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Nullification and Secession in the EU constitutional order of States

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ABSTRACT: Since its establishment, the European Union (EU) has been living in a state of perpetual crisis. The withdrawal of the United Kingdom (UK) brought to the fore the centrifugal dynamics that the Union has been facing. At the same time, "the notion of an issue-based withdrawal from the overarching 'federal' pact—what is often referred to in American constitutional thought as nullification—is commonly invoked" either by political means, such as in the case of the Greek referendum on the Euro-crisis measures, or by judicial means—for instance, the decision of the German Federal Constitutional Court (BVerfG) on 5 May 2020. Simultaneously, some EU countries have been trying to somehow challenge the notion that respect to the foundational values enshrined in Article 2 TEU is a conditio sine qua non for EU membership. A closer look at those examples sheds light on the reality that unless such issue-based withdrawal is somehow recognized in primary legislation, such as in the case of opt-outs, "nullification" faces insurmountable constraints within the EU constitutional order. That leaves the recalcitrant Member States with the option of functional secession from the voluntary Union per Article 50 TEU. The experience of Brexit, however, underlines that such complete withdrawal is also fraught with difficulty. Using the comparative historical argument, the article shows that the crisis the EU is experiencing contains significant federal dynamics.

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I. Introduction

Since its inception, political conflicts, crises and disputes have besieged the European integration process. From the "empty chair crisis" to the Eurozone crisis, the EU has paved a unique "Sonderweg" towards "an ever closer union."[1] Many of those crises relate to a decision of one or more Member States to assert themselves against a policy, a legislative initiative, a judicial decision adopted at the supranational level or even the declared aim of the EU for an "ever closer union."[2]

At their most extreme, such contestations have entailed the decision of a Member State to withdraw either in whole or in part from the overarching federal pact of the EU. For instance, the UK's withdrawal from the EU on January 31, 2020 was a "unilateral decision to separate territory and citizenry"[3] from the Union in order

1 *See generally* Joseph H.H. Weiler, *In Defence of the Status quo: Europe's* Sonderweg, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 7 (Marlene Wind & Joseph H.H. Weiler eds., 2003).

2 *See* the Preambles of the Consolidated Versions of the Treaty on European Union, 2008 O.J. (C 115) 13 [hereinafter "TEU"] and the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter "TFEU"].

3 Pekka Pohjankoski, *'Secession' and 'Withdrawal' from the European Union as*

to "take back control of [their] borders, money and laws."[4] This is why Vidmar aptly characterized it as "functionally akin to secession."[5] As a functional secession, Brexit denoted UK's "formal withdrawal from [the] central political authority"[6] of the EU and as such the abrupt end to the symbiotic relationship between their legal orders.

Having said that, in the long history of the Union, there have also been several instances where a Member State has attempted to terminate parts (instead of the entirety) of its constitutional contract. Such attempts can be described as nullification – "the notion of an issue-based withdrawal from the overarching 'federal' pact."[7] This concept is linked to the idea that members of a multi-level polity can "and perhaps even ought to, refuse to enforce federal laws that they deem unconstitutional."[8] Nullification is reserved for situations where a Member State objects to a "supposedly intrusive, centrally-imposed regulatory measure that is perceived to illegitimately infringe on an inviolable constitutional principle or belief indispensable to the [State's] fundamental identity."[9]

Examples of this phenomenon include instances where Member States have tried to resist and contest a certain EU policy that they considered as somehow threatening to their national interests. For instance, during the Eurozone crisis the Greek Government tried to resist certain measures that they perceived as threatening the sovereignty and democratic institutions of the State by means of a referendum that was organized in July 2015. At the same time, certain EU countries have been trying to challenge the notion that respect to the foundational values enshrined in Article 2 TEU is a *conditio sine qua non* for EU membership.[10] Equally, even

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Constitutional Expressions, 14 EUR. CONST. L. REV. 845, 849 (2018).

4 *See* DEPARTMENT FOR EXITING THE EUROPEAN UNION, EU EXIT, TAKING BACK CONTROL OF OUR BORDER, MONEY AND LAWS WHILE PROTECTING OUR ECONOMY, SECURITY AND UNION, 2018, Cm 9741 (UK).

5 Jure Vidmar, *Unilateral Revocability in Wightman: Fixing Article 50 with Constitutional Tools,* 15 EUR. CONST. L. REV. 359, 371 (2019).

6 John R. Wood, *Secession: A Comparative Analytical Framework*, 14 CAN. J. POL. SCI. 107, 110 (1981).

7 Ran Hirschl, *Secession and Nullification as a Global Trend*, 2 CONST. STUD. 23, 24 (2016).

8 *Id*. at 30.

9 *Id.*

10 *See* Kim Lane Scheppele et al., *EU Values Are Law, after All: Enforcing EU*

decisions of the highest courts of Member States have questioned an unconditional subjection to the primacy of EU law, such as the May 2020 judgment of the German Federal Constitutional Court (BVerfG).[11]

Within the EU constitutional landscape, such instances of secession and nullification should be distinguished from asymmetry. The latter is provided for by the European Treaties on the condition that the untouchable core of the order and its structural principles are respected.[12] Instead, the episodes of secession and nullification analyzed in this article call into question the values of Articles 2 and 6 TEU and the structural principles of primacy and direct effect which comprise of the untouchable core of the Union political and legal order.[13] In that sense, they should be better understood as examples of what Gardner has called "contestatory federalism."[14]

Building on the Madisonian idea that the "only reliable way to stabilize constitutional divisions of authority over the long term was to structure power in a way that pits officials against one another,"[15] Gardner defined "contestatory federalism" "as a method of protecting liberty through the institutionalization of a permanent contest for power between national and sub-national units of government."[16] In fact, he includes both secession and nullification in his inventory of methods of subnational contestation.[17] This is unsurprising considering subnational entities such as the US States have historically used those instruments to protect their own

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Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union, 39 Y.B. EUR. L. 3 (2021).

11 Bundesverfassungsgericht [BverfG] [Federal Constitutional Court] May 5, 2020, 154 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 17 (Ger.).

12 For instance, Art. 326 TFEU allows for enhanced cooperation, as we shall see later.

13 *See generally* LUKE DIMITRIOS SPIEKER, *Article 2 TEU as Constitutional Core of the EU Legal Order, in* EU VALUES BEFORE THE COURT OF JUSTICE: FOUNDATIONS, POTENTIAL, RISKS 87 (2023) (discussing the constitutional core of the EU legal order).

14 *See* James A. Gardner, *The Theory and Practice of Contestatory Federalism*, 60 WM. & MARY L. REV. 507 (2018).

15 *Id.* at 511 (citing THE FEDERALIST No. 51, at 357-59 (James Madison) (Benjamin Fletcher Wright ed., 1961)).

16 James A. Gardner, *In Search of Sub-National Constitutionalism*, 4 EUR. CONST. L. REV. 325, 328 (2008).

17 *See* Gardner, *supra* note 14, at 531–33.

interests against potential overreaches from the federal State.[18] In fact, the US States have "a long record of inserting themselves between their citizens and Washington, and of deploying their powers in ways intended quite self-consciously to thwart the operation of national policies that they have determined to be destructive of their citizens' liberties and others interests."[19]

Taking the cue from this historical fact, the following part of the article revisits the American experience to highlight certain aspects of the conceptual roots of nullification and secession that are relevant for the current situation in the EU. First, nullification and secession can be seen as vehicles for constitutional conflicts both in the US and the EU experiences.[20] In the case of the EU, constitutional conflicts entail struggles between the primacy of EU law and national constitutional supremacy. Second, nullification and to a certain extent secession, could be conceptualized as instruments to protect the rights of constituent States and their citizenry from abusive policies coming from the center.[21]

However—and this is where the two experiences differ—while in the American case, the federal State deemed such contestations "incompatible with the nature of the union,"[22] the EU constitutional order of States potentially allows for more flexibility. Article 50 TEU has codified a unilateral and unconditional right of Member States to functionally secede from the European Union[23] unlike what happens in the US and most other federations. At the same time, and although the EU institutions use the available legal and political toolkit to combat nullification attempts, the Union constitutional order of States is so flexible that it can potentially accommodate such issue-based withdrawals by using primary legislation, such as in the case of opt-outs.

Taking the discussion above into account, we highlight that

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18 *Id.*

19 *See* Gardner, *supra* note 16, at 330.

20 *See* Robert Schütze, *Federalism as Constitutional Pluralism: "Letter from America", in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 185 (Matej Avbelj & Jan Komárek eds., 2012).

21 *See* Erin Delaney, *The European Constitution and Europe's Dialectical Federalism*, *in* THE RISE AND FALL OF THE EUROPEAN CONSTITUTION 73, 87 (Nick W. Barber, Maria Cahill, & Richard Ekins eds., 2019).

22 *See* Schütze, *supra* note 20, at 196.

23 TEU, *supra* note 2, at art. 50.

because a successful nullification within the EU constitutional order of States requires unanimity and, as such, is difficult to achieve, the nuclear option of secession is the only remaining option. Still, although, Article 50 TEU remains "[t]he only undeniable legal limit that Member States have at their disposal against competence creep under the current Treaty framework,"[24] Brexit has revealed that secession is not an easy process. As a result, the Article 50 process may somewhat paradoxically have an integrationist effect.[25] As Delaney explained, "individual opt-outs from specific programs may be harder to negotiate" while "the option of withdrawal may make other mechanisms of recalcitrance less successful."[26] The remainder of this article is organized as follows. It analyzes the two forms of withdrawal by referring to the American experience (Part 2). Once those concepts are set in their historical context, we focus on understanding how nullification (Part 3) and secession (Part 4) have been applied in the EU context.

II. Nullification and Secession: A Brief Intellectual History

In considering the judgment of the German Constitutional Court on PSPP (Public Sector Purchase Program), Fabbrini and Kelemen[27] recalled the Compact Theory[28] –one of the interpretative theories of the US Constitution. According to this theory, the states are the sovereign parties to an agreement that gave rise to the

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24 Sacha Garben, *Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers*, 58 J. COMMON MKT. STUD. 41, 52 (2020).

25 Christophe Hillion, *Leaving the European Union, the Union Way*, 8 EUR. POL'Y ANALYSIS 1 (2016).

26 *See* Delaney, *supra* note 21.

27 Federico Fabbrini & R. Daniel Kelemen, *With One Court Decision, Germany May Be Plunging Europe into a Constitutional Crisis*, WASHINGTON POST (May 7, 2020, 1:46 PM), https://www.washingtonpost.com/politics/2020/05/07/germany-may-be-plunging-europe-into-constitutional-crisis/ [https://perma.cc/Z6JE-7LYW].

28 BverfG May 5, 2020, 154 BVerfGE 17 (Ger.). For some comments, see Miguel Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court*, VERFASSUNGSBLOG (May 6, 2020), https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court [https://perma.cc/8Z96-73YL]; Matej Avbelj, *The Right Question about the FCC Ultra Vires Decision*, VERFASSUNGSBLOG (May 6, 2020), https://verfassungsblog.de/the-right-question-about-the-fcc-ultra-vires-decision [https://perma.cc/8BS7-F7J9]; Toni Marzal, *Is the BVerfG PSPP Decision "Simply Not Comprehensible"? A Critique of the Judgment's Reasoning on Proportionality*, VERFASSUNGSBLOG (May 6, 2020), https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible [https://perma.cc/ZW9G-JWAB].

Union.[29] Although the concept originated in the 1832 nullification crisis involving South Carolina,[30] it first manifested at least ten years prior in the declaration of the delegates of Virginia concerning the ratification of the Constitution.[31]

The delegates of Virginia argued that "the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression and that every power not granted thereby remains with them and at their will."[32] This declaration also contained an essential element that would, in fact, trigger the Virginia and Kentucky Resolutions according to which, "among other essential rights the liberty of Conscience and of the Press cannot be cancelled abridged restrained or modified by any authority of the United States."[33]

Both the Virginia and Kentucky Resolutions were a reaction to the Alien and Sedition Acts, a set of laws approved by the federal Congress in fear of an imminent war with France.[34] These federal laws limited freedom of speech and of the press.[35] In order to defend the rights of their people, Virginia and Kentucky tried to block these laws by standing between them and their citizens. In that sense, the origin of the concept of nullification should be understood in a broader context where states were seen as the main guardians of citizens' rights—a tool used by the substate level to contest decisions of the centre[36] unfortunately including the ones on

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29 David Schwartz, *The International Law Origins of Compact Theory: A Critique of Bellia & Clark on Federalism*, 1 J. AM. CONST. HIST. 629, 630 (2023).

30 Fabbrini & Kelemen, *supra* note 27.

31 *See Ratification of the Constitution by the State of Virginia*; *26 June 1788*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/ratva.asp [https://perma.cc/9BJ4-CR5M] (last visited Nov. 8, 2024).

32 *Id.*

33 *Id.*

34 *See Alien and Sedition Acts (1798),* NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/alien-and-sedition-acts#:~:text=As%20a%20result%2C%20a%20Federalist,imprisonment%2C%20and%20deportation%20during%20wartime [https://perma.cc/22X3-RETW] (July 27,2023).

35 *See* Matteo Monti, *Il, "Sedition Act" europeo? Spunti dalla comparazione sull'esclusione di Russia Today e Sputnik dal mercato dell'informazione unionale*, OSSERVATORIO AIC (Jan. 3, 2023), https://www.osservatorioaic.it/images/rivista/pdf/2023_1_05_Monti.pdf [https://perma.cc/SRP3-AMBS].

36 *See* Delaney, *supra* note 21.

slavery.

Interestingly for the purposes of the article, until the so-called post-war (secession) amendments and the passing of the Fourteenth Amendment,[37] the Bill of Rights was not seen as applicable to the states. This was somewhat confirmed by the letter of the First Amendment, which states that "Congress shall make no law"[38] and thus seems to limit the application of the document only to the federal legislature (the Congress). At that time, the protection of rights was thought to take place at the level of the state constitutions, which were seen as more mature. Thomas Jefferson made a similar point when he stated that "the true barriers of our liberty in this country are our state-governments."[39] Not by coincidence, he had a

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37 On reconstruction as a second founding moment, see ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

38 U.S. CONST. amend. I.

39 Letter from Thomas Jefferson, to Destutt de Tracy (Jan. 26, 1811), https://founders.archives.gov/documents/Jefferson/03-03-02-0258 [https://perma.cc/838Z-22PQ]. The term nullification, however, did not appear in the final text of the Kentucky resolutions of 1798. They retained the passage in which an abusive federal act was conceived as "unauthoritative, void, and of no force". *III. Resolutions Adopted by the Kentucky General Assembly, 10 November* 1798, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-30-02-0370-0004 [https://perma.cc/ZZQ8-C7QK] (last visited Nov. 8, 2024). They also stated that, because of the absence of a "common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress" as the principles of '98 preceded the invention of the judicial review of legislation in Marbury v. Madison. *Id.* Incidentally, the word nullification would later be used in the Kentucky resolutions of 1799, although it is not clear whether the author of this text was also Jefferson. *See Kentucky Resolution – Alein and Sedition Acts,* THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/kenres.asp [https://perma.cc/YHT9-FGY6] (last visited Nov. 8, 2024). Like Calhoun years later, Jefferson kept the authorship of the Kentucky resolutions of 1798 a secret. "The Kentucky Resolutions of 1799 are of uncertain authorship, but revived Jefferson's nullification language, asserting that 'the several states who formed [the Constitution] . . . have the unquestionable right to judge of its infraction; and, That a nullification . . . of all unauthorized acts . . . is the rightful remedy.'" Nancy Verell & John Ragosta, *Kentucky and Virginia Resolutions*, MONTICELLO, https://www.monticello.org/site/research-and-collections/kentucky-and-virginia-resolutions [https://perma.cc/L5AC-GP2Y](Feb. 22, 2018). Having said that, the text of the Virginia resolutions reveals some important differences with the Kentucky ones both with regard to the terminology and concepts used. The former used the term 'interpose'. *Virginia resolutions*, *21 December 1798*, NAT'L ARCHIVES: FOUNDERS ONLINE. https://founders.archives.gov/documents/Madison/01-17-02-0128 [https://perma.cc/E62H-R9HW] (last visited Nov. 8, 2024). More importantly, while nullification seems to have been conceived as a unilateral right of each state, interposition

crucial role in conceptualizing the notion of nullification as the author of the 1798 Kentucky Resolutions.[40]

Having said that, it is John Calhoun that understood nullification not just as a defensive mechanism with the aim of defending the rights of citizens but rather as a device with which States could protect their sovereignty. In the South Carolina Exposition and Protest,[41] Calhoun refers to the unjust nature of the federation that would seem to privilege the interests of the North over the South. In this document and in his letter to General James Hamilton, Calhoun took up and developed elements already present in the so-called *Principles of '98*,[42] which were proclaimed in response to the passing of the Alien and Sedition Acts. Notably, reference was made to the famous Kentucky and Virginia resolutions and to the concepts of nullification and interposition,[43] based on the premise that the interpreters of the states' rights were the states themselves.[44]

The South Carolina Exposition and Protest inspired the 1832 nullification crisis after the approval of the Tariff of

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seems to have been a kind of 'collective' right of the states. *See id.*

40 *See* Giuseppe Martinico, *Jeffersonian Federalism and Constitutional Conflicts*, *in* THE FUTURE OF EU CONSTITUTIONALISM 71, 73 (Matej Avbelj ed., 2023).

41 John C. Calhoun, *South Carolina Exposition and Protest – 1828*, THE CLOCKWORK CONSERVATIVE, https://clockworkconservative.wordpress.com/freedom/primary-documents/south-carolina-exposition-and-protest/ [https://perma.cc/K55J-TNND].

42 On the importance of the Virginia and Kentucky resolutions, see K.R. Constantine Gutzman, *The Virginia and Kentucky Resolutions Reconsidered: "An Appeal to the Real Laws of Our Country"* 3 J. S. HIST. 473 (2000).

43 ANTONIO LA PERGOLA, RESIDUI CONTRATTUALISTICI E STRUTTURA FEDERALE NELL'ORDINAMENTO DEGLI STATI UNITI 58 (1969).

44 This, according to Calhoun, was an interpretation that could be inferred from the letter of Article VII of the US Constitution: "The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same". It was precisely this 'between' that gave the idea of the Constitution as a pact 'between' the states or, in Calhoun's words:

> They established it as a compact between them, and not as a constitution over them; and that, as a compact, they are parties to it, in the same character. I have thus established, conclusively, that these States, in ratifying the constitution, did not lose the confederated character which they possessed when they ratified it, as well as in all the preceding stages of their existence; but, on the contrary, still retained it to the full.

John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, CONST. SOC. http://www.constitution.org/jcc/dcgus.htm [https://perma.cc/ZF8U-K39P] (last visited Nov. 8, 2024).

Abominations.[45] On that occasion, a special South Carolina state convention put into practice Calhoun's ideas by declaring federal acts "null, void, and no law, nor binding upon this State, its officers or citizens" with the well-known ordinance of nullification of 1832.[46] This led to Congress passing the Force Bill of 1833, which authorized President Jackson to use the army, if necessary, to collect taxes.[47] In turn, the South Carolina Convention declared the Force Bill as "null and void."[48]

It is apparent that while in the center of Jefferson's thought was a theory of natural law and natural rights (with all the contradictions that characterized his thought),[49] for Calhoun the premise was that the sovereignty of the states must be preserved against abuses at the federal level—against the *ultra vires* acts of the federation. In this context, the interpreters of the Constitution are primarily the states (and state political actors) rather than the U.S. Supreme Court, that, not surprisingly, Calhoun idolized. This is evident in his criticism of decisions such as the ones in *Marbury v. Madison* and *Martin v Hunter's Lessee*.[50] Nullification in Calhoun's thought was the first step in a possible escalation that could lead to constitutional amendment or secession.[51] It is a manifestation of the power that

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45 Julie Silverbrook, *The Nullification Crisis,* BILL OF RIGHTS INST., https://billofrightsinstitute.org/essays/the-nullification-crisis [https://perma.cc/29XY-7NG6] (last visited Nov. 8, 2024).

46 *South Carolina Ordinance of Nullification, November 24, 1832*, THE AVALON PROJECT, https://avalon.law.yale.edu/19th_century/ordnull.asp [https://perma.cc/7BF5-X8ZK] (last visited Nov. 8, 2024).

47 Force Bill, 4 Stat. 632 (1833).

48 On conventions in American law, see chapter 8 of GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1998)

49 *See* William Cohen, *Thomas Jefferson and the Problem of Slavery*, 56 J. AM. HIST. 503 (1969).

50 Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

51 According to Calhoun, the amending power is the linchpin of state sovereignty and final proof of its rightful place in the American compact. Article V of the Constitution, in fact, 'shows, conclusively, that the people of the several States still retain that supreme ultimate power, called sovereignty—the power by which they ordained and established the constitution; and which can rightfully create, modify, amend, or abolish it, at its pleasure.' The Constitution therefore was not some higher law open to evolving with the spirit of the times, majority will, the political classes in power, or the preferences of Supreme Court Justices, but a compact between sovereign states, renegotiable only through amendments [. . .] The utmost guarantee against possible abuses of power was provided by the fact that the Constitution could only be amended only by (at least) three quarters of the states. Nullification, then, takes shape as the possibility that a single state could appeal to the

states have as interpreters of the compact. It can pave the way to the use of the amendment power and, under certain conditions, to secession.

In the same letter to General Hamilton, he clarified the relationship between nullification and secession. The former has a vertical nature, involving the relation between the masters of the compact and the agent produced by the compact, while the latter has a horizontal one, involving only the states, the holders of sovereignty. For Calhoun, secession was potentially legal and connected to the very idea of the compact:

> To situate secession in Calhoun's constitutional doctrine, one must remember that in Calhoun's system withdrawal from the Union is external, but not foreign, to the constitutional system. By now it should be clear that a state's right to withdraw does not simply derive from the contractual nature of the Union. Even if the Constitution is a contract, it has the characteristics of a political pact; this in turn creates a series of political obligations clearly distinguishable from merely contractual ones. In a nutshell, Calhoun held that the Constitution is contractual in nature, but in acceding to the pact, a state implicitly accepts the perpetuity of the Union in its political character. If the nature of the Union does not change, it is not permissible to withdraw from the Union itself. Accordingly, secession would not be impossible, but would amount to a Lockean appeal to Heaven; such cases would arise, not from the nature of the Union, but from the right of self-government of all communities of free human beings. In essence, a 'pre-political' right of secession exists, shading over into the right of revolution; there are no significant differences on this point between Webster, Calhoun, Jackson, and the entire American tradition. Institutionalization of power does not eliminate the people's right to rebel against a despotic

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supermajority — the highest constitutional authority. Nullification was thus entirely within the system, but it logically opens the way to revision of the constitutional pact, thus presenting each state with the dilemma whether to adhere to the new pact or withdraw from the Union. *See* Marco Bassani, *John C. Calhoun: Nullification, Secession, Constitution*, ABBEVILLE INST. PRESS (Aug. 8, 2014), https://www.abbevilleinstitute.org/john-c-calhoun-nullification-secession-constitution/ [https://perma.cc/SW4P-44K3].

government.[52]

However, the instruments of nullification and secession should be used with "prudence and propriety."[53] Indeed, in Calhoun's view, secession was possible after an escalation of measures that could be triggered by the use of the nullification doctrine.[54] If the state that triggered nullification and appealed to the supermajority of states is not supported in its interpretation of the compact by the other states, it will be able to unilaterally leave the Union.[55]

Notwithstanding Calhoun's views on nullification and secession, the 'national' response to those methods of contestation was clear. Concerning the former, it was expressed by President Jackson. Two weeks after the South Carolina Ordinance, he issued the 'Proclamation regarding Nullification'.[56] The latter was categorical:

> The ordinance is founded, not on the indefeasible right of resisting acts which are plainly unconstitutional and too oppressive to be endured, but on the strange position that any one State may not only declare an act of Congress void, but prohibit its execution; that they may do this consistently with the Constitution; that the true construction of that instrument permits a State to retain its place in the Union and yet be bound by no other of its laws than those it may choose to consider as constitutional. It is true, they add, that to justify this abrogation of a law it must be palpably

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52 Bassani, *supra* note 51.

53 Calhoun, *supra* note 44.

54 *Id.*

55 The primary function of nullification for Calhoun is not, in fact, antagonistic use of state power against the federal government; it is rather an appeal to the supreme federal power: the three-quarters majority of sovereign states. A state signals a de facto alteration in the nature of the Union, and thus of federal powers, by nullifying. The super-majority has the right to accept a different, more energetic, and powerful agent for managing common affairs. When the super-majority sustains the nullifying state, that state cannot legitimately secede. But if the Constitution is no longer the same, after consultation, two paths are open to the nullifying state: accession to the modified contract, or withdrawal from the Union. Calhoun's theory of secession rests within these rigorous conditions; secession is then precisely the withdrawal from the political obligations that the states voluntarily imposed on themselves, justified only by alteration of the constitutional compact. *See* Bassani, *supra* note 51.

56 The text of Jackson's Proclamation to the People of South Carolina (10 December 1832) can be found in *Documents of American History. Volume 1*, 263 (HS Commager, ed., 1949).

> contrary to the Constitution; but it is evident that to give the right of resisting laws of that description, coupled with the uncontrolled right to decide what laws deserve that character, it to give the power of resisting all laws.[57]

Similarly, secession has also been deemed antithetical to the Union. Four years after the end of the civil war, the US Supreme Court held that the "constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[58]

Overall, this short historical account of the conceptual roots of nullification and secession highlight three aspects. First, nullification and secession can be seen as vehicles for constitutional conflicts. Rather than being considered as "extra-legal", the American example points to the fact that they are part of the history of federal systems and, as such, have a role to play in them. In fact given that constitutional conflicts characterize the life of mature federal systems, their presence at the current stage of the EU integration process is a confirmation of the federalizing nature of the supranational process as we shall see.[59] Secondly, although nullification was used to support and justify some of the most abhorrent policies in US history, it was initially conceived as a tool to protect citizens' rights against abusive federal laws.[60] Later on, Calhoun used nullification to defend the rights of the states, seen as masters of the compact. This distinction should not be understood as a rigid dichotomy. Indeed, Jefferson's ambiguities on the question of rights and in particular on the question of slavery are well known. In the very different political and historical context of the EU, such early understanding of nullification and even secession as instruments to protect the rights of the Member States and their citizens from abusive federal policies is particularly useful. Finally,

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57 *Id.*

58 Texas v White, 74 U.S. 700, 725 (1868). Notwithstanding, as Radan pointed out, it also left the door ajar for the possibility for secession "through revolution, or through consent of the States." Peter Radan, *An Indestructible Union . . . of Indestructible States: The Supreme Court of the United States and Secession*, 10 LEGAL HIST. 187, 191 (2006). Following the logic of the court, secession of a state is not unconceivable if the U.S. Constitution is amended accordingly.

59 *See* PETER HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS. PATTERNS FOR NEW LEGAL STRUCTURES (1966). ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW (2009). On the concept of "federalizing process," see CARL J. FRIEDRICH, TRENDS OF FEDERALISM IN THEORY AND PRACTICE (1969).

60 *See* Martinico, *supra* note 40.

it is true that the American federal State declared such contestations "as incompatible with the nature of the union."[61] As we shall see, the EU experience is different. Although the EU institutions legally and politically contest nullification attempts, its flexibility has meant that the EU constitutional order of States often manages to accommodate such forms of contestatory federalism. Article 50 TEU allows any Member State to functionally secede from the EU while it is even possible to 'nullify' a part of the constitutional contract if there is consensus.[62]

III. Nullification in the EU Constitutional Order of States

Like in the case of the U.S., the history of the EU is full of examples of constitutional conflicts that have occurred when Member States inserted themselves between their citizens and Brussels to protect their rights or their national interests against what they perceived as an unwelcome advance of European integration, or detrimental to their national interests. In the cases that we examine in this article, they have gone as far as attempting to partially withdraw from the overall federal pact either by judicial means as in the case of the May 2020 BVerfGE ruling[63] or by political means as in the case of the 2015 Grexit[64] referendum and the rule of law crisis in Eastern Europe. However, similarly to the US where nullification was proved almost impossible to achieve, in all those examples, the respective Member States faced serious impediments that did not allow them to successfully negotiate issue-based withdrawals. Having said that, unlike the case of the US where it became clear that nullification could not be accommodated,[65] the EU constitutional order of States seems markedly more flexible. The Member States remain *Herren der Verträge [Masters of the Treaties]. As such,* they can amend the Treaties as they wish. In the third section of this part, we will refer to some of those examples pointing to the fact that issue-based withdrawal is possible if there is consensus by all Member States.

As we noted in the introduction, however, these forms of

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61 *See* Schütze, *supra* note 20, at 196.

62 TEU, *supra* note 2, at art. 50.

63 BverfG May 5, 2020, 154 BVerfGE 17 (Ger.).

64 The term Grexit refers to the possible (dis)orderly withdrawal of Greece from the Eurozone during the years of economic crisis.

65 *See* Schütze, *supra* note 20, at 196.

disobedience should not, in fact, be confused with the forms of asymmetry provided for in the European Treaties.[66] In order for asymmetry to function as an instrument of differentiated integration, the untouchable core of the supranational order must be respected. Against this background, the flexibility offered by asymmetry gives an added value to the life of a political system only when the identity of this system can be preserved. Otherwise, flexibility would lead to a revolution in a technical sense, i.e. a transformation of the identity of the legal system, or in Kelsenian terms a new basic norm and the interruption of the chain of validity.[67] In order to avoid this, a legal system allowing asymmetry presents some constitutional safeguards. For example, enhanced cooperation allows for asymmetry. Article 326 TFEU provides that: "any enhanced cooperation shall comply with the Treaties and Union law. Such cooperation shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them."[68]

In so doing, this provision identifies the existence of a constitutional core of principles and values whose respect makes asymmetry "sustainable". The forms of issue-based withdrawal that we are going to consider imply, instead, the denial of values that belong to the untouchable core of EU law.

A. Issue-based Withdrawal via Judicial Means: the case of the BVerfG Ruling

Weiler has noted that transnational constitutionalism has been at the very core of the European project.[69] From the first years of its existence, the CJEU introduced the principle of direct effect,[70] according to which individuals can rely on EU law provisions

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66 *See generally* BETWEEN FLEXIBILITY AND DISINTEGRATION: THE TRAJECTORY OF DIFFERENTIATION IN EU LAW (Bruno de Witte, Andrea Ott, & Ellen Vos eds., 2017) (discussing the differentiated integration process within the EU and whether such flexibility has negatively or positively impacted the EU).

67 *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115-22 (1945); HANS KELSEN, THE PURE THEORY OF LAW 208-14 (1970).

68 TFEU, *supra* note 2, at art. 326.

69 *See* Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

70 Case 26/62, van Gend & Loos v. Netherlands Inland Revenue Admin., 1963 E.C.R. 1.

before national courts, while in *Costa*[71] they held that EU law takes precedence over national law when the two are in conflict. Some years later, the court confirmed that the principle of primacy even covers conflicts between EU law and national constitutional law.[72]

Such conception of EU law has not, however, gone uncontested. *The decisions of the Italian courts in Frontini,*[73] *the German Courts in the Solange cases*[74] *and Maastricht-Urteil,*[75] as well as *the Lisbon Treaty judgments of the Czech, German, and Polish Constitutional Courts,*[76] *all suggest that certain Member States believe that an untouchable nucleus of sovereignty does exist and that it can be invoked against the Union. According to this understanding,* each Member State is an autonomous unit that retains its self-determination and sovereignty, including the ability to revoke its consent to participate in international organizations.[77] The codification of the duty to respect "the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government"[78] has reinforced this position.

Conflicts, such as those which characterized the seventies and lay at the heart of the Solange saga, were due to the absence (at supranational level) of provisions comparable to those aimed at protecting "fundamental rights" at national level, i.e. conflicts by divergence or by absence of a comparable protection of fundamental rights in EU law. [79] Put differently, the national supreme courts were inserting themselves between the Court of Justice and their citizens to protect the rights of the latter. Over the

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71 Case 6/64, Costa v. ENEL, 1964 E.C.R. 588.

72 Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhrund Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1126.

73 Case 183/73, Frontini v Ministero delle Finanze, 2 CMLR 372 (1974).

74 BVerfG May 29, 1974, 37 BVerfGE 271; BverfG Oct. 22, 1986, 73 BverfG 322.

75 BVerfG Oct. 5, 1993, 89 BVerfGE 155.

76 Ústavní soud České republiky 03.11.2009 (ÚS) (Constitutional Court) [Judgment of the Constitutional Court of Nov. 3, 2009], sp.zn ÚS 29/09 (Czech); BVerfG June 30, 2009, 123 BVerfGE 267; Constitutional Tribunal, Judgement of 24 November 2010, K 32/09 (2010) (Pol.).

77 Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja Zu Deutchland*", 10 GERMAN L.J. 1241, 1247 (2009).

78 TEU, *supra* note 2, at art. 4(2).

79 BVerfG May 29, 1974, 37 BVerfGE 271; BverfG Oct. 22, 1986, 73 BverfG 322.

years, the Union legal order has codified its commitment to respect for fundamental rights, particularly since the entry into force of the Lisbon Treaty, which made the EU Charter of Fundamental Rights binding.[80] However, constitutional conflicts between the Court of Justice and apex national courts have not disappeared, rather they have only changed their nature. The current conflicts seem to be due to the existence of an area of overlap between the national and supranational level, i.e. conflicts by convergence or by presence (of an EU law discipline).

The current conflicts are the unexpected consequences of the constitutionalization of the EU, partially brought by the recognition that fundamental rights are an integral part of the EU legal order. Interestingly, Boom read those processes through the lens of nullification.[81] More recently, commentators[82] have evoked its specter in the context of the German Constitutional Court decision of 5 May 2020.[83] In this case, the apex court of Germany declared that the CJEU had acted *ultra vires* when exercising the proportionality review in the *Weiss* case.[84] By questioning one of the fundamental pillars of European integration, the principle of primacy of EU law, the German highest court pointed out to the other German institutions that they were not bound by any of the relevant effects of the *Weiss* judgment. In other words, it decided the unilateral withdrawal of Germany from this part of the overall "federal" pact.

In particular, the German Constitutional Court somehow questioned the way in which the CJEU had carried out the proportionality test in *Weiss*.[85] In the words of the German Constitutional Court:

> The specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to

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80 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

81 Steve J. Boom, *The European Union after the Maastricht Decision: Will Germany be the Virginia of Europe*, 43 AM. J. COMPAR. L. 177 (1995).

82 *See* Fabbrini & Kelemen, *supra* note 27.

83 *See* BverfG May 5, 2020, 154 BVerfGE 17, ¶ 127 (Ger.).

84 Case C-493/17, Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018).

85 *Id.*

> the PSPP, between monetary policy and economic policy, i.e. between the exclusive monetary policy competence conferred upon the EU (Art. 3(1) lit. c TFEU) and the limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large (Art. 4(1) TEU; Art. 5(1) TFEU).[86]

In essence, the German Constitutional Court gave the European Central Bank (ECB) Governing Council a three-month ultimatum to adopt "a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme."[87] While the tone of the German Constitutional Court is unusual, scholars stressed that there were many ways of overcoming the impasse.[88] And indeed,

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86 154 BVerfGE 17, ¶ 127.

87 *Id.* ¶ 235. The court stated:

> Following a transitional period of no more than three months allowing for the necessary coordination with the ESCB, the Bundesbank may thus no longer participate in the implementation and execution of Decision (EU) 2015/774, the amending Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100, and the Decision of 12 September 2019, neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume, unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme. On the same condition, the Bundesbank must ensure that the bonds already purchased under the PSPP and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the ESCB.

Id. ¶ 235.

88 *See* for instance Poiares Maduro:

> I don't think the ECB can and will directly comply with the German Court's judgment. To do so would open the door to multiple national legal challenges, placing it under the jurisdiction of all national high courts, with disastrous consequences for the ECB and its role under the Treaties. But, without directly addressing the German Constitutional Court demand, the ECB may adopt a new decision with a more in depth justification of the program. This justification will likely mostly pay lip service to the arguments on proportionality raised by the Constitutional Court. But that may be sufficient to provide the justification needed by German authorities, that are the actual addressees of the judgment, to say that the requirement the Court has imposed has been fulfilled by the ECB and the problem is therefore solve. Naturally, those that brought this case will argue otherwise but that will have to be done through a new case: time will be gained (and the composition of the Court will also partly change).

the conflict was overcome thanks to the involvement of political actors.[89] Moreover, as the German Constitutional Court explicitly stated, this decision did not affect the new Pandemic Purchasing Program of the ECB.[90] This judgment confirms a recent trend, according to which courts have been eager to intervene despite the technicalities of the question by making a series of important decisions concerning European economic governance.[91] In spite of the PSPP decision, the ECB confirmed its intention to insist on its expansive monetary policy approach in a press release following the judgment of the German Constitutional Court of 5 May 2020.[92]

Precisely because the German ruling of 5 May 2020 questioned one of the fundamental pillars of European integration and created doubts as to whether the German constitutional order abides by the rules of the EU legal order, a number of scholars suggested the activation of the infringement procedure against Germany under Article 258 TFEU.[93] Indeed on 9 June 2021, the Commission sent a

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Poiares Maduro, *supra* note 28.

89 *See* Mattias Wendel, *Constructive Misunderstandings – How the PSPP Conflict was Eventually Settled and How it Reflects Constitutional Pluralism, in* THE FUTURE OF EU CONSTITUTIONALISM 53 (M Avbelj ed., 2023).

90 154 BVerfGE 17, ¶ 127.

91 Cristina Fasone, *Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective*, (European University Institute, Working Paper 2014/25).

92 The Court of Justice released a statement that:

> In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created. The institution will refrain from communicating further on the matter.

Court of Justice of the European Union Press Release 58/20, Press release following the judgment of the German Constitutional Court of 5 May 2020 (May 8, 2020).

93 TFEU, *supra* note 2, at art. 258:

> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

letter of notice to Germany.[94] This came only a few days after another decision of the German Constitutional Court in which it dismissed two applications for an order of execution that had been lodged after the BVerfG's judgment of 5 May 2020 on the PSPP.[95] However, in light of the German reply to the letter of formal notice, the Commission announced the decision to end its infringement proceedings against Germany on 2 December 2021.[96]

Overall, the concept of nullification is normally used with reference to acts of political actors not least because:

> [C]ourts are in general reactive institutions: they are called upon to adjudicate on the initiative of the parties that come before them. They thus react on the initiative of the parties, rather than on their own initiative, to the positions taken by other courts [. . .] They may not be allowed to consider *proprio motu* points not raised by the parties.[97]

However, in this instance, commentators have used it with reference to a constitutional court ruling.[98] The reason being that the German Constitutional Court somehow questioned one of the fundamental pillars of European integration: the principle of primacy of EU law. However, and in line with what we have argued above, it seems that the intention of the German Court – at least ostensibly – was to protect the rights of Germany and its citizens from an intrusive decision of a federal institution. The dialogue between the EU and the German institutions that took place following this judgment point to the fact that nullification could be seen as a vehicle of a constitutional conflict within the EU, another form of contestatory federalism. In this process, the EU institutions used the available legal toolkit including the threat of an infringement procedure to combat this judicial issue-based withdrawal.

In any case, for a judge-made nullification attempt to be

> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

94 EUROPEAN COMMISSION, JUNE INFRINGEMENTS PACKAGE: KEY DECISIONS (2021).

95 BVerfG Apr. 29, 2021, 158 BVerfGE 89.

96 EUROPEAN COMMISSION, DECEMBER INFRINGEMENTS PACKAGE: KEY DECISIONS (2021).

97 Antonios Tzanakopoulos, *Judicial Dialogue as a Means of Interpretation*, *in* THE INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE 72, 74 (Helmut Philipp Aust & Georg Nolte eds., 2016).

98 Fabbrini & Kelemen, *supra* note 27.

successful, the political institutions of the respective State should also "adopt" it and convince their counterparts in the other Member States to accommodate it within the Union constitutional order of States, as we shall see. Precisely, because it is unimaginable at the current situation that there will be consensus among all the contracting parties to challenge the primacy of EU law, functional secession from the EU remains the only realistic option for this to happen.

B. Issue-based Withdrawal via Political Means

The principle of judicial independence sometimes makes it difficult to attribute direct responsibility to a Member State for a judicial decision that might be interpreted as an attempt for an issue-based withdrawal. However, national political elites have also tried to "nullify" certain EU decisions to protect their citizens from what they perceived as policies that they threaten their rights and the national interests. In this section we will revisit two of those attempts. The 2015 Grexit referendum underlines how difficult it is for a Member State to partially withdraw from the EU legislative framework when its actual financial survival is at stake, even when there is an overwhelming majority for such an option. The rule of law crisis on the other hand highlights how some Member States have been trying to challenge the notion that respect to the foundational values enshrined in Article 2 TEU is a *conditio sine qua non* for EU membership. Despite the rather modest EU response, the Article 7 TEU procedure and the rule of law conditionality mechanism point to the limits of such attempts to "nullify" the foundational principles of the EU legal order.

1. The case of the Grexit Referendum

The prospect of Grexit was on and off the table since the Eurozone crisis erupted. In 2010, it was nearly avoided when a financing mechanism was "established involving a substantial IMF financing and a majority of European financing and taking the form of bilateral loans from the Member States."[99] Two years later, a cross-party majority in the Greek Parliament supported the second bailout and the associated debt restructuring preventing, once again,

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99 Antonis Antoniadis, *Debt Crisis and Global Emergency: The European Economic Constitution and other Greek Fables, in* THE EUROPEAN UNION AND GLOBAL EMERGENCIES 167, 172 (Antonis Antoniadis, Robert Schütze & Eleanor Spaventa eds., 2011).

the prospect of Grexit.[100] "The threat subsided even further after European Central Bank President Mario Draghi said that summer that the ECB was ready to do 'whatever it takes' to preserve the euro."[101]

All this, however, precipitated an economic malaise, significantly strained Greece's population and engendered a growing sentiment of social discontent.[102] The leader of the official opposition at the time, Alexis Tsipras, promised that if his party Syriza [Coalition of Radical Left] won the January 2015 elections, he would tear the Memoranda (economic measures) to pieces.[103] According to its election platform, Syriza did not want Greece to withdraw either from the EU as a whole or from the EMU.[104] Their aim was somewhat more modest: they wanted Greece's debt to be forgiven, and the terms of the remaining debt to be renegotiated, along with an abolition of the austerity demands made upon Greece as a condition of previous bailouts.[105] Syriza indeed won the election and together with the Independent Greeks – an anti-austerity right-wing populist party – formed a coalition government that led the efforts to renegotiate Greece's debts and the related austerity obligations.[106]

After five months of intensive negotiations, on 25 June 2015, Greece's creditors tabled an austerity-laden bailout offer.[107] It

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100 George Papakonstantinou, *The Grexit that Never Happened Offers Some Lessons for the UK*, LSE BLOG (Mar. 7, 2019), https://blogs.lse.ac.uk/brexit/2019/03/07/the-grexit-that-never-happened-offers-some-lessons-for-the-uk/ [https://perma.cc/8M2P-TXKC].

101 *Id.*

102 Eirini Andriopoulou, Eleni Kanavitsa and Panos Tsakloglou, *Decomposing Poverty in Hard Times: Greece 2007-2016*, (Hellenic Observatory Discussion Papers on Greece and Southeast Europe, Paper No 149) (discussing the economic malaise triggered by the economic crisis).

103 Eleni Xiarchogiannopoulou, *The deepening of Greek democracy is a crucial step towards economic recovery*, DEMOCRATIC AUDIT UK (Feb. 21, 2015), https://www.democraticaudit.com/2015/02/21/the-deepening-of-greek-democracy-is-a-crucial-step-towards-economic-recovery/.

104 Andrés Ortega, *Greece can't leave the Euro without leaving the EU*, ELCANO ROYAL INSTITUTE (Jan. 20, 2015), https://www.realinstitutoelcano.org/en/commentaries/global-spectator-greece-cant-leave-the-euro-without-leaving-the-eu/.

105 *Greek compromise: How Syriza has had to change its plans*, BBC (Feb. 24, 2015), https://www.bbc.co.uk/news/world-europe-31003070.

106 *Id.*

107 Luboš Pástor, *Brexit versus Grexit: Why you might call a referendum and then reject its outcome*, VOXEU CEPR (July 4, 2016), https://cepr.org/voxeu/columns/brexit-

consisted of two documents: "Reforms for the completion of the Current Program and Beyond" and "Preliminary Debt sustainability analysis."[108] The proposal fell well short of what the Syriza-led Government had hoped for. Two days later, Tsipras called for a referendum.[109] The following day, the Greek Parliament approved the organization of such a referendum for the following week, Sunday 5 July 2015.[110] The question put to the Greek electorate was not whether they wanted Greece to remain in the EU or the EMU; instead, they were asked to approve the bailout package as described in the two aforementioned documents.[111] Having said that, the stakes were clear to everybody. If the voters rejected the proposal, Greece faced the uncharted waters of a bankruptcy that might have even led to a parallel currency. The reason being that its continued existence in the single currency could have been made impossible either by the ECB restricting or ending emergency assistance to Greece or by the ECB limiting or removing Greek access to payment systems.[112] And yet the Syriza-led Government unequivocally supported "No", as did the Greek electorate who overwhelmingly rejected the proposal.[113]

What is particularly interesting for the purposes of the present article, however, is how this political debate was inextricably linked with the issues of nullification and secession within the EU. First, in line with the finding of the CJEU in *Pringle,* the "no bail-out"

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versus-grexit-why-you-might-call-referendum-and-then-reject-its-outcome.

108 Victoria Dendrinou, *Read the Greek Referendum Documents — and the Mistranslation*, WALL STREET J. (June 30, 2015, 9:19 AM), https://www.wsj.com/articles/BL-RTBB-5021.

109 Helena Smith, *Greek PM Alexis Tsipras calls referendum on bailout terms*, THE GUARDIAN (June 26, 2015, 11:25 PM), https://www.theguardian.com/world/2015/jun/26/greece-calls-referendum-on-bailout-terms-offered-by-creditors.

110 *Greek Parliament approves 5 July referendum*, EURACTIV (June 28, 2015, 08:06 AM), https://www.euractiv.com/section/economy-jobs/news/greek-parliament-approves-5-july-referendum/.

111 *What is the Background to the Greek referendum?,* WORLD ECON. FORUM (July 2, 2015), https://www.weforum.org/stories/2015/07/what-is-the-background-to-the-greek-referendum/.

112 Ioannis Glivanos, *Can Greece Be Forced out of the Euro? The Role of the ECB in Restricting Funding Avenues to Greece - Will Target2 Be Next?*, EU L. ANALYSIS, (June, 18 2015), http://eulawanalysis.blogspot.com/2015/06/can-greece-be-forced-out-of-euro-role.html [https://perma.cc/B9DF-M9PJ].

113 *Greece debt crisis: Greek voters reject bailout*, BBC (July 6, 2015), https://www.bbc.co.uk/news/world-europe-33403665.

clause contained in Article 125 TFEU allowed Member States to loan money to another Member State "provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy."[114] In other words, they could not "simply assume[] responsibility for Greek government debts."[115] This meant that the negotiating space of the Greek government was rather narrow from the very beginning.

More importantly, the Treaties do not provide for an explicit procedure for a State to leave the Eurozone. Instead, they include several references highlighting the irrevocability of the Eurozone. For example, "Article 140(3) TFEU states that, in the process of integrating new members into the Eurozone, the European Council will 'irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned.'"[116] This means that if Greece decided to voluntarily withdraw from the Eurozone, either the Treaties would have had to be amended or Greece would have had to trigger the Article 50 TEU process. In other words, Greece's issue-based withdrawal from the Eurozone could only have been achieved if the remaining Member States would have consented to it. Given that such an event would have also led to Greece defaulting on its debts to its creditors, including the relevant Member States, it is hard to see how consent could have been reached. Hence, the very real danger of having to default within the Eurozone and/or having to withdraw from the EU as a whole to survive financially, made the initial recalcitrance of Greece non-viable in the long term. When this dilemma became blatantly obvious, "the Greek parliament passed a law (4333/2015) delegating full authority to the prime minister and several other ministers to negotiate the conclusion of the third Memorandum

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114 Case C-370/12, Pringle v Government of Ireland and Others, ECLI:EU:C:2012:756, ¶ 137 (Nov. 27, 2012).

115 Steve Peers, *The Law of Grexit: What Does EU Law Say About Leaving Economic and Monetary Union?*, EU L. ANALYSIS, (June, 28 2015), http://eulawanalysis.blogspot.com/2015/06/the-law-of-grexit-what-does-eu-law-say.html [https://perma.cc/PG2C-3GGQ].

116 Clemens Fuest, *[Art 50] Ways to Leave the Euro – Does the Eurozone Need an Exit Clause?* 16 IFO DICE REP. 25, 26 (2018). The idea of irrevocability of the Eurozone has also been adopted and promoted by the Commission. "'The irrevocability of membership in the euro area is an integral part of the Treaty framework and the Commission, as a guardian of the EU Treaties, intends to fully respect it.'" *Id* .(citation omitted).

without any specific instruction."[117] In other words, the impossibility of nullification and the cost of secession, combined with the fear of bankruptcy, convinced the Greek government to compromise and not question the EU policy that the Grexit referendum challenged in the first place.

Again, this episode confirms the overall thesis of the article. The Greek political elites attempted to nullify one of the areas of the law regulating the Eurozone to protect the interests of their State and its people. Their attempt to withdraw partially from the Union federal pact triggered a dialectic process under suffocating pressures and existential political dilemmas. The accommodation of nullification would have necessitated the consent of the other contracting parties. The EU institutions and the other Member States made clear that this would be impossible and, as a result, Greece was left with the option of functional secession fraught with imminent dangers for political and social stability. This way, the Greek nullification attempt was combatted.

2. The Rule of Law crisis in the EU

Scholars have suggested "that the Polish and Hungarian governments' continued and deliberate defiance of the core principles of membership is an expression of their respective intention no longer to be subject to the EU Treaties. These conducts could thus qualify as notification for the purpose of Article 50(2) TEU."[118] From this perspective, the systematic violation of Article 2 TEU has been compared to a *de facto* form of withdrawal.[119] This is unconvincing, not least because withdrawal from the EU cannot be reduced to an "involuntary action." As the CJEU stressed no less than five times in *Wightman*, withdrawal from the EU concerns a sovereign right or choice.[120] Instead, the rule of law crisis could be

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117 Lina Papadopoulou, *Greece: Further EMU Steps Require a Democratic Eurozone Architecture, in* EMU INTEGRATION AND MEMBER STATES' CONSTITUTIONS 225, 232 (Stefan Griller & Elisabeth Lentsch eds., 2021).

118 Christophe Hillion, *Poland and Hungary Are Withdrawing from the EU*, VERFASSUNGSBLOG, (Oct. 6, 2017), https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/ [https://perma.cc/39RE-ZDQ9].

119 *Id.*

120 Case C-621/18, Wightman and Others v. Secretary of State for Exiting the European Union, ECLI:EU:C:2018:999 ¶¶ 50, 56, 57, 59, 72 (Dec. 10, 2018). For an analysis, see Armin Cuyvers, *Wightman, Brexit, and The Sovereign Right to Remain*, 56 COMMON MKT. L. REV. 1303 (2019).

better understood as an attempt to partially withdraw from the overall federal pact i.e. nullification. By challenging the foundational values of the EU legal order, those States do not aim at withdrawing from the EU. Instead, they wish to withdraw from the application of part of the Union legal order: Article 2 TEU. On the other hand, the EU institutions have been trying to use the available legal toolkit to ensure that the nullification of the Union foundational values is not successful.

The approval of measures in Poland and Hungary that attack the independence of the judiciary, centralize the power of the executives in office, restrict the freedom of the press and close universities represents a threat to the EU values enshrined in Article 2 TEU.[121] Article 7 TEU provides for the possibility of sanctions in cases of serious and persistent breaches to the Article 2 TEU foundational values, following a complicated procedure.[122] And although Article 7 TEU has proven ineffective so far, the CJEU has managed to remedy this by adapting the infringement procedure to comply with cases of violation of values.[123] Thanks to this, the CJEU has recognized the breach of EU values committed by Poland, Hungary and other countries in many cases.[124] In other cases, originating from preliminary ruling references under Article 267 TFEU, the CJEU recognized the conflict between EU law and national measures as jeopardizing the independence of the judiciary by confirming the importance of EU law in the preservation of constitutional values and safeguards.[125]

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121 For a discussion of the measures implemented in Poland and Hungary, *see* WOCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); RULE OF LAW, COMMON VALUES, AND ILLIBERAL CONSTITUTIONALISM: POLAND AND HUNGARY WITHIN THE EUROPEAN UNION (Tímea Drinóczi & Agnieszka Bień-Kacała eds., 2020).

122 *See* TEU, *supra* note 2, at art. 7.

123 *See* Kim Lane Scheppele, Dimitry Kochenov & Barbara Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, 39 Y.B. EUR. L. 3 (2020); THE ENFORCEMENT OF EU LAW AND VALUES. ENSURING MEMBER STATES' COMPLIANCE (András Jakab & Dimitry Kochenov eds., 2017).

124 *See e.g.,* Case C-78/18, Commission v. Hungary (Transparency of associations), ECLI:EU:C:2020:476 (Jan. 14, 2020); Case C-715/17, Commission v. Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale), ECLI:EU:C:2020:257 (Apr. 2, 2020). For an overview, see R MAŃKO, EUR. PARLIAMENTARY RSCH. SERV, PE 642.280, PROTECTING THE RULE OF LAW IN THE EU EXISTING MECHANISMS AND POSSIBLE IMPROVEMENTS (2019).

125 Case C-216/18, Minister for Justice and Equality v. LM, ECLI:EU:C:2018:586

Captured by political power, constitutional courts of these countries have been questioning the legitimacy of the European integration process by borrowing judicial doctrines invented in German case law. By challenging the authoritarian drift in Poland and Hungary, the EU, in particular the CJEU, has sought to avoid the emptying of procedural guarantees and to substantiate the rule of law,[126] relying on Article 19 TEU and Article 4(3) TEU.[127] The national constitutional courts in this context have engaged in a long-distance duel with the Court of Justice. By relying on its structural doctrines of primacy and direct effect,[128] the CJEU has delivered an important series of judgments to challenge this constitutional retrogression[129] in Poland, Hungary, and other countries (for instance Romania),[130] to protect judicial independence of national courts.[131]

More recently, the EU has added a new instrument to combat such nullification attempts. By approving the conditionality regulation, EU institutions can adopt measures to protect the budget in case of rule of law violations which threaten the EU financial interests.[132] Once passed, the regulation was immediately challenged before the Court of Justice by Hungary[133] and Poland[134]

(July 25, 2018).

126 Case C-619/18, Commission v. Poland (Independence of the Supreme Court), ECLI:EU:C:2019:531, ¶ 72 (June 24, 2019); *see* Xavier Groussot & Giuseppe Martinico, *Mutual Trust, the Rule of Law and the Charter: A New Age of Judicial Activism*, EU L. LIVE (Jan. 24, 2020), https://eulawlive.com/long-read-mutual-trust-the-rule-of-law-and-the-charter-a-new-age-for-judicial-activism-by-xavier-grousot-and-giuseppe-martinico/ [https://perma.cc/CRM9-JRKL]; Leandro Mancano, *You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence*, 58 COMMON MARKET L. REV. 683 (2021).

127 Case C-64/16, Associação Sindical dos Juízes Portugueses, EU:C:2018:117, ¶¶ 31–41 (Feb. 27, 2018).

128 *See* Matteo Bonelli, *The Primacy of Judicial Independence in the CJEU's Case Law*, YOUTUBE (June 20, 2023), https://www.youtube.com/watch?v=5s7_gY1SdbU&t=5s.

129 *See supra* note 126.

130 Case C-357/19, Euro Box Promotion and Others, ECLI:EU:C:2021:1034 (Dec. 21, 2021). Case C-430/21, RS, ECLI:EU:C:2022:99 (Feb. 22, 2022).

131 Case C-204/21, Commission v Poland, ECLI:EU:C:2023:442, ¶ 72 (Jun. 5, 2023).

132 *See* Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433) 1 (EU).

133 Case C-156/21, Hungary v. Parliament, ECLI:EU:C:2022:97, ¶ 1 (Feb. 16, 2022).

134 Case C-157/21, Republic of Poland v. Parliament, ECLI:EU:C:2022:98, ¶ 1 (Feb.

on the ground that it was not adopted under the appropriate legal basis. On 16 February 2022 the CJEU delivered two decisions dismissing these actions.[135]

It is interesting to note that in the background of this constitutional conflict between the EU and the relevant Member States, there was also an intra-EU institutional conflict between the European Parliament and the Commission. The origin of this institutional battle can be traced in the letter of Conclusions of the European Council of 10-11 December 2020:[136]

> With a view to ensuring that these principles will be respected, the Commission intends to develop and adopt guidelines on the way it will apply the Regulation, including a methodology for carrying out its assessment. Such guidelines will be developed in close consultation with the Member States. Should an action for annulment be introduced with regard to the Regulation, the guidelines will be finalised after the judgment of the Court of Justice so as to incorporate any relevant elements stemming from such judgment. The Commission President will fully inform the European Council. Until such guidelines are finalised, the Commission will not propose measures under the Regulation.[137]

The European Parliament almost immediately urged the Commission to apply the Regulation in a resolution adopted on 25 March 2021 by arguing that "the application of the Rule of Law Conditionality Regulation cannot be subject to the adoption of guidelines."[138] On 10 June 2021 another resolution was passed by the European Parliament in which it warned the Commission by

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16, 2022).

135 Court of Justice of the European Union Press Release 28/22, Measures for the Protection of the Union Budget: The Court of Justice, Sitting as a Full Court, Dismisses the Actions Brought by Hungary and Poland Against the Conditionality Mechanism which Makes the Receipt of Financing from the Union Budget Subject to the Respect by the Member States for the Principles of the Rule of Law (Feb. 16, 2022).

136 Presidency Conclusions, Brussels European Council (Dec. 11, 2020).

137 *Id.* ¶ 2(c). There are also other ambiguous passages in the Regulation. For a detailed analysis of the European Council Conclusions from the European Council Meeting on December 10-11, 2020, see Niels Kirst, *Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, 6 EUR. PAPERS, 101 (2021).

138 European Parliament Resolution of 25 March 2021 on the Application of Regulation (EU) 2020/2092, 2021 O.J. (C 494) 61.

stating that it:

> Regrets the Commission's failure to respond to Parliament's requests by 1 June 2021 and to activate the procedure laid down in the Rule of Law Conditionality Regulation in the most obvious cases of breaches of the rule of law in the EU; instructs its President to call on the Commission, within two weeks from the date of adoption of this resolution at the latest, on the basis of Article 265 of the TFEU, to fulfil its obligations under this regulation; states that, in order to be prepared, Parliament shall, in the meantime, immediately start the necessary preparations for potential court proceedings under Article 265 of the TFEU against the Commission.[139]

In April 2022, the Commission announced the application of the Regulation to Hungary and in September 2022, it presented a proposal to suspend 65% of the obligations of three operational programs under the cohesion policy with Hungary, for an amount of €7.5 billion.[140] Following the Commission's requirements, Hungary took several measures.[141] However, the Commission concluded that these corrections were not fully satisfactory.[142] On 15 December 2022 implementing Decision (EU) 2022/2506 was adopted by the Council on measures for the protection of the Union budget against violations of the principles of the rule of law in Hungary.[143] With a historical move, the Council thus decided to withhold €6.3 billion of EU funds for Hungary.[144]

All this demonstrates that despite the fact that the procedural rules under Article 7 TEU make it very difficult to activate the sanctions envisaged for violations of the Union's values, the EU institutions have still managed to use the legal toolkit in order to reduce the risk created by those nullification attempts. In that sense,

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139 European Parliament Resolution of 10 June 2021 on the Rule of Law Situation in the European Union and the Application of the Conditionality Regulation (EU, Euratom) 2020/2092, 2022 O.J. (C 67) 86.

140 European Commission Press Release, EU Budget: Commission Proposes Measures to the Council under the Conditionality Regulation (Sept. 18, 2022).

141 European Commission Press Release, Commission Finds that Hungary Has Not Progressed Enough in its Reforms and Must Meet Essential Milestones for its Recovery and Resilience Funds (Nov. 30, 2022).

142 *Id.*

143 Council Implementing Decision (EU) 2022/2506, 2022 O.J. (L 325) 94.

144 *Id.*

national policies that are used to ostensibly protect the rights of those States from what they consider to be intrusive policies of Brussels trigger a dialogue between the different levels of the EU multi-level legal order and become vehicles for a constitutional conflict. The recent electoral victories at national or regional level of populist and far-right parties in Europe[145] ensure that the rule of law crisis will remain in the political agenda for the years to come. Such victories may also trigger in the long run another withdrawal of a Member State from the EU as it is only through functional secession that a Member State could avoid the application of the Article 2 TEU values.

C. Issue-based Withdrawal via primary law derogations

In the previous sections, we have highlighted that nullification, i.e. issue-based withdrawal, is very difficult for a Member State to achieve. In fact, the EU institutions have actively made use of the legal toolkit to successfully combat such nullification attempts. Having said that, despite functioning as a European constitution,[146] the EU Treaties are still subject to the intergovernmental method of treaty-making and the will of Member States to accommodate specific economic and political interests that have so far not been subject to any specific legal limitations. In other words, on the face of it, the Member States can, as the "masters of the Treaties" amend them as they wish, provided that unanimity is achieved.[147] With regard to Accession Treaties, in particular, the Court of Justice has gone a step further. In the context of accession negotiations, it has recognized the freedom of negotiation, stating that "the legal conditions for such accession remain to be defined in the context of that procedure without its being possible to determine the content judicially in advance."[148]

This means that occasionally either in the context of Treaty negotiations or accession negotiations, Member States have managed to achieve an issue-based withdrawal from an EU policy either for the entirety of their territory or more frequently for part of

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145 Ruth Green, *The Year of Elections: The Rise of Europe's Far Right*, INT'L BAR ASS'N (Sept. 30, 2024), https://www.ibanet.org/The-year-of-elections-The-rise-of-Europes-far-right [https://perma.cc/F837-XU8J].

146 *See* Case C-294/83, The Greens (Les Verts) v. Parliament, 1986 E.C.R. 1365.

147 *See* TFEU, *supra note* 2, at art. 352.

148 Case C-93/78, Mattheus v. Doego, 1978 E.C.R. 2203, 2211.

it. Clearly, such opt-outs could be seen as forms of differentiated integration – asymmetries that allow the constitutional order to contain possible centrifugal dynamics. However, to the extent that those opt-outs cover core areas of the legal order, such as the four fundamental freedoms and the Economic and Monetary Union (EMU), they could also be seen as successful attempts at nullification.

For instance, the UK[149] and Denmark[150] successfully negotiated opt-outs from adopting the Euro and from numerous policies concerning the EMU. In particular, during the negotiations for the signing of the Treaty of Maastricht, Denmark secured four exceptions including one that allowed them not to adopt the common currency.[151] Such strategic choice was subsequently confirmed by the majority of the Danish electorate in the September 2000 referendum.[152] As a result, the country still does not take part in the third phase of the EMU and maintains the national currency (krone), as well as powers in relation to monetary policy. They also retain the autonomy to decide if and when to join the Euro.[153]

Interestingly, Denmark is also the only Member State that has managed to permanently limit the application of a fundamental freedom for the entirety of their territory.[154] During the negotiations for the signing of the Maastricht Treaty they secured a special Protocol that accepts the Danish prohibition for secondary residences.[155] The Protocol originated from the fact that Danish legislation prohibited the acquisition of second homes in Denmark by non-Danish people.[156] On this basis, Denmark insisted on

149 Protocol (No 15) on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, 2008 O.J. (C 115) 1, 284.

150 Protocol (No 16) on Certain Provisions Relating to Denmark, 2008 O.J. (C 115) 1, 287; Protocol (No 17) on Denmark, 2008 O.J. (C 115) 1, 288.

151 Presidency Conclusions, Edinburgh European Council (Dec. 11-12, 1992). The other three exceptions concerned Common Security and Defence Policy, Justice and Home Affairs and European citizenship. *Id.*

152 *See* William M. Downs, *Denmark's Referendum on the Euro: The Mouse that Roared . . . Again,* 24 W. EUR. POL. 222 (2007).

153 *Id.*

154 Protocol (No 32) on the Acquisition of Property in Denmark, 2008 O.J. (C 115) 1, 318 (EU).

155 *Id.*

156 Ivna Godžirov, *Restrictions on the Acquisition of Certain Categories of Real Estate in Relation to the Basic Market Freedoms in the European Union*, 4 EU AND

introducing a derogation to the principles of non-discrimination on the basis of nationality, the freedom to provide services, and the free movement of capital established by the Treaties.[157] The Protocol also represented a response to the *Cowan*[158] and *Commission v. Greece*[159] judgments given by the CJEU in 1989. In the latter case, the Court had held that the "restrictions applied by a Member State to nationals of other Member States in regard to the acquisition and enjoyment of rights in immovable property are contrary to Articles 48, 52 and 59 of the Treaty."[160] These judgments were seen as dangerous precedents jeopardizing the scope of national sovereignty in this field.

During the same period, Ireland was also successful in securing the famous *Grogan* Protocol (no. 35), according to which, "nothing in the Treaty on European Union or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."[161] This Protocol originated from the well-known *Grogan* judgment where the CJEU held that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the EEC Treaty."[162] Curtin duly pointed out the danger of such a protocol

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COMPAR. L. ISSUES & CHALLENGES 844, 853 (2020).

157 *Id.*

158 Case C-186/87, Cowan v. Trésor Public, 1989 E.C.R. 222-23.

159 Case C-305/87, Commission v. Greece, 1990 E.C.R. I-4311-12.

160 *Id.*

161 Protocol (No 35) on Article 40.3.3 of the Constitution of Ireland, 2016 O.J. (C 202) 320.

162 Case C-159/90, Society for the Protection of Unborn Children Ireland (SPUC) v. Grogan and others, 1991 E.C.R. I-04685. The case before the national judge was brought by the Society for the Protection of Unborn Children Ireland Ltd (SPUC) against Stephen Grogan and other people who had distributed information concerning abortion services in other EC States. Amongst other things, the Irish High Court asked the ECJ whether a "Member State can prohibit the distribution of specific information about the identity, location and means of communication with a specified clinic or clinics in another Member State where abortions are performed" After having defined the medical termination of pregnancy as a service, the ECJ said:

> The provision of information on an economic activity is not to be regarded as a provision of services within the meaning of Article 60 of the Treaty where the information is not distributed on behalf of an economic operator but constitutes merely a manifestation of freedom of expression. As a result, it is not contrary to

since it potentially gave all the Member States the possibility to obtain a document like this, requiring respect for a particular provision of the national constitution:

> This spectre of a Pandora's box which has been opened is of course profoundly disintegrative and strikes at the heart of the very uniqueness of Community law, as well as the image that has been carefully cultivated since the early 1970s that the Community takes its human rights protection seriously.[163]

In the context of the negotiations for the signing of the Treaty of Maastricht, the famous *Barber* protocol (no. 2) was also agreed.[164] This laid down a derogation – not geographically limited this time – to the *acquis communautaire*:

> For the purposes of Article 119 of this Treaty, benefits under

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> Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.

Id.

In this way the ECJ attempted to avoid a clash with the national constitution of Ireland. Later, in a similar case, *The Attorney General (Plaintiff) v. X. and Others*, in order to avoid conflict with the ECJ, the Irish Supreme Court preferred not to take EC law into consideration, arguing that:

> Apart from the practical time scale difficulties of obtaining a ruling by way of preliminary ruling from the Court of Justice of the European Community, pursuant to Article 177 of the Treaty, in time for the due resolution of the problems arising in this case, it is consistent with the jurisprudence of the Court that there being a ground on which the case can be decided without reference to European law, but under Irish law only, that method should be employed.

The Attorney General (Plaintiff) v. X. and Others [1992] 1 IR 1.

In a previous decision, *S.P.U.C. v. Grogan*, the Irish Supreme Court had menaced:

> If and when a decision of the Court of Justice of the European Communities rules that some aspect of European Community law affects the activities of the defendants impugned in this case, the consequence of that decision on these constitutionally guaranteed rights and their protection by the courts will then fall to be considered by these courts

S.P.U.C. v. Grogan [1989] IR 753

Clearly, this passage represented a sort of warning sent to the ECJ.

163 Deirdre Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces,* 30 COMMON MARKET L. REV. 17, 49 (1993).

164 Protocol Concerning Article 119 of the Treaty Establishing the European Community, 1992 O.J. (C 191) 68.

> occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.[165]

With this Protocol, Member States "interpreted" in an authoritative way the consequences of the contested judgment of the CJEU in *Barber*,[166] a judgment that had a considerable impact on national legislation. In order to contain the retroactive effects of this decision[167] the Protocol was approved.

Another area where significant opt-outs have been secured is the area of freedom, security and justice. For instance, Ireland was granted an opt-out from Schengen, not least because they wanted to retain the Common Travel Area with the UK – an open borders area that includes all islands of the British Archipelago.[168] The UK had chosen not to opt-in to Schengen. However, the Protocol on the Schengen *acquis*, integrated into the TFEU, specifies that Ireland (and the UK while an EU Member State) could request to opt-into the Schengen *acquis* on a case-by-case basis, subject to the unanimous approval of the other participating states.[169] Ireland

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165 *Id.*

166 The court stated that:

> [I]t is contrary to Article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal retirement age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.

Case C-262/88, Barber v. Guardian Royal Exch. Assurance Grp., 1990 E.C.R. I-1953, ¶ 35.

167 *Id.* at ¶ 49 ("The direct effect of Article 119 of the Treaty may not be relied upon in order to claim entitlement to a pension, with effect from a date prior to that of this judgment, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or raised an equivalent claim under the applicable national law."). For the different readings of this passage in the literature on employment law, see Curtin, *supra* note 165, at 51.

168 Protocol on the Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland art. 2. 1997 O.J. (C 340) 97.

169 Protocol (No 19) on the Schengen Acquis Integrated into the Framework of the

initially submitted a request to participate in the Schengen *acquis* in 2002, which was approved by the Council of the European Union.[170]

The most recent example of a permanent derogation consists of the Protocol, annexed to the Treaty of Lisbon, that applies to Poland (and the UK while a Member State).[171] It contains certain derogations from the application of the Charter of Fundamental Rights.[172] Having said that, the CJEU has held in *NS* that the said "Protocol (No. 30) does not call into question the applicability of the Charter [. . .] in Poland."[173] Still, there is a genuine question as to whether this Protocol "constitutes a simple clarification for [Poland] – not unlike the 'Explanations'; or whether it did indeed represent a *partial* opt-out by establishing special principles" for it.[174]

For the sake of completeness, in addition to those derogations that apply to the whole territory of a Member State, there are special territories in many Member States "which for either historical, geographical or political reasons, have differing relationships with their national Governments – and consequently also the EU – than the rest of the Member State's territory."[175] Many "do not participate in all or any EU policy areas and programmes. Some have no official relationship with the EU, while others participate in EU programmes in line with the provisions of European Union directives, regulations or protocols attached to the European Union Treaties," and especially the ones regulating the accession of new

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European Union, 2008 O.J. (C 115) 290; *see also* Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, 2008 O.J. (C 115) 295.

170 *See* Council Decision 2002/192/EC, 2002 O.J. (L 064) 20.

171 Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2008 O.J. (C 115) 313.

172 *Id.* Article 1(2) of the Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom provides that "nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." *Id.*

173 Joined Cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*, ECLI:EU:C:2011:865, ¶ 119 (Dec. 21, 2011).

174 ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 486 (3RD ed. 2021).

175 Nikos Skoutaris, *Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?,* 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 287, 300 (2017).

Member States.[176] Such territorial differentiation should be distinguished from the concept of issue-based withdrawal. Rather, those geographically based derogations should be understood as a legal mechanism to address issues arisen by the special geographic, historical, political and constitutional status that those regions enjoy within the respective metropolitan States.

This short review elucidates how, provided that there is consensus, Member States may occasionally secure an issue-based withdrawal from a certain EU policy for either a part or the entirety of their territory. Having said that, this freedom of the Member States to amend the Treaties to accommodate their divergent political, financial and economic aspirations may not be completely unfettered. It has been suggested that derogations from primary law may not touch the very core of Union principles.[177] The idea of "untouchable" core issues is present in the constitutions of Member States[178] and in the notion of *ius cogens* in international law. In *Opinion 1/91*,[179] the CJEU pointed to the existence of such a "untouchable core" in holding that the establishment of the judicial organ of dispute settlement in the envisaged EEA agreement would

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176 *Id.* For a comprehensive analysis of the application of Union law to Overseas Countries and Territories (OCTs) and to Outermost Regions, see generally EU LAW OF THE OVERSEAS: OUTERMOST REGIONS, ASSOCIATED OVERSEAS COUNTRIES AND TERRITORIES, TERRITORIES SUI GENERIS, (Dimitry Kochenov ed., 2011); Dimitry Kochenov, *Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States*, 17 MICH. STATE OF INT'L L. 195 (2008); Dimitry Kochenov, *The Impact of European Citizenship on the Association of the Overseas Countries and Territories within the European Community,* 36 LEGAL ISSUES OF ECON. INTEGRATION 239 (2009); FIONA MURRAY, EU & MEMBER STATE TERRITORIES, THE SPECIAL RELATIONSHIP UNDER COMMUNITY LAW (2004); Jacques Ziller, *The European Union and the Territorial Scope of European Territories*, 38 VICTORIA U. WELLINGTON L. REV. 51 (2007).

177 *See* Andrea Ott, *The "Principle" of Differentiation in an Enlarged European Union: Unity in Diversity?, in* THE CONSTITUTION FOR EUROPE AND AN ENLARGING UNION: UNITY IN DIVERSITY? 104, 122 (Kirstyn Inglis & Andrea Ott eds., 2005); *see also* Christophe Hillion, *Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?*, 3 EUR. CONST. L. REV. 269 (2007).

178 Art 79(3) of the German Basic Law provides that the principles contained in Arts 1–20 may never be modified. Grundgesetz [GG] [Basic Law] art. 79(3), translation at https://www.gesetze-im-internet.de/gg/art_79.html [https://perma.cc/5SJP-ZD5T]. In France, the republican principle may not be modified according to Art 89(5) of the Constitution. 1958 CONST. art. 89(5) (Fr.).

179 Opinion 1/91, Opinion Pursuant to the Second Subparagraph of Article 228 of the Treaty, 1991 E.C.R. I 6079.

threaten the role of the CJEU under the then Article 164 TEC[180] and thereby the "foundations of the Community" to a degree which could not have been removed, even by a Treaty amendment. This could be read as limiting the treaty-making power of the Member States.

At the same time, even the supposed freedom to negotiate a new Treaty is bound by the procedural requirements of Article 48 TEU, and also by the requirement that a condition of Union membership is a commitment to human rights, democracy and the rule of law in accordance with Articles 2 and 49 TEU.[181] Therefore, even if one accepts that a certain "untouchable core" of Union law exists and could not be modified, even by way of a new Treaty, such "untouchable core rules" would be found foremost in the characteristics of the institutional system of the EU, as a quasi-constitution protecting democracy, rule of law, human rights and the principle of non-discrimination per Article 2 TEU, as well as the supremacy and direct effect of EU law, rather than the full application of the four freedoms. In that sense, any issue-based withdrawal should still respect the democratic institutions, the rule of law and effectively protect human rights and fundamental freedoms.[182] Again, as we argue in this article, this underlines that within the EU legal order the instrument of nullification is not an extra-legal, "political" instrument that lies outside and beyond the legal order. Instead, it can be understood as the outcome of a dialectic process that is triggered by the intention of a Member State to protect certain rights. But in order to be successful, it needs to conform with the foundational values of the EU. In that sense, such issue-based withdrawal can be seen as a vehicle of a constitutional conflict.

It seems, however, that the main difficulty for the achievement of such issue-based withdrawal is a political rather than a legal one: the revision of the EU Treaties requires the unanimity of the

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180 Ex Article 164 TEC (ex Article 220 TEC after the Treaty of Amsterdam) replaced in substance by Article 19 TEU.

181 *See* TEU, *supra* note 2, at arts. 2, 48, 49.

182 On the rule of law, see for example Case C-222/84, Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1663-94; Case C-192/18, Commission v Poland, ECLI:EU:C:2019:924 (Nov. 5, 2019); Case C-791/19, Commission v. Poland, ECLI:EU:C:2020:277 (Apr. 8, 2020).

Member States.[183] It is not merely a coincidence that virtually all those opt-outs have been agreed either as a compromise to secure the smooth ratification of a Treaty or during the negotiations for the accession of a new Member State. How difficult it is to achieve such an issue-based withdrawal was particularly evident when the former Prime Minister David Cameron tried in 2015-2016 to renegotiate the terms of the UK's EU membership.[184] Cameron's main aim was to convince his counterparts to amend the relevant primary law provisions to the effect that there would be clear limitations to the free movement of workers.[185] He was talking about the possibility of an "emergency break" to EU migration.[186] Instead, the draft deal that he was offered entailed the amendment of secondary legislation only.[187] Where Cameron did manage to secure an amendment to primary law was with regard to the fact that the Heads of EU States and Governments agreed to clarify in the Treaties "that the references to ever closer union do not apply to the United Kingdom."[188]

However, even this success that related to the UK's sovereignty was largely symbolic. The European Council underlined that in any case the "references in the Treaties and their preambles to the process of creating an ever-closer union among the peoples of Europe do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation."[189] Overall, the outcome of the process was not difficult to predict. As we have mentioned before, despite the aforementioned examples, it is generally very hard for outlier States to negotiate an individual opt-out. In fact, the EU institutions often use the available legal toolkit to combat nullification attempts which leaves disgruntled Member States that have not managed to successfully negotiate a

183 TEU, *supra* note 2, at art. 48.

184 Kate Day et al., *David Cameron's EU Reform Deal Scorecard*, POLITICO (Feb. 20, 2016), https://www.politico.eu/article/david-cameron-eu-reform-deal-scorecard-brexit-eu-referendum-agreement/ [https://perma.cc/R47E-FKZ8].

185 Steve Peers, *Cameron's 'Emergency Brake': Killing the Free Movement of Persons, or Saving It?*, EU L. ANALYSIS (Oct. 17, 2014), http://eulawanalysis.blogspot.com/2014/10/camerons-emergency-brake-killing-free.html [https://perma.cc/S5NX-SW7A].

186 *See id.*

187 Presidency Conclusions, Brussels European Council (Feb. 19, 2016).

188 *Id.*

189 *Id.*

partial withdrawal from the EU *acquis* with the nuclear and difficult option to functionally secede from the EU. Given that the latter is fraught with difficulty and existential risks, most of Member States abandon their initial recalcitrance and compromise. In the case of the UK, however, the British electorate chose the road less travelled.

IV. Secession in the EU Constitutional Order of States

So far, we noted that Member States have used the instrument of nullification to protect the rights of their citizenry from what they considered abusive practices coming from the EU. They have done so by using either judicial or political means. And although the EU institutions have used the available legal toolkit to combat such partial withdrawals from the *acquis*, the Union constitutional order of States is so flexible that can potentially accommodate such attempts for nullification provided that there is consensus amongst the contracting State parties. Such flexibility is even more apparent in the case of functional secession from the EU. Unlike what happens in the US, the Union legal order has codified a right of complete withdrawal in Article 50 TEU.[190]

The implicit existence of this was evident from the fact that nobody contested the right of the UK to leave the Common Market if the British electorate had decided so in the first "Brexit" referendum in 1975.[191] This has also been the view of several national constitutional actors. For instance, the German Constitutional Court in its famous ruling on the Maastricht Treaty proclaimed that EU "membership may [. . .] be terminated by means of an appropriate act being passed."[192] A similar view was adopted by the Czech Constitutional Court in its ruling on the Treaty of Lisbon.[193]

In any case, the Treaty of Lisbon, which entered into force in 2009, clarified beyond any doubt that such right of complete withdrawal exists.[194] Article 50 TEU explicitly allows a Member

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190 TEU, *supra* note 2, at art. 50.

191 Allan F. Tatham, *"Don't Mention Divorce at the Wedding, Darling!": EU Accession and Withdrawal after Lisbon, in* EU LAW AFTER LISBON 128, 144 (Andrea Biondi, Piet Eeckhout & Stefanie Ripley eds., 2012).

192 BVerfG Oct. 12, 1993, 89 BVerfGE 155 (Ger.).

193 Ústavní soud České republiky 03.11.2009 (ÚS) (Constitutional Court) [Judgement of the Czech Constitutional Court of Nov. 3, 2009], sp.zn ÚS 29/09 (Czech).

194 Treaty of Lisbon art. 49A, 2007 O.J. (C 306) 1 (now TEU art. 50).

State "to withdraw from the Union in accordance with its own constitutional requirements."[195] This provision could be seen as a *lex specialis* to Article 54 of the Vienna Convention on the Law of the Treaties that allows a State to withdraw from a treaty either in conformity with the relevant provisions or by consent of all parties.[196]

From an EU law point of view, however, the EU is also a "Community of unlimited duration, having its own institutions, its own personality, its own legal capacity [and] real powers stemming from a limitation of sovereignty or transfer of powers from the [Member] States."[197] To the extent that Article 50 TEU allows the withdrawal of a Member State from the EU and the abrupt end to the symbiotic relationship of its legal order with that of the EU, it is also a process that bears significant resemblance to secession. To put it differently, the EU constitutional order of States is a complex overarching system of public law and the procedure that a Member State has to undergo in order to withdraw from it – like secession – denotes a "unilateral decision[] to separate territory and citizenry from the Union."[198] This is why "an exit from the EU is functionally akin to secession; it is not a simple severance of contractual obligations."[199] Withdrawal from the EU "leads to legal problems that resemble those that arise when secession occurs, e.g. regarding the continuation of citizenship rights, succession of treaty obligations, relations with third states, and various financial settlements."[200] Such understanding of complete withdrawal as a form of functional secession chimes with the reasoning of the Canadian Supreme Court, in its landmark *Reference Re Secession of Quebec*,[201] and the writings of Calhoun, both of whom have defined secession as a form of withdrawal.[202]

From a political point of view, it is interesting that one of the drafters of the provision implicitly recognized that the Article 50 secession clause could be used for the orderly exit of a recalcitrant

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195 TEU, *supra* note 2, at art. 50.

196 Vienna Convention on the Law of the Treaties, May 23, 1969, 1155 U.N.T.S. 331.

197 Case 6/64, Costa v. ENEL, 1964 E.C.R. 593.

198 *See* Pohjankoski, *supra* note 3.

199 *See* Vidmar, *supra* note 5.

200 *Id.*

201 *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 83 (Can.).

202 *See* Calhoun, *supra* note 44.

Member State which cannot achieve an issue-based withdrawal through its voice:

> The need to include a secession clause in the Constitutional Treaty (2003) and then the Treaty of Lisbon (2007) was upheld both by the federalists and by their opponents. Federalists saw the need to have a safety clause in the new treaty that would allow a let-out for any current member state which fought shy of accepting the leap forward in European integration that was at that time postulated. The UK government, aware of the risky nature of its ever-increasing exceptionalism, wanted a clause that would prevent the abrupt expulsion of an awkward member state by the mainstream majority.[203]

Overall, the unique characteristics of this secession clause makes its use seemingly more straightforward than issue-based withdrawal within the EU. The devil, however, lies in the detail. As Brexit has highlighted, avoiding a disorderly withdrawal requires the cooperation of the withdrawing Member State with the remaining ones. Thus, the prospect of the uncharted waters of a disorderly exit increases the loyalty of the remaining Member States and prevents the recalcitrant ones from triggering this process.

More importantly for the purposes of this article, the right to functional secession from the EU is an integral part of this multi-level constitutional order of States. Member States may trigger it as a final resort to protect their sovereignty—another form of contestatory federalism. As Garben suggested, the right to secede under Article 50 is "[t]he only undeniable legal limit that Member States have at their disposal against competence creep under the current Treaty framework."[204] In that sense, it can be seen as the ultimate struggle between the primacy of EU law and national constitutional supremacy. And unlike what we are used to from other federal orders, this rare right of complete withdrawal from the overall federal pact has two uncommon characteristics: unilateralism and unconditionality. In other words, the Union constitutional order of States is so flexible that not only has it

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203 Andrew Duff, *Everything You Need to Know about Article 50 (But Were Afraid to Ask)*, VERFASSUNGBLOG, (July 4, 2016), https://verfassungsblog.de/brexit-article-50-duff/ [https://perma.cc/3P5H-Z54T].

204 Sacha Garben, *Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers*, 58 J. COMMON MARK. STUD. 41, 52 (2020).

codified a right to functional secession, but also the Member States can exercise it in a unilateral and unconditional fashion—distinguishing the EU from federal orders, such as the United States, where secession is considered a flagrant breach of the political and legal order.[205]

A. Unilateralism and National Constitutional Requirements

Friel distinguishes three categories of withdrawal models in federal or quasi-federal systems.[206] The state primacy or sovereignty model provides every constituent unit with an unqualified right to secede.[207] The federal primacy model prohibits secession, while the federal control model provides a right to withdrawal subject to certain conditions.[208] Article 50(1) TEU provides that "any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."[209] Article 50(2) allows the relevant Member State to notify the EU Council of its decision, while Article 50(3) makes clear that the withdrawal may take place even if there is no agreement between the withdrawing Member State and the remaining ones.[210] Therefore, the Article 50 TEU right clearly belongs to the state primacy model since it is characterized by unilateralism.[211] It "is totally independent of the will of the EU [and] the remaining Member States."[212]

Prima facie, this unilateralism is very different from what the Canadian Supreme Court has held in *Reference re Secession of Quebec*. With this landmark ruling, secession was rehabilitated as a possible constitutional option despite the absence of a specific provision on the exit of a province from the Canadian confederation.

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205 *See* Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT'L & COMP. L.Q. 417 (2004).

206 *Id.* at 407.

207 *See id.* at 422.

208 *Id.* at 422–23.

209 TEU, *supra* note 2, at art. 50.

210 *Id.*

211 "The decision to withdraw is for [a] Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice." *See Wightman*, *supra* note 86, para. 50.

212 Carlos Closa, *Interpreting Article 50: Exit, Voice and . . . What About Loyalty?, in* SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION, 187, 193–94 (Carlos Closa ed., 2017).

While it denied the existence of a unilateral right of exit under Canadian and international law, it held that "the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada" would give rise to "the constitutional duty to negotiate" secession.[213] In other words, it did not recognize a proper "right" to secession; rather, it treated secession as an option that may be tolerated only in presence of some important safeguards. However, instead of answering the question of whether a province can secede in the negative, the Court constructed a procedural framework, "a normative due process," that makes secession conditional on compliance with certain fundamental principles.[214] This set of principles, then, were used by the Supreme Court of Canada in constructing an exit conditionality. To understand what is meant by this formula we must recall what the Court held in case of activation of the negotiations with Quebec. "The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."[215]

In so doing, the Canadian Supreme Court tried to mitigate the political transition characterizing the exit by ensuring an axiological continuity between the new order which was going to be created and the old constitutional system. This might appear paradoxical, but the Court tried to govern the process under which the old system accepts the detachment of the seceding entity by making it conditional upon adhesion to its fundamental values. This way the constituent phase of the seceding entity is partly guided and influenced by the values of the old constitution, and this could exorcise the revolutionary character of secession. Such an axiological continuity would guarantee the rights of that population residing in the territory of the new State which had not voted for the independence and would minimize the risk of political abuses that might be produced by a contingent majority.[216]

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213 *See Reference re Secession of Quebec*, *supra* note 201, para. 104.

214 *See generally* Antonello Tancredi, *A Normative 'Due Process' in the Creation of States Through Secession*, *in* SECESSION INTERNATIONAL LAW PERSPECTIVE 171, 171–207 (Marcello Kohen ed., 2006). (suggesting a theory of normative 'due process' in the birth of States through secession).

215 *See Reference re Secession of Quebec*, *supra* note 201, para. 90.

216 WAYNE NORMAN, NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE, 178 (2006).

Somehow similarly, the unilateral nature of the Article 50 TEU right is restricted by two limitations: one at national and one at supranational level. Both relate to the foundational values enshrined in Article 2 TEU. As we shall see, respect to those values during the Article 50 TEU negotiations, ensures that the withdrawing Member State can functionally secede from the EU in a smooth manner and also build after its withdrawal a constructive bilateral relationship with the supranational organization.

As mentioned, pursuant to Article 50(1) TEU, the withdrawal of a Member State should take place in accordance with its own constitutional requirements. This idea that such a fundamental political choice about the constitutional future of a Member State and the Union should be respecting the national constitutional rules is in conformity with the composite,[217] intertwined[218] and multi-level[219] character of the European constitution. Pernice has explained that the constitution of Europe is "made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties."[220] However, "the relation between the EU and national constitutions should not be viewed as a conglomerate of autonomous more or less detached systems which relate to each other at different 'levels.'"[221] Instead, it should be viewed as a "mutually assumed relationship" "where one part cannot function without the other."[222]

At the core of this composite constitution lies constitutional

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217 *See* generally LEONARD F. M. BESSELINK, A COMPOSITE EUROPEAN CONSTITUTION 6 (2007) ("The idea of a composite constitution suggests that in many respects the relation between the EU and the national constitutions should *not* be viewed as a conglomerate of autonomous, more or less detached systems.").

218 *See* generally Jacques Ziller, *National Constitutional Concepts in the New Constitution for Europe*, 1 EUR. CONST. L. REV. 452, 480 (2005) (arguing that the European Convention recognized the concept of "intertwined constitutionalism through the construction and innovations of the Constitution for Europe").

219 *See* generally *See generally* Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited?*, 36 COMMON MKT. L. REV. 703, 706 (1999) (arguing that the EU has a "coherent institutional system, within which competence for action, public authority or, . . . the power to exercise sovereign rights is divided among two or more levels").

220 *Id*. at 707.

221 Besselink, *supra* note 217, at 6.

222 *Id*.

tolerance.[223] This is depicted *par excellence* in Article 4(2) TEU which provides that the "Union shall respect . . . Member States . . . as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."[224] This means that the starting point for how the EU accommodates a constitutional event such as a functional secession from the Union is, and should be, the respect to the relevant Member State's constitutional procedures.[225] Having said that, there is a limit to such relative heteronomy. This can be found in the foundational values enshrined in Article 2 TEU.[226] Those are not only common values to the Member States but are, more importantly, the requirements for accession and EU membership per Article 49 TEU, the breach of which could trigger the Article 7 TEU sanction procedure.

Within the context of the Brexit negotiations, the EU-derived obligation for respect of the national constitutional requirements gave rise to a significant legal question in the UK. According to the uncodified and idiosyncratic British constitution, it was unclear which constitutional actor could trigger Article 50. Was it the Government using its undeniable prerogative/executive power to represent the UK on the international plane? Or the sovereign UK Parliament—the main locus of the British constitutional and political order? This question of separation of powers was adjudicated in *Miller No. 1*.[227] In this seminal case, the UK Supreme

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223 Weiler, *supra* note 1, 69.

224 TEU, *supra* note 2, at art. 4(2).

225 *See* Steve Peers, *The Future of EU Treaty Amendments*, 31 Y.B. EUR. L. 17, 59 (2012).

226 Pernice was one of the first to highlight that the duty to comply with the Article 2 TEU principles sets a limit to the constitutional heteronomy afforded by Article 4(2) TEU. "On the one hand, Member States' national identities 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' are protected by [now Article 4(2) TEU] . . . The Member States are deprived, on the other hand, of part of their constitutional autonomy insofar as they are subject to the common principles and values of the Union under [now Article 2 TEU]" Ingolf Pernice, *European v. National Constitutions*, 1 EUR. CONST. L. REV. 99, 101 (2005). In the context of the debate on secession within the EU, Closa also underlined that "national constitutional identity within the terms of Article 4(2) TEU is not to be interpreted as the absolute protection of the norms of Member State constitutions. Indeed, Article 4(2) TEU is to be read in the light of the values of the Union in Article 2 TEU." Carlos Closa, TROUBLED MEMBERSHIP: DEALING WITH SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EU, 10 (2014).

227 *R (on the application of Miller and another) v. Secretary of State for Exiting the*

Court decided that the UK Government could not rely on executive powers in international relations to trigger Article 50.[228] Instead, in accordance with the principle of parliamentary sovereignty, the UK Parliament had to enact relevant legislation authorizing the Government to trigger the withdrawal process, which they subsequently did: European Union (Notification of Withdrawal) Act 2017.[229]

Equally, the requirements of the British constitutional order that is founded on the principle of parliamentary sovereignty, included the need for Parliament to approve the Withdrawal Agreement:

> Under the UK constitution, [the decision to withdraw] is conditional on ultimate parliamentary approval, and it is only at the end of the Article 50 negotiations, when the terms of withdrawal are clear, that there can be a final decision on such withdrawal. Even if there is no withdrawal agreement, it is but Parliament which can decide, at the end of the two-year process, that the UK leaves the EU. That means that, under UK constitutional law, withdrawal is a process requiring a series of steps.[230]

Indeed, after one of the most tumultuous periods in modern British politics, its Parliament managed to approve the revised Withdrawal Agreement by passing the necessary implementation legislation—the EU (Withdrawal Agreement) Act 2020.[231]

At the other end of the spectrum, the composite nature of the EU constitution is also evidenced by the fact that the fulfilment of the condition to respect the "national constitutional requirements" may also be judicially reviewed by the CJEU.[232] However, the CJEU's ability to judicially review "national constitutional requirements" would be extremely modest. Its role would be limited to ensuring that the relevant withdrawal would not be grossly violating the common constitutional traditions of the Member States per Article

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European Union [2017] UKSC 5.

228 *Id.* at 274.

229 European Union (Notification of Withdrawal) Act 2017, *UK Public General Acts* (2017), March 16, 2017.

230 Piet Eeckhout & Eleni Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading*, 54 CMLR 695, 710 (2017).

231 *See* European Union (Notification of Withdrawal) Act, March 2017.

232 Takis Tridimas, *Article 50: An Endgame without an End?*, 27 KING'S LAW J. 297, 303 (2016).

6(3) of the TEU and the foundational values of the European constitutional order as provided by Article 2 of the TEU.[233] If that were to be proved, the EU would be faced with the following paradoxical scenario: its judicial branch would be blocking the withdrawal of a Member State due to breaches of constitutional principles that could have led in any case to a suspension of its membership rights according to Article 7.

With regard to the supranational limitation, on the other hand, it should be noted that "Article 50 TEU confers an 'exceptional horizontal competence,' enabling the Union to negotiate and conclude the withdrawal agreement deemed to encompass all matters necessary to arrange the withdrawal."[234] Despite the wide scope of this exceptional competence, Tridimas suggests that "in concluding the withdrawal agreement the EU . . . is bound to respect the EU Treaties and higher ranking constitutional norms of EU law."[235] In fact, the CJEU held in *Kadi* that the obligations imposed on the EU by an international agreement cannot have the effect of prejudicing the constitutional principles of EU law, which include the principle that all EU acts must respect fundamental rights.[236] This means the terms of the orderly withdrawal of a Member State should not violate the Article 2 TEU values, including democracy, rule of law and protection of human rights. Indeed, to do that, the Withdrawal Agreement that the EU and the UK endorsed in 2019 is a wide-ranging international treaty that settles the rights of *inter alia* EU citizens living in the UK, UK citizens living in the EU and their families,[237] includes rules on dispute settlement[238] and provides an imaginative solution with regard to Northern Ireland.[239]

Overall, the fact that respect to Article 2 TEU consists of a limitation to the unilateral nature of Article 50 TEU reminds us that functional secession is not an extra-legal instrument of the EU legal

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233 *See Eeckhout and Frantziou,* Article 50 TEU.

234 Christophe Hillion, *Withdrawal under Article 50 TEU: An Integration-Friendly Process*, 55 CMLR, 29, 40 (2018).

235 *Id*. at 311.

236 *Kadi v. Council and Commission*, Joined Cases C–402/05 P and C–415/05 P, ECLI:EU:C:2008:461, para. 285 (2008).

237 *See* Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Part Two, arts. 09-39, EUR-Lex (2017).

238 *Id.* at 95–107.

239 *Id.* at Protocol on Ireland/Northern Ireland.

order. It is another vehicle for the expression of constitutional conflicts—the most extreme instrument of contestatory federalism. Having said that, an orderly complete withdrawal from the EU—which is the preferred outcome of this ultimate struggle between national sovereignty and EU primacy law—should not violate the foundational values of this legal order. Despite the unilateral nature of the right, such emphasis on the respect of the Article 2 TEU foundational values ensures that the complete withdrawal of a Member State from the overall federal pact would take place in a smooth and peaceful fashion.[240] In other words, a Member State which cannot achieve a partial withdrawal from the overall federal pact (i.e. nullification) can unilaterally trigger Article 50 TEU. However, the withdrawal negotiations should not violate the Article 2 TEU values to ensure a smooth transition to the new state of affairs.

B. The (Un)conditional Nature of Article 50 TEU

Apart from unilateral, the exercise of the Article 50 TEU right to wholly withdraw from the EU is also unconditional. It "is not subjected to any preliminary verification of conditions nor is it even conditional on the conclusion of the agreement foreseen in the provision."[241] Article 50(1) allows a Member State "to withdraw from the Union in accordance with its own constitutional requirements."[242] Article 50(3) foresees that the withdrawal can take place two years after the Member State has notified the EU of its intention to leave even if no withdrawal agreement has been achieved by then. Once the notification has been submitted, the withdrawal of a Member State is certain—even in a disorderly fashion that could harm the political and economic interests of both the EU and the withdrawing State—unless revoked by the State itself.

This stands in marked contrast to the majority of constitutional provisions that regulate secessions. Most of them provide for conditions with regard to the organization of a referendum that could potentially lead to secession and/or foresee an *inter partes* agreement as an important step to finalize the process. For instance, a referendum for the reunification of Ireland can only be organized

240 TEU, *supra* note 2, at art. 2.

241 *See* Closa, *supra* note 148, at 195.

242 TEU, *supra* note 2, at art. 50(1).

if "it appears likely to [the UK Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland."[243] Article 113 of the Constitution of Saint Kitts and Nevis allows for the secession of Nevis Island following a process that is prescribed in a very detailed manner by that provision.[244] In Liechtenstein, pursuant to Article 4(2) of its Constitution, secession can only be regulated by law or by treaty, while Article 39(4)(e) of the Ethiopian constitution allows for it "when the division of assets is effected in a manner prescribed by law."[245]

As seen, the CJEU went a step further in underlining the unconditional and Member State-driven nature of the Article 50 secession process:

> [A] Member State that has reversed its decision to withdraw from the European Union is entitled to revoke that notification for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3), possibly extended in accordance with that provision, has not expired.[246]

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243 Northern Ireland Act 1998 c.41, sch 1(2) (UK).

244 St. Kitts & Nevis Const., art. 113, June 23, 1983 (St. Kitts & Nevis).

245 *Id.*

246 *See Wightman, supra* note 86, para. 69. To the extent that such a decision is unequivocal and unconditional, "the sovereign nature of the right of withdrawal enshrined in Article 50(1) supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the European Union." Article 50 TEU has been interpreted under *Wightman*, which has, to some extent, partly rewritten (or at least supplemented) the provision. *Wightman* has been a game changer in this respect. Indeed, on December 10, 2018, the CJEU and recognised the unilateral revocability of the notification under Art. 50 TEU: "Article 50 TEU must be interpreted as meaning that, where a Member State has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that Member State—for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired—to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the Member State concerned has taken the revocation decision in accordance with its constitutional requirements. 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

In so doing, the CJEU tackled the wider question of the Article's own foundations and decided on a number of crucial aspects governing the departure of a Member State from the EU.

The Court offered a reading of Article 50 TEU in context, by attempting to interpret this provision in light of the values that characterize the integration process. For example, the reference to the impact of the possible exit of the UK on the EU citizenship[247] is a confirmation of the systematic reading given by the Court.[248] Moreover, after discarding the parallel with the decision to request an extension of the negotiations pursuant to Article 50(3) TEU,[249] the CJEU focused on Article 49 TEU in order to reiterate that the decision to join the EU is based on a free and voluntary commitment.[250] Finally, by illustrating the parallels between Article 49 TEU and Article 50 TEU, the CJEU concluded as to the revocability of the notification:

> In those 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. However, if the notification of the intention to

withdrawal procedure to an end."

247 Daniel Sarmiento, *Brexit and EU Citizenship After Wightman*, DESPITE OUR DIFFERENCES (Dec. 12, 2018), https://despiteourdifferencesblog.wordpress.com/2018/12/12/brexit-and-eu-citizenship-after-wightman/ [https://perma.cc/P4T4-CH2Y].

248 *Wightman, supra* note 120, para. 64 ("It must also be noted that, since citizenship of the Union is intended to be the fundamental status of nationals of the Member States (see, to that effect, judgments of 20 September 2001, Grzelczyk, C-184/99, EU:C:2001:458, paragraph 31; of 19 October 2004, Zhu and Chen, C-200/02, EU:C:2004:639, paragraph 25; and of 2 March 2010, Rottmann, C-135/08, EU:C:2010:104, paragraph 43), 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.").

249 *Id.* para. 41.

250 *Id.* para. 63 ("As is apparent from Article 49 TEU, which provides the possibility for any European State to apply to become a member of the European Union and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the European Union is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values (see, to that effect, judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, paragraph 35).").

> withdraw were to lead inevitably to the withdrawal of the Member State concerned from the European Union at the end of the period laid down in Article 50(3) TEU, that Member State could be forced to leave the European Union despite its wish—as expressed through its democratic process in accordance with its constitutional requirements—to reverse its decision to withdraw and, accordingly, to remain a Member of the European Union. Such a result would be inconsistent with the aims and values referred to in paragraphs 61 and 62 of the present judgment. In particular, it would be inconsistent with the Treaties' purpose of creating an ever closer union among the peoples of Europe to force the withdrawal of a Member State which, having notified its intention to withdraw from the European Union in accordance with its constitutional requirements and following a democratic process, decides to revoke the notification of that intention through a democratic process.[251]

At the same time, the CJEU, aware of the risk of an excessively unconditional reading of this provision, tried to limit the time frame in which such a decision could be taken, declaring (repeatedly, as if to reassure itself) that:

> As the Advocate General stated in points 94 and 95 of his Opinion, the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the European Union, for as long as a withdrawal agreement concluded between the European Union and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired.[252]

In so doing, the Court tried to minimize the risks associated with the unconditional nature of the revocability of the intention to leave in the two-year period (except for what is established by Article 50(3) TEU). However, even during this period a situation of evident uncertainty could be generated (and this indeed, happened), increasing confusion surrounding the activity of the EU institutions

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251 *Id.*, paras. 65–67.

252 *Id.*, para. 57.

and the instability of the markets. These considerations of the Court were followed by a procedural clarification that "[i]n 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, with the result that it may be decided upon unilaterally, in accordance with the constitutional requirements of the Member State concerned."[253]

Interestingly, the decision of the Court of Justice had significant differences with the Opinion of Advocate General Campos Sánchez-Bordona.[254] First, while the Advocate General made a clear link between the existence of Article 50 TEU and the respect that the EU pays to the national constitutional identities of its Member States,[255] the CJEU did not refer to that concept. Second, the Advocate General found a limit to this unconditional sovereign choice of the Member State concerned in the principle of good faith and sincere cooperation (Article 4 TEU), while the CJEU did not share this view. Third, the Advocate General analyzed the withdrawal as "a typical international law issue"[256] and thus used international law and the Vienna Convention on the Law of the Treaties "to provide interpretative guidelines to assist dispelling doubts about issues that are not expressly dealt with in Article 50 TEU."[257] The CJEU refused to treat withdrawal and its reversal as an issue of international law relating to the participation of States in a Treaty and reaffirmed its willingness to stress the difference between the EU legal order and "ordinary international treaties."[258] Indeed, the CJEU based its reasoning on the idea that the EU is a new legal order, autonomous from the Member States and international law, with its own institutions and independent sources of law, which have primacy over the laws of the Member States and may confer rights with direct effects.[259] This is why it analyzed the question of revocation in light of EU law, underlining that its conclusion was only "corroborated by the provisions of the Vienna

253 *Id.* para. 58.

254 Case C-621/18*, Wightman v. Sec'y of State for Exiting the European Union,* ECLI:EU:C:2018:978 (Dec. 4, 2018).

255 *Id.* paras. 131–132.

256 *Id*. para 84.

257 *Id*. para 82.

258 *Wightman*, *supra* note 120, para. 44.

259 *Id*. paras. 44–45.

Convention on the Law of the Treaties."[260]

The CJEU stressed that the right of withdrawal expresses a sovereign decision of the State and reconnected this to the right of the State "to retain its status as a Member State of the European Union, a status which is not suspended or altered by that notification."[261] This reveals the fundamental difference between the Opinion of the Advocate General and the decision of the CJEU: insofar as revocation is unconditional, in principle, the constitutional requirements of the States are the only legal conditions attached to the exercise of such a right. The Advocate General considered that the exercise of the right should be reasonably mitigated to protect from procedural abuse. He stressed that the duty to give reasons for the revocation would be reasonable as the State in question "runs counter to its previous actions";[262] the temporal limit covering the period before the subscription of the agreement of the parties shall "logically" apply to the revocation;[263] and the exercise of the right shall be subject to the principles of good faith and sincere cooperation.[264] All these requirements should protect against "tactical revocations,"[265] while ensuring the legitimate right of the State to change its position. According to the Advocate General, making the revocation unanimous "would increase the risk of the Member State leaving the European Union against its will," changing a sovereign choice into potential expulsion.[266] In the interpretation of the Advocate General, revocation should be exercised by ensuring mutual trust between the departing State and the EU, and not mutual consent as required by the Council and the Commission.[267] Mutual trust requires reasonable justification to ensure that collateral legal tactics do not drain negotiations and do not turn a right into a privilege. By contrast, the CJEU, did not impose any condition on the exercise of this right, since it only requires the revocation to be "unequivocal

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260 *Id*. para. 70.

261 *Id*. para. 59.

262 Case C-621/18, *supra* note 254, para. 146 (opinion of the AG Campos Sánchez-Bordona).

263 *Id*. para. 147.

264 *Id*. para. 148.

265 *Id*. paras. 150,154.

266 *Id*. para. 169.

267 *Id*.

and unconditional, that is to say that purpose of that revocation is to confirm the EU membership of the Member State concerned under the terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end."[268]

To avoid undue interference and preserve the unconditional characteristics of the right, the CJEU rejected the condition of the unanimity of the European Council required by the Council and the Commission as well as did not require any additional evidence in the exercise of the revocation to demonstrate that there is no tactical use of the right. The burden is thus upon the other Member States to trust the declaration of the State to reverse its withdrawal intentions unequivocally and unconditionally. The conclusion of the CJEU focused on the good faith of the decision of the Member State to genuinely reverse its previous withdrawal intention, while binding the other Member States to that decision. Essentially, the principle of mutual trust still applies in the relations between both the (un-)departing Member State and the remaining ones, because they all commit to the same values.

Conclusively, unlike what is provided in other federal orders such as the U.S., the EU constitutional order of States recognizes a unilateral and unconditional right to its Member States to functionally secede from it. The unconditional nature of such right is so wide that it allows the departing Member State to revoke its notification without having to satisfy any condition. However, the right to withdraw from the EU is being unconditional does not mean that the political will and aims of the withdrawing Member State are the sole defining factors in how this process is shaped. For instance, pursuant to Article 50(3), the consent of the remaining Member States is necessary if the period of negotiations is to be extended. This means that the Damoclean sword of a disorderly withdrawal may be in the hands of the remaining Member States.

Indeed, the UK managed to successfully extend this period three times after the remaining 27 Member States unanimously agreed to it. More importantly, the agreement of the qualified majority of the Council members after having obtained the consent of the European Parliament is also needed for reaching an agreement on the terms of the orderly withdrawal. All the above secure that an orderly complete withdrawal from the EU can never be achieved at the peril of the overall federal pact. In that way, and somewhat paradoxically,

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268 *Wightman*, *supra* note 120, para. 74.

even the functional secession can be understood not only as an integral part of this federal order but also as an element that might have integrationist effects.

V. Conclusion

In this article, we have analyzed the current phase of the European integration process in light of two instruments of contestatory federalism: nullification and secession. After defining these two concepts, we have reconstructed their nature by using the comparative method highlighting the interesting similarities and differences between the pre-Civil War United States and the EU. In both cases they can be seen as vehicles of constitutional conflicts. In fact, the respective constituent states use them in the belief they can defend the rights of their citizens. However, while in the case of the US, it has been made clear that those instruments violate the constitutional order, the EU constitutional order has exhibited such flexibility that allows even the accommodation of such extreme forms of contestatory federalism.

This is perhaps due to the fact that the architecture of EU federalism is based on the constitutionalization of cooperative instruments,[269] while US federalism is (at least in theory) a dual system. At the same time, the position of the Court of Justice is certainly stronger today than that of the Federal Supreme Court in antebellum US. This is not a detail, but an important difference. There are also remedies within the EU legal order to test the compliance of Member States with the principle of loyal cooperation and to protect the fundamental rights guaranteed within the European constitutional landscape: from infringement proceedings to the *Köbler* doctrine.[270]

The principle of loyal cooperation also allows us to distinguish the position of the German Constitutional Court from that of the other constitutional courts that have used the *ultra vires* argument. The German court declared the *Weiss* judgment *ultra vires* only after having used the preliminary ruling procedure, thus respecting the pattern given in *Honeywell*.[271] The same cannot be said for the

269 *See* SCHÜTZE, *supra* note 59.

270 *See Köbler* v. Republik Österreich, Case C-224/01, ECLI:EU:C:2003:513.

271 BVefG, 2 BvR 2661/06, July 6, 2010, https://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106.html (Ger.).

other courts.[272] In conclusion, while the judgment of the German court may appear problematic, it does not represent the end of the process of European integration; rather it is a sign of the existence of federal dynamics that may pave the way for clearer relations between constitutional courts and the Court of Justice.

Similarly, the Eurozone and the rule of law crises and the respective attempts of the relevant political elites to achieve issue-based withdrawals from EU policies that were considered problematic for their national interests have actually led to the deepening of European integration. Even the UK's withdrawal, despite the obvious cost of "losing" a Member State, has led to the strengthening of the Union. The difficulties that the UK faced as a withdrawing Member State and the real dangers of a disorderly withdrawal have served as a cautionary tale to the outlier States that might consider triggering Article 50 TEU. In that sense, both the difficulty of achieving nullification and the risks that functional secession entail may have a paradoxically integrationist effect on a Union that has never stopped moving from crisis to crisis.

272 Giuseppe Martinico, *Taming National Identity: A Systematic Understanding of Article 4.2 TEU*, 27 EUROPEAN PUBLIC LAW 447, 462 (2021).