ibid.
[811] ibid 31.
[812] ibid 32.
[813] ibid 34.

the spill-over of the unbound exercise of constituent power at Treaty amendment into the ordinary functioning of the constitutional order.

The pursuit of an exceptionalist strategy that seeks only to vindicate the interests of individuals *qua* nationals is evident in a Ministerial response to the Committee. When questioned whether the government's interpretation of 'pursuant to' could have implications for the interpretation of the term in the other 98 instances in the Treaties, the Justice Secretary replied that this would not be an issue because 'My issue, as Secretary of State for this Government, is looking after the interests of the United Kingdom'.[814] Accommodating recalcitrant Member States poses a threat to the uniformity of the EU legal order. The disputes show that the supranational institutions should have the final authority to determine the scope of opt-out mechanisms to preserve the integrity of the constitutional order for all individuals *qua* EU citizens. Allowing a unilateral determination by the opt-out Member State in the interests of its own constituent nationals undermines supranational uniformity.

[814] ibid 20.

III. The Origins and Developments of Opt-Outs: A Narrative of the Reservation of Constituent Power

i. Origins of opt-outs

The narrative of opt-outs is interweaved with the story of successive amendments of the foundational Treaties between the Single European Act[815] signed on 17 February 1986 and coming into force on 1 July 1987, and the Treaty of Lisbon[816] signed on 13 December 2007 and coming into force on 1 December 2009. These constitutional amendments are bookended by two international agreements which are the prologue and the epilogue of the story: the Schengen Agreement[817] signed on 14 June 1985 and coming into force on 26 March 1995, and the Decision of The Heads of State or Government, Meeting Within the European Council, Concerning A New Settlement for the United Kingdom Within the European Union,[818] agreed on 19 February 2016, and coming into force upon the hypothetical event of the United Kingdom notifying its intention to remain a Member State.

Amendments have prompted the creation of opt-outs for two reasons: the creation of new constitutional sectors and the incorporation of prior international agreements. The 'deepening' of European integration into new policy areas prompts reluctance of certain Member States to acquiesce to the extension of supranationalism. The paradigm of this origin is the Third Stage of Economic and Monetary Union, agreed upon and created in the Treaty of Maastricht.[819] The United Kingdom and Denmark opted-out through Protocols addended to the final Treaty. [820]

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[815] Single European Act [1987] OJ No L 169/1.
[816] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.
[817] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13.
[818] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16.
[819] Treaty on European Union signed at Maastricht on 7 February 1992 [1992] OJ C 191/1.
[820] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; TEU and TFEU, Protocol (No 16) on certain provisions relating to Denmark; TEU and TFEU, Protocol (No 17) on Denmark 17; Protocol (No 19); TEU and TFEU, Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland; TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; TEU and TFEU, Protocol (No 22) on the position of Denmark; TEU and TFEU, Protocol (No 36) on transitional provisions..

The paradigm for the incorporation of previously concluded international agreements into the supranational constitutional framework is the Schengen *acquis*. Agreed upon in 1985 and finally coming into force in 1995, the international agreement was constitutionalised by the Treaty of Amsterdam.[821] The two Member States that had not consented to the international agreement, Ireland and the United Kingdom, secured opt-outs from the newly minted sector.[822] Denmark retained its national and international law basis for Schengen co-operation.[823]

The origins of the other opt-outs may be situated between the creation of new sectors and the incorporation of existing agreements. The Area of Freedom, Security, and Justice[824] never had an autonomous existence as a separate international agreement. However, its previous existence as the Third Pillar in the Maastricht Treaty distinguished it from the fully supranational First Pillar of the then European Community.[825] Before homogenisation into the current two Treaty structure, this sector existed between intergovernmental co-operation through international law agreements, and full supranational constitutionalism. The opt-outs arose through the contestation of the transfer from the Third Pillar to the First Pillar, and subsequent constitutionalisation at Lisbon.[826]

The United Kingdom's former Social policy opt-out presents further ambiguity. The sector was created as an 'Agreement'[827] between all of the Member States except the United Kingdom during the Maastricht Treaty negotiations. Whether this Agreement was a creature of the Union's constitutional order or the international legal order remained ambiguous until the Court of Justice adjudicated upon the agreement.[828] In direct opposition to the Schengen example, when Social Policy was fully constitutionalised in the Treaty of Amsterdam, [829] the United Kingdom government 'reversed' its opt-out and fully committed to the new constitutional sector.[830]

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821 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.
822 Protocol (No 19).
823 TEU and TFEU, Protocol (No 17) on Denmark.
824 TFEU, Part III, Title V.
825 For more on the pillar structure see David O'Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (John Wiley & Sons 1994).
826 TEU and TFEU, Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; TEU and TFEU, Protocol (No 22) on the position of Denmark 22.
827 Protocol on Social Policy of the Treaty on European Union signed at Maastricht on 7 February 1992 [1992] OJ C 191/1.
828 Case T-135/96 *UEAPME v Council* [1998] ECR II-2335.
829 Now contained within TFEU Part 3, Title X.
830 Julia Lourie, 'The Social Chapter' (House of Commons Library 1997) Research Paper 97/102 <http://researchbriefings.files.parliament.uk/documents/RP97-102/RP97-102.pdf> accessed 27 January 2020.

The final and most ambiguous example is the 'quasi opt-out' from the Charter of Fundamental Rights of the European Union.[831] Debate raged over whether this Protocol fulfilled the conditions to be a sector-specific opt-out. First, the Charter is a constitutional guarantee for individuals rather than a substantive sector. Second, rather than disapplication, the wording arguably only declares and clarifies the operation of the norms. Protocol (No 30) again falls between the origins of creation and incorporation of norms. The issue was not the form of these norms as either international or supranational, but the question of whether they were legally binding upon the Member States or merely declaratory.

The Charter was first proclaimed at the Nice European Council on 7 December 2000. as a The legal 'force' of the Declaration would be 'considered later'.[832] This occasion arose with the Intergovernmental Conference for the Treaty of Lisbon, resulting in the new Article 6 TEU's confirmation that the Charter 'shall have the same legal value as the Treaties'.[833] The corollary to this confirmation of legally binding status as primary law was the decision of the United Kingdom and Polish governments to pursue the attachment of a Protocol[834] to the Treaty seeking to restrict the operation of the Charter.

Protocol (No 30) states that the Charter does not extend the ability of the Court of Justice or nationals courts to find that legal actions of the United Kingdom or Poland are inconsistent with fundamental rights, freedoms and principles.[835] The Charter does not create justiciable rights except if Poland and the United Kingdom have provided for such rights in national law.[836] At the time of the Lisbon amendment debate emerged over whether the Protocol constituted an opt-out or not.[837] Catherine Barnard conditionally endorses the views of Alan Dashwood and the House of Lords EU Select Committee that the Protocol functions as an unequivocal statement of the legal situation rather than an opt-out.[838] Although the origin of the Protocol may be regarded as a species of disrupted integration, its operation does not lead to disapplication of supranational norms. This illustrates the distinction between political declarations contained within and pertaining to the Treaties and legally binding opt-outs.

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[831] See Catherine Barnard, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Springer 2008).
[832] European Council, 'European Council Nice 7-10 December 2000: Conclusions of the Presidency' <https://www.europarl.europa.eu/summits/nice1_en.htm> accessed 27 January 2020.
[833] TEU, art 6(1).
[834] TEU and TFEU, Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom..
[835] ibid art 1(1).
[836] ibid art 1(2), art 2.
[837] Barnard (n 831).
[838] ibid.

The New Settlement for the United Kingdom within the European Union would have represented a paradigm shift for the origins of opt-outs. Formally, the simplified international agreement would have bound the Member States to the deepening of opt-out Protocols in advance of a treaty amendment. This contrast to the Edinburgh Agreement establishing opt-outs for Denmark which was agreed after the Treaty of Maastricht.[839] In terms of substance, opt-outs were sought from established provisions of EU law rather than norms that were being incorporated or created *a novo* in the supranational constitutional order. Most dramatically, the United Kingdom sought to 'opt out' from the European Union's telos statement of ever closer union amongst the peoples of Europe. The Decision states that 'the United Kingdom is…not committed to further political integration into the European Union'.[840] The implication is that even if the United Kingdom had not triggered Article 50 TEU, the Member States would have ceased the levelling-up of constituent power to the supranational level in practice.

ii. The 1972 Member States and disrupted integration

The United Kingdom has not been the only 'awkward partner' in the process of European integration. The description of Denmark's history of interaction with the EU as 'limited engagement, fragmentation, and pragmatism'[841] may be applied to all three Member States that acceded in 1972. This is not to say, of course, that these three are the only 'awkward' Member States. From different perspectives and regarding different aspects, all Member States may well be described as awkward at different times. Each Member State of the European Union has its own experience of European integration, and that the interaction of the national constitutional order and the European constitutional order will vary based on the differing 'constitutional identities' of the states.[842]

There are certain shared aspects of the 1972 Member States' experiences in the European Union. All three states have strong cultures of parliamentary primacy in the constitutional order.[843] All three states have also experienced judicial and democratic clashes with the EU constitutional order. The boundaries between the national legal order and the EU legal order have been

[839] See discussion in subsection iv, subsubsection B below.
[840] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16 16.
[841] Madsen, Olsen and Šadl (n 387).
[842] Rosenfeld (n 101).
[843] *Miller (UKSC)* (n 364); Madsen, Olsen and Šadl (n 387).

questioned in national courts in, *inter alia*, the *Factortame*[844] cases in the United Kingdom, the *Grogan*[845] case regarding Ireland, and the *Dansk Industri*[846] case regarding Denmark. A major contrast is that the procedures for levelling-up constituent power are contained within a constitutional higher-law in Denmark and Ireland.[847] Article 29 of the Irish Constitution also explicitly enshrines the legal basis for the 'options or discretions' under the opt-out Protocols.[848] Both Houses of the Irish Parliament must approve of executive decisions under the Protocol, providing a further layer of representation for Irish nationals *qua* democratic subjects. Within the United Kingdom's uncodified constitution, further levelling-up of constituent power was constrained by the 'referendum lock' in the now repealed constitutional statute of the European Union Act 2011.[849] No such legislative grounding was provided for the executive's prerogative power to opt-in to legislation under the opt-out Protocols.

Democratically, all three states have returned negative votes towards Europe in national referendums. The Irish population returned 'No' votes to the Nice and Lisbon Treaties in 2001 and 2008 respectively, both of which were reversed in later referendums.[850] The Danish electorate initially returned a 'No' vote to the Maastricht Treaty in 1992,[851] and another 'No' vote on the relaxation of the opt-out from the Area of Freedom, Security, and Justice in 2015.[852] Most infamously the United Kingdom population returned their 'No' vote to levelling-up constituent power in 2016.[853] As most clearly demonstrated in the Danish case, reluctant popular legitimation has been a direct causal influence on the creation of the opt-out Protocols. Although the United Kingdom, Denmark, and Ireland share these similarities, they are not the only Member States that have contested supranational constitutionalism through the judiciary, the political elites, and the demos.

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[844] R *(Factortame Ltd) v Secretary of State for Transport* [1990] UKHL 13.
[845] Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-04685.
[846] Danish Supreme Court case 15/2014 *Dansk Industri, acting on behalf of Ajos A/S v Estate of A*.
[847] Constitution of Ireland art 29; The Constitutional Act of Denmark of 5 June 1953 art 20.
[848] Constitution of Ireland art 29(7).
[849] European Union Act 2011 s 6.
[850] 'Ireland Rejects Nice Treaty' (*the Guardian*, 8 June 2001) <http://www.theguardian.com/world/2001/jun/08/eu.politics> accessed 18 April 2020; Henry McDonald Allegra Stratton, 'Irish Voters Reject EU Treaty' *The Guardian* (13 June 2008) <https://www.theguardian.com/world/2008/jun/13/ireland> accessed 18 April 2020.
[851] Torben Worre, 'First No, Then Yes: The Danish Referendums on the Maastricht Treaty 1992 and 1993' (1995) 33 JCMS: Journal of Common Market Studies 235.
[852] Henriette Jacobsen, 'Denmark Rejects Further EU Integration in Referendum' (*www.euractiv.com*, 4 December 2015) <https://www.euractiv.com/section/justice-home-affairs/news/denmark-rejects-further-eu-integration-in-referendum/> accessed 23 January 2020.
[853] See Part 2, Section III, subsection ii.

The judiciary of arguably the most pro-European Member State, the Federal Republic of Germany, has most prominently and frequently contested supranational constitutional boundaries.[854] The constitutional courts in other Member States, such as the Czech Republic[855] and Italy,[856] have also protected the boundaries of national constitutional identity. The Hungarian population were asked the question of whether to comply with European Union policy on refugee admissions in 2015. Although the vote went against the European order, the national threshold for validity was not reached.[857] More dramatically, the Treaty establishing a Constitution for Europe was halted abruptly by 'No' votes from the Dutch and French electorates in 2005.[858]

Both France and the Netherlands were members of the 'Original Six' signatories to the Treaty of Rome in 1957. A decade on from these votes, both the Netherlands and France have seen surges in electoral popularity of nationalist parties advocating withdrawal from the European Union.[859] Following national electoral defeats and Brexit, these withdrawal strategies have been revised into anti-supranational strategies to reform the European Union into an intergovernmental alliance of independent nation-states.[860] Despite these examples of resistance to European integration, no Member States other than the United Kingdom, Denmark and Ireland have constitutionalised such disruption in the form of Protocols exempting them from the creation and application of EU law.

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[854] Grimm, Wendel and Reinbacher (n 76).

[855] David Kosař and Ladislav Vyhnánek, 'Constitutional Identity in the Czech Republic' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

[856] Federico Fabbrini and Oreste Pollicino, 'Constitutional Identity in Italy' in Christian Calliess and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).

[857] Andrew MacDowall, 'Voters Back Viktor Orbán's Rejection of EU Migrant Quotas' (*POLITICO*, 2 October 2016) <https://www.politico.eu/article/hungary-referendum-eu-migration-viktor-orban/> accessed 23 January 2020.

[858] 'French Say Firm 'No' to EU Treaty' (*BBC News*, 30 May 2005) <http://news.bbc.co.uk/1/hi/world/europe/4592243.stm> accessed 23 January 2020; 'Dutch Say 'No' to EU Constitution' (*BBC News*, 2 June 2005) <http://news.bbc.co.uk/1/hi/4601439.stm> accessed 23 January 2020.

[859] Michael Stothard, 'Could France's Marine Le Pen Deliver Frexit?' (*Financial Times*, 14 March 2017) <https://www.ft.com/content/d37b6d90-fdd1-11e6-8d8e-a5e3738f9ae4> accessed 23 January 2020; James Fontanella-Khan, 'Geert Wilders Outlines Case for a Dutch 'Nexit' from the EU' (*Financial Times*, 6 February 2014) <https://www.ft.com/content/0030c5f4-8f19-11e3-be85-00144feab7de> accessed 23 January 2020. See for deeper analysis of the Le Pen strategy Théo Fournier, 'From Rhetoric to Action, a Constitutional Analysis of Populism' (2019) 20 German Law Journal 362.

[860] Rym Momtaz, 'French Far Right Wants to Scrap European Commission' (*POLITICO*, 15 April 2019) <https://www.politico.eu/article/marine-le-pen-national-rally-french-far-right-wants-to-scrap-european-commission/> accessed 23 January 2020; Stijn van Kessel, 'Geert Wilders Is No Longer so Keen on Pushing for a 'Nexit' – and It's Because Dutch People Don't Want It' (*EUROPP*, 2 March 2017) <https://blogs.lse.ac.uk/europpblog/2017/03/02/nexit-evolving-euroscepticism-geert-wilders/> accessed 23 January 2020.

iii.The Single European Act to the Treaty of Maastricht

A. Schengen

The original Schengen Agreement was concluded between the States of the Benelux Economic Union (the Kingdom of Belgium, the Kingdom of the Netherlands, and the Grand Duchy of Luxembourg), the Federal Republic of Germany, and the French Republic on 14 June 1985.[861] This agreement was eventually implemented in a Convention which came into force in 1990.[862] The Agreement was promulgated with a prospective focus. The obligations and rights pertaining to the gradual abolition of checks at common borders are split into two Titles: Title I details 'Measures Applicable in the Short Term', whereas Title II details 'Measures Applicable in the Long Term'. Steve Peers claims that 'the Commission supported such measures as an interim solution, hoping that the time would one day come when Member States could agree to address these issues using Community law'.[863] The resort to international law as a means to pre-determine the exercise of supranational constituent power provided the conditions for certain Member States eventually to reserve constituent power. The telos of Schengen is embodied within the declarations of the preamble to the Agreement. The State Parties declares themselves to be:

> AWARE that the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals of the Member States and in the free movement of goods and services (…)
>
> PROMPTED by the resolve to achieve the abolition of checks at their common borders on the movement of nationals of the Member States of the European Communities and to facilitate the movement of goods and services at those borders[.][864]

[861] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13 13.; for detailed analysis of the origins in French-German co-operation and the terms of the Agreement, see Julian Schutte, 'Schengen: Its Meaning for the Free Movement of Persons in Europe' (1991) 28 Common Market Law Review 549.

[862] The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

[863] Steve Peers, *EU Justice and Home Affairs Law: EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (4th edn, Oxford University Press 2016) 71.

[864] The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13 13.

The purpose of the Parties is to provide legal rights for nationals of the Member States to pursue life plans without the obligations of internal border checks. This focuses on the 'output legitimacy' for individuals *qua* juridical objects. The 'input legitimacy' for individuals *qua* democratic subject is limited to representation by their heads of state or government through the state consent necessary to create obligations in international law. The agreement to enable individuals to move between common borders represents a supranational inroad into the traditionally intimate relationship between a state's internal and external sovereignty and its territory. [865] Traditional legal theory presents state-based legal orders as geographically differentiated on the basis of territory; within this territory, the state's authority is theoretically absolute. [866] Loïc Azoulai claims that Schengen, free movement, and EU citizenship have transformed the concept of 'Member State territory' into the concept of 'Union territory'.[867]

It is appropriate to discuss the original Schengen Agreement within the framework of the supranational constitutional order despite its origins as a creature of public international law. The preamble makes reference to the Union's *raison d'être* of ever closer union amongst the peoples of Europe.[868] This declaration is evidence that the 'centre of gravity' around which the 'Satellite Treaty' orbits is the Union legal order.[869] Ever closer union provided the pathway for the incorporation of the Schengen *acquis* into the Union's constitutional order. The purpose of the Agreement was to function as an *avant-garde*[870] for a unified regime to abolish the internal borders between Member States.

This prompts the question of why such goals were not pursued within the auspices of the supranational constitutional order from the outset. An *inter se* international agreement to pursue European integration is a paradigmatic case of 'old-fashioned flexibility'. [871] Recourse to international law was necessary due to the failure to secure unanimous consensus for supranational amendment. Schutte outlines the 'fundamental difference of view between the Member States as to... [the] implications for the existing regime of checks on persons when crossing borders between

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865 As evidenced by criteria (b), 'a defined territory' for statehood outlined in the Montevideo Convention on the Rights and Duties of States, Signed at Montevideo, December 26, 1933.
866 Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange, Ltd 1945); Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (n 36).
867 Loïc Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in Dimitry Kochenov (ed), *EU Citizenship and Federalism* (Cambridge University Press 2017).
868 TEU, art 1.
869 See De Witte, 'Old-Fashioned Flexibility' (n 742).
870 See Thym (n 646).
871 De Witte, 'Old-Fashioned Flexibility' (n 742); Bruno De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in the EU* (Edward Elgar Publishing 2017).

Member States'.[872] The legitimacy of extra-constitutional forms of integration is debated. Peers uses the evocative term 'black-market' European integration to describe the Schengen Agreement.[873] By contrast, Bruno de Witte has emphasised that international agreements are an acceptable tool to resolve co-ordination problems when unanimity is not possible.[874]

The Member States that would eventually create opt-outs have been described as 'dissidents' in the Schengen process since its inception.[875] Peers claims that 'four Member States (United Kingdom, Ireland, Denmark, and Greece) did not believe in the abolition of internal border controls'[876] and 'two Member States—the UK and Ireland—maintained for some time that the abolition of internal border controls was not part of the European integration process at all'.[877] These claims suggest that the predilection against Schengen may not have been rooted purely in national self-interest. There is a constitutional perspective in the argument that such legal norms are detrimental rather than beneficial for constituent citizens. This has been framed as a 'battleground' between 'States' desire to retain discretion over control of their borders as a key aspect of their sovereignty [and] the need to ensure effective protection of rights and liberties'.[878]

This indicates the inherent tension between guaranteeing the fulfilment of individuals *qua* immobile nationals of a Member State and individuals *qua* mobile EU citizens. Control over the entry of individuals into the territory of the polity pursues the former goal, whereas reducing the burdens to enable individuals to travel between Member States pursues the latter objective. The constitutional disquiet over the new frontier of European integration developed into the decisions of these Member State to opt-out when the *acquis* was constitutionalised within the Treaties.

Before the Treaty of Amsterdam, the international law Schengen *acquis* and the number of State parties increased in tandem with attempts to consolidate within the supranational constitutional order.[879] The 'original sin' for the incorporation of the Schengen *acquis* was the dispute over the interpretation of ex Article 8a EEC, now Article 26 TFEU.[880] The 1987 Single European Act sought to create a 'great leap forward' in European economic integration. Article

[872] Schutte (n 734).
[873] Peers (n 863) 68.
[874] De Witte, 'Old-Fashioned Flexibility' (n 742); De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' (n 871).
[875] Rebecca Adler-Nissen, *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration* (Cambridge University Press 2014) 116.
[876] Klaus-Peter Nanz, 'The Schengen Agreement: Preparing the Free Movement of Persons in the European Union' in Roland Bieber and Jörg Monar (eds), *Justice and Home Affairs in the European Union* (European Interuniversity Press 1995) 45–6; see also Alkuin Kölliker, *Flexibility and European Unification: The Logic of Differentiated Integration* (Rowman & Littlefield 2006) 212.
[877] Peers (n 864) 68.
[878] ibid.
[879] For a brief yet detailed overview of this process see ibid 69–75.
[880] TFEU, art 26.

8a obliged the supranational institutions to adopt measures to establish the internal market as an area without internal frontiers before the end of 1992. Some Member States regarded this prerogative as requiring the abolition of border checks, replicating and eventually absorbing the Schengen norms. Others disputed this interpretation. Nanz claims that 'only the five Schengen countries could clearly accept the Commission's interpretation of [ex] Article 8a EEC'[881] as a legal competence for the Schengen *acquis*. Schutte details their view that 'this Article does not require the full abolition of checks on persons at internal borders and therefore does not guarantee a right of free circulation for everyone legitimately present within EC territory'.[882] The United Kingdom argued further that the abolition of border checks need only be extended to nationals of Member States, excluding Third Country Nationals.[883]

The centrifugal forces leading to the Schengen opt-outs were set in motion by the five original Schengen states. The decision of these Member States to fulfil their interpretation of the Union's mission statement without the necessary consent of all representatives set the course for the reservation of constituent power. Disagreement over free movement of persons between the would ultimately manifest itself in the United Kingdom's attempts to renegotiate its membership in February 2016.[884]

B. Economic and Monetary Union

Superficially, the opt-outs from Economic and Monetary Union seem to arise from resistance to new sectors of the *acquis communautaire* created in the Treaty of Maastricht. A more nuanced analysis identifies the reservation of constituent power as the culmination of fragmented participation in the two prior stages of Economic and Monetary Union. Before Maastricht 'the EMS [European Monetary System] already recognised that non-participation need not always be based on motives pertaining to the Member States' socio-economic performance'.[885] This incremental method may have created a pathway dependence whereby participation in the macroeconomic constitution was regarded as an executive elective.[886] This contrasts to the microeconomic elements of the supranational constitutional order which have been enshrined in

[881] Nanz (n 877).
[882] Schutte (n 862) 564.
[883] Peers (n 864) 70.
[884] See subsection vi, subsubsection A below.
[885] Filip Tuytschaever, *Differentiation in European Union Law* (Hart Publishing 1999) 176.
[886] Tuori, *European Constitutionalism* (n 18) 174–226.

binding primary law from the Treaty of Rome.[887] This observation illustrates a qualitative difference to the Schengen opt-out origins. This was rooted in a dispute over the *ex post facto* interpretation of a legal provision.[888] In Economic and Monetary Union there was prospective resistance to the creation of such a source of legal norms.

Such an explanation may have power for the United Kingdom. It has less explanatory validity for Denmark which participated in the EMS from 1979. This discrepancy may be confronted by distinguishing between contestation of macroeconomic supranationalism as an executive preference, and constraints upon levelling-up imposed by national constitutional structures. Whereas the United Kingdom government actively pursued a policy of resistance to Economic and Monetary Union, Danish governments have been prevented from following an integration-friendly policy by a lack of popular will.

The telos of Economic and Monetary Union may be reconstructed from the declarations contained within the 'Werner' report'[889] of 1970 and the 'Delors Report' of 1989.[890] The former presents the ordoliberal justification for Economic and Monetary Union as a necessary element to complete the single market: 'general economic disequilibrium in the member countries…is likely to compromise seriously the integration realized in the liberation of the movement of goods, services and capital'.[891] Integration is not merely presented as an objective *per se*. Reference is made to the 'realization of the objectives of growth and stability'.[892] This terminology would persist in the evolution of Economic and Monetary Union.[893]

These concepts are the macroeconomic conditions necessary to ensure that undue disruption is not caused for individuals in their pursuit of self-fulfilment. This supports the Union's telos to ensure that Europe will not fall back into armed conflict. The devastating impact of the global financial crash in the 1930s and hyperinflation in the Weimar Republic is regarded as a condition that allowed the Nazi regime to come to power eventually leading to the Second World War.[894] The objectives of growth and stability feed into the overriding imperative to preserve the

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[887] ibid 127–173; but for a nuanced account see Gráinne de Búrca, 'Differentiation within the Core: The Case of the Internal Market' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000).
[888] TFEU, art 26.
[889] Pierre Werner, 'Report to the Council and the Commission on the Realisation by Stages of Economic and Monetary Union in the Community ('Werner Report')' (1970) Supplement to Bulletin II-1970 of the European Communities.
[890] Jacques Delors, 'Report on Economic and Monetary Union in the European Community by Committee for the Study of Economic and Monetary Union Presented 17 April 1989' (1989) EU Commission - Working Document.
[891] Werner (n 890) 8.
[892] ibid.
[893] Treaty on Stability, Coordination and Growth of 2 March 2012 T/SCG.
[894] Lewis E Hill, Charles E Butler and Stephen A Lorenzen, 'Inflation and the Destruction of Democracy: The Case of the Weimar Republic' (1977) 11 Journal of Economic Issues 299.

necessary precondition for individuals to exercise self-determination in order to pursue self-fulfilment.

These objectives are defined in the report as effecting 'a lasting improvement in welfare in the Community'[895] and achieving 'simultaneously satisfactory growth, a high level of employment, and stability'.[896] The statements on the adoption of a single currency are most pertinent for the United Kingdom's and Denmark's opt-outs: 'From the technical point of view the choice between these two solutions [maintenance of national monetary symbols or the establishment of a sole currency] may seem immaterial, but considerations of a psychological and political nature militate in favour of the adoption of a sole currency which would confirm the irreversibility of the venture'.[897] Political and psychological factors transcend economic rationales. The single currency becomes a symbol for the mutation of European integration into political union and the consequent threat to state sovereignty. These political and psychological factors expose a cleavage between whether nationality or EU citizenship is the appropriate status to legitimate monetary policy. This explains why Economic and Monetary Union became the locus for this compromise necessary to ensure the Maastricht Treaty was ratified.

In March 1971, the Member States declared 'their political will to establish an economic and monetary union'.[898] Various mechanisms in the 1970s and the 1980s prepared the ground. The 'Snake' was established in 1972,[899] the European Monetary Cooperation Fund in 1973,[900] and Council directives on stability, growth, and full employment were adopted in 1974.[901] The momentum for macroeconomic integration continued in 1979 with the creation of the Exchange Rate Mechanism (ERM) within the European Monetary System (EMS) and the European Currency Unit (ECU).[902]

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[895] Werner (n 890) 9.
[896] ibid.
[897] ibid 10.
[898] Member States of the European Community, 'Resolution on the Achievement by Stages of Economic and Monetary Union in the Community' (European Parliament - Committee on Institutional Affairs 1982).
[899] 'The Snake - Historical Events in the European Integration Process (1945–2014)' (*CVCE.EU by UNI.LU*) <https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/1b3433df-a25b-455a-b872-dec04270f820> accessed 27 January 2020.
[900] European Central Bank, 'European Monetary Cooperation Fund' (*European Central Bank*) <https://www.ecb.europa.eu/ecb/access_to_documents/archives/emcf/html/index.en.html> accessed 27 January 2020.
[901] Council Directive 74/121/EEC of 18 February 1974 on stability, growth and full employment in the Community [1974] OJ L 63/19.
[902] 'The European Monetary System - Historical Events in the European Integration Process (1945–2014)' (*CVCE.EU by UNI.LU*) <https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/1b3433df-a25b-455a-b872-dec04270f820> accessed 27 January 2020.

These integration mechanisms challenge the origin paradigm. The iterative development of economic and monetary policy through forms of intergovernmental co-operation outside amendment of the Treaties preceded the creation of the sector at Maastricht. The participation of the United Kingdom and Denmark in these predecessor mechanisms indicates the executive attitudes towards macroeconomic co-operation. After departing from the 'Snake' as early as 1972,[903] the United Kingdom only joined the ERM as late as 1990 after 11 years of abstention.[904] It was forced to withdraw from the mechanism ignominiously in 1992 in the wake of 'Black Wednesday' when the pound dropped below the agreed lower limit.[905] At this point, the UK government had already decided to opt-outs from the third stage of EMU. The negative effects of this experience and its inextricable association with European integration hardened political attitudes against future participation in Economic and Monetary Union. Stephen Wall asserts that 'our withdrawal from the ERM helps explain the persistent hostility in Britain to the single currency. We linked our currency to those of our partners and were forced into what looked like a humiliating defeat'. [906]

The arguments against participation in the ERM were broadly coherent with the arguments against EMU in general. The latter was the final crystallisation of the price stability goals of the former. The statements of senior UK politicians in this period indicate that economic arguments were combined with constitutional arguments against the policy. Wall claims that 'EMU and the European superstate were to become increasingly associated in people's minds'.[907] The economic arguments were generally applicable to all the Member States and may be interpreted as concerned with all individuals *qua* EU citizens. The constitutional arguments were peculiar to the situation of the United Kingdom, and therefore sought only to protect individuals *qua* nationals of that Member State. The UK government's reasons for joining the ERM were ultimately economic. The chancellor Nigel Lawson argued that 'it would reduce exchange rate fluctuations and we would be able to use it to assist us in our anti-inflationary policy'.[908] The Prime Minister, Margaret Thatcher, also expressed economic arguments against participation in the EMU. Wall claims Thatcher

[903] 'The Difficulties of the Monetary Snake and the EMCF - Research Corpora' (*CVCE.EU by UNI.LU*) <https://www.cvce.eu/en/collections/unit-content/-/unit/56d70f17-5054-49fc-bb9b-5d90735167d0/2d84f078-672e-4ae9-92d5-b4969911442a> accessed 27 January 2020.
[904] 'The ERM and the Single Currency' (*UK Parliament*) <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-joins-erm-to-introduction-of-single-currency/> accessed 27 January 2020.
[905] Larry Elliott, Will Hutton and Julie Wolf, 'September 17 1992: Pound Drops out of ERM' *The Guardian* (17 September 1992) <https://www.theguardian.com/business/1992/sep/17/emu.theeuro> accessed 27 January 2020.
[906] Stephen Wall, *A Stranger in Europe: Britain and the EU from Thatcher to Blair* (Oxford University Press 2008) 142.
[907] ibid 81.
[908] Wall (n 907).

believed that 'if one could find an objective standard to act as a spine, there was no need for an ECB or a single currency. It was only necessary that all ERM members should adopt sound economic and monetary policies'.[909]

The contestation which set the course for the United Kingdom's non-engagement was rooted in an ideological position beyond economic arguments. The move to a single currency rather than a common currency was not economically necessary; it was pursued for political and psychological reasons to symbolise the irreversibility of integration.[910] This was mirrored in Margaret Thatcher's opposition to EMU being interweaved with concern for the sovereignty of the United Kingdom beyond economic arguments: '[a] number of fundamental issues…will be transferred from national parliament to a rather amorphous group of people whose duties and rights are not specifically defined but who are not publicly accountable… It would be the biggest transfer of national sovereignty that we have ever had and I do not think it would be acceptable at all to the British Parliament that we should transfer certain fundamental rights over the Budget, over the Budget Deficit, over economic structure and over monetary policy to another group'.[911] There are no legal limitations on the substance of levelling-up of constituent power in the United Kingdom's uncodified constitution.[912] Thatcher's speech, however, indicates that there are political conceptions of such limits, which included economic and monetary policy.

Wall delineates these political limits: 'a national currency and national decision-making on economic and monetary policy were among the most substantial attributes of sovereignty in the modern world'.[913] This may be contrasted with the counter-limits on supranationalism proposed by other Member State constitutional actors, such as the German Constitutional Court, in which monetary policy is not afforded such primacy.[914] The United Kingdom's initial resistance was not parochial to the Member State's own nationals. The government expressed its concern generally for the nationals of all of the Member States from the United Kingdom's particular perspective on sovereignty: 'EMU was [regarded as] a vehicle by which the sovereignty which defined the independence of nation-states would be undermined'.[915]

Denmark had participated in the Exchange Rate Mechanism since its inception in 1979. Following a change of government economic policy in 1983, it was an enthusiastic proponent of

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[909] ibid 93.
[910] Delors (n 891) 15.
[911] Margaret Thatcher, 'Press Conference after Madrid European Council | Margaret Thatcher Foundation' <https://www.margaretthatcher.org/document/107711> accessed 27 January 2020.
[912] See Part 1, Section II, subsection iii.
[913] Wall (n 907) 103.
[914] *'Lisbon'* BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 (n 385).
[915] Wall (n 907) 104.

Economic and Monetary Union.[916] The Danish political class and economic system converged towards the predicative requirements of EMU: price stability, liberalisation of capital, and the independence of central banks.[917] Marcussen outlines that this 'sound policy strategy' 'became consensually shared and achieved a taken-for-granted quality among the elites within the Danish macroeconomic organizational field'.[918]

Rebecca-Adler Nissen corroborates the susceptibility of the Danish political class towards EMU: 'most of the parties in the Danish Parliament, the various Danish governments and the politico-administrative-economic elite are, at least in principle, favourable to joining the euro…Denmark is not the same kind of euro-outsider as the UK.'[919] The reforms to the economic system in the 1980s meant that the Danish executive did not contest the validity of Economic and Monetary Union on the basis of economic arguments. Concerns relating to political sovereignty played the key role within Denmark. Two factors distinguish the Danish sovereignty concerns from the United Kingdom. Rather than a particular *formal* conception of absolute Parliamentary Sovereignty, in Denmark the national 'fault-line' is a *substantive* conception of the welfare state.[920] Unlike the United Kingdom's absolutist doctrine, 'semi-sovereignty is completely taken-for-granted and accepted praxis in the Danish polity'.[921] However, the Danish welfare state is 'sacred' and was placed in direct contestation with the economic logic of the 'sound policy' paradigm.[922] Marcussen argues that '[t]he sacredness of welfare was…a critical point which had somehow to be decoupled from EMU if the euro was to have any chance of being 'sold' convincingly to the Danish electorate.'[923] Attempts to either decouple or synthesise the supranational constitutional telos of EMU and the national constitutional significance of the welfare state were attempted in the run-up to the 2000 referendum on adopting the euro.[924]

The second difference between the United Kingdom and Denmark is that the sovereignty concerns were not an executive preference of the Danish government. Resistance manifested itself within the national electorate.[925] Article 20(2) of the Danish Constitution[926] makes the levelling-up

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[916] Martin Marcussen, 'EMU: A Danish Delight and Dilemma' in Kenneth Dyson (ed), *European States and the Euro: Europeanization, Variation, and Convergence* (Oxford University Press 2002).
[917] ibid.
[918] ibid 123–4.
[919] Adler-Nissen (n 790) 80.
[920] For more on the distinction between United Kingdom and Danish conceptions of sovereignty see Part 1, Section II, subsection iii and Garner, 'The Borders of European Integration on Trial in the Member States' (n 31).
[921] Marcussen (n 917) 123.
[922] ibid 136.
[923] ibid 138.
[924] See subsection v, subsubsection B below.
[925] Jens Henrik Haahr, '`Our Danish Democracy': Community, People and Democracy in the Danish Debate on the Common Currency' (2003) 38 Cooperation and Conflict 27.
[926] The Constitutional Act of Denmark of 5 June 1953, art 20.

of constituent power dependent upon a successful referendum if there is no five-sixths parliamentary super-majority.[927] The determination of whether there has been a delegation of powers to international authorities is made by the Danish executive. Although ultimately a popular decision is necessary to transfer sovereignty, the executive retains the discretion to determine that such a constitutional event is in play.[928] At the time of Maastricht, the United Kingdom executive had a similar but unfettered discretion whether to submit levelling-up to referendum.[929] By virtue of the first-past-the-post voting system, a simple majority of loyal Members of Parliament meant that the executive could secure its preferences. Rebellion may challenge this majority, as was the case for John Major in implementing the domestic legislation on the Treaty of Maastricht.[930]

In Denmark, by contrast, in the absence of a super-majority the decision automatically becomes one for the people: 'The Danish constitution…prevented it from making an advance commitment to a single currency.'[931] Maya Sion-Tzidkiyahu makes the dramatic claim that in Denmark the electorate functions as a 'veto player' in European integration.[932] This may correspond to an ideal model of levelling-up of constituent power as a decision may by individuals *qua* democratic subject without interference from constituted powers.[933] National constitutions which subject Treaty amendments to popular referendums may vindicate 'actual' constituent power more than the Member States in which solely the constituted powers of the state decide on conclusion and ratification. This constitutional fault-line would be exposed by the referendum rejecting the ratification of the Treaty of Maastricht. The management of this rejection by the government would inform Denmark's pursuit of an opt-out from Economic and Monetary Union.

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[927] See further Helle Krunke, 'From Maastricht to Edinburgh: The Danish Solution' (2005) 1 European Constitutional Law Review 339.

[928] ibid. Krunke outlines that in 1986 a decision was made that the Single European Act did not involve a transfer of sovereignty, whereas in 1992 the decision was made that it did.

[929] The Constitutional Reform and Governance Act 2010 and the European Union Act 2011 have subsequently made the transfer of powers to the EU and other bodies subject to 'referendum locks' similar to the Danish constitutional situation.

[930] 'House of Commons Hansard Debates for 23 Jul 1993' <https://publications.parliament.uk/pa/cm199293/cmhansrd/1993-07-23/Debate-1.html> accessed 27 January 2020.

[931] Adler-Nissen (n 790) 80.

[932] Maya Sion-Tzidkiyahu, 'Comparing Opt-Outs: How Different Is Differentiated Integration' in Thomas Giegerich, Desirée C Schmitt and Sebastian Zeitzmann (eds), *Flexibility in the EU and Beyond: How Much Differentiation Can European Integration Bear?* (Hart Publishing ; Nomos Verlag 2017).

[933] See discussion in Part 1, Section IV, subsection ii.

C. Area of Freedom, Security and Justice

The Treaty of Rome to the Treaty of Maastricht has been described as an "informal' intergovernmental period'[934] for co-operation in the areas that would become the Area of Freedom, Security and Justice. The creation of norms exclusively involved representatives in international law of individuals *qua* nationals, with no norm-creation role for the supranational institutions representing individuals *qua* EU citizens.[935] The source of norms was limited to Conventions binding in international law. For individuals *qua* juridical objects, there was no recourse to the Court of Justice of the European Union: 'As for the EU's Court of Justice, there was no interest in giving it jurisdiction to interpret intergovernmental measures, except for those dealing with civil cooperation'.[936] In the absence of democratic subjecthood for individuals *qua* EU citizens, juridical objecthood *qua* EU citizen was also omitted. Norm application occurred exclusively through national courts.

Individuals were represented again in 'dualist' systems in the creation of implementing legislation. Before Maastricht, the constitutional consensus was that areas pertinent to Justice and Home Affairs were the exclusive sphere of the constituent states as guarantors of self-determination for nationals. No wholesale levelling-up to the supranational level was attempted. The Member State governments exercised their constituent power purely through the traditional means of public international law and national constitutional law. The Treaty of Maastricht substantially reformed this intergovernmentalism.

iv.The Treaty of Maastricht to the Treaty of Amsterdam

A. Schengen

Between the Single European Act and the Treaty of Amsterdam attempts were made to accommodate the international and supranational sources of norms. This has been referred to as 'two divergent processes of integration first outside, and then inside, the EU legal framework'.[937] The Maastricht Treaty created the 'Third Pillar'. This included measures overlapping with the international law Schengen *acquis* such as external border and visa policy. The Third Pillar did not

[934] For the framework prior to the Maastricht Treaty see Peers (n 864) 7–8.
[935] ibid 7.
[936] ibid.
[937] ibid 68.

confirm Union competence over internal borders: 'the issue of whether the [EU] had competence over internal border issues was still open'.[938] The European Parliament brought a legal action against the Commission for failure to act in 1992.[939] This was dropped when the Commission proposed three Directives on border controls. The continuing opposition of the United Kingdom and Ireland to such measures meant that the unanimity requirements for the legislation under ex Article 100 EC were not fulfilled.[940]

Concurrent with the supranational failure, the international Schengen *acquis* deepened and widened after coming into force in 1995.[941] Following the accession of eight new Member States, the autonomous Executive Committee proceeded to adopt 'a wide range of decisions in most of the areas covered by the convention'.[942] The supranational constitutional order was transcended in order to pursue integration goals that were hamstrung by the supranational requirements of unanimity. The two sources of norms would finally be reconciled through the Amsterdam incorporation. The price of constitutional unity would be the reservation of constituent power by the Member States that never accepted the legitimacy of the policy area.

B. Economic and Monetary Union

The final decision by the United Kingdom to retain constituent power in Economic and Monetary Union was influenced by the economic concerns of Thatcher's successor as Prime Minister. 'John Major's main preoccupation…was with the economic viability. He was particularly concerned about the lack of economic convergence'.[943] The author concludes that 'his reservations were not so much about sovereignty or defence of the pound as about the credibility of trying to move to a single currency without adequate economic convergence.'[944] The 'wait and see' policy of the Major government would establish an equivocal institutional design for the opt-out

[938] ibid 73.
[939] Order of the Court in Case C-445/93 *European Parliament v Commission* [1996] OJ No C 336/15.
[940] Peers (n 863) 73.
[941] The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.
[941] Schutte (n 734) 1352.
[941] Wall (n 907) 114.
[941] ibid.
[941] ibid 113.

Protocols. Member States could decide at a later stage to reserve their opt-out and level-up constituent power.

This policy was influenced by concerns that an *inter se* treaty could be used to exclude the United Kingdom.[945] The United Kingdom government did accept this method being used to bring the Social Policy Protocol into force.[946] This discrepancy indicates the perception of the significance of Economic and Monetary Union. This interplay in the preferences of the constituent powers explains how the present paradigm of specific opt-out Protocols came to exist, as opposed to alternative more general exemption procedures akin to enhanced cooperation.

Before the Maastricht negotiation Major set out his arguments against EMU: 'To move to a single currency without the convergence of national economies would be an economic catastrophe. This is why we are negotiating a Treaty which would allow the British government and the British parliament to take the decision on whether to join such a single currency when the option is a realistic on'.[947] This presents a vision of the EMU opt-out not as an outright restriction on levelling-up of constituent power, but as a deferral of this decision to a time after the treaty amendment.

The need for the opt-out to be enshrined in a legally binding form may be explained by internal constitutional dynamics: 'Parliament would not accept a treaty that provided for automatic moves to EMU provided certain economic conditions were met'.[948] This suggests that guarantees to insulate nationals from the operation of EU legal norms must be provided in the supranational constitutional order rather than just national law. The experience with Schengen, where the United Kingdom could have been subject to infringement proceedings for non-implementation of Article 8a of the Single European Act, may have been instructive.[949] The preferences of the United Kingdom executive for clarity in the EMU case also served to promote legal certainty for individuals *qua* judicial objects in the supranational constitutional order.

Major's address to the House of Commons on 20 November 1991 illustrated the balancing between the two constituent roles of individuals: 'A single currency would be the means of safeguarding anti-inflationary policies for the whole of the European community. That would be a great prize…the price is that it would take from national governments the control of monetary

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[946] See discussion in Section I above.
[947] John Major, 'Mr Major's Speech to the Lord Mayor's Banquet - 11 November 1991' (*Sir John Major KG CH*, 11 November 1991) <http://www.johnmajorarchive.org.uk/1991/mr-majors-speech-to-the-lord-mayors-banquet-11-november-1991/> accessed 20 April 2020.
[948] Wall (n 907) 131.
[949] See discussion in subsection iii, subsubsection A.

policy…We cannot take that step now, but nor should we exclude it'.[950] This form of temporal disruption prevented the perception of an irreversible fault-line in the supranational constitutional order.[951]

Major warned against the creation of a 'core Europe': 'I think that would be fatal for Europe if we were to go ahead in that fashion…because it would be extremely difficult for those countries that did not go ahead in that inner core to subsequently become part of that inner core'.[952] These remarks also addressed the Eastern and Central European candidate states which would become 'Member States with a derogation' regarding Economic and Monetary Union. The United Kingdom's resistance to a core Europe at Maastricht arguably preserved the default principle of equality in the application of norms for future citizens of the Union.[953] Non-application to certain Member State nationals was limited to the exceptional scenario of specific opt-out Protocols.

Stephen Wall suggests that the legal form of the opt-out was pre-determined by pre-IGC negotiations: 'Major argued against an opt-out clause from EMU that was UK-specific. But Mitterrand [President of France] was resistant. He did not want to see Britain isolated but nor did he want to offer a temptation to others to open up the issue in a few years' time'.[954] The United Kingdom's initial proposals were for an opt-out clause generally available to all Member States. This would have avoided a distinction in the application of norms on the basis of nationality being enshrined in the constitutional text. This general form of derogation was rejected on the basis of the centrifugal effects it could have. This would have undermined the telos of the Third Stage of EMU to move beyond voluntary intergovernmental mechanisms such as the ERM towards a macroeconomic policy that was fully constitutionalised within the Union legal order.

The EMU opt-out broke from the United Kingdom's policy against a two-speed Europe. Dyson and Featherstone outline that 'the shift was, in significant part, owing to what was seen as the intransigence and isolation of the British position'.[955] A disconnect was growing between the UK government's perspective of the interest of its nationals, and the EU institutional representation of individuals *qua* EU citizens. The terminology of a 'fire-break' on EMU that would be generally available to all Member States before the transition from the Second to the

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[950] 'House of Commons Hansard Debates for 20 Nov 1991, Col 274' <https://publications.parliament.uk/pa/cm199192/cmhansrd/1991-11-20/Debate-1.html> accessed 20 April 2020.
[951] For the concept of 'temporal differentiation' see Tuytschaever (n 886).
[952] Wall (n 907) 117.
[953] For arguments regarding the implications of core Europe for EU citizenship see Thym (n 646).
[954] Wall (n 907) 133.
[955] Kenneth Dyson and Kevin Featherstone, *The Road To Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999) 652.

Third stage was replaced by the terminology of a specific opt-out. This was the Rubicon crossed to safeguarding the capacity for self-determination and self-fulfilment of only United Kingdom nationals. The perceived necessity of an opt-out from the national level was consolidated by the position taken at the supranational level: 'Jean-Claude Trichet argued in a French paper to the IGC in April 1991 that the transition to stage 3 should be based on the twin principles of 'no coercion and no veto': no member state could be forced to enter into it, nor could any government stop the rest from going ahead. Such principles seemed to underscore the notion of an opt-out'.[956]

The United Kingdom negotiators presented legal arguments for why a political declaration would be insufficient: 'First, a declaration outside the Treaty would not confer the necessary legal certainty. Secondly, the right of a member state to take a separate decision must be contained within the Treaty. Finally, there was no rule of EC law that Community obligations should necessarily be binding on all states if there were good reasons for not making them so.'[957] These features distinguish disrupted integration from outright breaches of EU law. The argument for legal certainty and clarity ensures that individuals *qua* juridical objects are fully aware of which norms apply to them within the territory of different Member States.

The structure of an intergovernmental conference to enact constitutional change informed the legal nature of the opt-out Protocol. The political brinkmanship of negotiations between heads of state with compromises at the 'thirteenth hour' would condition the legal text adopted. 'On the opt-out, the Major government played its cards close to its chest. It [the government] wanted to avoid Britain's [EU] partners dissecting in detail a draft protocol in advance of Maastricht, for fear that it might be undermined'.[958] 'What Britain's partners had not expected was the detailed legal text written up…and only tabled when Major judged that it was too late for others to try to rewrite it'.[959] Dyson and Featherstone note that '[t]he implication was that such negotiation was an unexpected intrusion into British affairs. Yet the protocol would be part of a Treaty binding on all: twelve EC states…would have to ratify the British protocol.'[960] The nature of intergovernmental negotiations meant that the text of provisions that would have consequences for all individuals *qua* citizens of the Union was not opened up to scrutiny before adoption.

Deirdre Curtin criticises this paradigm from a constitutional perspective: 'It is truly extraordinary that the revision of a 'constitutional charter based on the rule of law' takes place behind closed doors in a *diplomatic* conference. Part and parcel of such diplomatic negotiations is

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[956] ibid 654.
[957] ibid 657.
[958] ibid 655.
[959] Wall (n 907) 136.
[960] Dyson and Featherstone (n 955) 660.

the natural desire of *governments* to retain the maximum in the inter-governmental sphere and to avoid parliamentary and judicial control of their activity.'[961] This 'extraordinary' phenomenon is evidence of the tension between the ultimate grounding of the Union in international treaties, and the supranational constitutionalism that these treaties generate.[962]

The opacity and the late date of introduction of the opt-out Protocol undermined throughput legitimacy. The creation of the Protocol did not comply with the principle that such reconstructions of the supranational constitutional order should be based on a discursive exchange of reasons between representatives.[963] None of the executives representing all the other nationals of the Member States were able to influence the legal form of this provision. This undermined the juridical objecthood of these individuals because they would not be able to rely upon norms their representatives had agreed upon within the territory of a constituent Member State.

The constitutional tension between the objectives of Economic and Monetary Union and preservation of the welfare state informed the Danish government's approach to the Maastricht intergovernmental conference. The United Kingdom government criticised the Danish approach: 'There was some frustration amongst the British over how the Danish delegation was pursuing the opt-out goal. It was seen as deserting the cause…the British felt the Danes were being too lax in the drafting of an opt-out. The Danes were more ready to accept an individual solution'.[964] Adler-Nissen corroborates this account: 'Because the UK essentially fought the battle over the EMU in the early 1990s, Denmark hid behind the UK during the negotiations, and its reluctance passed almost unnoticed'.[965]

This may be explicable on the basis that the Danish executive did not have endogenous concerns regarding the economic or constitutional feasibility of the Third Stage of EMU. The government did not pursue a strategy of contesting its existence and legitimacy in the same manner as the United Kingdom. Instead, they were cautious about the perception of feasibility and legitimacy amongst the nationals whom they represented. These concerns came to fruition in the negative referendum result in 1992 against the Treaty. The attempts to assuage the electorate through an opt-out Protocol failed. Following the rejection, the Danish executive and legislature were compelled to frame the opt-outs in a manner that would persuade the electorate to accept the Treaty.

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[961] Curtin (n 262) 66.
[962] See further discussion of this tension in Part 4, Section II.
[963] See Part 1, Section IV, subsection iii, subsubsection B.
[964] Dyson and Featherstone (n 955) 658.
[965] Adler-Nissen (n 790) 80.

The Danish convergence with the economic telos of economic and monetary union means that the crucial question is not why the Member State contested the policy. Instead, the issue is why the immediate triggering of the opt-out Protocol was proposed as a means to appease the electorate. The Danish executive found itself in a similar position to the United Kingdom electorate after the Brexit referendum in 2016.[966] The constituted powers' position on European integration clashed with an expression of popular sovereign will. Whereas in the United Kingdom's case a renegotiation was pursued before the referendum, in the Danish case the renegotiation was pursued afterwards. This reflects a qualitative difference between a referendum on the ratification of a Treaty, which may lead to withdrawal if the conflict is not resolved, and a referendum on membership *per se*.

The phenomenological connection between opt-outs and withdrawal was evident after the Danish rejection of Maastricht. The failure to ratify the Treaty could have led to *de facto* withdrawal. Stephen Wall notes the sentiment amongst the other Member State executives that 'this was a good opportunity for the rest of the EC to 'let the Danes go''.[967] The Danish executive contemplated this eventuality: 'The Danes themselves seemed all too ready to contemplate just such an outcome, not because it was what their government wanted, but because they felt the breath of some of the larger member states aggressively hot on their necks.'[968]

Deirdre Curtin indicates the potential legal form of such a *de facto* withdrawal in the pre-Article 50 era: 'a frightening crescendo of voices was to be heard stressing the applicability of general principles of international law to the Communities and the ability of the…'group of 11' to withdraw from the European Communities en masse, leaving their erstwhile Danish partner.'[969] The Danish political establishment managed to avoid this withdrawal scenario through the conclusion of the 'Edinburgh Agreement'.[970] This followed the domestic process of establishing a 'people's compromise'. This compromise mandated the holding of a second referendum on Maastricht.

Krunke outlines that, following the referendum defeat, the Danish government and Parliament had to 'interpret' the outcome of the referendum.[971] They chose to interpret it as a general expression of concerns regarding the transfer of sovereignty authority to the European Union: 'The Danish 'no' to European Union on 2 June 1992 reflected the fact that the majority of

[966] See discussion in Part Two, Section III, subsection i and ii.
[967] Wall (n 907) 139.
[968] ibid.
[969] Curtin (n 262) 67–8.
[970] Denmark and the Treaty on European Union [1992] OJ C 348/1.
[971] Krunke (n 928) 341.

Danes do not want a United States of Europe. It was not…a 'no' to…membership'.[972] Krunke corroborates this through national polling: 'Many voters were concerned about ceding sovereignty and creating 'The United States of Europe' and about specific political areas, about European Citizenship, the common defence policy, a European currency and the social dimension'.[973] The national compromise and Edinburgh Declaration were the Danish government's attempts to re-address this balance. This provides the clearest example of opt-outs resulting from the direct reconstruction of the conditions for the levelling-up of constituent power by nationals of a Member State.

The Edinburgh Agreement triggered the EMU opt-out by Denmark, in addition to the creation of further Protocols containing norm-specific declarations on EU citizenship and second homes. The national compromise went beyond the eventual 'exceptions' into general declarations on democracy, openness, and transparency.[974] These arguments were relevant to all individuals *qua* EU citizens rather than simply Danish nationals. They may have been attempts to shape the general reconstruction of the supranational constitutional order. However, the outcome remained specific to the situation of Denmark. With regard to EMU, the relevant declaration was that 'Denmark will not participate in the third stage of the Economic and Monetary Union'.[975]

Despite some debate over whether the Edinburgh Agreement functioned as a ratification reservation, Annex 1 refers to a 'decision of the Heads of State and Government, meeting within the European Council'.[976] The Agreement was registered by the United Nations, and the Danish government's own position was that the Decision was binding under international law.[977] The exceptions relating to the Area of Freedom, Security and Justice and Common Security and Defence Policy were eventually incorporated into the Protocols to the Amsterdam Treaty, extinguishing the Agreement as a live legal instrument.[978] The use of international law to 'pre-bind' the Union's constitutional legislators indicated how the Member States can utilise their external sovereignty to direct the supranational constituent process. The Edinburgh Agreement set a precedent in form and substance for the United Kingdom's attempts to renegotiate its membership in 2016.

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[972] Krunke (n 745) quoting the Danish Foreign Affairs Office.
[973] ibid 341–2.
[974] ibid 343.
[975] Denmark and the Treaty on European Union [1992] OJ C 348/1.
[976] ibid.
[977] Krunke (n 745) 350.
[978] See subsection v, subsubsection C below.

Denmark triggered the EMU opt-out Protocol once the Maastricht Treaty was ratified following a successful second referendum. Krunke argues that 'a new referendum was not necessary (and might legally even be not possible)'[979] because the five-sixths parliamentary majority had now been achieved. The reservation of constituent power has a transformative effect upon the national constitutional order. The conditions for the creation and revocation of opt-outs are autonomous from the general conditions for transfers of sovereignty. The constitutional mutation manifested itself in a referendum lock as a condition to revoke any of the four exceptions. This applied for Denmark's 2015 referendum on Protocol (No 22) on the Area of Freedom, Security and Justice.[980] The lock also applied to the exceptions that did not entail a transfer of sovereignty under Article 20 of the Constitution.

Henning Koch argues that such mutations are constitutionally justified on the basis of a 'constitutional convention taking form, according to which referendums on transferring sovereignty to the European Union can take place even though five-sixths of parliament support it'.[981] An analogy may be drawn to Vernon Bogdanor's argument that there is an informal constitutional convention in the United Kingdom to hold referendums on major constitutional issues.[982] Bogdanor argued that a referendum was necessary at the time of Maastricht due to the transfer of powers from Westminster: 'MPs are entrusted by the electorate with legislative power, but they are given no authority to transfer that power. That authority requires a specific mandate from the people.'[983] In Denmark, the constitutional convention displaced the permissions for the constituted powers under Article 20. The Danish parliament agreed not to enact a Bill with a majority of five-sixths to ratify the Maastricht Treaty. Constitutional transformation is also evident in the increased parliamentary scrutiny of European integration, further empowering the constituent subject of national of Denmark.[984]

C. Area of Freedom, Security and Justice

[979] Krunke (n 928) 345.
[980] See subsection v, subsubsection C below.
[981] Henning Koch, 'Grundlovsstridige EU-Folkeafstemninger (Unconstitutional EU Referenda)' in Henning Koch (ed), *Politik og jura. Festskrift til Ole Espersen* (Forlaget Thomson 2004) 520; Krunke (n 928) 351.

[982] Bogdanor, 'After the Referendum, the People, Not Parliament, Are Sovereign' (n 371). See discussion in Part 2, Section III, subsection i above.
[983] Vernon Bogdanor, 'Why the People Should Have a Vote on Maastricht: The House of Lords Must Uphold Democracy and Insist on a Referendum, Says Vernon Bogdanor | The Independent' (*The Independent*, 8 June 1993) <https://www.independent.co.uk/voices/why-the-people-should-have-a-vote-on-maastricht-the-house-of-lords-must-uphold-democracy-and-insist-1490346.html> accessed 21 April 2020.
[984] Krunke (n 928) 353.

The Maastricht amendment established nine items pertinent to Justice and Home Affairs in the 'Third Pillar' of the Treaty on European Union.[985] Curtin describes this as 'a grafting technique [that] was preferred over a technique of absorption or expansion'.[986] Peers argues that the convoluted structure was a 'compromise agreement whereby certain aspects of visa policy were included within the EC Treaty, but all other measures remained subject to the intergovernmental system established by the Maastricht Treaty'.[987] The rationale for the 'Pillars' metaphor derives from the different rules for the adoption and application of legal norms. These rules were distinguished as the 'Community method' and the 'intergovernmental method'. The former is supranational constitutionalism with its commitment to equality between nationals of the Member States and citizens of the Union. The latter emphasises unanimity between the High Contracting Parties as sovereign equals. The compromise set in motion the eventual reservation of constituent power as Justice and Home Affairs norms were converted from intergovernmentalism at Maastricht to full supranational constitutionalism at Lisbon.

Peers identifies distinctions between the First and Third Pillars.[988] The supranational institutions were diminished in the Third Pillar: '[it] largely use[s] the Council as an instrument of intergovernmental cooperation and pass[es] over in silence the role of the Commission (as initiator) and the European Parliament'.[989] A specialised 'Co-ordinating Committee' was established exclusively for the Third Pillar. The use of a Union legislative institution as an 'instrument' is evocative of the manner in which *inter se* international law agreements have similarly appropriated the institutions.[990] The Member States as constituent powers in international law utilised supranational institutions without vindicating the dual-representation of individuals. Curtin illustrates the normative problems of intergovernmentalism for democratic subjecthood and juridical objecthood: 'the result [is] that parliamentary and judicial control is extremely minimal'.[991]

Peers' second distinction concerns the Court of Justice: 'the third pillar provided for special rules which significantly restricted the Court's jurisdiction'.[992] Curtin clarified at that 'the only possibility is that conventions…may stipulate *express jurisdiction* for the Court of Justice to interpret

985 Hans Ulrich Jessurun d'Oliveira, 'Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Area of Free Movement, Immigration and Asylum' in David O'Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (John Wiley & Sons 1994) 261–2.
986 Curtin (n 262) 23..
987 Peers (n 864) 7.
988 ibid 5.
989 Curtin (n 332) 28.
990 See De Witte, 'Old-Fashioned Flexibility' (n 742); De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' (n 872).
991 Curtin (n 262) 25.
992 Peers (n 864) 6.

their provisions and to rule on any disputes'.[993] The Third Pillar restricted the Court of Justice to the role of an international arbiter with *ad hoc* jurisdiction mandated by the State parties. This predicated the Court's vindication of individuals' juridical objecthood *qua* EU citizens upon the will of the Member States. Establishment of the Court of Justice's supranational jurisdiction in the Area of Freedom, Security and Justice after the Treaty of Lisbon became the driver and legal condition for the creation and activation of the United Kingdom's opt-out under Protocol (No 36).[994]

The final two distinctions also relate to norm-application. The First Pillar used the orthodox Directives, Regulations, and Decisions whereby EU secondary law takes effect today. In contrast 'third pillar law used different instruments, although those instruments changed with the adoption of the Treaty of Amsterdam'.[995] Before the Treaty of Lisbon, primacy, direct effect, the interpretative obligation for Directives, and remedies, applied only to norms created under the First Pillar. Third Pillar norms were not imbued with the specific characteristics that determine the Union's juridical constitutional identity.[996] One may argue that these norms were not incorporated fully within the supranational constitutional order but instead were peripheral cases of EU law. The amendments between Maastricht and Lisbon would seek to eliminate these divergences progressively.

The Three Pillar structure means that, before the Treaty of Lisbon, the European Union did not represent a complete levelling-up of constituent power. Hans Ulrich Jessurun d'Oliveira captures this in his description of the Third Pillar as 'forms of co-operation among the Member States…inside the Union, but outside the European Community'.[997] This co-operation is a partial form of levelling-up beyond international law but beneath the threshold of full incorporation of legislative and judicial power into the supranational constitutional structure. Resistance from the representatives of the United Kingdom, Denmark and Ireland to complete levelling-up of constituent power in this area was the key driver for opt-outs at Amsterdam. This is a specific form of the 'incorporation' origin of opt-outs. Rather than resistance to the incorporation of international law norms into Union law, Member States resist the levelling-up of constituent power from a partial intergovernmental form into a complete supranational form.

[993] Curtin (n 781) 29 (emphasis in the original).
[994] See subsection v, subsubsection C below.
[995] Peers (n 864) 6.
[996] See Tuori, 'Crossing the Limits but Stuck behind the Fault Lines?' (n 38) and the discussion in Part 1, Section II, subsection i.
[997] Jessurun d'Oliveira (n 985) 261.

The shift to constitutionalise Justice and Home Affairs measures into the First Pillar of the was envisaged at the time of Maastricht: 'Article K.9…explicitly contemplates, albeit under very strict conditions, the transfer of certain matters relating to justice and home affairs from the third pillar to Article 100c of the Treaty establishing a European Community'.[998] The recalcitrant Member States did consent to the mechanisms which enabled further supranational constitutionalism. The legal and normative justifications for such a move were elucidated early: 'it is difficult to avoid the view, given the extent to which the system is liable to generate legal rights and duties (and their importance to individuals in terms of human rights) as well as the impact which they will have on clearly EC matters, that they should have been properly integrated into the EC system'.[999]

This critique that Justice and Home Affairs should have been incorporated in the First Pillar due to the rights of individuals *qua* judicial objects was a forerunner to the present critique that Member States should not opt-out from the Area of Freedom, Security and Justice.[1000] The connecting predicate of these critiques is that in an area of vital importance for the pursuit of self-fulfilment of individuals, a central tenet of the EU constitutional order's telos to pursue 'ever closer Union', institutional and normative unity and coherence should be prioritised over pragmatic differentiation to enable integration.

v.The Treaty of Amsterdam to the Treaty of Lisbon

A. Schengen

The Treaty of Amsterdam, concluded in 1997, and entering into force on 1 May 1999, fully incorporated the Schengen *acquis* within the supranational constitutional order.[1001] The relevant issues are why Schengen was incorporated, why Ireland and the United Kingdom chose to create opt-out Protocols, and why Denmark elected for international law implementation. A further issue is why separate Protocols for Schengen and the Area of Freedom, Security and Justice were created.[1002] The constitutional inclusion at Amsterdam necessitated the constitutional exclusion of

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[998] Peers (n 864) 6.
[999] Curtin (n 781) 26.
[1000] Nadine El-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' in Bruno De Witte, Andrea Ott and Ellen Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar Publishing 2017).
[1001] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.
[1002] See further discussion in subsubsection C below.

the recalcitrant Member States. Georgia Papagianni states that the opt-out Protocols are 'the price to pay for the decision taken by the Heads of State and Government at Amsterdam in order to proceed with the ambition of the project of the 'area without internal frontiers''.[1003]

Reform of the Third Pillar was an early topic of debate leading up to the Amsterdam Intergovernmental Conference. The provisions introduced in the Treaty of Maastricht were perceived to be weak.[1004] The decision to incorporate the Schengen *acquis* was informed by the 'interdependence between the objective of the elimination of border controls on persons and certain matters covered by the old 'Third Pillar' [which] made its partial 'communitarisation'…indispensable'.[1005] Martin Hedemann-Robinson claims that the explicit purpose of enshrining the concept of 'freedom, security and justice' in the Treaties was to provide a 'vehicle for incorporating the body of agreements and measures on immigration and security issues established under the Schengen accords'.[1006]

The article by a Union official published under the pseudonym 'Helmut Kortenberg' by provides an insight into the reasons for the incorporation of Schengen during the opaque negotiations.[1007] Kortenberg argues that '[i]f such a solution had not been found, there was a serious risk of further instances of cooperation along the Schengen model, outside the framework of the Community treaties…if these examples of cooperation became numerous, there was a risk that a schism would progressively emerge in the Community, with competition from instances of intergovernmental cooperation developing outside the common institutional framework.'[1008] By incorporating Schengen, the executive Masters of the Treaty sought to preserve the integrity of the supranational constitutional order through an 'ordering'[1009] of external norms. The substantive telos was the elimination of border controls for individuals, and structurally the objective was to prevent such norms proliferating outside the supranational structures for norm-creation and application. Incorporation may be regarded as an action by the constituent powers to preserve the coherence between the quadripartite roles of individuals.

[1003] Georgia Papagianni, 'Flexibility in Justice and Home Affairs: An Old Phenomenon Taking New Forms' in Bruno De Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 111.
[1004] Jörg Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) 4 European Law Review 320, 321.
[1005] Papagianni (n 1003) 111.
[1006] Martin Hedemann-Robinson, 'The Area of Freedom, Security and Justice with Regard to the UK, Ireland and Denmark: The "Opt-in Opt-Outs" under the Treaty of Amsterdam' in David O'Keefe and Patrick Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 2000).
[1007] Helmut Kortenberg, 'Closer Cooperation in the Treaty of Amsterdam' (1998) 35 Common Market Law Review 833.
[1008] ibid.
[1009] See discussion in Part 1, Section II, subsection i.

The United Kingdom, Ireland, and Denmark's decisions to opt-out may be regarded as a rejection of these objectives. The United Kingdom and Ireland rejected the substantive telos of Schengen, whereas Denmark rejected the process of supranational constitutionalism: 'For the United Kingdom, and for Ireland on account of its special links with the United Kingdom, the essential point was to preserve the existence of controls at borders with other Member States. For Denmark, the question was more the avoidance of any new transfer of competences.'[1010] The United Kingdom attempted to justify its retention of constituent power by reference to the Declaration affixed to the Single European Act: 'nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries'.[1011] This declaration is analogous to Protocol (No 30) on the Charter of Fundamental Rights,[1012] and may be regarded as a progenitor to Protocols as the mechanism to retain constituent power.

There is a consensus that Ireland was effectively compelled to follow the same position as the United Kingdom with regard to border controls. This idea has been expressed most provocatively in Maya Sion-Tzidkiyahu's claim that Ireland's 'veto player' in negotiations was the United Kingdom itself.[1013] Similarly, Cyprus has an informal derogation from Schengen because it could not fulfil the obligations to remove frontier controls due to the occupation of its Northern territory.[1014] The Common Travel Area is a series of unilateral domestic law provisions which removes border controls for Irish citizens entering the United Kingdom and vice versa.[1015] This would be undermined if Ireland removed frontier controls through applying Schengen norms. Following the conclusion of the Good Friday agreement in 1998, this was reinforced by the requirement to ensure no hard border controls between Northern Ireland and the Republic of Ireland.[1016]

The Irish executive made the decision at Amsterdam that ensuring coherence with the United Kingdom's regime of border controls than coherence with the supranational regime. The burdens of passports controls for all individuals *qua* EU citizens are justified by the preservation of peace and security for individuals *qua* nationals of Ireland and the United Kingdom. The same logic has driven the creation of the Protocol on Ireland/Northern Ireland following the United

[1010] Kortenberg (n 1007).
[1011] General Declaration on Articles 13 to 19 of the Single European Act [1987] OJ L 169/25.
[1012] See discussion in Section I above.
[1013] Sion-Tzidkiyahu (n 933).
[1014] ibid.
[1015] House of Commons Briefing Paper Number 7661, "The Common Travel Area and the Special Status of Irish Nationals in UK Law" 9 June 2017; Butler (n 589).
[1016] 'The Belfast Agreement' (n 568).

Kingdom's withdrawal, but with the opposite effects.[1017] As the United Kingdom and Ireland did not have opt-outs from customs and internal market norms, the former has been compelled to apply EU law norms. Ireland's Schengen and Area of Freedom, Security and Justice opt-outs may be justified on the basis of objective circumstances rather than subjective preferences. This may provide a model for the reform of opt-outs discussed in Part Four of the thesis.

Denmark's own 'opt-out' from Schengen was informed not by disagreement with the substance of norms on the abolition of border controls. Instead the executive contested the supranational form pursued to achieve these aims. Conversely to Ireland opting-out to preserve the Common Travel Area, Denmark signed the Schengen Convention in 1996 to preserve the Nordic Passport Union upon the accession of Sweden and Finland to the European Union.[1018] This vindicated nationals *qua* juridical objects by preserving free movement between the territories of these states. Kortenberg argues that '[t]he transfer of competences…under the Treaty of Amsterdam…was…not acceptable, but Denmark did not wish to obstruct such a transfer providing it could be exempted'.[1019] He claims that 'Denmark – recalling the difficulties it experienced during the ratification of the Treaty on European Union – simply tried to arm itself against any transfer of competences'.[1020]

This accords with Sion-Tzidkiyahu's claim that in Denmark the 'veto player' against levelling-up constituent power is the population who voted against Maastricht,[1021] and the Eurosceptic parties in Parliament who are able to block the five-sixths majority under Article 20 of the Constitution.[1022] The Danish government's policy towards Schengen at Amsterdam opt-out was directly influenced by the complications with the levelling-up of constituent power experienced at the Maastricht reconstruction. This demonstrates how a pathway dependence of reserved constituent power can develop within a Member State and spill-over across constitutional sectors.

Denmark sought to continue its incorporation of the Schengen *acquis* through national and international law methods.[1023] The Danish government were subject to a 'volley of unbridled criticism…on account of their outright rejection of Community [Union] law and method'.[1024] The European Policy Centre clearly articulates this criticism: 'the normal [Union] articles on judicial

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[1017] See Part Two, Section III, subsection v, subsubsection B.
[1018] Adler-Nissen (n 790) 118.
[1019] Kortenberg (n 1007).
[1020] ibid.
[1021] See discussion in subsection iv, subsubsection B above.
[1022] Sion-Tzidkiyahu (n 933).
[1023] See Section II, subsection ii above for a more detailed analysis.
[1024] Hedemann-Robinson (n 1006) 300.

control will not apply [to Denmark], which represents a serious and unprecedented encroachment on the integrity of the [Union] legal order'.[1025] Denmark prioritised the role of its nationals *qua* democratic subjects to the exclusion of all other EU citizens *qua* democratic subjects. Individuals *qua* juridical objects will be able to rely on the same norms to avoid border controls when entering Denmark. However, they will be unable to vindicate any legal claims before the Court of Justice. The peculiar phenomenon of a Member State exempting itself from supranationalism arises specifically from the incorporation form of opt-out origins. This enables the Member State to retain the previously authoritative international law source of legitimation.

A final question is separate opt-out Protocols were created for Schengen and the Area of Freedom, Security and Justice in light of the substantive overlap. The ostensible reason is that the Member States chose to use a Protocol attached to the Treaties as the means to incorporate the Schengen norms.[1026] Article 1 stated that the contracting parties 'shall be authorised to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen *acquis*'.[1027] This Protocol is connected to the legal bases of the Treaties: 'Proposals and initiative to build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties'.[1028] Article 4 delineated the means by which Ireland and the United Kingdom may participate in the application of the *acquis*, and Article 5 provides the means by which they may participate in its implementation through the adoption of further measures.[1029] Certain academic commentators have argued that this incorporation was the first usage of the enhanced co-operation mechanism.[1030] The Court of Justice has stated that 'Article 4 of the Schengen Protocol…applies in lieu of Article 331 TFEU within the framework of enhanced co-operation in…the Schengen *acquis*'.[1031] Despite the reference to 'closer cooperation' and the familial resemblance in functioning, the Schengen Protocol is a *sui generis* constitutional mechanism separate from the conditions established by Article 20 TEU.

The Protocol mandates an endogenous procedure for opt-outs. The Protocol is the vessel for both the legal norms and the norms that enable the derogation and iterative opt-ins.[1032] By

[1025] European Policy Centre, 'Making Sense of the Treaty of Amsterdam' (1997) para 182.
[1026] TEU and TFEU, Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union.
[1027] ibid art 1.
[1028] ibid art 5.
[1029] ibid art 4, art 5.
[1030] See Thym (n 689) 39; Sebastian Zeitzmann (n 637) 101 (albeit qualified as 'bogus enhanced cooperation'); Pascale Joannin, 'Elements of Differentiation Within the Schengen Acquis and the Prüm Convention' in Thomas Giegerich, Desirée C Schmitt and Sebastian Zeitzmann (eds), *Flexibility in the EU and Beyond: How Much Differentiation Can European Integration Bear?* (Nomos/Hart 2017) 127.
[1031] C-44/14 *Kingdom of Spain v European Parliament and Council* [2015] ECLI:EU:C:2015:554, para 49.
[1032] Protocol (No 19) art 3, art 4. For detailed analysis of the functioning of these provisions see Section II, subsection ii above.

contrast, the Area of Freedom, Security and Justice Protocols are exogenous means to create opt-outs and flexible opt-ins as their object are provisions in the main body of the Treaty.[1033] Kortenberg emphasises that this fragmented structure arose from a lack of coordination on the negotiations of the AFSJ Title of the Treaty, the Schengen Protocol, and the AFSJ opt-out Protocols.[1034] This was exacerbated by the latter's creation at the end of negotiations.[1035] Kortenberg's suggestion to 'straighten things out by harmonizing these regimes on the occasion of a future intergovernmental conference'[1036] would go unheeded.

After Amsterdam, the Union institutions and the opt-out Member States clashed over the limits of opting-in to Schengen norms without accepting the core obligation to remove internal border controls. The Council adopted two decisions on 20 May 1999 determining the legal basis for each of the provisions that constituted the Schengen *acquis*.[1037] The United Kingdom immediately requested to participate in certain measures relating to judicial cooperation in criminal matters, narcotic drugs, and the Schengen Information System.[1038] Ireland followed on 16 June 2000 following the Council's approval of the United Kingdom's request.[1039] The Council authorised the United Kingdom's participation in the requested measures on 29 May 2000 and declared that the United Kingdom 'shall be deemed irrevocably to have notified…that it wishes to take part in all proposals and initiatives which build upon the Schengen acquis' in relation to the measures.[1040]

In the preamble to the Decision, the Council emphasised the imperative significance of maintaining the coherence of the policy area: 'Whereas it is the view of the Council that any partial participation by the United Kingdom in the Schengen acquis must respect the coherence of the subject areas which constitute the ensemble of this acquis'.[1041] The Council protects the integrity

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1033 Specifically, the norms contained in what is now Title V TFEU. See further discussion in subsection C below, and Section II, subsection iii.
1034 Kortenberg (n 1007).
1035 See further detail in subsection C below.
1036 Kortenberg (n 1007).
1037 Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis [1999] OJ L 176/1; Council Decision 1999/436/EC of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis [1999] OJ L 176/17.
1038 Commission opinion on the request by the United Kingdom to take part in certain provisions of the Schengen acquis [1999] IP/99/550.
1039 Commission opinion on the request by Ireland to take part in some of the provisions of the Schengen acquis SEC [2000]1439.
1040 Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis [2000] OJ L 131/43 art 8(2).
1041 ibid; see discussion by Pascale Joannin (n 850) 130–1.

of the supranational constitutional order. In the constitutional sectors with uniform application of norms, the role of ensuring coherence and integrity is left to the norm-applying judicial institutions. The Council and Parliament as the co-legislature focus on the policy goals embodied in the creation of norms. Within the Schengen *acquis* and the Area of Freedom, Security and Justice, this coherence insurance function is transferred in the first instance to the Council. Because two of the opt-out Member States are able to choose which norms they wish to apply, the institutional body which mandates this participation must ensure that the holistic integrity of the constitutional order is not undermined.

Disagreements over the opt-out Protocols in the Council can spill-over into litigation once the norm-application process commences.[1042] The 2007 *UK v Council* case determined that the United Kingdom and Ireland could not participate in the Regulation establishing the FRONTEX border management agency because they did not implement prior measures on removing border controls.[1043] The unanimity requirement to enable *de novo* participation by the opt-out Member States would be 'deprived of all effectiveness' if the United Kingdom and Ireland could participate in proposals building upon the Schengen *acquis* even though they had not accepted the relevant provisions or had not been authorised to participate.[1044] The Court of Justice preserved the democratic subjecthood of the Council in preserving the integrity of the supranational constitutional order through its decisions to authorise or reject participation by the opt-out Member States.

Kortenberg presciently predicted the *UK v Council* case in 2010.[1045] He argued that '[t]he difficulty of distinguishing in the longer term between measures arising from [the AFSJ legal bases], and from the further development of the Schengen *acquis* may be a source of disputes since the legal arrangements are different'.[1046] The United Kingdom and Ireland disagreed with the Council over whether a 2008 Decision on consultation of the Visa Information System for the purpose of counter-terrorism fell within Schengen legal bases or the Area of Freedom, Security and Justice legal bases on police cooperation.[1047] The Member States participated in the latter but not the former. The Court of Justice found that the Decision must be classified as a measure falling within

[1042] Case C-77/05 *United Kingdom v Council* [2007] ECR I-11459; Case C-482/08 *United Kingdom v Council* [2010] ECR-I-10413.
[1043] *UK v Council* [2007] (n 1042) para 62.
[1044] ibid para 67.
[1045] Case C-77/05 *United Kingdom v Council* [2007] ECR I-11459 (n 861); Case C-482/08 *United Kingdom v Council* [2010] ECR-I-10413 (n 861).
[1046] Kortenberg (n 1007).
[1047] *UK v Council [2010]* (n 1042) paras 31-41.

the area of the Schengen *acquis* concerning the common visa policy.[1048] A Member State cannot participate in a norm developing the Schengen *acquis* without first adopting the foundational measure, and it cannot circumvent this requirement by citing an Area of Freedom, Security and Justice legal base.[1049]

Alberto Miglio argues that the Court of Justice 'aimed to limit fragmentation and to provide an incentive for Ireland and the United Kingdom to join the whole of the Schengen *acquis*'.[1050] This is corroborated by the Court's dicta that 'the Schengen Protocol…seeks to ensure the maximum participation of all Member States in the Schengen acquis'.[1051] The Court of Justice defines and guards the formal limits of the opt-out Protocols. The judicial institution ensures that the reservation of constituent power is properly translated into the functioning of the juridical order. This preserves legal certainty for individuals *qua* juridical objects. The litigation generated attempts to reconstruct the Schengen Protocol during the Lisbon negotiations.[1052]

B. Economic and Monetary Union

The United Kingdom government triggered its option not to proceed to the Third Stage. This temporal development is enshrined in the text of the opt-out Protocol: 'Given that on 16 October 1996 and 30 October 1997 the United Kingdom government notified the Council of its intention not to participate in the third stage of economic and monetary union'.[1053] Both Denmark and the United Kingdom grappled with the question of whether to reverse their EMU opt-outs. The 'prepare and decide' policy and the Chancellor's five economic tests continued the economic concerns of the Major era. These factors shaped the political discourse on whether or not to hold a referendum on joining the single currency.[1054] The practice of the Labour government of promising a referendum recognised an informal constitutional convention.[1055] Denmark held its own unsuccessful referendum on reversing the opt-out in 2000.[1056] This may indicate convergence between the opt-out Member States on the legitimate process to reverse all opt-outs. This

[1048] ibid para 57.
[1049] C-482/08 *United Kingdom v Council* [2010] ECR I-10413, para 61.
[1050] Alberto Miglio, 'Schengen, Differentiated Integration and Cooperation with the "Outs"' (2016) 1 European Papers 139.
[1051] *UK v Council* [2007] (n 1042) para 67.
[1052] See subsection vi, subsubsection A below.
[1053] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.
[1054] Smedley (n 336).
[1055] Ruberto (n 372).
[1056] Anders Ravn Sørensen, 'The Danish Euro: Constructing a Monetary Oxymoron in the Danish Euro Debate' (2014) 16 National Identities 31.

preconception is challenged by the United Kingdom's reversal of the opt-out on Social Policy during the Treaty of Amsterdam negotiations without a popular vote.[1057]

The United Kingdom executive's prerogative to notify the Council that it intended to adopt the euro was made conditional upon the Chancellor's five economic tests.[1058] These tests were 'first, whether there can be sustainable convergence between Britain and the economies of a single currency; secondly, whether there is sufficient flexibility to cope with economic change; thirdly, the effect on investment; fourthly, the impact on our financial services generally; and fifthly, whether it is good for employment.'[1059] Andrew Geddes asserts that these economic tests are an indication that the United Kingdom executive's contestation of EMU was based upon economic factors rather than constitutional factors: 'there were no constitutional impediments to membership, although a referendum would be required. Brown grounded the case in pragmatic terms: 'If a single currency would be good for British jobs, British business, and future prosperity, it is right in principle to join. The constitutional issue is a factor in the decision, but it is not an overriding one'.[1060]

Geddes argues that fulfilment of the tests was not insulated from executive preferences: 'The government claimed that any decision to join would be on an economic basis, rather than a political one. In fact, the politics cannot easily be detached from the economics, especially when the 'five economic tests' adopted by Gordon Brown in order to assess British membership allowed a significant margin for interpretation'.[1061] The executive retained control through its subjective assessment of the best interests of individuals *qua* juridical objects of economic and monetary policy.

The promise of a referendum meant that ostensibly the ultimate decision would be taken by individuals *qua* democratic subjects.

The substantive conditions for a referendum on Economic and Monetary Union contrasts to the 2016 referendum on withdrawal. The latter referendum was not predicated upon the fulfilment of any substantive conditions.[1062] The 'review of the balance of competences' across all departments of government could have provided conditions analogous to the five economic

[1057] TEU and TFEU, Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.
[1058] Ed Potton and Adam Mellows-Facer, 'The Euro: Background to the Five Economic Tests' (2003) House of Commons Research Paper 03/53.
[1059] 'House of Commons Debate on Economic and Monetary Union, HC Deb 27 October 1997, Col 583-4'.
[1060] Andrew Geddes, *Britain and the European Union* (Palgrave 2013) 184.
[1061] ibid.
[1062] See Part Two, Section III, subsection ii for more discussion.

tests.[1063] This discrepancy indicates that successive United Kingdom governments have nationals as more likely to revoke their status as EU citizens than strengthen it through adopting the single currency.

The Danish executive actively sought to persuade the electorate to participate in EMU. After the United Kingdom's executive-led adoption of Social Policy, the 2000 Danish referendum could have been the first exercise of popular sovereignty to reverse the reservation of constituent power. The constituted powers of the government and Parliament introduced a Bill in the Danish Parliament providing the national legal authorisation to join the eurozone if the population consented.[1064]Attempts were made to reconcile supranational monetary integration and national social policy by claiming the two were mutually compatible.[1065] The government sought to synthesise the *teloi* of the two separate constitutional sectors. Adopting the euro was framed as a means to vindicate individuals *qua* nationals rather than individuals *qua* EU citizens: 'The ministry [of Economic Affairs] actively sought to frame something, as intrinsically novel and supranational as the common currency, as nothing but a natural (and national) continuance of Danish monetary history'.[1066]

Both Europhile and Eurosceptic voices in the referendum debate presented the same argument that either adopting or rejecting the euro was necessary to strengthen the self-determination of individuals *qua* nationals of Denmark. The Danish Minister of Finance argued that 'the euro actually posed a unique opportunity to influence the decisions and policies of the great European powers, rather than flowing with the economic tides, as Denmark had been doing for the past 300 years'.[1067] The Danish government moved beyond the euro's positive economic consequences, and 'eventually sought to promote the euro as a phenomenon closely linked to the nation'.[1068] Despite its failure, the Danish government recognised that it was crucial to frame levelling-up as reinforcing the self-determination of individuals *qua* democratic subjects. The mere passive acquisition of economic or other material benefits *qua* juridical objects may be insufficient to justify levelling-up to the supranational level. Sørensen presents the government's proposal to create 'a Danish euro coin' as a 'conceptual oxymoron'.[1069] By contrast, the national symbolism of the head of state, in conjunction with the supranational symbol of the twelve stars of the European

[1063] 'Review of the Balance of Competences' (*GOV.UK*, 18 December 2014) <https://www.gov.uk/guidance/review-of-the-balance-of-competences> accessed 22 April 2020.
[1064] Sørensen (n 1056) 37.
[1065] Marcussen (n 917).
[1066] Sørensen (n 1056) 31.
[1067] ibid 42.
[1068] ibid 43.
[1069] ibid 46.

Union, may have been a microcosmic symbol for the dual supranational and national construction of the European order.

Sørensen identifies three strategies pursued by those against the euro: the national currency was presented as a 'symbol of shared historical experiences and the expression of a collective origin'.[1070] In functional terms, the Krone was presented as a 'guarantee of the independence and sovereignty of the nation'.[1071] The Eurosceptics 'articulated the national currency as a precondition for conducting monetary policy – hence, for the very existence of Denmark as an independent state'.[1072] Finally, the retention of national currency and national monetary policy was framed as a 'crucial precondition to the future existence of the Danish welfare model…the national currency came to represent not only popular sovereignty but something even more valued: the way Danes have chosen to organise their society'.[1073] This interconnection between a substantive macroeconomic policy sector and the capacity for self-determination within Denmark is analogous to the interconnection between the microeconomic and macroeconomic constitutional sectors in the European Union.[1074] The arguments to preserve the integrity and autonomy of the role of individual *qua* national in relation to monetary policy won out. The Danish electorate voted by a 53.1% majority to reject the proposal to introduce the euro.

C. Area of Freedom, Security and Justice

The Treaty of Amsterdam reconstructed the Justice and Home Affairs *acquis* as the 'Area of Freedom, Security and Justice'.[1075] Funda Tekin argues that this terminology goes beyond window dressing and instead suggests an important balance between these three objectives.[1076] Peers provides an overview of the holistic nature of the impetus for this reform: 'the objectives of JHA cooperation were not clear; the institutional roles were ill-defined and left in part for future negotiation; the legal effect of the new instruments was ambiguous; and aspects of the third pillar/first pillar borderline were controversial.'[1077]

[1070] ibid 47.
[1071] ibid.
[1072] ibid.
[1073] ibid.
[1074] Tuori, *European Constitutionalism* (n 18).
[1075] Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004); Fichera (n 58).
[1076] Funda Tekin, *Differentiated Integration at Work: The Institutionalisation and Implementation of Opt-Outs from European Integration in the Area of Freedom, Security and Justice* (Nomos Publishers 2012).
[1077] Peers (n 864) 8.

There were two practical limbs to this symbolic move. The first was the incorporation of the Schengen Convention from international law into EU constitutional law.[1078] The second limb was the transfer of the legal basis for pre-existing border checks, asylum, and immigration norms from the intergovernmental Third Pillar to the supranational First Pillar. Police and criminal co-operation remained within the framework of the third pillar but with comprehensively amended rules.[1079] This was a partial form of this incorporation origin for opt-outs. Supranationalisation of the norm-creation and norm-application processes provoked dissidence from Member States that did not believe this transformation to be in the interests of their nationals. The substantive overlap between the chapter on border checks, asylum, and immigration and the Schengen *acquis* can explain the decisions of the United Kingdom and Ireland to opt-out at Amsterdam. The reservation of constituent power spilt over between constitutional sectors. When the legal bases on police and judicial co-operation were incorporated this led to a far more complex form of opt-out and opt-in legal mechanism due to the United Kingdom's agreement with the policy but resistance to the supranational methods.[1080]

The Member States chose to dissipate and disaggregate the juridical form of the Area of Freedom, Security and Justice. Symbolically, this was an inauspicious start to the objective to construct a holistic constitutional area. Beyond the dissipation between the First and Third Pillars, the rules regarding norm-creation and norm-application within these Pillars were subject to caveats, transitional periods, and complexification.[1081] Tuytschaever opined that '[t]he price to be paid for communitarisation…is high. It is…regrettable that the area of freedom, security and justice is… the part of the Treaty which attains a hitherto unequalled level of technical complexity, which is barely understandable for the insider, let alone the ordinary citizen'.[1082] The driving force behind this complex disaggregated structure was the contestation of the recalcitrant Member States.[1083] The reservation of constituent power complexified the Area of Freedom, Security and Justice even outwith the areas subject to opt-outs. The origins of the AFSJ opt-out Protocols are intimately interconnected with complex depillarisation.

As with 'Helmut Kortenberg', Alexander Stubb provides particular insight as a participant in the negotiations of the Amsterdam Treaty. He validates the hypothesis that complexification

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1078 See subsubsection A above.
1079 Peers (n 864) 15.
1080 See discussion of the Treaty of Lisbon in subsection vi, subsubsection C below.
1081 Peers (n 864) 11.
1082 Tuytschaever (n 704) 74.
1083 Alexander Stubb, *Negotiating Flexibility in the European Union: Amsterdam, Nice and Beyond* (Palgrave Macmillan 2002); Peers (n 863); Tuytschaever (n 885).

was connected to the position of the United Kingdom and Ireland: 'The outcome of the first- or third-pillar question depended to a large extent on what sort of compromise could be struck between the Presidency and the British government.'[1084] Stubb illustrates the negotiating logic which drove the United Kingdom's opt-out. He outlines two scenarios in response to the United Kingdom's resistance to integration in the first pillar. The first was that the United Kingdom would exercise its veto to block the transfer: 'This would have led to an unwelcome and pointless crisis and made it more difficult for the United Kingdom to achieve other negotiating aims'.[1085]

The alternative was for the United Kingdom to allow this completion of the levelling-up of constituent power in the Area of Freedom, Security and Justice and 'seek a formal opt-out from those provisions (i.e. pre-defined flexibility). This would be a satisfactory solution for all, and it would allow the United Kingdom to see solutions in other issues important to its position'.[1086] The dichotomy demonstrates the status quo theoretical presumption that opt-outs are created as a necessary compromise to enable the willing Member States to forge forward with deeper integration. The necessary consent of all the nationals of the Member States to level-up constituent power is procured through exemption rather than persuasion. Stubb's evidence shows that opt-outs were becoming an accepted feature of treaty amendment by Amsterdam.

Whereas the opt-outs from the Schengen incorporation were regarded as inevitable, the creation of the concurrent opt-out from the Area of Freedom, Security and Justice was less foreseeable: 'The interesting thing was that no one talked about special arrangements for the United Kingdom, Ireland and Denmark. This is in stark contrast to the Maastricht negotiations where the opt-outs for Britain from EMU and Social Policy were subject to fierce debate, especially during the final stages of negotiations.'[1087] Opinions diverge on the predictability of this outcome. Tuytschaever presents the reservation of constituent power as a surprise: 'the technical complexity of the area of freedom, security and justice is a consequence of the fact that a number of Member States, at the very last moment, i.e. at the Amsterdam Summit itself, surprised the other delegations by rejecting the preparatory work… and by calling for important exemptions'.[1088] Stubb presents a certain degree of inevitability: 'This almost indifferent approach indicates that the other member governments had accepted that it would be politically and constitutionally difficult for the United Kingdom, Ireland and Denmark to participate in the issues that were to be transferred from the

[1084] Stubb, *Negotiating Flexibility in the European Union* (n 1083) 98.
[1085] ibid 99.
[1086] ibid.
[1087] ibid 94.
[1088] Tuytschaever (n 704) 74.

third to the first pillar...These issues would have to be dealt with bilaterally between the Presidency and the government involved'.[1089]

Stubb highlights the failure of new differentiation mechanisms to accommodate the recalcitrant Member States: 'it had become clear that the enabling clause alone would not be sufficient in third-pillar matters or matters relating to the incorporation of the Schengen Agreement and the new Community provisions on visas, asylum and immigration. The United Kingdom, Ireland and Denmark would have to be dealt with in the traditional way…through opt-outs'.[1090] Opt-outs has been normalised as a constitutional practice following the fierce resistance at Maastricht. A pathway dependence forms once levelling-up commences and develops in an area which a Member State resists. Tuytschaever states that 'Apart from the exemption of the UK and Ireland with respect to Schengen, none of the above exemptions was the subject of any public debate. They were decided behind closed doors at the Amsterdam Summit itself.'[1091] The lack of reasoned discourse and argumentation between the representatives in the actual creation of the Protocols is greatly deficient from the perspective of throughput legitimacy, and the full representation of all individuals as nationals of the High Contracting Parties. This is particularly deleterious with regard to the consequences of the flexible Area of Freedom, Security and Justice Protocol for the ordinary legislative procedure.[1092]

The road that leads to further Member State opt-outs is paved by the incrementalism of past revisions. Unanimity sets the threshold for future constitutional change at the highest possible level in order to vindicate the sovereignty of dissident Member States. If there is a constituent subject from one or more of the Member States that remains unwilling to level-up this power, then it would be illegitimate for the norms to apply within the legal order of the constitutional state. Within this impasse, the willing representatives believe that exemption is more expedient than the two alternatives: constitutional paralysis preventing levelling-up by any of the constituent powers from the national to the supranational level, or using international law to enact levelling-up by excluding the dissent Member State causing a *de facto* withdrawal.[1093]

[1089] Stubb, 94.
[1090] Ibid 98-9.
[1091] Tuytschaever, 74-5.
[1092] See further discussion in subsection vi. Subsubsection C and Section III, subsection iii, subsubsection A below.
[1093] See discussion of Denmark after the Maastricht referendum in subsection iv, subsubsection B above.

vi. The Treaty of Lisbon to the New Settlement for the United Kingdom

A. Schengen

The Treaty of Lisbon consolidated the special positions of Denmark, Ireland, and the United Kingdom with regard to the Schengen *acquis*. The amendment of the Protocol responded to the strict application of the meta-norms by the Court of Justice in the *UK v. Council* cases.[1094] The period after the Treaty ratification saw further judicial determination in *Spain v. Council and European Parliament.*[1095] As the momentum moved from further integration to constitutional disintegration between Lisbon and Brexit, the opt-outs were pushed to their limits by unilateral measures taken by the Danish executive, and the renegotiation of membership by the United Kingdom executive.

Schutte details the attempts of the United Kingdom in the Lisbon negotiations to 'try to undo the effects [of the cases]…and allow the UK to have a free choice of opting in or staying out of measures that develop the parts of the Schengen *acquis* by which it was bound'.[1096] Article 5 of the Protocol was modified provide the discretion to withdraw the notification of participation within 3 months.[1097] Constitutional replication and complexification are evident in this amendment. The increased discretion for the United Kingdom and Ireland emulates the flexibility of the 'opt-in' procedures provided for in Protocol (No 21) on the Area of Freedom, Security and Justice.[1098] Replication creates greater coherence *between* the legal form and operation of different opt-out mechanisms. Complexification results from the desire to maximise executive discretion and avoid legal barriers to political consensus, whilst maintaining a basis in the Treaties. This complex result is a legacy of the different legal sources and forms for the Schengen and AFSJ Protocols. The institutional pathway dependence creates an irrational distinction. Protocols mandating similar procedures within a sector of the constitution covering the same substantive norms are not integrated.

The procedure mandated by the Lisbon Treaty affords complete primacy to the institutions representing individuals *qua* nationals to the detriment of the supranational institutions and EU citizens. The discretion provided to individual Member States in norm-creation generates

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[1094] See detailed analysis in subsection v, subsubsection C above.
[1095] *Spain v EP and Council* (n 1031) 14.
[1096] Schutte (n 734) 1358.
[1097] Protocol (No 19) art 5(2).
[1098] See detailed discussion of the creation and operation of the flexible mechanisms in subsubsection C and Section II, subsection iii above.

uncertainty and opacity. The compromise in the ordinary legislative procedure to accommodate the United Kingdom's and Ireland's 'interest in participating in measures developing the Schengen *acquis* without being willing to accept the underlying *acquis*'[1099] undermines the throughput legitimacy of the norms governing movement through the internal space of the Union.

The *Spain v. Council and European Parliament* case clarified the legal operation of the renegotiated Schengen Protocol. Article 18 of Regulation No 1052/2013 provided for the international law cooperation of the United Kingdom and Ireland in the collection of information through the European Border Surveillance System. The Court of Justice confirmed that the opt-out Protocols are not exempt from the principle that secondary legislation must not contradict secondary law: 'the EU legislature cannot validly establish a procedure that differs from…Article 4 of the Schengen Protocol, whether in the direction of strengthening or easing that procedure'.[1100]

The limited co-operation in the Regulation did not place Ireland or the United Kingdom in a situation equivalent to a Member State, and so did not constitute 'taking part' in Schengen provisions.[1101] The factual situation did not fall within the ambit of the Schengen Protocol. The dicta confirmed the superior status of the Protocols as primary law even when a Member State is willing to participate in Schengen measures through other means. The positivisation of retained constituent power in the Protocols forecloses the use of international law for co-operation mandated therein. EU legality persists even to prevent the fulfilment of the Schengen Protocol's telos to allow 'maximum participation'[1102] of all Member States if these attempts are outwith the scope of the Protocol.

The judgment ensures the formal coherence of the EU legal order. Insistence on the Protocol also ensures that the opt-out Member States cannot enjoy the benefits of certain policies without accruing the obligations. Otherwise, citizens of the Union *qua* juridical objects would still be subject to the burden of passport checks, whereas individuals *qua* nationals would benefit from the increased security provided by their executive's access to the benefits of security measures that compensate for passport liberalisation. The prospect of asymmetric burden-sharing is tempered by the Schengen Protocol's conditions on prior participation and consent of the Council. The absence of these features in the AFSJ opt-out Protocol increases the imbalance between individuals *qua* nationals and *qua* EU citizens.[1103]

[1099] Schutte (n 862) 1364.
[1100] *Spain v EP and Council* (n 1031) para 31.
[1101] ibid para 42, para 58.
[1102] *UK v Council [2007]* (n 1042) para 67.
[1103] See analysis in subsection C below, and normative critique in Section IV, subsection v.

In the early 2010s, the negative consequences of a Member State extricating itself from supranationalism manifested themselves. Rebecca Adler-Nissen claims that Denmark's representatives are not excluded from influencing the norm-creation process by its international law arrangement: 'Denmark has formally abstained from influence but is bound to adopt all decisions taken by the Council of Ministers six months after the other Member States…[s]ince Denmark automatically implements all legislation, if only on an intergovernmental basis, and because of the norm of consensus-seeking, Danish representatives are permitted to influence new Schengen measures'.[1104] This *de facto* position does not change the discrepancy *de jure* that representatives of individuals *qua* Member State nationals of Denmark are not represented in the creation of Schengen norms. Within Danish territory, individuals *qua* EU citizens have been formally represented in the formulation of the norms, but individual *qua* nationals have not. Despite this lack of input, the substance of the norms still applies to these individuals on the basis of international and national law. Their representation is reduced to the creation of implementing domestic measures.

There are further consequences for the norm-application process. The Protocol outlines that 'appropriate measures' will be considered if Denmark fails to implement a Council of Ministers decision within the time-frame. Adler-Nissen suggests that this is a 'euphemism' for being 'thrown out of Schengen'.[1105] These crude retaliatory sanctions are far removed from the full constitutional jurisdiction of the Court of Justice of the European Union. This adjudicative lacuna was evident in 2011 when border checks were re-established at the border with Germany as part of a coalition concession.[1106] The threat to the Schengen *acquis* prompted warnings from the President of the Commission that intervention would be pursued if the situation were not remedied.[1107] When Denmark and Sweden re-installed border controls again in 2015 in response to the migration crisis, Denmark complied with the norm-specific derogation regime established by the Schengen Border Code on Temporary Reinstatement of Border Controls.[1108] The Danish Protocol removes the situation from the enforcement mechanisms of the framing juridical

[1104] Adler-Nissen (n 790) 136.
[1105] ibid.
[1106] ibid 134.
[1107] Ian Traynor, 'EU Warns Denmark over Border Controls | Denmark | The Guardian' (13 May 2011) <https://www.theguardian.com/world/2011/may/13/eu-denmark-border-controls> accessed 23 April 2020.
[1108] Alberto Horst-Neidhardt, 'An Ever Looser Union among the Peoples of Europe? • Alberto-Horst Neidhardt' (*Alberto-Horst Neidhardt*, 12 January 2016) <https://me.eui.eu/alberto-horst-neidhardt/blog/an-ever-looser-union-among-the-people-of-europe/> accessed 23 April 2020; temporary reinstatement rules now found in Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77/11 arts 25-35.

constitution.[1109] Any attempts to ensure compliance are limited to unbinding political pressure. The foundations of the Schengen norms in national and international law within Denmark provide weaker foundations than the rest of the Member States listed in Article 1 of the Schengen Protocol. As Denmark participates in all Schengen measures in this way, its commitment to Schengen may be regarded as wider but constitutionally shallower than the United Kingdom and Ireland.

The United Kingdom's February 2016 renegotiation of membership did not explicitly seek to amend Protocol (No 19). The amendments proposed to Protocol (No 21) and (No 22) on Area of Freedom, Security and Justice measures sought to address complications that also pertained to the Schengen Protocol.[1110] It may also be argued that the United Kingdom's proposed amendments to social benefits and free movement were a spill-over of its reservation of constituent power in relation to Schengen. Resistance to removing border controls can be functionally connected to resistance to the free movement of EU citizens into the territory of the United Kingdom. This provides evidence that the reservation of constituent power is an expansive phenomenon.

The Decision proposed the amendment of Regulation No 883/2004 on the coordination of social security systems to provide Member States with an option to index child benefits to the conditions of the Member State where the child resides.[1111] The proposal to amend Regulation No 492/2011 on free movement or workers would have seen the creation of an 'emergency brake' mechanism to allow Member States to restrict access to non-contributory in-work benefits for 7 years in the event of 'inflow of workers from other Member States of an exceptional magnitude over an extended period of time'.[1112]

The constitutional legislators in international law managed to prevent a specific opt-out from the juridical core of EU citizenship for one Member State by constructing a general derogation clause. The reverse situation to the negotiation of the EMU opt-out Protocol may be explained by the paradigm shift of an origin for opt-outs arising not from resistance to constitutional innovation, but contestation of the established obligations of the EU legal order. Nevertheless, the boundaries of EU citizenship were pushed in order to appease an uncooperative Member States despite the claim that the renegotiation would not undermine the 'principles on

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[1109] Tuori, *European Constitutionalism* (n 18).
[1110] See discussion in subsubsection C below.
[1111] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16 22.
[1112] ibid 23.

which the European project is founded'.[1113] If these proposals had been enacted a further legal barrier would have been established for individuals seeking to rely on their EU citizenship to integrate into the society of another Member States. This would have been inimical to the value of free movement as an 'instrument that liberates the individual's mind and body from the domination that the nation-state exerts over it'.[1114] The United Kingdom's attempt to reconstruct free movement rights is the logical continuation of its ongoing resistance to the Schengen norms on the removal of border controls. This dissidence is the judicial manifestation of its resistance to the legitimacy of the supranational constituent status of citizenship of the European Union that would culminate in withdrawal.

B. Economic and Monetary Union

By the time of the Treaty of Lisbon, the Danish electorate's explicit rejection of the euro, and the procrastination of the United Kingdom government over holding a referendum, meant that the Protocols had now become *de facto* temporally unlimited opt-outs from Economic and Monetary Union. This situation was entrenched further by the traumas of the eurozone crisis for much of the decade leading up to Brexit.[1115] Measures to try and address the crisis in 2011 saw the United Kingdom government refuse to level-up constituent power for a treaty amendment designed to address stability, coordination and governance in the eurozone.[1116] The objection of the United Kingdom required resort to 'old-style flexibility' and the conclusion of the international Treaty on Stability, Coordination and Governance.[1117] This revived the paradigm from Schengen of using international law to overcome Member State reticence. Rather than resistance to a new sector, this was required due to deferred levelling-up by the United Kingdom in Economic and Monetary Union. The veto also intersected with disintegration as a means to manifest general resistance to European integration in the face of domestic pressure.

[1113] Donald Tusk, 'Letter by President Donald Tusk to the Members of the European Council on His Proposal for a New Settlement for the United Kingdom within the European Union' <http://www.consilium.europa.eu/en/press/press-releases/2016/02/02/letter-tusk-proposal-new-settlement-uk/> accessed 23 April 2020.

[1114] De Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship' (n 163).

[1115] See inter alia Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis* (Cambridge University Press 2014); Thomas Beukers, Bruno De Witte and Claire Kilpatrick, *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017); Mark Dawson and Floris De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 The Modern Law Review 817.

[1116] Laura Kuenssberg, 'PM Blocks EU-Wide Treaty Changes' *BBC News* (9 December 2011) <https://www.bbc.com/news/uk-16104275> accessed 27 April 2020.

[1117] Treaty on Stability, Coordination and Growth of 2 March 2012 T/SCG.

The eurozone crisis drove the demarcation between the spheres of governance of the eurozone Member States and the opt-out Member States in the February 2016 New Settlement for the United Kingdom. The heads of state or government would have been committed to incorporate the substance of the section into the Treaties at the time of the next revision.[1118]

The New Settlement reiterated that 'measures, the purpose of which is to further deepen economic and monetary union, will be voluntary for Member States whose currency is not the euro and will be open to their participation wherever feasible'.[1119] The opt-out Member States would have committed to not creating obstacles but to facilitate such further deepening whilst their rights and competences would be respected.[1120] The declaration would have reiterated that discrimination on the basis of currency was prohibited.[1121] In return, Member States whose currency is not the euro would have committed not to impede the implementation of legal acts directly linked to the functioning of the euro area.[1122] The application of norms is clarified through the statement that 'Union law on the banking union conferring…authority over credit institutions is applicable only to credit institutions located in Member States whose currency is the euro' or for Member States with a close cooperation agreement with the European Central Bank.[1123]

A crucial safeguard would have been provided in the statement that '[e]mergency and crisis measures designed to safeguard the financial stability of the euro area will not entail budgetary responsibility for Member States whose currency is not the euro'.[1124] The declarations also sought to preserve the democratic representation of individuals *qua* nationals in relation to economic and monetary policy: 'The informal meetings of the…Euro Group shall respect the powers of the Council as an institution upon which the Treaties confer legislative functions and within which Member States coordinate their economic policies'.[1125] The throughput legitimacy of the Council is emphasised in the statement that 'all members of the Council participate in its deliberations, even where not all members have the right to vote.'[1126]

The declaration may be regarded as re-ordering the fault-line between the Eurozone and non-Eurozone Member States. This demonstrates that the Economic and Monetary Union opt-

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[1118] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16. 15.
[1119] ibid 12.
[1120] ibid.
[1121] ibid 13.
[1122] ibid.
[1123] ibid.
[1124] ibid 14.
[1125] ibid.
[1126] ibid.

outs have established a permanent state of constitutional distinction as opposed to temporal differentiation. This requires principles to ensure the co-existence and equality of individuals *qua* EU citizens despite the material difference in their currency on the basis of their nationality. To this end, 'the Union institutions, together with the Member States, will facilitate the coexistence between different perspectives within the single institutional framework consistency, the effective operability of Union mechanisms and the equality of Member States before the Treaties'.[1127] The withdrawal of the United Kingdom means that this opportunity to clarify constitutional boundaries has been lost.

C. Area of Freedom, Security and Justice

The most important development at Lisbon was the extension of the scope of Protocol (No 21) and (No 22) to cover judicial and police co-operation. This was a necessary requirement of de-pillarisation'[1128] and the establishment of the dual-Treaty structure. The abolition of the third pillar and the subsequent relocation of the legal bases for police and judicial co-operation brought these measures within the condition for the scope of application of the opt-out Protocols.[1129] The pathway dependence that had started at Maastricht to apply the full supranational constitutional method despite the resistance of certain Member States had reached its conclusion. Extension in a different dimension was executed through the addition of Article 4a to Protocol (No 21). This extended the scope of the opt-out mechanism to include measures amending an existing norm even if the United Kingdom and Ireland have opted-in to the original measure. The sub-article addresses the opposite situation of the *UK v Council* cases in which the United Kingdom was prevented from participating in amending measures.[1130] The clause provides the opt-out Member States with an even higher degree of flexible discretion, with greater risks to the internal coherence of the rights and obligations in the Area of Freedom, Security and Justice.

The Lisbon amendments provided a further example of the interconnection between different forms of derogation. Depillarisation was tempered by the creation of a transitional regime in Protocol (No 36).[1131] Title VII thereof covers Area of Freedom, Security and Justice

[1127] ibid 12.
[1128] Steve Peers, 'In a World of Their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon' (2008) 10 Cambridge Yearbook of European Legal Studies 383; Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 Common Market Law Review 617.
[1129] See Section II, subsection iii, subsubsection A.
[1130] *UK v Council [2007]* (n 1042); *UK v Council [2010]* (n 1042). See discussion in subsection v, subsubsection A above.
[1131] TEU and TFEU, Protocol (No 36) on transitional provisions.

measures.[1132] A continuity clause ensured that all measures adopted before Lisbon remained legally valid. The corollary was that, with respect to police and judicial co-operation measures adopted *before* the entry into force of the Treaty of Lisbon, the Commission's infringement procedure power would not apply and the prior consensual regime for Court of Justice adjudication would apply. This represented a gradual embedding of the full architecture of the juridical constitution. The length of this period was established as five years.

This temporal derogation opened the door to a new form of opt-out for the United Kingdom. The Protocol empowered the Member State to notify that it did not accept the new powers of the supranational institutions. Although the initial disapplication of norms does not fall within the executive discretion of the Member State, in the sense that the legal choice is to reject the authority of the supranational institutions, the next paragraph does provide an opt-in discretion.[1133] This is analogous to yet distinct from the Protocol (No 21) opt-in mechanism. The United Kingdom was entitled, with the broad discretion of 'any time afterwards', to notify the Council of its wish to participate in the acts which had ceased to apply to it. The United Kingdom exercised this power in 2014 and opted back into a select number of measures.[1134] Bruno de Witte notes that 'the privileged treatment which the UK had meted out to itself when signing the Lisbon Treaty consisted not only of having a block *exit* option, but also a selective *re-entry* option for those EU measures that it liked to keep – namely the ones that seemed most useful from the point of view of the UK's domestic justice and home affairs policy'.[1135] The United Kingdom did not provide extensive reasons for its decision to opt-in to particular measures under Protocol (No 36). This lack of transparency and accountability has been criticised, and it was left to scholars to reconstruct the reasons for these choices.[1136]

Protocol (No 36) provides a *de facto* opt-out from the relevant police and judicial co-operation measures. De Witte argues that 'for the first time in the EU's history, it allowed a Member State to free itself from existing EU law obligations'.[1137] Although the exact legal power is not to opt-out from pre-existing measures, the necessary consequence that all the police cooperation and judicial cooperation measures cease to apply to the Member State.[1138] Legally, this

[1132] See analysis in Section II, subsection iii. Subsubsection C.
[1133] TEU and TFEU, Protocol (No 36) on transitional provisions art 10(5).
[1134] See Section II, subsection iii, subsubsection C for discussion of the legal conditions for this opt-in.
[1135] De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' (n 872).
[1136] Maria Fletcher, 'EU Criminal Law Flexibility: What Lessons from the UK Protocol No. 36 Saga?' in Valsamis Mitsilegas, Maria Bergström and Theodore Konstadinides (eds), *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016); Valsamis Mitsilegas, 'European Criminal Law After Brexit' (2017) 28 Criminal Law Forum 219.
[1137] De Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' (n 872) 14.
[1138] TEU and TFEU, Protocol (No 36) on transitional provisions art 4(10).

blurs the lines between an executive decision to reserve constituent power, and the remedial suspension of legal rights resembling the remedy of reciprocal non-performance of obligations in public international law. Such a 'remedy' is contrary to the European Union's self-fulfilling prophecy of constituting a new legal order distinct from international law.[1139] It is particularly ironic that such an a-constitutional legal phenomenon was created as part of a grand consolidation of supranational constitutionalism.

This legal construction acts as a smokescreen obscuring innovation in the practice of Member State opt-outs. For the first time, a Member State was given the option to utilise its constituent power to realise the disapplication of binding EU law norms, as opposed to the status quo of securing an exemption from participation in the creation of new norms. A partial justification may be forwarded that, although the substance of the norms had applied, the supranational method had not. No norms that had been legitimated by individuals *qua* nationals and *qua* EU citizens were disapplied through the unilateral act of one Member State. The United Kingdom's notification under the Protocol may be regarded as an exercise of deconstructive power rather than mere retention of constituent power. This functions as a microcosm of notification under Article 50 TEU. Protocol (No 36) was a theoretical and chronological stepping-stone towards the United Kingdom's eventual withdrawal.

After Lisbon, the United Kingdom sought to enforce the scope of Protocol (No 19) and (No 21) before the Court of Justice of the European Union.[1140] This provides further evidence for the importance of the Court in preserving legal certainty when opt-out mechanisms extend into the ordinary legislative functioning of the Union's constitutional order. A series of cases concerned the appropriate legal base for measures concerning special cases of Third Country Nationals.

In *UK v Council* (the EEA case) the UK argued that legislation extending EU law social security schemes to citizens of the EFTA states, which was adopted under Article 48 TFEU on freedom of movement for workers, should have been proposed under Article 79 TFEU concerning legally resident third-country nationals.[1141] The Court of Justice reiterated the test that the choice of legal basis must rest on 'objective factors amenable to judicial review'. Teleologically, the Court held that the EEA Agreement established a special and privileged relationship for this class of Third Country Nationals, and endorsed the Decision being adopted under Article 48 'so that the internal market established within the European Union is extended to the EFTA states'.[1142]

[1139] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (n 17).
[1140] House of Lords European Union Committee (n 807).
[1141] Case C-431/11 *UK v Council of the European Union* [2013] ECLI:EU:C:2013:589.
[1142] ibid para 50.

The Court of Justice also reinforced its judgment by reference to the telos of Article 79 TFEU: 'the efficient management of migration flows, fair treatment of third-country nationals…and the prevention of…illegal immigration and trafficking'.[1143] None of these objectives pertained to the relationship established within the EEA Agreement, which created a quasi-EU citizenship with full free movement rights. Consequently, it would have been teleologically inappropriate if the United Kingdom were able to opt-out from these measures in relation to EEA citizens.

A similar dispute informed the Swiss social security coordination case.[1144] The United Kingdom argued, similarly to the EEA citizens in the above case, that Article 48 TFEU could not be extended to address third-country nationals or economically inactive persons. Again, however, the Court of Justice emphasised the telos behind the Agreement as ensuring free movement between Swiss citizens and EU citizens. It endorsed Article 48 TFEU as the appropriate legal base 'in order to preserve a coherent and correct application of the legal acts of the European Union and to avoid administrative and…legal difficulties'[1145] Protocol (No 21) plays no part in determining the propriety of this legal base.

The same dispute arose in relation to the extension of social security coordination with Turkey.[1146] The Court held again that the relationship between the EU and Turkey was distinct from the general regulation of Third Country Nationals under Article 79 TFEU. By contrast to the relationship with the EFTA states, however, the Court of Justice held that the principles of the single market did not provide a teleological basis. Article 48 TFEU had to be accompanied by Article 217 TFEU's general competence to conclude agreements with Third Countries. The United Kingdom's strategy to enforce its opt-out Protocol through litigation corrected a legal error by the legislative institutions, albeit without the result that the United Kingdom argued for.

Similar disputes arose in cases outside of the topic of social security coordination. In the Philippines case,[1147] the Commission sought annulment of a Council Decision to sign a Framework Agreement on Partnership and Cooperation between the EU and the Philippines. The Commission concluded the agreement under Article 207 TFEU on the common commercial policy and Article 209 TFEU on development cooperation. The Council added additional legal bases, including Article 79(3) TFEU concerning the conclusion of readmission agreements for Third Country Nationals who do not fulfil conditions for entry or residence in the territory of a Member State. The Court of Justice upheld the Commission's claim, arguing that the predominant

[1143] ibid para 62.
[1144] Case C-656/11 *UK v Council of the European Union* [2014] ECLI:EU:C:2014:97.
[1145] ibid para 62.
[1146] Case C-81/13 *UK v Council of the European Union* [2014] ECLI:EU:C:2014:2449.
[1147] Case C-377/12 *European Commission v the Council* [2014] ECLI:EU:C:2014:1903.

telos of development would be promoted by individual clauses on readmission if they served this purpose.[1148] The Court of Justice's approach may be regarded as ensuring that Area of Freedom, Security and Justice measures should only be utilised when legislative measures have a predominant telos that concerns this sector of the constitutional order. In turn, this ensures that the scope of the opt-out Protocols is similarly limited and does not creep into measures which seek to uphold objectives outwith the Area of Freedom, Security and Justice.

In the conditional access services case, which concerned the application of the common commercial policy to the Council of Europe Convention on the legal protection of services based on conditional access, the Court of Justice reiterated the approach to the opt-out Protocol contrary to the interpretation of the United Kingdom. [1149] It stated that the opt-in Protocol 'was not capable of having any effect whatsoever on the correct legal basis for the adoption of the Decision'[1150] to allow the EU to sign an international convention. The fact that a provision in the Convention concerned criminal penalties in order to enforce a prohibition did not bring the Council Decision to conclude the Convention under the scope of the Area of Freedom, Security and Justice. This approach would be putting the cart before the horse; the legal basis of the measure determines whether the Protocol should be applied, and not vice versa. This confirmed that the opt-out Protocols are only activated at the point at which the Area of Freedom, Security and Justice legal basis has been confirmed.

The skirmishes over the definition and scope of the United Kingdom's opt-out Protocol reveal the distinction between the reservation of constituent power through opt-outs and the exercise of deconstructive power through withdrawal. With the exception of Denmark's Schengen opt-out, recalcitrant Member States cannot unbind themselves from the overarching formal principles of the constitutional order through the opt-outs. The Union's institutions must have the final say on the exact scope of the legal mechanisms to enshrine these reservations. Only the exercise of deconstructive power and the construction of a new legal relationship in public international law will allow a state to reclaim the sovereignty to determine the formal arrangements governing legal co-operation.

The reforms to the Area of Freedom, Security and Justice opt-out proposed in the New Settlement for the United Kingdom would have addressed the disputes over legal bases: '[t]he representatives of the Member States in their capacity as members of the Council will ensure that,

[1148] ibid para 39, 58.
[1149] Case C-137/12 *European Commission and the European Parliament v the Council of the European Union* [2013] ECLI:EU:C:2013:675.
[1150] ibid para 73.

where a Union measure, in the lights of its aim and content, falls within the scope of [the AFSJ], Protocols No 21 and 22 will apply to it, including when this entails the splitting of the measure into two acts'.[1151] This would have expanded the scope of the Protocol to closer resemble the United Kingdom government's subject interpretation of the opt-out applying to all Justice and Home Affairs relevant legislation.[1152] This proposal would have caused further disruption to the ordinary legislative procedure due to the retention of constituent power.

Before the United Kingdom's referendum on membership in June 2016, Denmark held another referendum to determine whether the democratic subject *qua* national wished to reduce the restrictions on the levelling-up of constituent power. On 3 December 2015, a referendum was held on whether to exercise the option afforded under Article 8 of Protocol (No 22).[1153] This would have been a necessary condition to enable Denmark to become a full member of the Europol agency. As opposed to the complete reversal of the opt-out envisaged by Article 7, Article 8 mandates the replacement of the complete opt-out with flexible arrangements analogous to the United Kingdom and Ireland's Protocol (No 21). This would also have 'reversed' Denmark's opt-out from the Schengen *acquis*.[1154] The condition for the notification is that such a decision is 'in accordance with its constitutional requirements'. This is a standardised condition for the exercise of constituted constituent power within the triptych, and its Protocols which function as off-shoots from Article 48 TEU. The referendum did not provide a case-study for the 'reversal' of an opt-out through an exercise of popular sovereignty. The no vote won by 53% and Denmark retained its block opt-out from the Area of Freedom, Security and Justice. [1155]

[1151] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16 18.
[1152] See discussion in Section II, subsection iv above.
[1153] TEU and TFEU, Protocol (No 22) on the position of Denmark, art 8.
[1154] ibid art 8(2).
[1155] Jacobsen (n 853).

IV. Summary

The Protocols enabling Member State opt-outs result from the retention of constituent power during treaty amendments. Excavation of the normative foundations of differentiation reveals that opt-outs may be justified when an objective reason distinguishes certain Member State nationals from all other EU citizens. The present conditions for the creation of opt-outs do not require any such justification. Reserved constituent power is positivised through Protocols addended to the Treaties. The United Kingdom has the tailored Protocol (No 15) for opting-out from the third stage of Economic and Monetary Union, whereas Denmark's Protocols (No 16) and (No 17) places Denmark in the same position as the 'Member States with a derogation' that have not fulfilled the conditions for the third stage of EMU. The United Kingdom's and Ireland's opt-outs from the Schengen *acquis* are confirmed in Protocol (No 19) that incorporated the international agreement. The opt-out is distinct from the EMU Protocols because the Member States may participate in Schengen legislation with the agreement of the Council. The separate Protocol (No 20) further defines the opt-out by reference to the permissions for the national authorities of the United Kingdom and Ireland. The Schengen provisions of Denmark's Protocol (No 22) confirm an opt-out from the supranational constitutional method. Instead, the Member State implements the Schengen *acquis* through national and international law.

The United Kingdom and Ireland have a flexible opt-out from the Area of Freedom, Security and Justice under Protocol (No 21). By contrast to the Schengen *acquis*, the agreement of the Council is not necessary for the Member States to opt-in to the creation and application of legislation. Opt-ins after adoption may be subject to a review procedure. By contrast, Denmark has a complete opt-out from the Area of Freedom, Security and Justice through Protocol (No 22). This is supplemented by the text of a flexible opt-in mechanism that may be activated through a decision in accordance with Denmark's constitutional requirements. The United Kingdom secured further discretion in the transitional Protocol (No 36) not to consent to the authority of the supranational institutions in police and judicial co-operation. This decision led to the disapplication of measures already binding upon the United Kingdom. The Protocol allowed the activation of the Schengen and AFSJ opt-in mechanisms after disapplication.

The origins of opt-outs are resistance to incorporation of norms and the creation of new sectors of the supranational constitutional order. From the Single European Act to the Treaty of Maastricht the opposition of certain Member States required an international agreement to create the Schengen zone of liberalised border controls. Economic and Monetary Union was limited to

intergovernmental mechanisms with fragmented participation by the opt-out Member States. Justice and Home Affairs co-operation did not have a treaty base. Cooperation between the Member States occurred through international Conventions.

The Treaty of Maastricht saw the first creation of opt-out Protocols. Resistance from the United Kingdom and Denmark to the adoption of the euro saw the first official retention of constituent power during a treaty amendment. Denmark would trigger the option to opt-out from the third stage of EMU following the initial rejection of the treaty through a referendum. The United Kingdom also activated its opt-out before the Treaty of Amsterdam. Maastricht also saw the creation of a treaty base for Justice and Home Affairs in the Third Pillar, with the declared intention for further supranational integration in the future. The Schengen Protocol was incorporated into the supranational constitutional order by the Treaty of Amsterdam. The result of supranational integration was the retention of constituent power by the United Kingdom, Denmark, and Ireland. The reconstruction of Justice and Home Affairs as the Area of Freedom, Security and Justice and the transfer of measures to the First Pillar saw the creation of further opt-out Protocols. Ireland was compelled to secure opt-outs by its unique territorial relationship with the United Kingdom.

Before the Treaty of Lisbon, the United Kingdom government prevaricated on holding a referendum on participation in Economic and Monetary Union. The Danish electorate rejected the reversal of the opt-out in a 2000 referendum. The Treaty of Lisbon deepened the opt-outs from the Area of Freedom, Security and Justice in reaction to the de-pillarisation of the Treaties. The adoption of the full supranational method required a transitional regime. This transition created the means for the United Kingdom to reject the authority of the supranational institutions over police and judicial co-operation. The present narrative of disrupted integration transitioned into the narrative of disintegration with the New Settlement for the United Kingdom. The Decision between the heads of state or government in international law would have pre-bound the constituent powers at the next treaty amendment. Both the form and content of the New Settlement would have pushed the boundaries of the constitutional acceptability of Member State opt-outs.

4. Reform – Reconstructive Power[1156]

I. Introduction: The Argument for Reform

Brexit provides an opportunity to assess the functioning of opt-outs and withdrawal and consider reform. After two decades of disrupted integration, the European Union has experienced the phenomenon of disintegration for the first time. The operation of Article 50 TEU in practice allows assessment of whether it fulfils its telos of providing for a sovereign right of withdrawal and an orderly procedure. Schimmelfennig and Holzinger claim that 'Denmark and other countries with a comparatively high level of differentiation are unlikely to follow the UK out of the EU'.[1157] It should be added that Member States such as Poland and Hungary that are engaged in existential values clashes with the supranational institutions are also unlikely to trigger Article 50.[1158] This unlikelihood may be regarded as a success for the deterrent strategy of the supranational institutions during Brexit negotiations to prevent complete disintegration. Nevertheless, withdrawal remains a sovereign right of all the Member States and should be designed to operate optimally regardless of whether its use is likely.

The withdrawal of the United Kingdom also means that the main protagonist of disrupted integration will no longer participate in reconstructions of the supranational constitutional order. The Protocols enabling opt-outs will no longer fully apply. Schimmelfennig and Holzinger predict that 'Brexit may…not only reduce the probability of further differentiation in future differentiation in future treaty negotiations and legislation. It may also create pressures on peripheral countries to reconsider and reduce their opt-outs from monetary union, interior policies and defence'.[1159]

This Part of the thesis considers the arguments for reform of the Protocols and Article 50 TEU at the next treaty amendment. The objective is not to remove the possibility of withdrawal or opt-outs, but instead to ensure that the legal mechanisms function in a manner that is more normatively consistent with the supranational constitutional order. These reforms are considered

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[1156] This Part of the thesis develops the text in Garner, 'Reforming Withdrawal and Opt-Outs from the European Union' (n 7).

[1157] Frank Schimmelfennig and Thomas Winzen, 'Differentiated EU Integration: Maps and Modes' (European University Institute 2020) EUI RSCAS Working Paper 2020/24 21 <http://cadmus.eui.eu//handle/1814/66880> accessed 27 April 2020.

[1158] For the alternative argument that the conduct of the Hungarian and Polish governments constitutes an intention to withdraw under Article 50(1) TEU see Christophe Hillion, 'Poland and Hungary are withdrawing from the EU' (*Verfassungsblog*, 27 April 2020) <https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/> accessed 27 April 2020.

[1159] Schimmelfennig and Winzen, 'Differentiated EU Integration' (n 1157) 21.

through the specific normative lens of vindicating the role of individuals as both nationals of the Member States and citizens of the Union in their roles as democratic subject and juridical object. Subsection i and subsection ii delineate the normative deficiencies of opt-outs and withdrawal that would need to be addressed in a hypothetical reform process. Section II considers whether the process of amendment itself requires reform. Section III, subsection i considers reform to the operation of opt-outs, and subsection ii considers reforms to Article 50 TEU.

i. Normative deficiencies of opt-outs

The prevalence of opt-outs in the supranational constitutional order violates the quadripartite role of individuals. The creation of these legal Protocols is a retention of supranational constituent power, which are then legitimated by all of the High Contracting Parties through the ratification of the Treaty amendments. This use of this power to carve out sectors of the EU legal order extends the function of the constitutional states as guarantors of their nationals into the ordinary functioning of the supranational constitutional order. These opt-outs reveal an irritation in the 'levelling up' of constituent power whereby Member States contest the legitimacy of certain norms being created at the supranational level. The European Parliament has argued that 'opt-outs for individual Member States endanger the uniform application of EU law, lead to excessive complexity in terms of governance, jeopardise the cohesion of the Union and undermine solidarity among its citizens'.[1160]

The manifestation of opt-outs in practice poses challenges to the validity of the dual-constituent thesis as an explanatory theory of European integration. The opt-outs that the United Kingdom, Denmark, and Ireland rely upon violate the normative principles of equality between individuals qua democratic subjects. They provide evidence that in the critical processes of establishing the primary law norms that will apply and will not apply to individuals as juridical subjects the executive representatives of individuals *qua* nationals of a Member State remain the dominant constituent power. The representatives of individuals qua EU citizens, the Members of the European Parliament, are excluded from the processes of discursive deliberation that produce the Protocols enabling opt-outs. Their role is relegated to either approving or disapproving the entire negotiated text with no specific influence over whether or not opt-out Protocols should be included or not. Furthermore, once created, the operation of these opt-outs also are indicative of

[1160] European Parliament (n 700).

the continuing constituent dominance of the Member States, in particular with regard to the iterative 'opt-in' mechanisms provided for in the Area of Freedom, Security and Justice.

These opt-outs undermine the co-equivalence between individuals *qua* nationals of a Member State and *qua* citizen of the Union because individuals from an opt-out Member State are represented in the creation of norms in their latter role, but not in their former role. Further inequality is created between individuals *qua* democratic subject and *qua* juridical object. The asymmetric territorial application of norms to individuals undermines the equality of representation in the creation of these norms. For individuals from the non-opt-out Member States there is territory of the European Union in which they are disconnected from the norms that they have legitimated for individuals who are from the opt-out Member States they will be subjected to norms within the territory of other Member States that they have legitimated in only one of their democratic subject personae.

The current opt-outs pose specific challenges to the supranational constitutional order. With regard to the United Kingdom and Denmark's opt-outs from EMU, the legislative institutions that represent democratic subjects in their dual-roles have been fragmented by the informal Eurogroup that represent the Member States of the Eurozone.[1161] This is exacerbated by the executive body of the European Central Bank which is predominantly empowered to act only with regard to the Eurozone Member States.[1162] Both the creation processes for opt-outs and the actions of Member States derogating from EMU have increased the propensity for the High Contracting Parties to revert to 'satellite Treaties' as a tool of European integration.[1163] The Edinburgh Agreement that bound the Member States to implement opt-outs for Denmark after the Maastricht ratification failure was an international Treaty between the heads of state or government.[1164] This precedent was followed for the United Kingdom's renegotiation in February 2016, which was concluded as an international agreement binding between the 'heads of state or government acting within the European Council'.[1165]

[1161] Curtin and Fasone (n 746).
[1162] Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank* (Hart Publishing 2001); Chiara Zilioli and Martin Selmayr, 'The Constitutional Status of the European Central Bank' (2007) 44 Common Market Law Review 355.
[1163] De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (n 643).
[1164] 'Edinburgh European Summit - Conclusions of the Presidency - December 1992' <http://www.europarl.europa.eu/summits/edinburgh/default_en.htm> accessed 17 December 2018. See Part 3, Section III, subsection iv, subsubsection B.
[1165] European Council meeting (18 and 19 February 2016) - Conclusions, Annex 1 - Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union - Brussels 19 February 2016 EUCO 1/16. See Part 3, Section III, subsection vi.

Between these two instances, the objection of the United Kingdom during the Article 48 amendment process to the 'Fiscal Compact', despite the fact its opt-out meant it would not be bound by all of the obligations contained therein, led to the conclusion of the international Treaty on Stability, Coordination and Governance.[1166] The resort to international law side-lines the supranational institutions in the creation of norms even if it explicitly assigns roles for them in its application. This undermines the capacity for individuals *qua* EU citizens to exercise democratic subjecthood due to the exclusion of the European Parliament.

Denmark's 'opt-out' from the Schengen *acquis* raises a unique challenge for supranational constitutionalism. The substance of these norms is the same for individuals *qua* juridical objects within the territory of Denmark. However, the norms are created and apply through national and international law. Only individuals *qua* nationals of the state are represented in the creation of these norms. The supranational judicial architecture for the application of these norms is unavailable for individuals *qua* juridical objects.

The United Kingdom and Ireland's flexible opt-outs from Schengen and the Area of Freedom, Security and Justice have particularly egregious consequences for the supranational constitutional order. The retention of the constituent power of the state spills-over into the supranational creation of legislation within the Council. This undermines the principles that underpin the functioning of this institution.[1167] The spill-over of the constituent power function is also evident in the wholesale opt-out and opt-in procedures mandated by Protocol (No 36). This Protocol crossed the Rubicon because it enables the de-enforcement of norms that already applied to and within the opt-out Member State. Notification under the Protocol by the United Kingdom may be understood as a forerunner to the exercise of deconstructive power under Article 50 TEU.[1168]

The consequences of opt-outs for individuals *qua* juridical objects of the iterative opt-in mechanisms for Schengen and AFSJ may undermine the holistic integrity of these constitutional sectors. The United Kingdom and Ireland have been left with the executive discretion to opt-in to measures which they believe will support their own domestic justice and home affairs policies.[1169] Nadine El-Enany observes that 'the UK has opted-out of nearly all proposals concerning visas, borders and legal migration, but it has opted into all proposals concerning asylum and civil law

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[1166] Treaty on Stability, Coordination and Growth of 2 March 2012 T/SCG. See Part 3, Section III, subsection vi, subsubsection B.
[1167] See Part 1, Section IV, subsection ii.
[1168] See Part 3, Section II, subsection iii, subsubsection C. See also Part 3, Section III, subsection vi, subsubsection C.
[1169] See Part 3, Section II, subsection iv.

and nearly all proposals concerning illegal immigration'.[1170] These latter measures have been conceptualised as 'compensatory measures'[1171] that compensate the Member States for removal of internal frontiers. The opt-out Member States can benefit from added rights without undertaking the initial duties. El-Enany argues that the United Kingdom and Ireland 'neither has to justify its asylum regime choices as reasonable, sensible, moral or defensible, nor must it compromise on its individual preferences'.[1172] The selective participation of Member States in the supranational legislative process undermines the principles whereby the interests of individuals *qua* nationals are represented on the basis of an exchange of persuasive reasons.

The reasons for the creation of Ireland's Schengen and Area of Freedom, Security and Justice opt-outs may indicate normative justifications. The executive was compelled to follow the reservation of constituent power of the United Kingdom in order to ensure the legal regime of border controls between the two states was maintained.[1173] The interests of Irish nationals *qua* juridical objects in the preservation of internal security provided an objective difference to nationals of other Member States without the unique context of relations between the United Kingdom and Ireland. This distinction outweighed the importance of a uniform regime of border controls for all individuals *qua* EU citizens on the island of Ireland.

ii. Normative deficiencies of withdrawal

Disintegration has more deleterious consequences for individuals *qua* democratic subjects and *qua* juridical objects than disrupted integration. The normative paradox is that withdrawal is a more acceptable phenomenon within the supranational constitutional order than opt-outs. Disrupted integration takes an *ad hoc* legal form that accommodates the executive discretion of Member State governments during treaty amendments when supranational constraints are inapplicable. By contrast, disintegration is prospectively mandated by a supranational clause with express roles for the institutions that represent individuals in their quadripartite role and a clearly defined juridical outcome. The normative critique concerns whether the dual objective of Article 50 TEU has been realised during Brexit as the first manifestation of Member State disintegration.

Withdrawal cleaves apart the quadripartite role of individuals. The status of citizenship of the European Union is severed from the status of nationality of the Member State that has

[1170] El-Enany (n 1000) 365.
[1171] Peers (n 864).
[1172] El-Enany (n 1000) 365.
[1173] See Part 3, subsection v, subsubsection A.

withdrawn.[1174] Former EU citizens lose the rights to vote in European Parliament and local elections throughout the European Union that form the core of the status as a means to exercise democratic subjecthood.[1175] They also lose the core of the judicial rights contained within EU citizenship of free movement between different Member State territories.[1176] The status of EU citizenship as the unique reserve for these rights is evidenced by their omission from Part II on citizens' rights in the Withdrawal Agreement.[1177] Individuals *qua* nationals of a former Member State revert back to a special transitional sub-category of third country national, a residual juridical object within the territory of the European Union's Member States.

Within the Member State that has withdrawn the supranational source of EU law norms is disapplied. A replacement domestic constitutional source for these norms means that their continuing application is left within the discretion of domestic legislative and executive bodies.[1178] For sedentary nationals of the state who have not relied upon the core democratic and juridical rights of EU citizenship, norms that they may have relied upon domestically for their life plans will be left exposed to domestic alteration or disapplication without supranational protection.[1179] The supranational architecture for the application of EU law norms within the territory of the former Member State will be conditionally dismantled.[1180] For nationals of other Member States who continue to hold EU citizenship, the territory within which they can exercise their democratic subjecthood and juridical objecthood contracts. Their presence within the territory moves from supranational regulation, to determination through national law and international law measures. The residence rights and enfranchisement of EU citizens in local and national elections becomes the prerogative of the former Member States.

Legitimate disintegration through Article 50 TEU explodes the dialectic tension between nationality of a Member State and citizenship of the European Union as co-equivalent constituent statuses. The relationship transforms from constant balancing leading to tensions, as exemplified by disrupted integration, to the complete destruction of EU citizenship and the re-establishment of nationality of a constitutional state as the exclusive constituent status. Certain authors have

[1174] For a categorical overview of the juridical consequences of withdrawal see Garner, 'After Brexit' (n 2) 4–7.
[1175] See Part 1, Section III, subsection i.
[1176] See Part 1, Section III, subsection ii.
[1177] See Part 2, Section III, subsection v, subsubsection B.
[1178] See the mechanisms for retention and alteration of 'retained EU law' in the United Kingdom's European Union (Withdrawal) Act 2018.
[1179] Garner, 'After Brexit' (n 2) 6–7.
[1180] See discussion of the Withdrawal Agreement for the exceptions in which the preliminary reference procedure will continue to apply in Part 2, Section III, subsection v, subsubsection B.

criticised this dialectic resolution as democratically illegitimate.[1181] Legal claims have been pursued arguing that the extinction of EU citizenship by the Withdrawal Agreement is juridically invalid.[1182] So long as the wording 'the treaties cease to apply' is held to revoke EU citizenship this remains a juridically mandated consequence of disintegration. Furthermore, the capacity for the nationals of a Member State to reserve the levelling-down of constituent power is a precept for the dual-constituent foundations of the European Union.[1183] The extinction of the status and rights of EU citizenship is not a normative deficiency of withdrawal, but a necessary consequence of disintegration. Normative deficiencies may be assessed by considering whether the process to realise these consequences complies with the dual telos of Article 50 TEU to enshrine a sovereign right of withdrawal, and to subject the exercise of the right to an orderly process.

The overarching deficiency concerns the framing of the first objective of Article 50. The Court of Justice of the European Union defined this objective as 'enshrining the sovereign right of a Member State to withdraw from the European Union'.[1184] This presents a public international law perspective of withdrawal from an international treaty, rather than a supranational constitutional law perspective on the levelling-down of constituent power.[1185] This framing is evident throughout the wording of the withdrawal clause. The subject of the clause is defined as the 'Member State'. No reference is made to the 'nationals of the Member State', despite the implicit inclusion of these individuals *qua* democratic subjects in the reference to 'constitutional requirements'.[1186] The 'Member State' may decide to withdraw, and the 'Member State' notifies the intention to the Council. The condition for withdrawal is defined as 'the Treaties shall cease to apply to the State',[1187] rather than ceasing to apply within the state, and to the nationals of the Member State *qua* juridical objects. The absence of a supranational perspective is evident in the omission of any reference to EU citizenship in the conditions to initiate and finalise withdrawal. There is no reference to the decision to withdraw as a decision by nationals of a Member State to extinguish the co-constituent status of EU citizenship. There is no reference to the extinction of this status as a consequence of the treaties ceasing to apply.

1181 Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (MIT Press 2005) 167–8; Tore Vincents Olsen and Christian F Rostbøll, 'Why Withdrawal from the European Union Is Undemocratic' (2017) 9 International Theory 436. See detailed discussion in Part 4, Section III, subsection ii, subsubsection A.

1182 *C/13/640244 / KG ZA 17-1327* of the Rechtbank Amsterdam (n 527); Hocking, Harrison and von Westernhagen (n 575).

1183 See Part 1, Section IV, subsection i and Part 4, Section III, subsection ii, subsubsection A.

1184 *Wightman* (n 15) para 56.

1185 See critique in the discussion of *Wightman* in Part 2, Section III, subsection iii, subsubsection B and C.

1186 TEU, art 50(1).

1187 TEU, art 50(3).

Withdrawal is presented in the Treaties as an action that occurs on the plane of international relations between states rather than the constitutional plane between individuals. This framing has contributed to the legal ambiguities of withdrawal that have generated litigation. The omission of a right of revocation in the wording of Article 50 is a deficiency in itself. The consequences were that the United Kingdom government engaged in the deconstitutional convention for over a year whilst ignorant of the right of nationals of the United Kingdom to reverse the process. The United Kingdom submitted its notification under Article 50(2) on the basis of an improper understanding of the law due to the presumption of irreversibility in the *Miller* case.[1188] The international law framing of Article 50 may have contributed towards the Court of Justice in *Wightman* emphasising sovereignty in establishing unconditional revocation, rather than considering the supranational constitutional interests of individuals represented by the Council and the European Parliament.[1189] The silence on EU citizenship has led to the rejected preliminary reference request before withdrawal that EU citizenship is not extinguished by Member State withdrawal. The legal challenge has now been revived after the Withdrawal Agreement coming into force.[1190] The international law framing enabled the court in *Shindler* to hold that the franchise for a referendum on membership is a matter of untrammelled Member State sovereignty. This enables the exclusion of certain Member State nationals from the decision.[1191] The international law perspective may also have incentivised the United Kingdom's government to regard the prerogative power for conduct of treaty relations as a sufficient legal basis for notification, leading to the *Miller* litigation.[1192]

Miller exposed the domestic deficiencies in the manifestation of withdrawal. No explicit definition of the 'constitutional requirements' of the United Kingdom was provided before the 2016 referendum. There was an absence of clarity on the exact procedure for the decision and notification, which led to a debate over whether an Act of Parliament was necessary or executive powers were sufficient. The result was uncertainty for individuals *qua* juridical objects. There was no attempt to elaborate substantive conditions to justify a decision to withdraw, despite the balance of competences review that had been recently concluded.[1193] The ambiguous status of the referendum also caused disputes as to whether the vote was a genuine expression of self-

[1188] See Part 2, Section III, subsection iii, subsubsection A.
[1189] See discussion in Part 2, Section III, subsection iii, subsection B and C.
[1190] See discussion in Part 2, Section III, subsection v, subsubsection B.
[1191] See Part 2, Section III, subsection ii, subsubsection B.
[1192] See Part 2, Section III, subsection ii, subsubsection C.
[1193] 'Review of the Balance of Competences' (n 1063).

determination that legitimated the United Kingdom's withdrawal.[1194] This deficiency did not derive from the text of Article 50, but from the realisation of its requirements by a Member State. The Brexit case study provides a cautionary tale for any Member States considering withdrawal in the future. The explicit prior definition of constitutional requirement is a necessary prerequisite to ensure that disintegration results from a legitimate expression of self-determination by nationals *qua* democratic subjects.[1195]

Discrepancies in the wording between Article 50(1) and 50(2) can be blamed for further judicial disputes in the United Kingdom. Whereas Article 50(1) refers to a decision to withdraw, Article 50(2) refers to notification of an intention to withdraw. Domestically the legal meaning and effects of decision and intention were elided.[1196] Nevertheless, legitimate debate may persist over what exact legal act constituted the United Kingdom's decision to withdraw. The disconnect between Article 50(1) and Article 50(2) also exposes a lacuna in the temporal operation of the withdrawal clause. Once a decision is made under Article 50(1), there is no indication of when notification must be submitted to the European Council under Article 50(2). The United Kingdom provided notification on 29 March 2017, over six months after the referendum decision on 23 June 2016. The vacuum opens up the possibility of a Member State indefinitely postponing notification following a decision in accordance with its constitutional requirements.[1197]

The period of uncertainty between the referendum and notification provided the conditions for pre-emptive actions by the supranational institutions in relation to the deconstitutional convention. The United Kingdom's presidency of the Council was abolished, and the Commission appointed itself as the Union negotiator before the Article 50 process had officially commenced. The latter action arguably did not comply with the treaty procedure for the nomination of an institution to conduct negotiations.[1198] The actions of the supranational institutions during the intermission between referendum and negotiation could have prejudiced the United Kingdom's sovereign right whether to provide notification or not. The ambiguous legal basis for these actions jeopardised the objective to ensure that disintegration follows an orderly process in accordance with the rule of law.

The institutional discretion afforded to the European Council to determine the initiation and extension of the deconstitutional convention has provoked further normative criticism. The

[1194] See discussion in Part 2, Section III, subsection ii, subsubsection A.
[1195] See reform proposals in Part 4, Section III, subsection ii, subsubsection A.
[1196] *Webster* (n 365). See discussion in Part 2, Section III, subsection ii, subsubsection D.
[1197] For discussion of this possibility and responses see Hillion, 'This Way, Please! A Legal Appraisal of the EU Withdrawal Clause' (n 283).
[1198] See Part 2, Section III, subsection iv, subsubsection B.

argument has been made that the European Council's decision to sequence negotiations to ensure all the withdrawal priorities were resolved before discussion of the future relationship prejudiced the sovereignty of the withdrawing Member State.[1199] Sequencing arguably generated the externalities of the transition period and the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement to regulate issues provisionally before a future relationship could be negotiated.[1200]

The discretion of the European Council over the extension of the two-year period for negotiations in the deconstitutional convention is a clearer example of a normative deficiency for individuals as quadripartite subjects.[1201] A decision to continue the status of individuals as co-constituent democratic subjects of the order and juridical objects, and to continue the operation of EU law norms in the territory of a state, is left purely to the determination of the heads of state or government. No supranational representation of individuals through the Commission, the Council, or the European Parliament is provided. In addition to input legitimacy concerns, the throughput legitimacy of this decision is deficient due to the opacity of the European Council and the absence of any need to provide justifications for the decision. Article 50 does not constrain how long the European Council may decide to continue the extension of the application of the Treaties, nor what substantive conditions it may impose. The primacy of the intergovernmental institution of the European Council, with its working methods predicated in the paradigm of diplomatic international relations, is a further example of the withdrawal clause's international law framing of disintegration.

The final normative deficiency of Article 50 TEU is no deal withdrawal. The automatic cessation of the application of the Treaties if no Withdrawal Agreement is concluded seeks to vindicate the first objective of Member State sovereignty. The realisation of this objective would completely obviate the second objective of ensuring an orderly withdrawal. This suggests a misbalancing in the teloi of Article 50. The immediate disapplication of EU law to and within the withdrawing Member State would lead to dramatic negative consequences.[1202] Such material consequences resulting from the automatic operation of EU law would call into question the extent to which Article 50 TEU realises the European Union's foundational values.

[1199] Dixon (n 530). See discussion in Part 2, Section III, subsection iv, subsubsection C.
[1200] See discussion in Part 2, Section III, subsection v, subsubsection B.
[1201] See discussion in Part 2, Section III, subsection v, subsubsection C.
[1202] See Part 2, Section III, subsection v, subsubsection C.

II. Amending Amendment

The amendment limb of the triptych of constituted constituent power procedure may need to be amended itself to allow reform of opt-outs and withdrawal that would vindicate individuals *qua* quadripartite subjects. Rather than analysing the minutiae of Article 48 TEU,[1203] this section considers briefly whether proposals for a new dual-constituted institutional body are necessary for the reform of opt-outs and withdrawal.[1204] For withdrawal, greater representation of individuals *qua* EU citizens may be necessary to enable a more supranational framing of the withdrawal clause. Amending revisionary constituent power is most significant for opt-outs because the Protocols derive from the capacity for a Member State to reserve the levelling-up of constituent power. After the multilateral Convention under Article 48(3) TEU, the only constraints upon the conference of representatives of the Member State are the requirements of state consent and domestic ratification.[1205]

There is no legal way to prevent the creation of opt-outs except through the diplomatic means of other Member State executives refusing to accept these Protocols in negotiations. The only democratic input for individuals *qua* nationals beyond the representation by their government is the refusal to ratify this Treaty in representative or direct democratic procedures at the domestic level. After the Convention individuals *qua* EU citizens are not represented at all in the final execution of the reconstruction. Unlike Article 218 TFEU in relation to international agreements,[1206] there is no mechanism for the Court of Justice of the European Union to issue an opinion on the suitability of the revisions for individuals *qua* juridical objects. The representatives of the government are ostensibly free to reconstruct or deconstruct any feature of the supranational constitutional order.

The present procedure for constitutional amendment within the European Union does not sufficiently enable individuals in their dual-constituent role to exercise self-determination through representative institutions. Exercises of reconstructive constituent power should be expressions of self-determination of the political communities involved, and such representation should represent a plurality of positions from the state demoi.[1207] Critique of opt-out formation by opposition political parties can only be expressed through acceptance or rejection of the

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[1203] See Bruno De Witte, 'Treaty Revision Procedures after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press 2012).
[1204] See the proposal in Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 69).
[1205] See Part 1, Section IV, subsection iii.
[1206] TFEU, art 218.
[1207] See Part 1, Section IV, subsection iii, subsubsection B.

ratification of a Treaty. This is not a true opportunity for will formation because in the case of opt-outs the contestation may be precisely against decisions not to bind the state to obligations created in the Treaty amendment.[1208] This was the case during the United Kingdom's ratification of the Maastricht Treaty. The opposition Labour party opposed the Social Policy opt-out. The remedy of rejecting ratification of the Treaty itself to protest against these opt-outs is self-defeating. Furthermore, if a simple democratic majority suffices for ratification rather than a super-majority then the votes of opposition parties will have no effect. A simple majority has been sufficient to ratify treaty amendments in the United Kingdom. The requirements of the European Union Act 2011 were never put into effect.[1209] This contrasts to the super-majority of five-sixths of parliament, or a referendum, necessary in Denmark.[1210]

The only democratic input for individuals *qua* citizens to reject these opt-outs would be through the European Parliament. This role could only be exercised through the institution refusing to consent to the consensus recommendation of the Convention to the conference.[1211] The historical precedent of the text of opt-outs being proposed at the later stages of the conference displaces the European Parliament's earlier filtering role in the Convention.[1212] The role of the European Parliament in supranational reconstructions is diminished compared to the supranational legislative process, and even supranational disintegration through Article 50 TEU.[1213] This falls short of the principles whereby constitutional decisions are expressions of the political self-determination of individuals *qua* EU citizens, and these EU citizens interact on formally equal terms *qua* democratic subjects.[1214]

Patberg concludes his explication of the principles for supranational politics by proposing reforms to the amendment procedure: 'the executive-centred mode of EU Treaty making should be replaced with procedures and institutions that enable the citizens to exercise constituent power, that is, to shape the supranational polity without the involvement of constituted powers'.[1215] The re-situation of Habermas' hypothetical original constituent convention in the processes of amendment of the constitutional Treaties is expressly envisaged by Patberg: 'while I have developed these normative standards through the thought experiment of a process of founding,

[1208] See discussion of the ratification in Part 3, Section III, subsection iv.
[1209] European Union Act 2011.
[1210] The Constitutional Act of Denmark of 5 June 1953, art 20.
[1211] TEU, art 48(3).
[1212] See Part 3, Section III, subsection iv and subsection v.
[1213] See Part 2, Section III, subsection iv.
[1214] Part 1, Section IV, subsection ii, subsubsection C.
[1215] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 69) 453.

they apply to processes of reform as well'.[1216] He proposes a permanent elected constitutional convention at the EU level consisting of two 'chambers' each composed of representatives elected from different lists and by different national and European constituencies. The different channels of representation 'would allow the citizens to determine the common good from the standpoints of Member State citizens and EU citizens'.[1217] The proposal bears a resemblance to Deirdre Curtin's response to the Maastricht amendment: 'What is needed is either a constituent assembly (involving both the members of the European Parliament and of national parliaments…) or a new Committee of (non-political) Experts to prepare a revised Constitution'.[1218] Patberg's reform would extinguish the reconstructive constituent power of the state as a constituted power in international law. Constituent power would be limited to deconstructive decisions to withdraw from the Treaty structure, or a decision by all the High Contracting Parties to disintegrate the European Union. The decision to opt-out from EU law would be reallocated to the dual constituent convention.

If EU treaty amendment were subject to a dual constituent convention it may make reform of opt-outs and withdrawal more likely. It is not, however, a necessary condition. Within the current paradigm it is not possible to preclude entirely the continuing creation of opt-outs through Protocols addended to treaty revisions. However, the creation of an explicit clause to regulate opt-outs may incentivise the High Contracting Parties to prevent extra-constitutional means of retaining constituent power. The reforms for opt-outs and withdrawal below may be considered from this ideal paradigm of a dual-constituted amendment power or from the current paradigm of executive-led Treaty amendment. In both situations the holders of revisionary constituent power would need to agree upon the best balance between individuals *qua* national citizens and *qua* EU citizens with regard to the conditions to enable Member States to cease partially or completely to apply the Treaties.

[1216] ibid.
[1217] ibid.
[1218] Curtin (n 262) 69.

III. The Reform Proposals

i. Reforming opt-outs

Reform proposals would constrain this constituent power by limiting the capacity for Member States to opt-out. Member States should only reserve constituent power when their residual function as guarantors of the freedom and security of nationals would be threatened by participation in the supranational constitutional order. After considering alternatives, this subsection will argue for the creation of a new limb of the triptych of constituted constituent power to accompany Article 48, Article 49, and Article 50 TEU.[1219] The reconstructed quadriptych would ensure that opt-outs are subject to clear constitutional rules and supranational oversight akin to amendment, accession and withdrawal rather than the iterative anomaly of Protocols with ad hoc and discrete rules for creation and maintenance.

The most radical reform proposal is to abolish opt-outs entirely. The President of the Commission stated in 2017 his hope that 'Europeans will wake up to a Union…[w]here being a full member of the euro area, the Banking Union and the Schengen area has become the norm for all.'[1220] The European Parliament has proposed that 'the next revision of the Treaties should rationalise the current disorderly differentiation by ending, or at least drastically reducing, the practice of opt-outs, opt-ins and exceptions for Member States at EU primary-law level'.[1221] Abolition would require a constitutional decision by the individuals *qua* nationals of Denmark and Ireland to revoke these Protocols.[1222] Representatives of these Member States, in either a hypothetical dual-constituent convention or in the Article 48 conference, could forward compelling reasons for why the complete abolition of their opt-outs might undermine the capacity for self-determination of their nationals. These constitute elaborations of the principle whereby the content of the constitutional order is determined on the basis of an exchange of genuine reasons.[1223]

Irish representatives could argue, with regard to the opt-outs from Schengen and the Area of Freedom, Security and Justice, that the preservation of the Common Travel Area is fundamental to guarantee the freedom and security of Irish nationals. This necessity has been exacerbated by

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[1219] See Part 1, Section IV, subsection iii.
[1220] Juncker (n 700).
[1221] European Parliament (n 700) para 10.
[1222] See Part 3, Section II for the conditions for revocation of the opt-out Protocols.
[1223] See Part 1, Section IV, subsection ii.

the withdrawal of the United Kingdom; the prevention of the hard border between Ireland and Northern Ireland was a crucial sticking point in the Brexit negotiations.[1224] Ireland finds itself in an analogous situation to Cyprus whereby its territorial connection to a Third Country makes it incapable of participation in the Schengen *acquis*.[1225]

For Denmark, the reversal of opt-outs is predicated upon the conditions of Article 20 of the Constitution.[1226] Representatives of nationals could argue that a supranational decision to abolish Denmark's opt-out Protocols would violate the principle whereby Article 20 functions as an autonomous elaboration of the right of individuals to participate in revisions of the constitution or processes of supra-state constitutional politics.[1227] The complete abolition of opt-outs would not vindicate individuals *qua* Member State nationals in the process of supranational reconstruction. The reasons that may justify Denmark and Ireland's opt-outs may arise again in the future. In the parlance of the European Parliament reform proposals would need to 'rationalise' disrupted integration rather than abolish it entirely.[1228] The reconstructed regime for opt-outs needs to respect the genuine reasons why Member States believe they cannot level-up constituent power whilst preserving the integrity of supranational norm-creation and norm-application.

Fritz W. Scharpf and R. Daniel Kelemen have both proposed mechanisms to manage Member State opt-outs. The former is grounded in the norm-creation process, whereas the latter focuses on opt-outs arising from the norm-application process. Like Habermas, Scharpf grounds his rules for a multilevel European democracy in a hypothetical scenario.[1229] Rather than an imagined historical foundation, Scharpf envisages a major future crisis that disrupts the present foundations of European integration. He proposes a complex regime that would resituate the capacity to opt out from primary law revisions to the secondary legislative process. The first rule is that individual Member States should have the right to opt out from ordinary legislation.[1230] This is qualified by the rule that legislation may propose the exclusion of opt-outs, but this must be adopted by an absolute majority in Parliament and by a qualified majority in the Council.[1231]

Scharpf's purpose is to 'enlarge, at the same time, the action spaces of national and European political processes'.[1232] The objective to 'facilitate political action and opportunities for

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1224 See discussion in Part 3, Section III, subsection v.
1225 Sion-Tzidkiyahu (n 933).
1226 The Constitutional Act of Denmark of 5 June 1953 art 20.
1227 See Part 1, Section IV, subsection ii, subsubsection A.
1228 European Parliament (n 700).
1229 Fritz W Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy' (2015) 21 European Law Journal 384.
1230 ibid 401.
1231 ibid.
1232 ibid 404.

politicisation and democratic accountability at the European level' is balanced against the need to 'respond to *demoicratic* aspirations for Member State autonomy'.[1233] National opt-outs would protect the 'legitimate diversity' of Member States that would be opened up to contestation by a move to a simple majoritarian legislative process. This protects the democratic and juridical interests of individuals *qua* nationals against the majority preferences of EU citizens *qua* democratic subjects. The exception of legislation without opt-outs would preserve the uniformity of EU law for individuals *qua* juridical objects only when considered essential by democratic subjects. This reverses the status quo whereby uniformity is the default position and derogation is the exception.

Opt-outs as a default possibility in the norm-creation process undermines the equality between individuals *qua* nationals and *qua* EU citizens. In the process of will formation the 'citizens of the (future) supranational polity' would not interact on formally equal terms.[1234] After the majority vote of the European Parliament, the ultimate decision on the application of the norms would rest with each individual Member State in the Council. This would replicate the representation deficits in the Article 48 TEU Convention and conference structure. Retention of constituent power as the default position would also undermine equality in the representation of Member State nationals in the Council. The exceptional situation for the United Kingdom and Ireland under the Area of Freedom, Security and Justice Protocol would become the supranational constitutional default.

Scharpf's 'demoicratic' perspective neglects the autonomous status of EU citizenship.[1235] Demoicracy holds that the different peoples of the Member States are all individually *pouvoirs constituants* without any admixture.[1236] Scharpf explicitly distinguishes his position from Habermas' dual-constituent thesis.[1237] A default regime of opt-puts can only be justified by recognising nationals of the Member States as the sole constituent subject. Scharpf recognises the consequences for EU citizenship as a status of democratic subjecthood: 'As different majorities are likely to form in different issue areas, they would not necessarily strengthen the sense of common identity and the democratic legitimacy of the European polity'.[1238] The perspective of the dual-constituted supranational constitutional order could not allow Member States to opt-out

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[1233] ibid 400.
[1234] See Part One, Section IV, subsection ii, subsubsection C.
[1235] For the distinction between demoicracy and the dual-constituent thesis see Niesen (n 139).
[1236] Francis Cheneval, Sandra Lavenex and Frank Schimmelfennig, 'Demoi-Cracy in the European Union: Principles, Institutions, Policies' (2015) 22 Journal of European Public Policy 1.
[1237] 'In this regard, demoicracy differs from the position of Habermas (above, n 31, especially at 62–69). He also asserts a dual identity of individuals as citizens of their respective states and of the Union, but in his view this dualism justifies majoritarian democracy at the European level in order to break the strangle-hold of intergovernmental veto players under present rules of the Community Method.' Scharpf (n 1229) fn 51.
[1238] ibid fn 56.

from secondary legislation as a default. Within Patberg's hypothetical institution it may be hypothesised that the chamber representing EU citizens would reject the proposal.

Kelemen envisages a route to create opt-outs through juridical processes. This concerns the role of national constitutional courts and the Court of Justice in preserving the autonomy of individuals *qua* juridical objects.[1239] Kelemen argues that the primacy of EU law means that the only remedy for national constitutional courts when EU institutions threaten constitutional identity is to declare membership in the European Union unconstitutional.[1240] He argues that '[T]his approach would compel governments to either amend their constitutions, to work through their EU political process to change the EU legal norms in question or secure an opt-out or, if necessary, to withdraw from the Union altogether'.[1241]

If this observation were repurposed as an exclusive model for the creation of opt-outs it would show more deference to EU citizenship than Scharpf's proposal. Opt-outs would only be available if the application of EU law threatened the capacity for Member States to guarantee self-determination in the domestic constitutional sphere. The problem is that, whereas the other remedial measures Kelemen proposes have the clear procedural routes of Article 48 and Article 50 TEU, there is no generalised procedure whereby a Member State claiming a constitutional identity infringement could claim an opt-out. Outside of Treaty amendments, the simplified international treaty of the United Kingdom's New Settlement has been necessary for pre-agreement on opt-outs. Even beyond the normative problem using international law to pre-bind the constituent power, the agreement could only envisage the actual creation of opt-outs at the next Treaty amendment. The proposal for an opt-out clause below will attempt to address the mischief that Kelemen raises whilst also constitutionalising the situation that led to the United Kingdom's renegotiation.

The triptych of constituted constituent power of Article 48, Article 49, and Article 50 should be complemented by a specific limb concerning the reservation of constituent power. The anomalous Protocols would be replaced by a fourth limb of the newly reconstituted quadriptych. This would enable the supranational institutions to assess claims for opt-outs and provide explicit authorisation. Opt-outs would no longer be a side-effect of the failure to level-up constituent power through the amendment procedures. Instead, the legitimacy and authority of opt-outs

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[1239] See discussion in Part One, Section II, subsection iii.
[1240] R Daniel Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 Maastricht Journal of European and Comparative Law 136, 149.
[1241] ibid.

would be predicated upon a supranational constitutional mechanism. To avoid the legitimacy defects of the existing opt-outs, the creation of an opt-out should be subject to strict conditions.

The activation of the reservation constitutional mechanism should be strictly time-limited to the period between the conclusion of the treaty amendment and its coming into force. This would provide a separate constitutional forum for considering the merits of disruption disentangled from the wider discussions over the substance of the treaty amendment. In the ideal theory of Patberg's dual-constituted assembly, this body would make the decision to approve or reject an opt-out. In the current status quo, both the Council and the European Parliament should be required to approve the opt-out by analogy to their roles in approving or rejecting a Withdrawal Agreement under Article 50 TEU. The need to persuade representatives of all Member State nationals and EU citizens would require an exchange of reasons. The recalcitrant Member State's representatives would need to convince its peers why the levelling-up of constituent power would undermine the capacity for self-determination of its nationals due to specific conditions that make the Member State a distinct case. If their concerns are general, then these should be ventilated through resistance during the amendment itself. The disentanglement of the creation of opt-outs from treaty amendment could also provide the space for a Court of Justice Opinion mechanism equivalent to Article 218 TFEU. This would allow the Court to provide a prospective overview of the consequences of the opt-out for individuals *qua* Member State nationals if a constituent player requests an opinion.

The maintenance of the opt-out should be subjected to a review process that is conducted periodically by the supranational institutions. This would contrast to the accountability mechanisms that are solely at the national level for present opt-outs. As has been seen with the United Kingdom in relation to Protocol (No 21), this incentivises the Member State government to pursue only the interests of individuals *qua* Member State nationals with no incentive to consider the position of all individuals *qua* EU citizens.[1242] Representatives of the supranational institutions in a mandated review process would ensure that these justifications to maintain the opt-out were balanced against the interests of individuals *qua* EU citizens.

The review mechanism for the maintenance of opt-outs could draw inspiration from secondary legislation that enables Member State derogations. The Directive on voting in municipal elections by EU citizens residing in other Member States it clear that the derogations 'must be warranted…by problems specific to a Member States' and that any derogation 'must, by its very

[1242] See Part 3, Section II, subsection iv.

nature, be subject to review'.[1243] The legislation mandates derogations available to all Member States that fulfil the conditions.[1244] The preamble recognises a specific derogation for Belgium comparable to the primary law opt-outs. This is predicated upon characteristics of the constitutional identity of that state: 'Whereas the Kingdom of Belgium is characterized by specific features and balance linked to the fact that…its Constitution provide[s] for three official languages and a territorial division into regions and communities, as a result of which full application of this Directive…might have effects such as to necessitate providing for the possibility of derogation…in order to take account of those specific features and balances'.[1245] This provides a clear example of the form in which Member States should present claims that opt-outs are necessary in order to justify the reservation of constituent power. Ideally, a Member State would identify why the full application of EU law could affect the defined 'specific features' of its constitutional order.

The scheme of derogations in the directive on municipal voting for the reform regime also provides a model for a primary law review mechanism for opt-outs. Article 12(4) mandates the Commission to submit reports to the European Parliament and the Council every six years to 'check whether the grant to the Member States concerned of a derogation…is still warranted and shall propose any necessary adjustments be made'.[1246] This review mechanism can be transplanted into the new constitutional mechanism mandating the reservation of constituent power. This would ensure that the objective justifications for the opt-out persist and can be verified by the supranational institutions. This contrasts to the stagnation in the current regime of opt-outs regarding justification. For example, the United Kingdom's opt-out ostensibly temporary deferral of a constituent decision on Economic and Monetary Union became permanent due to the lack of sufficient conditions upon the executive. The national and supranational conditions for the revocation of the opt-outs could be explicitly tied to the outcome of the periodic reviews. A creation and review process involving the European Parliament and the Council would reassert the symmetry within the quadripartite role by ensuring that individuals *qua* EU citizens and *qua* all Member State nationals are represented in decisions whether to maintain or extinguish opt-outs.

[1243] Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the union residing in a member state of which they are not nationals [1994] OJ L 368/38.
[1244] Voting of non-national EU citizens may be restricted to those who have been resident for a minimum period if 20% of the total number of EU citizens of voting age are not nationals. ibid art 12.
[1245] Belgium may apply the conditions of the derogation to a limited number of local government units in addition to the total electorate. ibid art 12(2).
[1246] ibid art 12(4).

This ensures that all individuals affected by the opt-outs *qua* juridical objects can express their political subjecthood regarding their legitimacy.

ii. Reforming withdrawal

This section will first consider radical proposals to reform withdrawal. These reforms are rejected on the basis that they would undermine telos of Article 50 TEU. In turn, they would jeopardise the balance between individual *qua* nationals and individuals *qua* EU citizens. The section will then conclude by proposing reforms to the operation of Article 50 that would preserve the telos of a sovereign right of withdrawal in an orderly fashion but would ensure greater vindication of the self-determination of individuals in their quadripartite role.

A. Radical proposals for reform

Radical proposals for reform would alter relate two dimensions of the operation of Article 50 TEU: its unconditionality and its unilaterality. The former considers the setting of conditions for withdrawal at the supranational level. The latter considers the representation of all those holding EU citizenship in the process of decision, rather than only those who hold the constituent status of nationality of a Member State contemplating withdrawal. These proposals will be explicated below before being critiqued on the basis of their (in)compatibility with the dual-constituent thesis.

This first proposal may be deduced from the criticisms of the withdrawal clause offered by Hauke Brunkhorst,[1247] and Christian F. Røstboll and Tore Vincents Olsen.[1248] These build upon the criticisms advanced during the 2003 Convention that the withdrawal clause would undermine the purpose of 'ever closer union'.[1249] These criticisms are predicated upon the significance of citizenship as a constituent status. Brunkhorst argued at the time of the creation of the withdrawal clause that its use would be 'inadmissible because regardless of their national citizenship the citizens of the European Union have rights within the whole territory of the European Union, and thus in all of the member countries'.[1250] Røstboll and Olsen develop this position to argue that the United Kingdom's decision to withdraw was undemocratic. They advance the thesis of the 'all

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[1247] Brunkhorst (n 1181).
[1248] Olsen and Rostbøll (n 1181).
[1249] See Part Two, Section II, subsection i.
[1250] Brunkhorst (n 1181) 167–8.

affected status principle' whereby 'people whose status as free and equal is mutually dependent ought to be included and remain in common democratic decision-making.'[1251] Unilateral decisions to withdraw do not live up to this principle because 'they exclude people from participating in a decision that affects their status as rights holders and co-rulers, and hence, they do not rule themselves.'[1252]

If one extracts a prescriptive reform from Røstboll and Olsen's criticisms, beyond the absolute abolition of withdrawal, it is the shackling of deconstructive power to strict supranational conditions: 'our argument is not directed at the right to withdrawal but concerns the democratic credentials of its use. Regarding the latter, we do not deny that there might be conditions under which the right could be used as a remedy against domination, but only that normally this is not the case'.[1253] This resonates with Hofmeister's argument before the first use of Article 50 that 'withdrawal should only be possible under exceptional circumstances that would need to be clearly defined'.[1254] Withdrawal as a remedy against 'domination' may be understood in the same terms as the proposal for the reform of opt-outs explicated above. One could make an argument whereby withdrawal could only be made available in the event of a complete failure to resolve a situation in which a Member State has claimed that the capacity for individuals *qua* nationals of that Member State to exercise self-determination has been violated by participation in the supranational constitutional order.

This would positivise within the Treaties Kelemen's argument that, if necessary, Member States should withdraw in the event of a fundamental constitutional conflict.[1255] Article 50(1)'s necessary condition that a decision is an exercise of self-determination by individuals *qua* nationals would be supplemented by the complementary 'constitutional requirements' of the Union's constitutional order. The objective would be to preserve insofar as possible the self-determination of individuals *qua* EU citizens. This would be achieved by limiting the possibility to extinguish the constituent status of EU citizenship and the contraction of the constitutional territory in which it is effective to a last resort.

An alternative or supplement to strict supranational conditionality would be reform of the unilaterality of the exercise of deconstructive power. Conditionality protects the self-determination of EU citizens *qua* juridical objects by ensuring their legal rights may only be rescinded as a last resort to preserve the self-determination of individuals *qua* Member State nationals. Expanding

[1251] Olsen and Rostbøll (n 1181) 445.
[1252] ibid 461.
[1253] ibid.
[1254] Hofmeister (n 515) 599.
[1255] See subsection i above.

the scope of those entitled to make the decision would fulfil this goal by enfranchising EU citizens *qua* democratic subjects in the contraction of their status *qua* juridical objects. Such a transformation of the scope of the constituent status of citizenship would be legitimated through the democratic consent of all those who hold it. This would necessitate an amendment whereby a decision to withdraw would be made not only by individuals *qua* nationals of that state, through the fulfilment of the 'constitutional requirements', but also by all individuals *qua* EU citizens. Røstboll and Olsen reject that the enfranchisement of all individuals *qua* EU citizens in a decision to withdraw would legitimate the process: 'even a multilaterally agreed decision to allow an individual nation to withdraw from the EU is undemocratic because of its detrimental consequences for future democracy'.[1256]

The representation of all individuals *qua* EU citizens regardless of nationality could be achieved through representative democracy by making the European Parliament a necessary decision-maker in the Article 50(1) TEU process. A more ambitious democratic exercise would be a European-wide referendum. Decisions by national parliaments and governments would be more problematic on the basis that their main representative interest is towards individuals *qua* nationals of the individual Member States. A withdrawal decision by all EU citizens would represent the political vindication of the judicial dicta that EU citizenship is a status of political and legal equality throughout the territory of the Union. It would also recognise the negative effects of withdrawal for the nationals of remaining Member States due to the change of status within a former territory of the Union. If a decision to withdraw were dependent upon the consent of all EU citizens, then the government proposing withdrawal would be incentivised to protect the rights of these individuals in order to secure their support. This would vindicate the normative democratic principle of the representation of the 'all affected status'.[1257]

From the dual-constituent perspective, the criticisms which form the basis for such reform proposals over-emphasise the importance of citizenship of the Union as a constituent status. Røstboll and Olsen argue that 'if the conditions of citizens are determined by factors beyond the control of national (state) institutions, the value of self-determination is seriously reduced…under current conditions, sovereign self-determination is illusory and hence not a cogent idea'.[1258] This ignores the fact that, although the conditions of citizens as democratic subjects and juridical objects are determined beyond the boundaries of the national constitutional orders, the levelling up process means that this is not beyond the control of national institutions. Instead, they are the

[1256] Olsen and Rostbøll (n 1181) 461.
[1257] Olsen and Rostbøll (n 1181).
[1258] ibid 454.

crucial co-player in the process. Furthermore, these criticisms conflate EU citizenship as a role of juridical objecthood and as a role of democratic subjecthood. The normative premise of the argument is a conceptualisation of the status as one of absolute equality. This reflects the judicial construction of a fundamental status of juridical equality.[1259] This misses the material reality that there is no absolute equality due to the different Member State nationalities underpinning acquisition of the status.

The potential for a Member State to withdraw from the European Union is one of the key tenets in the dual-constituent thesis. The retention of the capacity for individuals *qua* Member State nationals to disengage from the process of levelling-up constituent power is the ultimate means to ensure that the freedom-guaranteeing function of the constitutional state is not undermined by European integration. As Habermas explicates: '[A]lthough the Union was not founded for a definite duration, every member state is free to *regain* the degree of sovereignty it enjoyed before joining the Union'.[1260] This sentiment is expressed in the judicial construction of the telos of Article 50 TEU as 'enshrining the sovereign right of a Member State to withdraw from the European Union'.[1261] This sovereign right should be understood in supranational democratic terms as the capacity for individuals exclusively *qua* nationals to level-down constituent power without interference in their initial decision.

Reform proposals to constrain withdrawal to supranational conditions or to enfranchise all individuals *qua* EU citizen are not compatible with this limb of the dual objective of Article 50 TEU. Even if such conditions were promulgated in accordance with the principles for supranational constitutional politics, they would still undermine the entire basis of *pouvoir constituant mixte*: 'Entry and exit would still be matters to be decided by each Member State autonomously. There is no contradiction in demanding, on the one hand, that procedures for shaping the EU polity should conform to the standard of dual constituent power and insisting, on the other hand, that the Member States have the right to unilaterally decide whether they want to (continue to) be part of the EU. Nothing in the rational reconstruction of polity formation implies that the *pouvoir constituant mixte* should become the final authority on the question of membership'.[1262]

The dual-constituent thesis recognises that the ultimate authority on the question of membership, both accession under Article 49 TEU and withdrawal under Article 50 TEU, is the primordial constituent subject of 'national of a constitutional state'. The principles that determine

[1259] See Part 1, Section III, subsection ii.
[1260] Habermas, *The Crisis of the European Union* (n 6) 40.
[1261] *Wightman* (n 15) para 56. See Part 2, Section II, subsection ii.
[1262] Patberg, 'A Systematic Justification for the EU's Pouvoir Constituant Mixte' (n 69) 453.

the exercise of this authority are the first stage of the hypothetical constitutional convention before any levelling-up is enacted.[1263] The principle that enables the 'levelling up' of constituent power at the domestic level must also enable the 'levelling down' of this power, through the operation of the 'constitutional requirements' of Article 50(1) TEU. This principle is the predicate upon which the supranational functions of Member State nationals and EU citizens is legitimated. To subject the 'levelling down' of constituent power to conditions established at the supranational level, or to enfranchise individuals beyond the original constituent subjects who have authorised 'levelling up', would violate the initial premises of supranational integration.

Patberg and Niesen's own proposal to reform withdrawal falls foul of this interpretation of withdrawal as 'levelling down' constituent power. They recommend that 'Article 50…be amended to allow for the re-entry of former Member States, by referendum or act of parliament, or, if this cannot be achieved, by providing an identical re-entry clause in the withdrawal agreement'.[1264] The normative basis is that the current configuration of Article 50(5), whereby a Member State that withdraws can only re-apply for membership through the accession procedures of Article 49 TEU, undermines the self-determination of that state's nationals: 'its citizens will not have a definitive say in the outcome as they do now. They will be treated as petitioners, not co-sovereigns, no different from the nationals of first-time applicants'.[1265] This proposal re-frames Member State withdrawal in relation to the constituent process. It is not a process of 'levelling-down' that repatriates constituent power exclusively to the domestic constitutional level. Instead, Article 50 would hold the levelling-up of constituent power in abeyance. This could be re-activated at any time by an exercise of self-determination by the national democratic subject. As the piece concludes, 'Former EU citizens would not fall back to the status of third-country nationals but encounter current EU citizens as co-citizens 'on standby''.[1266] This challenges the notion that the 'levelling up' of constituent power can be completely extinguished by the domestic constituent subject.

The only acceptable reforms to unilaterality and unconditionality are at the domestic constitutional level. The proposals to establish conditions for withdrawal and to enfranchise all individuals *qua* EU citizens can be repurposed for the domestic 'constitutional requirements'.[1267]

[1263] ibid 448–9. See Part One, Section IV, subsection ii, subsubsection A.
[1264] Patberg and Niesen (n 636). See also Patberg, 'Can Disintegration Be Democratic?' (n 8).
[1265] Patberg and Niesen (n 636).
[1266] ibid.
[1267] This draws upon Oliver Garner, 'Why all Member States should clarify their Constitutional Requirements for Withdrawing from the EU' (*Verfassungsblog*, 2 November 2016) <https://verfassungsblog.de/why-all-member-states-should-clarify-their-constitutional-requirements-for-withdrawing-from-the-eu/> accessed 18 December 2018.

It would be desirable for all Member States, even if they do not intend to make a decision under Article 50(1), to clarify pro-actively the procedural conditions for how the constitutional requirements would be fulfilled, and the substantive conditions that would justify a decision to withdraw. The former process could draw inspiration from permanent domestic law provisions such as the Canadian Clarity Act of 2000 which sets the procedure for the secession of Quebec. [1268] The latter could draw inspiration from the clarification of the conditions for Germany's continuing commitment to European integration established by the German Constitutional Court[1269] now enshrined in the conditional commitment under Article 23(1) of the Basic Law.[1270]

Prospective procedural conditions would ensure that the legal uncertainty of Article 50's activation in the United Kingdom would not be repeated.[1271] Nationals *qua* democratic subject could exercise deconstructive power with complete clarity regarding the reasons why and methods for how a withdrawal decision would be made. The domestic 'constitutional requirements' could be transformed to mandate a dual-decision. Individuals would decide to revoke the membership of their state *qua* nationals, and to revoke explicitly their status *qua* citizens of the Union. This would ensure that individuals are fully aware that the consequences of their decision is not only the withdrawal of their state from a treaty on the international plane, but also the extinction of their constituent capacity to determine the nature and functioning of a supranational constitutional order. This reform would address the criticism that the withdrawal process in Article 50 TEU is delineated in international law rather than supranational constitutional terms.

B. Reforms to the text of Article 50 TEU

Transforming unconditionality and unilaterality of the withdrawal decision would undermine the telos of Article 50 TEU of providing a sovereign right to the nationals of a Member State. Therefore, reform should focus on the second limb of the dual objective of ensuring that

[1268] An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference S.C. 2000, c. 26 Assented to 2000-06-29.
[1269] *'Lisbon' BVerfG, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08* (n 383) para. 244 'European integration may neither result in the system of democratic rule in Germany being undermined (a) nor may the supranational public authority as such fail to fulfil fundamental democratic requirements (b)'; para. 249 ''European unification on the basis of a union of sovereign states under the Treaties may, however, not be realised in such a way that the Member States do not retain sufficient space for the political formation of the economic, cultural and social circumstances of life. This applies in particular to areas which shape the citizens' circumstances of life, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understandings as regards culture, history and language and which unfold in discourses in the space of as political public that is organised by party politics and Parliament'.
[1270] Basic Law of the Federal Republic of Germany art 23(1).
[1271] See Part 2, Section III, subsection ii and iii.

the process of withdrawal is orderly. A range of specific amendments may be proposed to the operation of Article 50 TEU. These seek to address the normative failings of the clause during the Brexit negotiations.[1272] The overarching objective is to provide a supranational rather than international framing for the withdrawal clause.

Proposal 1: *The Double-Decision Lock*

For the Treaties to cease to apply, a Member State would need to make a second final confirmatory decision in accordance with its constitutional requirements to withdraw at the end of negotiations. This addresses the changes of circumstances that may occur between the initial expression of the intention to withdraw and the conditions of Article 50 being fulfilled. This was evidenced in the Brexit case-study. There was a paucity of discussion of the Irish border during the referendum campaign before this became the most important issue during the withdrawal negotiations.[1273] Over a period of time individuals *qua* democratic subject may change their mind regarding exercises of self-determination as circumstances become clearer.

The double-decision lock would also resolve the remaining uncertainty over whether there is a distinction between the notification of the 'intention' to withdraw, and the eventual 'decision' to withdraw itself.[1274] Within the new structure, the first instruction in accordance with the constitutional requirements would represent the expression of the 'intention' to withdraw. The second instruction would be the 'decision' once the outcome of the deconstitutional convention is clear. This encourages symmetry with the accession limb of the constituted constituent power triptych.[1275] Article 49 TEU first mandates the intention to accede through candidate state status, before this intention is realised through the formal conclusion of the accession treaty and the acquisition of Member Statehood, The formal confirmation of a final decision requirement being would constitutionalise *de jure* what happened *de facto* in the Brexit case-study. The orthodox will-expression of the General Election in 2019 was necessary to realise the popular expression of will in 2016 due to resistance within the constituted institution of Parliament. A supranational condition of a final decision would ensure that the ordinary constitutional functioning of the domestic order was not distorted by the need to make *de facto* decisions on withdrawal.

[1272] See Section I, subsection ii above.
[1273] See Part 2, Section III, subsection v, subsubsection B.
[1274] See Part 2, Section III, subsection ii.
[1275] See Part 1, Section IV, subsection iii.

Proposal 2: *Revocation replaced by a fast-tracked second decision*

The unwritten right to revoke notification of an intention to withdraw would be reformed into a right to bring forward the final confirmatory decision at any point during negotiations. The establishment of a two-stage process for withdrawal would obviate the necessity of a unilateral rights of revocation. Instead, the telos that *Wightman* recognised – to ensure that the withdrawal decision is a voluntary expression of democratic will by the nationals of the Member State – would be upheld by enabling the final decision to be taken at any time during the negotiation of a withdrawal agreement.

This reform to fast-track the final decision could also address the issues concerning the constitutional propriety of the *Wightman* judgment. The United Kingdom conducted negotiations over withdrawal from March 2017 to December 2018 without full cognisance of the extent of its sovereign power to initiate and reverse the levelling-down of constituent power. In contrast to the Brexit case-study, a future Member State would have clarity and certainty over the exact procedural parameters of their withdrawal, and their capacity to request an expedited conclusion to this process.

The opportunity for the constituent powers of the Member States and the supranational institutions to address the textual lacuna means that a mechanism could be constructed that involves the representation of the supranational institutions. The mechanism for a fast-track request could replicate the multilateral structure of withdrawal itself.[1276] Rather than a unilateral decision, the Member State could have the right to request taking a final decision. This would then need to be approved by the supranational institutions. Such approval is justified by an early decision constituting alteration of the deconstitutional convention. If the institutions decide not to approve this request, the sovereign right to withdrawal would not be undermined, but deferred until the conclusion of the negotiations.

Proposal 3: A time-limit on re-notification of withdrawal

The *Wightman* judgment left many of the practical concerns expressed by the EU institutions regarding strategic revocation unanswered. The Court of Justice instead merely established the condition that revocations must be in good faith and unconditional to ameliorate

[1276] See alternative to *Wightman* in Part 2, Section III, subsection iii.

the possibility.[1277] The amendment of Article 50 would provide the constituent powers and the supranational institutions with the opportunity to address these concerns proactively. A strong means to achieving this would be a bright-line condition that if a Member State makes a final confirmatory decision to revoke its intention to withdraw and remain a member state, a time-limit would be imposed before it can choose to send a new notification of an intention to withdraw.

Proposal 4: The reform of no deal withdrawal

Within the new double-decision structure, the withdrawing Member State would still have the option not to adopt a Withdrawal Agreement and to leave without a deal. However, the current paradigm in which the Treaties immediately cease to apply undermines the *telos* of ensuring an orderly withdrawal.[1278] The dramatic consequences of a no deal exit arguably violate the European Union's values in its relations with third countries in its neighbourhood. In order to avoid these consequences, a reform proposal would amend no deal so that it operated as a graduated process. Following a final decision not to adopt a Withdrawal Agreement, a withdrawing Member State would move through stages of Treaty de-application. As opposed to a cliff-edge, the levelling-down of constituent power would operate analogously to a parachute landing.

This would promote further symmetry with the process of levelling-up constituent power. The current regime established for accession to the European Union ensures that a candidate state is able to apply the sectors of the *acquis communautaire* through a monitoring process before the accession treaty is concluded.[1279] By analogy, a graduated no deal withdrawal would involve a monitoring process whereby the withdrawn Member State and the supranational institutions would ensure that both the European Union and the former Member State are in a position not to apply EU law within particular sectors before the Treaties are finally de-applied.

The amendment of no deal withdrawal into a graduated process would also constitutionalise the purposes of the ad hoc mechanism of the transition period established in the Withdrawal Agreement. A graduated no deal withdrawal would ensure sufficient time to preserve the interests of individuals *qua* juridical objects of EU law in the transition to becoming solely objects of the national legal order. The graduated process would also enshrine *de jure* the purpose behind the contingency legislation proposed by the European Commission to continue the

[1277] ibid.
[1278] See Part 2, Section III, subsection v, subsubsection C.
[1279] See Part 1, Section IV, subsection iii.

application of EU law to the United Kingdom in the event of a no deal withdrawal.[1280] By contrast to these emergency measures, the graduated process would ensure a sustainable process with a clear legal base in the withdrawal clause.

Proposal 5: *The reform of the time-limit and extension for withdrawal negotiations*

The double-decision structure would obviate the requirement for a two-year time-limit for negotiations. The time period for negotiations would be made contingent on a decision by the withdrawing Member State and the supranational institutions in the guidelines that commence the deconstitutional convention. This would provide further coherence with accession as Article 49 TEU that does not impose time-limits for accession. The original telos of the time-limit was to ensure that a Member State's sovereign intention to withdraw could not be frustrated by interminable negotiations. This purpose would be served by the capacity to make a final withdrawal decision. If a fast-tracked decision request were refused, sovereignty would be ensured through the final decision at the expiry of the time period for negotiations agreed upon with the European Union.

The removal of the two-year time limit in the text of Article 50 would also remove the executive-driven extension mechanism.[1281] Instead, two separate means for extending the negotiation period may be provided to address different justifications. The first instance is when the withdrawing Member State rejects the outcome of the negotiations, but also does not wish to reverse its decision to withdraw. In this situation, one of the options available for the final decision in accordance with the constitutional requirements should be to re-initiate the negotiation period, with the agreement of the supranational institutions. In order to avoid the interminable repetition of withdrawal negotiations, the supranational institutions should have the power to reject this request. This would require the Member State to decide either to reverse the withdrawal or withdraw without an agreement.

The second situation in which extension may be required covers the 'technical' extensions that may be necessary to finalise ratification of a Withdrawal Agreement. Any such time-period deadlines and extensions after a final decision to withdraw should be limited to situations of necessity for national and EU ratification procedures. This can be provided for prospectively in

[1280] ibid.
[1281] See discussion and critique in Part 2, Section III, subsection v, subsubsection C.

the determination of the time-limits at the start of the negotiations, or iteratively following a final decision to withdraw.

Proposal 6: The roles of the EU institutions and the sequencing of negotiations

The ambiguity over the sequencing of the withdrawal negotiations and the necessity of a two-agreement solution should be clarified in the text of Article 50. This would include clarifying the role of the Commission as the institution responsible for conducting the negotiations.[1282] The wording of Article 218(3) TFEU that clarifies the Commission's role in submitting recommendations to the Council before the nomination of the Union negotiator could be replicated. Clarification of the institutional roles would ensure coherence with the Union's general framework for negotiating international agreements.

A possible further amendment is that the 'framework for future relations' should be replaced by a legally binding mandate for future relationship negotiations. This reform would ensure that the negotiations actually take account of the future relationship, as opposed to a political declaration that is addended at the end of negotiations as an afterthought.[1283] A hard reform to the text of the Treaty could make the conclusion of a treaty on future relations in simplified form a condition for the Treaties to cease to apply. A softer reform would be a commitment for any hypothetical future withdrawal negotiations guidelines to work on separation and future issues in tandem. Provision should also be made for a mandate to be concluded and for negotiations on a future relationship to commence as an integral component of a staggered no deal withdrawal. This would constitutionalise the situation in the Irish Protocol whereby replacement of the transitional replacement by a future relationship agreement is explicitly mandated.[1284]

Proposal 7: EU Citizenship in the withdrawal clause

A major deficiency in Article 50 TEU is the lack of explicit recognition that an automatic effect of withdrawal from the European Union is the extinction of the status of EU citizenship for nationals of that Member State. The text should be amended to make it clear not only that a Member State may withdraw through a decision in accordance with its constitutional requirements,

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[1282] See criticism in Part 2, Section III, subsection iv.
[1283] See discussion in Part 2, Section III, subsection iv.
[1284] See Part Two, Section III, subsection v, subsubsection B.

but that the necessary consequence of this decision is that individuals *qua* nationals will extinguish their status as EU citizens. The reformed wording would reflect the character of the European Union as a creature of both international treaty law and supranational constitutional law. Primary law confirmation would also resolve the ambiguity that has prompted challenges to the Withdrawal Agreement's removal of EU citizenship for United Kingdom nationals.[1285]

The withdrawal clause should also constitutionalise the protection of citizens' rights in the EU and in the withdrawing Member State. Guaranteed protection would reinforce the 'orderliness' of withdrawal for individuals *qua* juridical objects who are exposed to uncertainty over their legal and political status. At present, there is no guarantee of the preservation of citizenship rights beyond the political will of negotiators for bilateral solutions and national legislatures to provide unilateral protection. The extensive legal protection provided by Part II of the Withdrawal Agreement would have been rendered null by a no deal withdrawal.

This idea could be constitutionalised in primary law by establishing agreement on the holistic protection of citizens rights' as a condition for withdrawal. Although this would not ameliorate the risk of a withdrawing state retreating from such international agreement after finalising its withdrawal, it would provide far more certainty than the present situation. A more radical proposal would provide for the retention of a status equivalent to EU citizenship by nationals of a withdrawing Member State for the rest of their lifetime. By contrast to the Withdrawal Agreement, this would ensure that individuals also retain the rights as democratic subjects to vote in local and European Parliament elections in an EU Member State. An alternative indirect method to ensure the retention of EU citizenship for former Member State nationals would be to provide a legal competence for fast-track naturalisation in the Member State of residence. This would respect the principle that nationality of a Member State is the predicate for holding and retaining EU citizenship. Such a proposal may be controversial due to nationality laws being a last bastion of Member State sovereignty that has not been 'pooled' at the European level. Implementing legislation at the national level would be necessary. Therefore, it may only be realistic to secure a political commitment from the Member State governments that they will legislate to create a special status for former EU citizens in the acquisition of nationality.

If this radical option were feasible, Article 50 could be amended to provide an option either to rely on the protections of the legal status of EU citizenship, akin to the UK-EU Withdrawal Agreement, or instead to enjoy a right to fast-track naturalisation in the state of residence. Individuals may choose the former option because they do not feel a sufficiently genuine

[1285] ibid.

connection to the Member State that they are resident in to become a national citizen. Furthermore, they may wish to rely upon rights of family reunification that are only available to EU citizens residing in a different Member State which they would lose upon naturalisation. Alternatively, naturalisation would enable retention of EU citizenship as a status of democratic self-determination rather than just the protection of legal rights. Former Member State nationals could continue to exercise self-determination *qua* EU citizens in local and European Parliament elections, in addition to electing their representatives in the Council *qua* nationals through participation in the national elections of their state of residence. The protection of citizens' rights became an immutable requirement *de facto* for an EU-UK Withdrawal Agreement.[1286] Constitutionalising protection as the default scenario regardless of negotiations ensures certainty for individuals *qua* juridical objects and democratic subjects.

[1286] See Part 2, Section III, subsection iv and subsection v.

Conclusion

The Treaty of Rome represented an exercise of constituent power in international law by the High Contracting Parties to create a supranational constitutional order. This order is a new species of constitutionalism because individuals retain their nationality as a constituent status whilst constructing the new constituent status of citizenship of the European Union. These roles are co-equivalent in the norm-creation process as an exercise of democratic subjecthood. Individuals also fulfil the role of juridical objects in the application of and reliance upon EU law. The High Contracting Parties created a triptych of primary law in order to constitutionalise the exercise of constituent power. The triptych ensures a legitimate means to reconstruct the supranational constitutional order without the need to resort to complete disintegration by dissolving the international treaty basis of the European Union. Article 49 TEU enables the extension of the constituent statuses to new individuals, Article 48 TEU mandates the reconstruction of the order, and Article 50 TEU mandates the repatriation of constituent power by a particular class of Member State nationals.

Member State withdrawal functions as a means of regulated partial disintegration of the supranational constitutional order. The capacity for a Member State's nationals to repatriate constituent power is a necessary precept of the retention of nationality as a constituent status. The withdrawal clause provides a prescribed constitutional procedure for disintegration that vindicates the sovereign decision of the Member State whilst providing an orderly supranational procedure. Member State opt-outs are not a necessary component of the dual-constituent basis of the supranational constitutional order. This phenomenon of disrupted integration is a product of the particular design of the amendment procedure in Article 48 TEU. The initial Convention involves supranational institutions representing individuals as Member State nationals and EU citizens. The conference that adopts the final amendment, however, is composed solely of the heads of state or government of the High Contracting Parties. The unravelling of the EU legal order during reconstruction enables particular Member State executives to reserve the levelling-up of constituent power. Protocols addended to the treaties, rather than a dedicated supranational clause, enshrine exemption from the creation and application of EU law norms.

Article 50 TEU was created to confirm the pre-existing right of Member States to withdraw from the European Union. It also enshrined a specialised supranational procedure distinct from public international law. Strategically, the clause may have been promulgated to reassure the Member States reluctant about further integration. The actual use of the clause may not have been

envisaged by the original drafters. The United Kingdom's eventual withdrawal on 31 January 2020 has provided the first case-study of the operation of Article 50. The deficiencies during this period may be agglomerated under a general critique that the withdrawal clause frames disintegration as a process in public international law, rather than a phenomenon that has effects within a supranational constitutional order. The specific problems are the United Kingdom's underdetermination of 'constitutional requirements'; the ambiguous relationship between a 'decision' to withdraw and 'notification'; the legal vacuum opened up between these two actions; the executive discretion for the European Council to determine the initiation and extension of the deconstitutional convention, and the deleterious consequences of no deal withdrawal for the balance between the teloi of Article 50 TEU. The unconditionality and unilaterality of withdrawal at the supranational level are necessary to ensure the dual-constituent foundations of European integration. A number of alterations to the text of Article 50 TEU may enable the withdrawal clause to realise more fruitfully its teloi to provide a sovereign right for the nationals of a Member State *qua* democratic objects to repatriate constituent power, and to ensure an orderly supranational process for this partial disintegration for all EU citizens *qua* juridical objects.

Member State opt-outs have arisen more haphazardly over three decades as a form of disrupted integration. This phenomenon is not as easy to conceptualise neatly within the framework of the dual-constituent thesis. This exposes the disjuncture between the hypothetical device of an original founding exercise of dual-constituent power, and the reality of the incremental development of the European Union from intergovernmental co-operation to a (predominantly) supranational constitutional order. The decision to bypass reluctant Member States and use international law to establish the Schengen *acquis* on border liberalisation set disrupted integration in motion. The other form of origin arose at the Treaty of Maastricht through resistance to the creation of the new constitutional sector of Economic and Monetary Union. This confirmed Protocols addended to the Treaties as the legal mechanism to enshrine reserved constituent power. When the Member States sought to incorporate the Schengen *acquis* into the supranational constitutional order, the excluded Member States continued their resistance by reserving their constituent power and creating an opt-out. The opt-outs from the Area of Freedom, Security and Justice represent a mid-point between these two forms of origin and provide further evidence that the incremental reality of European integration has driven disruption. The transfer of competences from the intergovernmental former Third Pillar to the supranational First Pillar prompted the further reservation of constituent power. This resistance was deepened further when the Pillars were abolished at the Treaty of Lisbon.

The Protocols lead to asymmetry in the quadripartite role of individuals. Territory is demarcated within which EU law does not apply, and certain individuals only legitimate these norms in their role as EU citizens *qua* democratic subjects. The flexible opt-in provisions in the Area of Freedom, Security and Justice and Schengen Protocols distort the supranational legislative process by enabling executive discretion over participation in the creation and application of norms. The Danish opt-out from Schengen undermines supranational constitutionalism by enabling national and international law means of participation. Reform of the Treaties in order to provide a new limb of a reconstructed quadriptych of constituted constituent power to mandate and regulate opt-outs would address these asymmetries.

These specific deficiencies mean that disrupted integration through opt-outs is more detrimental to supranational constitutionalism than partial disintegration through withdrawal. This seems paradoxical as the output legitimacy consequences of Member State withdrawal are more dramatic for individuals than the partial disapplication of norms through opt-outs. From the perspective of input and throughput legitimacy, however, withdrawal is subject to a prescribed supranational process rather than the *ad hocism* of the opt-out Protocols. Withdrawal also serves to protect the integrity of the supranational constitutional order from recalcitrant Member States. The United Kingdom's renegotiation of membership in February 2016 represented inroads into the juridical rights of EU citizenship in addition to the telos of 'ever closer union'. This Decision demonstrated a Member State that was not only symbolically closer to disintegration, but also practically through the condition that the pre-binding of the constituent powers could only come into force upon notification of a decision to remain in the European Union.

Opt-outs have been presented as a means to prevent Member State withdrawal, and the possibility of Member State withdrawal has been presented as an incentive to prevent opt-outs. The withdrawal of the Member State that has been the leading protagonist in reserving constituent power prompts reconsideration of the relationship between disrupted integration and disintegration. The material conditions in which the nationals of a Member State decided to repatriate constituent power were shaped by a sustained strategy of reserving constituent power as an executive preference with minimal input from individuals *qua* democratic subjects. The result has been a distinctly disconnected experience for United Kingdom nationals *qua* juridical objects. Opt-outs from Schengen, the Area of Freedom, Security and Justice, and Economic and Monetary Union have distanced the United Kingdom from the experience of the eurozone and migration crises in the last decade. Supranational constitutional innovation generated contestation, which generated the deconstitutional innovations of disruption and disintegration. This innovation has

been presented as a restoration of the status quo of national constitutionalism to reverse supranational mutations for which United Kingdom nationals never provided their consent.

This experience has been distinct from the other opt-out Member States of Ireland and Denmark. The Irish government has been compelled to pursue an opt-out strategy in order to ensure harmonisation with the United Kingdom's legal regime on border controls. Denmark's retention of constituent power has been legitimated and re-legitimated by nationals *qua* democratic subjects through clearly mandated national constitutional procedures. This continuing discourse on levelling-up constituent power was born out of the possibility of a *de facto* withdrawal from the European Union following the Maastricht treaty referendum rejection. This provides a converse dynamic in the relationship between disintegration and disrupted integration in comparison to the United Kingdom.

The emergence of disintegration through Brexit may also require a reappraisal of the consequences and value of differentiated integration in the European Union. The withdrawal of the key proponent of opt-outs means that what manifested itself as a temporal form of disrupted or deferred integration at the time of the treaty amendments may now more properly be regarded as deferred disintegration. The debates during the 2016 referendum campaign concerning sovereignty took the same form as the arguments during the Maastricht ratification and the creation of the first example of an opt-out Protocol. The United Kingdom's experience suggests a relational dialectic between European integration and disintegration. Differentiation creates a legitimacy deficit through the lack of consent of a subset of constituent nationals. This deficit is repaid when attempts at supranational uniformity are made at future treaty amendments. A precarious state of disrupted (dis)integration can only persist for so long before it needs to be resolved in favour of one outcome or the other. This relation may inform the future development of Ireland and Denmark's participation in European integration. Those who propose further differentiated integration should also take heed. The short-term success of overcoming Member State vetoes to secure a Treaty amendment ratification can gestate a long-term legacy of disintegration.

The dual-constituent thesis can be used to explain disrupted integration and disintegration, but these phenomena also challenge the explanatory and normative validity of the thesis. The fact that the Member States dominate the Article 48 TEU process with a diminished role for the supranational institutions representing citizens of the Union has enabled the retention of constituent power. The prerogative of Member State nationals to extinguish EU citizenship for themselves is enshrined in Article 50 TEU. Withdrawal is the ultimate rejection by a Member State

population of the idea that constituent power can be shared with a supranational subject. Opt-outs are the symptoms of the malaise. Disruption and disintegration are evidence that nationality of a Member State remains the dominant constituent status. Rather than a co-equivalent means to exercise a *pouvoir constituant mixte*, citizenship of the European Union is a parasitic status that is precariously dependent on the democratic will of nationals. Entirely domestic exercises of simple majoritarian democracy can completely extinguish EU citizenship as a means for democratic and juridical self-determination. Disintegration has exposed the precarity of EU citizenship. It remains to be seen whether the extinction of the status for a class of former Member State nationals may prompt a counter-reaction whereby individuals who do regard EU citizenship as a fundamental constituent status engage in an exercise of emancipatory constituent power to protect its continuing existence against future disintegration.

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