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THE EU CHARTER OF FUNDAMENTAL RIGHTS: AN ORIGINALIST ANALYSIS

Stephen Brittain

Thesis submitted in fulfilment of the Doctor in Philosophy Degree

Trinity College Dublin 2014
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Summary

This thesis is about the method by which a novel and unusual form of law ought to be interpreted. That law is the European Charter of Fundamental Rights (CFR), which was drafted in 2000 and first given legal effect in 2009. The CFR sets out a comprehensive range of fundamental rights, ranging from traditional civil and political rights such as the right to freedom of expression (art 11) to novel forms of social and economic rights such as the right to collective bargaining (art 28).

The CFR applies to the institutions of the EU and to the Member States only when they are 'implementing Union law' (art 51). The exact meaning of this seemingly innocuous phrase has been the subject of heated scholarly controversy and the dispute over the extent to which the CFR should penetrate the domestic legal orders of the Member States is likely to provide one of the enduring themes of European legal discourse for decades to come. If the CFR is accorded a wide scope of application by the ECJ, and the portents emerging from the court's case law certainly suggest that it will be, then it is likely to exert a strong homogenizing influence on the legal systems of the Member States. Given that the EU is characterized by deep linguistic, cultural, and philosophical fissures, which divide the Member States from one another and contribute to their distinct understandings of human rights, the experience of legally enforced amalgamation is likely to prove traumatic for those cultures that find themselves submerged beneath what Lord Denning described as the 'incoming tide' of EU law.¹

The central argument made in this thesis is that the ECJ should effect a radical course correction and instead ascribe to the CFR a scope of application to Member States consistent with its wording and consistent with maintaining a high degree of cultural diversity in the EU. It will be submitted that the only means of accomplishing this is for the court to apply an originalist approach in its interpretation of the CFR.

Originalists seek to discern the meaning of constitutional texts by reference to three key indicia: text, drafting and ratification history, and legal tradition. The first of these is accorded priority such, if the text dictates a particular outcome an originalist is bound to follow it. However, it is a truism that constitutional texts are frequently

¹ HP Bulmer & Anor v Bollinger S.A. & Ors [1974] 1 Ch 401, 418.
expressed in vague and ambiguous terms, thus frequently necessitating resort to the
drafting and ratification history and legal tradition.

The first part of the thesis consists of an introduction, in which the broad outlines of
my argument for an originalist approach to the interpretation of the CFR are
sketched. Part II discusses the teleological approach to interpretation currently
employed by the ECJ, concluding for various reasons that it is a fundamentally
undesirable method of interpretation and, accordingly, should no longer be
employed by the ECJ.

Part III of the thesis attempts to set out a normative foundation for the adoption of an
originalist approach to the interpretation of the CFR. Shortly put, the argument shall
be that the CFR was given legal effect by the unanimous consent of all Member States
of the EU. For this reason, it is submitted that it ought not to be interpreted in a
manner inconsistent with the fundamental moral commitments of any of the
Member States.

Part IV of the thesis sets out the nature of originalist methodology in detail, and
describes role and respective weights to be accorded to text, drafting and ratification
history, and tradition in originalist exegesis.

Part V of the thesis applies the originalist methodology described in Part IV to two
particularly intractable issues that arise under the CFR, to wit the precise scope of its
application to Member State governments and its relationship with the ECHR.
Acknowledgements

I have been helped in various ways by a large number of people and organisations during the preparation of this thesis.

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I have been tremendously fortunate to have had Professor Catherine Donnelly supervising my work over the last four years and to have been taught Advanced EU Law by her previously. Catherine was always available when I needed her and the thesis has been immeasurably improved as a result of her observations and insights. I will always be extremely grateful to her for that.

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Thanks also to my family in France, to my aunt Anne, uncle Gérard, to my cousins Laura and Myriam, and to Mathieu. Their beautiful home and warm company provided much needed respite in times of strain and great fun in times of ease.

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Finally, I would like to extend my thanks to my family at home: to Luke Carton, to my beloved siblings Sarah, Ciarán, and Anna Brittain, and to my nephew Harry, whose presence in our lives over the last two years has been a blessing to us all. My greatest debt, however, is owed to my parents, Anne Brittain and Gearóid de Briotún, whose love for and devotion to their children know no bounds. It is to them that the thesis is dedicated.

Needless to say the views expressed in this thesis are those of the author alone.
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PART I

INTRODUCTION
Introduction

This thesis is about the law, or more specifically about the methods by which a novel and unusual form of law ought to be interpreted. That law is the European Charter of Fundamental Rights (CFR), which was drafted in 2000 and first given legal effect in 2009. The CFR sets out a comprehensive range of fundamental rights, ranging from traditional civil and political rights such as the right to freedom of expression (art 11) to novel forms of social and economic rights such as the right to collective bargaining (art 28).

The CFR applies to the institutions of the EU and to the Member States only when they are ‘implementing Union law’ (art 51). The exact meaning of this seemingly innocuous phrase has been the subject of heated scholarly controversy and the dispute over the extent to which the CFR should penetrate the domestic legal orders of the Member States is likely to provide one of the enduring themes of European legal discourse for decades to come. If the CFR is accorded a wide scope of application by the ECJ, and the portents emerging from the court’s case law certainly suggest that it will be, then it is likely to exert a strong homogenizing influence on the legal systems of the Member States. Given that the EU is characterized by deep linguistic, cultural, and philosophical fissures, which divide the Member States of the EU from one another and contribute to their distinct understandings of human rights, the experience of legally enforced amalgamation is likely to prove traumatic for those cultures that find themselves submerged beneath what Lord Denning described as the ‘incoming tide’ of EU law.¹

The central argument made in this thesis is that the ECJ should effect a radical course correction, abjure the cudgels of the cultural warriors, and instead assume the nobler but less feted role of neutral arbiter, charged with defending what could truly be described, and what would be widely understood, as basic human rights. It will be submitted that the only means of accomplishing this is for the court to apply an originalist approach in its interpretation of the CFR.

Structure of the Argument

The argument of the thesis shall be structured as follows. Part II consists of chapters 1 to 3 of the thesis. In it the methods of interpretation currently employed by the court shall be examined. The court’s method has been variously described as purposive, teleological, and systematic in nature. In Chapter 1 of the thesis the court’s method of interpretation shall be described in detail, by examining a number of selected court decisions. In this chapter it shall be submitted that the decisions of the court have often either exceeded the text of the law being interpreted or have directly contradicted it. In Chapter 2 of the thesis some of the arguments which have been put forward by scholars in attempting to justify the court’s teleological approach shall be examined. These include traditional justifications, practical justifications, and moral-political justifications for the court’s approach. It shall be argued that each of the arguments which have been put forward by the court’s scholarly acolytes is wanting in one respect or another and is, therefore, incapable of justifying the court’s approach. In Chapter 3 of the thesis a number of arguments are put forward against teleological interpretation. It is argued inter alia: that the court’s approach violates the intentions of the law-maker, the Member States in the context of the CFR; that the court’s approach is undemocratic; and that the court’s approach ignores the fact that the purposes served by the law are more often multifarious than unitary. Thus, it is hoped that the arguments advanced in Part II of the thesis will succeed in convincing some that the teleological approach of the ECJ is a fundamentally undesirable method of interpretation and that a different approach entirely ought to be adopted by the court.

Part III consists of chapters 4 and 5 of the thesis, in which a competing theory of Charter interpretation shall be set out. Specifically, in Chapter 4 it will be argued that the EU is best understood as a consociational democracy, which is to say that it is best understood as an attempt to establish structures to mediate conflicts between the different groups which constitute European society. It is submitted that it is accurate as a descriptive matter to characterize the EU as a consociational democracy, for the following reasons: first, because it is governed by coalitions of elites from all sections of EU society; second, because each Member State has a veto over important decisions affecting it; third, because proportionality is the principal standard of political representation in the EU; and, fourth, because each Member State enjoys a significant degree of autonomy, which allows it to govern its own internal affairs without external interference. In Chapter 4 it is argued that the consociational conception of the EU is also desirable from a normative point of view. The principal arguments put forward in this regard are that recognizing the consociational nature of the EU implies an acceptance of the legitimacy of cultural pluralism as between states, which is
important *inter alia* because it facilitates experimentation and peaceful co-existence between states.

In Chapter 5 it is sought to move the argument forward, from the recognition of the legitimacy and desirability of cultural plurality in general to a discussion of the implications of that conclusion for the methods of interpretation employed by the ECJ. It is argued that the normative desirability of cultural pluralism as between states implies that the ECJ should defer to the authority of the Member States in its interpretation of the CFR which was, after all, adopted on the basis of their unanimous consent. Specifically, it is argued that recognizing the normative desirability of cultural plurality between states implies recognizing the influential authority of the Member States, which should be respected by the ECJ in its interpretation of the CFR.

In Chapter 5 it is further argued, by reference to the theory of 'self-government over time,' that the authority of the Member States to direct Charter interpretation should be deemed to date from the time of the ratification of the Lisbon Treaty in 2009, the date upon which the CFR was given legal force for the first time.

Part IV contains chapters 6 to 10 of the thesis. It is devoted to a consideration of the implications of recognizing the influential authority of the Member States for Charter interpretation, the overall conclusion being that the influential authority of the Member States to direct Charter interpretation implies that an originalist approach ought to be adopted in its interpretation. The first and primary indicator of the original meaning of any document is provided by its text. Therefore, in Chapter 6 some of the more important maxims of textualist interpretation are discussed, by reference to the jurisprudence of Justice Antonin Scalia and Justice Clarence Thomas of the U.S Supreme Court.

Chapter 7 discusses a difficulty which has not featured in the U.S discourse on originalism, and which the originalist justices have not had occasion to address, that of multilingualism. In Chapter 2 it was noted that many scholars invoke the multilingual nature of EU law as a justification for teleological interpretation. It was noted at that point that alternative solutions to the difficulties posed by multilingualism existed, apart from the adoption of a teleological approach. In Chapter 7 these alternatives are discussed in detail. It is concluded that, rather than resorting to teleological interpretation in the face of the difficulties posed by multilingualism, the court should adopt a mixed classical and purposive approach to the resolution of divergences between the different language versions of the CFR.
Though both Chapters 6 and 7 set out certain maxims to be adopted in the interpretation of legal texts, both general and multilingual, it is recognised that these maxims cannot provide a complete account of interpretation, especially when applied to a human rights instrument such as the CFR, the language of which is frequently vague or abstract. Thus, it is necessary in cases where the text is obscure or does not dictate a particular result in the case at hand to have resort to supplementary sources of textual meaning.

In Chapter 8 one of these supplementary sources, namely drafting and ratification history, is considered. It is argued that the drafting and ratification history of the CFR ought to be considered in its interpretation because it is capable of casting light on the intention of the Member States with respect to the CFR at the time it was given legal effect in 2009. However, 'intention,' in this context should not be understood to refer to the subjective wishes of identifiable flesh and blood authors of the CFR but, rather, to the intention which a reasonable reader would glean from a consideration of the discussions which took place at the time of the drafting and ratification of the CFR. This has been described in the literature as the 'institutional intention' of the lawmaker. It is also submitted in Chapter 8 that interpreters should seek to discern how they believed constitutional provisions should apply and that the ECJ should give effect to those expectations in their interpretation of the CFR.

The approach advocated in this thesis may be described as the 'original text and institutional understanding' approach. It is also submitted in Chapter 8 that this approach mirrors both the public original meaning approach adopted by Justice Scalia in his interpretation of the U.S Constitution and also the slightly distinct general original meaning theory of Justice Thomas.

In Chapter 9 the last remaining indicator of textual meaning under an originalist approach is considered, namely legal tradition. It is argued that legal tradition, in both its pre- and post-ratification varieties, ought to be considered by the court in its interpretation of the CFR, where neither its text nor its drafting and ratification history dictate a particular resolution to the case at hand.

Part V contains Chapters 10 and 11 of the thesis. In Chapter 10 an originalist analysis of Article 51 of the CFR is undertaken. That provision states that the CFR shall apply to the Member States only when they are 'implementing Union law.' It is concluded that Article 51 of the CFR ought to be interpreted much more narrowly than the ECJ has thus far done. Specifically, it is argued that the phrase 'implementing Union law' should be understood

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to apply to the Member States exclusively in circumstances where they are acting as agents of the EU.

In Chapter 11 an originalist analysis of Article 52(3) CFR is undertaken. That article provides as follows:

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

The key issue posed by this provision is whether it renders adherence by the ECJ to the jurisprudence of the ECtHR mandatory. That jurisprudence is highly dynamic in nature and under it the ECHR is recognized as a living instrument. Thus, if on an originalist view Article 52(3) renders adherence by the ECJ to the jurisprudence of the ECtHR mandatory, then the viability of an originalist approach to the interpretation of the remaining provisions of the CFR would be called into question. However, after carrying out an originalist analysis of this provision it is concluded that Article 52(3) was not originally understood to impose a binding obligation on the ECJ to adhere to the jurisprudence of the ECtHR in its interpretation of the CFR. Rather, on an originalist view the jurisprudence of the ECtHR is entitled to be accorded considerable respect but may be departed from for sufficient reason. In the course of Chapter 11 I discuss some such reasons, both as they emerge from the jurisprudence of the ECJ and from independent analysis of the provisions of the CFR itself.

Overall, it is hoped that this thesis will contribute to the literature in this area by considering whether it would be viable to apply an originalist method in the interpretation of the CFR, a question which has not yet received significant scholarly attention. This is by no means the first work to discuss originalism in the EU context. For example, Gerard Conway engages in a sustained critique of the teleological method of interpretation of the ECJ and a convincing defence of the use of an originalist methodology in the interpretation of EU, upon which I draw heavily below. In addition, Marco Slotboom has deployed originalist methods in his comparison of the law of the European Union and the World Trade Organisation.

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3Gerard Conway The Limits of Legal Reasoning and the European Court of Justice (CUP, 2012).
attempt has yet been made to provide a systematic justification for the application of an originalist methodology in the interpretation of the CFR to date.\footnote{Athough an originalist approach has been adopted by other authors in analysing the interpretative problems presented by discrete provisions of the CFR: see, Jonas Bering Luisberg 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 C M L Rev 1171.}

It is further hoped that the case studies undertaken in Chapters 10 and 11 will succeed in convincing readers that originalism, as that theory is adumbrated below, can and should be applied by the ECJ in its interpretation of the CFR.
PART II

TELELOGICAL INTERPRETATION
THE INTERPRETATIVE METHODS OF THE EUROPEAN COURT OF JUSTICE

Introduction

In this chapter the methods of interpretation employed by the European Court of Justice (ECJ) in making its decisions shall be discussed. In the first section of the chapter the ECJ's methodology shall be described through an examination of a representative sample of the court's case law. In this section it is sought to demonstrate that the court frequently renders decisions which cannot be justified by reference to the language of the laws it is charged with interpreting. In the literature this extra-textual aspect of the court's jurisprudence is referred to as the 'teleological' or 'purposive' method of interpretation.

1.1 'Interpretation' Defined

Before proceeding to discuss the specific methods of interpretation employed by the ECJ, it may be useful to pause briefly and explain what is meant by the term 'interpretation.' Gerard Conway defines interpretation as 'the process of understanding and applying a text.' This broad definition includes any conceivable method of interpretation and is therefore useful in examining the comparative merits of the ECJ's current teleological method and the radically different originalist method advocated in this thesis.

1.2 Methodology and Structure of Section

Trevor Hartley divides decisions of the ECJ into three categories: decisions which are within the text of the law, decisions which are beyond the text of the law, and decisions which are against the text of the law. This taxonomy shall be adopted in this discussion of ECJ decisions. The late Christopher Hitchens once remarked that '[a] theory that tries to explain everything explains nothing.' Thus, any theoretical account of the ECJ's interpretative methodology, which purports to encapsulate the entirety of the court's jurisprudence in a neat formula, whether 'teleological,' or 'systematic' or 'dynamic,' will either be excessively vague, and hence useless, or simply wrong as applied to a large number of deviant cases. Hartley's taxonomy is, therefore, useful in avoiding excessive generalization. However, in dividing ECJ decisions into three broad categories, each of a general nature, it also avoids the opposite extreme: excessive particularization. Judge David Edward attacked Sir Patrick O'Neill's polemic against the ECJ, *A Case Study in Judicial Activism,* on the basis that it discussed a mere 0.28% of the court's output. In so doing, Edward appeared to imply that that, in order to be taken seriously, any scholarly discussion of the ECJ's methods of interpretation would have to discuss a significant proportion of the court's case law. Given that the ECJ has decided many thousands of cases since its establishment, this seems unrealistic. If taken seriously, it would preclude criticism of the court, save perhaps by those prepared to devote a lifetime and many volumes to the effort. An approach which seeks to examine general trends over time, but which makes no claim to exhaustiveness, seems preferable to one which insists upon absolute comprehensiveness; informed criticism seems preferable to mere learned accumulation. Thus, I shall adopt Hartley's taxonomy in the remainder of this discussion.

The debate on the ECJ's methods of interpretation largely concerns the legitimacy of decisions which fall within the second and third of Hartley's categories; decisions within the first category are generally considered unexceptionable. For this reason, I propose to confine my discussion to decisions which either exceed or contradict the text. In section 1.3 of this

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5 Albors-Llorens (n2) 383.
chapter I shall provide examples of decisions which fall into Hartley's second category, *ie* those which go beyond the text of the law being interpreted but which do not directly contradict it. In section 1.4 of this chapter I shall provide examples of decisions falling into Hartley's third category, *ie* those which directly contradict the text.

### 1.3 Decisions Beyond the Text

#### 1.3.1 Direct Effect

The first, and one of the most important decisions which falls to be discussed in this connection, and which certainly exceeds the text being interpreted by the court, is the celebrated *Van Gend En Loos v Netherlands Inland Revenue Administration.* The case is so widely known that to give anything more than a terse synopsis would be otiose.

The most important question raised was whether individuals could rely upon provisions of the Treaty of Rome before their national courts. No part of the text of the Treaty expressly provided that individuals could rely on its provisions. Moreover, the background international law principle was that it was for national constitutional law to determine the extent of treaty provisions' applicability in national law. The court nonetheless held that, provided provisions of the Treaty were clear and unequivocal, and provided they did not make their implementation conditional on the adoption of a national legislative measure, they could be directly relied upon by individuals. In insisting upon the applicability of EU law in circumstances where the text of the Treaty was silent and international legal tradition suggested it ought not to apply without an intervening national legislative measure, the ECJ exceeded the text of the Treaty.

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9 The decision is 'celebrated' in every sense of the term. On 13 May, 2013, a day of reflection was held at the European Court of Justice to commemorate the decision of the court in *Van Gend En Loos.* See, 'Gend en Loos judgment to be marked in Luxembourg,' *Irish Times* (Dublin, 11 March, 2013). http://www.irishtimes.com/search/archive.html?rm=listresults&q=Van+Gend+En+Loos&fromDate=11%2F03%2F2013&toDate=&sortOrder=relevance. Accessed 27/11/2014.


11 Hartley (n3) 97.

12 ibid.


14 For the view that the decision in *Van Gend en Loos* goes beyond the text and the intent of the Treaty's framers, see Anthony Arnell 'Interpretation and Precedent in European Community Law' in Mads Andenas and Francis Jacobs (eds) *European Community Law in the English Courts* (Clarendon Press, Oxford, 1998) 118; Renaud Dehousse *The European Court of Justice* (Macmillan Press, 1998) 41; Juha Raitio 'The Interpretation of Community Law' (1996) 7 Finnish YB Int'l L. 369, 376; Rasmussen (n8) 11-12; Bredimas (n2) 77-85; Andrew W Green *Political Integration by Jurisprudence: the Work of the Court of Justice of the European Communities in European Political Integration* (A.W Sijthoff-Leyden, 1969) 324.
The court put forward a number of arguments to justify its decision. However, none of these rested on a specific textual mandate. Rather, the court referred to the purpose of the EEC Treaty, as discerned from its preamble, along with other references to the involvement of individuals in the working of the EEC, in support of the conclusion that the EEC was of direct concern not merely to the Member States but also to their nationals. Thus, *Van Gend En Loos* demonstrates the willingness of the court to go beyond the text of the law if it deems such an approach to be warranted by the law's objective.

The court later significantly diluted the requirements for direct effect. In *Reyners v Belgium*, it had been argued by certain national governments that because Article 52 of the EEC Treaty, which created a right to freedom of establishment, was programmatic in nature and envisaged the adoption of secondary legislation to accomplish its aims, it was not sufficiently precise to be directly effective in national law. The court held, however, that, because Article 52 required the Member States to attain freedom of establishment by the end of a transitional period, a precise result in the view of the court, this provision was capable of having direct effect, without intervening secondary legislation. The same result was arrived at in *Ministere Public v Van Wesemael*, in which similarly programmatic provisions, this time relating to the freedom to provide services, were interpreted as having direct effect.

Similarly, in *Defrenne v SABENA*, the court held that the provisions of Article 119 EC, which guaranteed equal pay for equal work between men and women, were directly effective, and could be invoked against both public and private bodies which directly discriminated on the

However, for the view that decision in *Van Gend en Loos* can be reconciled with the customary rules of interpretation of international law, now embodied in Articles 31-33 of the Vienna Convention on the Law of Treaties, see Edward (n7) 46. I shall rebut this argument in my discussion of the differences between the methods of interpretation of the ECJ and those of international law.

Specifically, the court noted that the activities of the EEC institutions affected both Member States and their nationals, that Member State nationals were called upon to cooperate with each other in the EEC Parliament and the Economic and Social Committee, and that the preliminary reference procedure enabled EEC law to be invoked before national courts, which supported the conclusion that individuals could invoke EEC law directly. See, *Case 26/62; [1963] ECR 3* *Van Gend En Loos v Netherlands Inland Revenue Administration*, p.12-13

*Case 2/74; [1974] ECR 631.*

ibid, para. 24

ibid, para. 32. For criticism of this decision, see Rasmussen (n8) 29.

*Joined Cases 110 and 111/78; [1979] ECR 35, paras. 25-26.*

*Case 43/75 Defrenne v SABENA [1978] ECR 1365.*
basis of sex. The court came to this conclusion in spite of the fact that the provision was, on its face, addressed exclusively to the Member States.

Thus, the court created the doctrine of direct effect without a textual basis and also held several provisions to be directly effective in spite of their language, which plainly did not envisage their being directly effective. The justification given in each case for this expansive approach has been that the alternative would compromise the attainment of the objectives of the Treaty.

The ECJ has refused to allow Directives, which have not been given effect to after the date for their transposition has expired, to be directly invoked against private parties. However, the ECJ nonetheless held, in the Marleasing case, that national laws applicable in disputes involving private parties should, where possible, be interpreted in accordance with the relevant Directive, thus giving Directives an indirect horizontal effect. Nothing in the language of the Treaty implies that unimplemented Directives, which impose obligations on Member States alone, should impose any obligations on private parties, whether directly or indirectly.

1.3.2 Supremacy

A similar approach to interpretation was adopted by the court in Costa v ENEL. In that case the court held that EEC law had supremacy over national law in the event of a conflict between the two. No provision of the EEC Treaty expressly provided that EEC law was to prevail over contradictory national law. As in Van Gend En Loos, the court ignored the applicable international legal principles, under which it was left to national law to determine the extent to which international legal norms would apply in the national legal order.

The justification given for this extra-textual decision by the court closely mirrored that in Van Gend En Loos. The court noted that if the application of EU law varied from one jurisdiction to another the attainment of the objectives of that law, as set out in Article 5 thereof would be imperilled. The court added that any admission by it that national law might prevail over EU law would call the entire legal basis of the EU into question.

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21 ibid para. 40.
22 ibid para. 30-40.
23 C-106/89.
24 Case 6/64; [1964] ECR 585.
25 See the references in (n14).
In Amministrazione delle finanze dello Stato v Simmenthal, the court re-affirmed its holding in Costa, and reiterated its view that EU law prevailed over any contrary provisions of national law, even those enacted subsequent to the conflicting EU law rule. As in Costa and many other cases the court emphasized that the effectiveness of EU law would be undermined otherwise.

The ECJ's postulation of EU law supremacy over national law caused national courts, most notably the German and Italian constitutional courts, to express concern at the seeming absence of human rights protection under EU law, and the potential for citizens to be left defenceless against EU laws which violated human rights. These courts suggested, in outright defiance of the ECJ, that provisions of EU law would be held invalid if they were found to infringe rights guaranteed by national constitutions. These stirrings of rebellion had the potential to render stillborn the nascent doctrine of EU law supremacy and, thus, to compromise the uniform application of EU law.

The beginning of the ECJ's response to this danger occurred in Stauder v City of Ulm. Here, the court suggested that ambiguous provisions of EU law should be given a 'liberal interpretation' which respected the human rights of individuals. In the Stauder case that meant interpreting a decision of the Council, which made surplus butter available to recipients of social welfare payments, in a manner which did not require individual beneficiaries to be named on the coupons with which they had been issued, as part of the scheme.

In Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, the court took its reasoning in Stauder a step further. The ECJ here reiterated its position that the validity of EU law could not assessed in light of any species of national law, including national constitutions. However, in a concession to national constitutional courts, the ECJ stated that human rights, though not explicitly mentioned in the Treaty, formed part of the general principles of law, the observance of which the court ensured. This holding

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27 ibid, para. 21.
28 ibid, para. 20.
30 See, Solange I, BVerfGE 37, 271 2 BvL 52/71(German Constitutional Court); Spa Fragd v Amministrazione delle Finanze, Dec. 232 of 21 April 1989 (1989) 72 RDI (Italian Constitutional Court).
31 Case 29/69.
32 ibid, paras. 2-7.
33 Case 11/70.
34 ibid, para. 3.
was reaffirmed in *Nold v Commission.* The court in *Internationale* went on to state that, in elaborating on the human rights norms protected under EU law, it would draw inspiration from constitutional traditions common to the Member States. As in *Van Gend En Loos* and *Costa,* the interpretation of the ECJ lacked any firm textual basis, which did not expressly empower the court to protect human rights. Moreover, it is a near-certainty that the failure of the Member States to include human rights provisions in the EEC Treaty was a deliberate omission and that they intended to withhold from the ECJ the power to enforce human rights norms.

That Treaty was drafted and ratified in the aftermath of the failure of European Political Community (EPC) and European Defence Community (EDC). The former had included provisions to empower the supreme court of the EPC to review the activities of the EPC institutions for compliance with human rights standards. These twin projects failed after they were rejected by the French National Assembly. In the aftermath of this failure, the architects of what would become the EEC, sought to ensure that their proposals, contained in the Spaak Report, which was ultimately to become the basis for the Treaty of Rome, would be accepted by Member States. The means they employed to ensure such acceptance was to stick closely to the instructions they had been given at the Messina conference of Member States. These instructions were known as the Messina mandate. As this mandate contained no reference to human rights, no proposals relating to human rights were included in the Spaak Report or, later, in the Treaty of Rome.

It is worth noting that Paul-Henri Spaak chaired the committee that drafted the provisions for the EPC Treaty as well as that which drafted the Spaak Report. For this reason, we may conclude without any doubt that, in the movement from the EPC to the EEC Treaty, there was a clear intention to exclude human rights protection under the latter.

The ECJ extended its human rights jurisdiction to Member State measures designed to implement EU law in the *Wachauf* case. This was perhaps an inevitable outcome once the court had recognized its jurisdiction to review EU law provisions for compliance with

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35 Case 4/73.
36 ibid para. 4.
37 Article 45, Draft Treaty on European Political Community.
38 For discussion of the evolution from the EDC and EPC Treaties to the Treaty of Rome, from the point of view of human rights protection, see Grainne de Búrca *The Evolution of EU Human Rights Law,* Chapter 16, Paul Craig and Grainne de Búrca (eds) *The Evolution of EU Law* (OUP, 2011).
human rights norms, given that in such circumstances Member State discretion is limited and they are, in effect, acting as agents of the EU.

However, the court subsequently also asserted a jurisdiction to review Member State derogations from EU law for compliance with human rights. The ERT case concerned the granting of a legal monopoly by Greece to ERT in the radio and television sector. It was argued that this ban violated inter alia Article 10 of the European Convention on Human Rights, which protects a right to freedom of expression. The Greek government sought to rely on Article 56 of the Treaty, which allowed Member States to derogate from the rules relating to the freedom to provide services on grounds of 'public policy, public security or public health.' The court held that a Member State could only be permitted to derogate from an EU law principle if, in so doing, it respected fundamental rights, as defined by the ECJ.

Thus, in the human rights cases, the court not only arrogated to itself a power which the Treaty had withheld, ie the power to review EU law provisions for compliance with human rights but also held itself entitled to review national derogations from EU law. This grossly exceeded the text of the Treaty and the intent of its framers. The original motivation for the recognition of a human rights jurisdiction had been to reassure national courts that the doctrine of EU law supremacy would not lead to a lowering of the standard of human rights protection in Europe. By so doing the ECJ hoped that national courts could be persuaded not to review EU law provisions for compliance with national constitutional rights, which the court feared would jeopardize the effectiveness of EU law. Thus, Internationale

Knook divides derogations into three categories. First, Member States derogate from EU law when they rely upon an exception, provided for in the Treaties, to justify restrictions on rights protected thereby. See, C-260/89 Elliniki Radiophonía Tíloussaní AE and Panellínia Omospondía Syllogon Prospóikou v Dimotiki Etaireía Pliroforisís kai Sotirías Kouvelas and Nikołós Avdellás and others [1991] ECR 1-2925. Second, Member States derogate from EU law when they rely on mandatory requirements, a range of considerations recognized by the ECJ in its jurisprudence as being capable of justifying restrictions on the freedoms protected by the Treaties. See, C-368/95 Familiaexpress v Bauer Verlag [1997] ECR 1-3689. Third, Member States derogate from EU law when they invoke fundamental rights as a justification for restrictions on the fundamental freedoms provided for in the Treaties. See, C-112/00 Schmidberger v Austria [2003] ECR I-5659, a Member State successfully justified a restriction on the free movement of workers as necessary to protect the fundamental rights of striking workers. See, Allard Knook 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 C M L Rev 367, 371.

Ibid para. 43.

Handelsgesellschaft and its progeny interpreted the Treaty so as to secure the effectiveness and uniform application of EU law. However, the ERT decision, which involved the ECJ in the review of national legislative choices, in which the Member States were not acting as agents of the EU, and which were already subject to national constitutional controls, cannot be squared with the rationale of Internationale Handelsgesellschaft, which was to prevent national review of EU law for compliance with human rights. Thus, it is difficult to see how ERT can be justified by any concern for the effectiveness of EU law.

1.3.3 Competences

In the case of Commission v Council (ERTA), the question before the court was whether the Member States, by conferring on the EU authority to create common rules in the field of transport, had alienated their right to enter into agreements with third parties in the same field. The court ultimately held that the Member States could not assume obligations pursuant to such agreements because they might affect the common EU rules in the field of transportation or alter their scope, which would undermine 'the unity of the Common Market and uniform application of Community law.' As the court itself acknowledged, no express provision of the Treaty conferred any competence on the EU to enter into international agreements in the field of transportation, though it did confer such powers in other fields. Nonetheless, the court held that the Member States could no longer unilaterally enter into international agreements in the field of transport, and that the EU had exclusive competence in the field. Thus, the court in ERTA plainly exceeded the text of


Case 22/70.
ibid para 48. However, the court noted that Article 3 of Regulation No 543/69 had conferred a limited competence to enter into international agreements necessary to give effect to that regulation.

The Treaty expressly conferred competence on the EU to enter into agreements in the field of tariffs and trade (Articles 113 and 114) and empowered the EU to enter into association agreements (Article 238).

ibid para 30.
the Treaty, which confers limited competences on the EU, in favour of its supposed purpose, i.e. to ensure the uniform application of EU law in all Member States.49

1.3.4 Member State Liability

In the case of Francovich and Bonifaci v Italy,50 the question before the court was whether Member States were obliged to make good damage suffered by individuals as a result of a failure to implement a Directive. The court reiterated the view it had expressed in Van Gend En Loos that the legal order of the EU comprised not merely the Member States but also their nationals. The court also noted that the rights arising from EU law were not confined to those expressly enumerated. Rights could also arise from the imposition of a clear and unconditional obligation on the Member States or on Community institutions.51 The court’s view that the imposition of an obligation on one party must vest a right of action in another has been said to derive from the conception of obligation recognized in civil law jurisdictions.52 I shall not engage with this argument at this point but shall return below to a general discussion of the impact of civil law methods of interpretation on the methods of interpretation employed by the ECJ. The court went on to hold that the effectiveness of EU law would be weakened ‘if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.’53 Therefore, the court held that the principle that ‘a State must be liable for loss or damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.’54 The court further held that Member States could be liable for loss or damage arising from their failure to transpose a Directive provided three conditions were fulfilled: first, that the Directive conferred rights on individuals; second, that the content of the rights could be identified from the terms of the Directive itself; and, third, that the breach of the State’s obligation caused the loss or damage incurred.55

49 Dehousse (n14) 58.
50 C-6/90.
51 ibid, para. 31.
53 C-6/90, para. 33.
54 C-6/90, para. 35.
55 C-6/90, para. 37.
It is worth emphasizing that the Treaty did not provide for any such right to reparation. Nor did it specify the limitations which the court imposed on that right. Thus, the right to reparation recognized in *Francovich* was fashioned entirely from whole cloth by the court.\(^5\)

1.3.5 *Economic Matters*

Article 95 of the EEC Treaty prohibited the imposition of discriminatory internal taxes on goods imported from other Member States. By its text this article plainly referred to imports; it did not refer to charges on exports. In *Statens Kontrol Med Aedle Metaller v Larsen*,\(^7\) however, the ECJ held that the objective of Article 95, when considered in light of the rest of the Treaty, was ‘to guarantee generally the neutrality of systems of internal taxation with regard to intra-Community trade.’\(^5\) Thus, Article 95 was held also to apply to exports. There could hardly be a clearer example where the court exceeded the language of a Treaty provision in order to give effect to its supposed purpose.

Similarly, in *Continental Can v Commission*,\(^9\) the court was called upon to interpret Article 86 of the EEC Treaty, which prohibited only the ‘abuse...of a dominant position.’ Article 86 had given examples of what constituted such abuse; mergers between firms were not included among these examples. Nonetheless, the court held that, where a merger between firms would accord the resulting undertaking overwhelming dominance in the market, thus undermining competition, such a merger could be considered an abuse of a dominant position and, thus, could be enjoined under Article 86.\(^6\) A number of textualist objections may be raised to this conclusion. First, the very phrase ‘abuse...of a dominant position’ implies that it is possible to hold a dominant position in a market without abusing it. If dominance was considered abusive *per se* by the framers, then they would have prohibited the acquisition of a dominant position. Second, the examples of an abuse of a dominant position given in Article 86 demonstrate that the dominance *per se* is not considered abusive. The examples given are the following:

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of

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\(^6\) Case 142/77.

\(^7\) Ibid para. 23.

\(^9\) Case 6/72.

supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

An undertaking which does not enjoy a dominant position in the market cannot do any of the things which are specified in Article 86 as constituting an abuse of a dominant position. If they attempted to do so where they did not enjoy dominance, consumers would simply go elsewhere. Thus, it is plain that Article 86 is designed to mollify the consequences of dominance, not to eliminate it. Therefore, the examples given in Article 86 of abuses of a dominant position affirmatively establish that dominance is not per se abusive. In Continental Can, the court arrived at the opposite conclusion, thus exceeding the text of the Treaty.

1.4 Decisions Against the Text

The cases discussed in the previous section were ones in which the court supplemented the text of the law being interpreted. None of those decisions was directly supported by the text but neither did they contradict it either. In this section a number of decisions of the ECJ will be discussed which directly contradict the legal text on which they purport to rely. The line between those cases which go beyond the text and those which directly contradict it is a difficult one to draw. This is because the concept of 'decisions against the text' must include expansions of the text which are excluded by necessary implication from its express provisions. Thus, Larsen could have been placed in either category as could many other cases. Much must depend on the strength of the implication arising from the text, on which subject people may have different views. In this section, therefore, only the clearest cases, in which the ECJ ignored some irresistible textual implication or other, have been included. Aside from necessary implications from the text, I have also included in this section decisions of the ECJ which ascribe to a particular text a meaning which it cannot bear as a linguistic matter.

1.4.1 Powers of the European Parliament

In Parti Écologiste 'Les Verts' v European Parliament, the issue was whether an action for annulment under Article 173 of the Treaty could be taken against a measure adopted by the European Parliament. On its face this provision enabled actions for annulment to be taken.

61 Case 294/83.
exclusively against measures adopted by the Council and the Commission. Considering that the EU consisted then, and still consists, of three principal institutions, the Parliament, the Council, and the Commission, the irresistible inference from Article 173 in *Les Verts* was that an action for annulment could not be taken against measures adopted by the Parliament. Nonetheless, the court held that such an action could, indeed, be taken. The court stated that this result was supported by the ‘spirit’ of the Treaty, reasoning that there was no other way in which the Parliament could be kept within the bounds of the powers conferred upon it by the Treaty. Thus, the court was prepared to disregard the clear wording of the Treaty in order to guarantee effective judicial review of the activities of EU institutions.

The capacity of the European Parliament to bring an action for annulment was the subject of litigation before the ECJ. At the time, Article 173 of the Treaty provided that actions for annulment could be brought by ‘a Member State, the Council or the Commission’ and by ‘[a]ny natural or legal person against a decision addressed to that person or... against a decision which... is of direct and individual concern to the former.’ The coverage in Article 173, judging by its extensive listing of those entitled to take actions for annulment, was plainly intended to be exhaustive. Thus, in the *Comitology* case, the ECJ held that the Parliament did not have the capacity to bring an action for annulment. However, in the *Chernobyl* case, the court reversed *Comitology* and held that the Parliament was entitled to bring an action for annulment. The court reasoned that the existence of alternative remedies apart from an action for annulment, which were available to protect the privileges of Parliament, such as the preliminary reference procedure, the right of action available to Parliament in the event of another institution failing to act, and the Commission’s ability to bring an action for annulment, were all inadequate to guarantee that a measure adopted in violation of the prerogatives of Parliament would be reviewed. The court reasoned that such a ‘procedural gap’ would upset the ‘institutional balance laid down by the Treaties.’ Thus, the court held that Parliament could take an action for annulment pursuant to Article 173,

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62 ibid para. 25.
63 ibid.
64 Debosses (n14) 104; Hartley (n3) 101; Koslowski (n2) 121-122.
66 Case 302/87.
67 Case 70/88.
68 ibid para. 26.
but only in order to protect its own institutional prerogatives. It is plain that, in Chernobyl, the broad objective of ‘institutional balance’ was invoked in order to arrive at a result which was contrary to the text of Article 173. Hartley has stated that ‘[i]t is hard to imagine a clearer example of changing the law while supposedly interpreting it.’

1.4.2 Public Service Exception

In the original EEC Treaty, Article 48, subsections (1) to (3) laid down the principle of non-discrimination and provided for the abolition of all discrimination on grounds of nationality between workers of the Member States. Article 48(4) provided, by way of exception, that the principle of non-discrimination was not to apply to ‘employment in the public service.’ In the case of Commission v Belgium, the court held that this exception applied only to ‘posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.’ It is plain that, on a literal reading, the concept of ‘public service’ is a good deal broader than the definition crafted by the court would suggest. Thus, in Commission v Belgium, the court gutted the public service exception. This is just one instance of the general tendency of the court to narrowly construe exceptions to EU law, so as not to undermine the putative purposes of that law.

1.4.3 Competences of the EU

In Commission v Parliament and Council (‘Environmental Crimes’) the issue before the court was whether Council Framework Decision 2003/80/JHA, which had imposed on Member States an obligation to create various environmental offences, had been adopted on a correct

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69 Ibid para. 27. Indeed, it has been argued that the decision of the court in Chernobyl may be explained by reference to a meta-principle of ‘legal protection,’ which the ECJ frequently employs in interpreting EU law. See, Mitchel De S.-O.-l'E. Lasser Judicial Deliberations: a Comparative Analysis of Judicial Transparency and Legitimacy (OUP, 2004) 225-227.
72 Case 149/79.
73 See also, C-321/96 Mecklenburg v Kreis Pinneberg Der Landrat, para. 25; C-103/01 Italy v Commission para. 32.
74 C-176/03.
legal basis. The Council had purported to adopt the Framework decision under Title VI of the Treaty on European Union (TEU), under the Third Pillar of the European Union, dealing with Police and Judicial Co-operation in criminal matters, the legislative procedures of which excluded both the Commission and the Parliament.

Article 47 of the TEU provided that no provision of the Treaty was to affect the powers of the Community under the EC Treaty. The EC Treaty contained no express power to create criminal offences. However, it did contain various provisions empowering the EC to adopt policies in the field of environmental protection. The court concluded that, in spite of the absence of an express power to create criminal offences in the EC Treaty, such a power could be inferred from the general competence of the EC in the field of environmental protection. The court stated that recognizing an implied competence in the EC to create criminal offences was necessary to ensure the effectiveness of the measures it took in the field of environmental protection. The court held on this basis that the Framework Decision impinged upon the legislative powers of the EC and that it ought to have been adopted under the EC Treaty, rather than the TEU. In Environmental Crimes the ECJ not only implied a competence to create criminal offences into the EC Treaty, which was neither expressly nor impliedly contained therein, but also denied to Member States the freedom to use the Third Pillar 'where either the centre of gravity or predominant aim of the measure was something which related to the third pillar, ie the achievement of co-operation between the Member States in the field of criminal justice.' For this reason, the decision in Environmental Crimes may be considered to violate the text of the Treaties.

1.4.4 Human Rights

As I recounted above, the ECJ's human rights jurisdiction originally had no support in the text of the Treaties. However, the Parliament, Council, and Commission accepted the court's assertion of a jurisdiction in this field, by means of a Declaration, as early as 1977. The Treaty of Maastricht for the first time included a general reference to human rights in the text of the

75 ibid paras 41-43.
76 ibid paras 48-52.
The Treaty of Amsterdam added another dimension to this protection – Article 7 TEU – which empowers the Council to suspend the voting rights of a Member State found to have consistently violated human rights. However, the most important innovation in the field of EU human rights law since the decision in *Internationale Handelsgesellschaft* has been the adoption of the EU Charter of Fundamental Rights (CFR), proclaimed at Nice in December 2000 by the European Parliament, Council and Commission, but only given formal legal effect in December 2009, with the ultimate ratification of the Lisbon Treaty.

The CFR, according to Article 51 thereof, applies to 'the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' The principal controversy this chapter has engendered concerns the meaning of the phrase 'implementing Union law.' In a series of cases, the ECJ has held that Article 51 CFR applies to Member State measures both implementing Union law and derogating from EU law. In Chapter 10 a detailed analysis of Article 51 shall be undertaken, during the course of which it shall be submitted that that provision cannot be interpreted as applying to derogations from EU law. Rather, it shall be submitted that, on a proper interpretation of Article 51, the CFR ought to applied to Member States exclusively in situations such as that in *Wachauf*, described above, where they are acting as agents of the EU, and are directly applying provisions of EU law, whether regulations, directives, decisions, or directly effective treaty provisions. At this point my argument that it is erroneous to interpret Article 51 as applying to derogations may be summarized as follows. The phrase 'implementing Union law' and its variants have always been used, by the ECJ, by EU officials, and by scholars, to refer to situations where Member States were acting as agents of the EU, and the drafting history of the CFR confirms that that meaning was intended by its framers. For these reasons, which shall be fully developed in Chapter 10, it may be concluded that the decisions of the ECJ, which have held that Article 51 of the CFR applies to Member State derogations from EU law, contradict its text.

### 1.5 Conclusion

79 This original provision is now contained in Article 6 TEU.
81 See, above (n39) for a definition of derogations.
82 C-617/10 Åkägaren v Hans Åkerberg Fransson (ECJ, 26 February 2013), para. 15-20; C-256/11 Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v Bundesministerium für Inneres (ECJ, 15 November 2011), para. 72; C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM) (ECJ, 8 March 2011).
It is plain from the above discussion that ECJ decisions sometimes expand upon the text of EU laws and, on occasion, even contradict the text.\(^\text{83}\) The ECJ frequently justifies such decisions by invoking one or more of the following considerations: the need to ensure the effectiveness of EU, the need to fulfil the law’s ‘purpose’ or ‘objective.’ Thus, the court employs a ‘purposive’ or ‘teleological’ method of interpretation. But what precisely is meant by a ‘teleological’ approach? It has been said that such an approach ‘presupposes the need to extend the application of texts to situations admittedly beyond the scope of legislative intent.’\(^\text{84}\) As we have seen, this is certainly an accurate description of teleological interpretation as practiced by the ECJ. However, it does not explain what is to replace legislative intent. Pescatore tells us that teleological interpretation ‘is based on the consideration of the objectives assigned to the Community.’\(^\text{85}\) Thus, the essence of teleology is the expansion of legal texts in pursuit of the objectives of the law or legal system in question.\(^\text{86}\) In its application of a teleological approach to interpretation, as we have seen, the ECJ tends to invoke a variety of ‘meta-purposes,’ \(\text{i.e.}\) purposes which reflect systemic concerns of the EU legal system as a whole rather than the purposes of an individual law or legal provision,\(^\text{87}\) including effectiveness, uniformity, legal certainty, and legal protection.\(^\text{88}\)


\(^{85}\) Pierre Pescatore The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities (A.W. Sijthoff, Leiden, 1974) 88.


\(^{87}\) Conway (n1) 3, 22; Raitio (n14) 377; McMahon (n83) 339.

\(^{88}\) Lasser (n68) 213-223.
JUSTIFICATIONS FOR THE COURT'S TELEOLOGICAL APPROACH - AN EVALUATION

Introduction

In this chapter the arguments which have been put forward to justify teleological interpretation shall be considered. A variety of such arguments have been put forward. For present purposes these arguments may be divided into three categories: moral-political, traditional, and practical. 'Moral-political' arguments are reasons of political morality which justify the teleological approach. In Section 2.1 of this chapter the moral-political arguments which have been put forward to justify the court's teleological approach shall be considered. 'Traditional' arguments are those which derive from the experiences and practices of the legal orders from which the EU springs: public international law and national law and from the claims of precedent and continuity. In Section 2.2 the traditional arguments which have been deployed in defence of the court's approach shall be assessed. 'Practical' arguments are those which suggest that teleological interpretation is necessitated, or that no other approach is practicable, because of the distinctive texture and nature of EU law. In Section 2.3 the practical arguments which have been put forward to justify the ECJ's approach to interpretation shall be evaluated.

2.1 Moral-Political Justification: European Integration

2.1.1 Introduction
In order to choose a method for the interpretation of constitutional documents, one must have some conception of the nature and normative value of the legal system in which it is to be applied.¹ In other words, one must establish a connection between the law’s source of validity and its source of proximate authority.² The proximate source of authority of a law in modern democratic societies is usually a judge of some sort, who decides in concrete cases what the law means and which result it dictates among a range of possible options. There is frequently debate over the ultimate source of validity of the law in a given legal system. This is because the fundamental moral underpinnings of the legal system, and hence of the society in which it operates, are implicated. Thus, the debate over the methods of interpretation employed by the ECJ is really a debate over the nature of the EU legal order as a whole. Scholars who support the court’s teleological approach argue that such an approach is necessary in order to advance European integration, an objective they see as pervading the entire EU legal order. It cannot be denied that the jurisprudence of the court has, in fact, lent considerable weight to the integration process, occasionally giving it a fillip in times of stagnation, generally construing principles of EU law broadly and, as we have seen, expanding and contracting the text of the Treaties in ways designed to further integration.³ The arguments which have been put forward by EU law scholars to justify

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² Diarmaid Rossa Phelan It’s God We Ought to Crucify: Validity and Authority in Law (Four Courts Press, 2000) 14.
conceiving of EU law as a 'law of integration' shall now be considered.\(^4\) In succeeding chapters an alternative vision of the EU polity shall be put forward. An alternative interpretative methodology suitable for such a polity shall also be put forward. Various arguments have been made in support of the notion that the objective of European integration should permeate and shape the interpretative approach of the court. First, it has been argued that the text of the Treaties supports an integrationist approach to interpretation; second it has been argued that the framers of the Treaties were committed to European integration and that their vision in this regard should inform the interpretative approach of the court; third, it has been argued that the value of European integration is the fundamental normative value underpinning the EU legal order and, therefore, that all provisions of EU law must be interpreted so as to cohere with that fundamental value; fourth, it has been argued that the economic integration envisaged by the Treaties necessarily implies political integration and, therefore, that it is legitimate for the court to move along the inevitable process of political integration in its interpretation of the Treaties.

2.1.2 Text of the Treaties

The preamble and opening articles of the TEU, the former of which grandly proclaims that the Member States of the EU are 'RESOLVED to continue the process of creating an ever closer union among the peoples of Europe,' are frequently cited in this regard.\(^5\)

Pollicino has stated that the best place to find the *telos*, or ultimate cause, of the EU is in the preamble.\(^6\) He has moreover stated that, as the preamble is part of the law which it is the mission of the court to uphold, it should be referred to by the court in its interpretation of EU law.\(^7\) Judge Federico Mancini, a former judge of the ECJ, has stated that '[t]he preference for Europe is determined by the genetic code transmitted to the Court by the founding

\(^4\) I refer to the title of Pescatore's classic work. See, Pierre Pescatore *The Law of Integration: Emergence of a New Phenomenon in International Relations, Based on the Experience of the European Communities* (A.W. Sijthoff, Leiden, 1974).


\(^6\) Pollicino (n3) 289.

\(^7\) ibid, 296. See also, Takis Tridimas 'The European Court of Justice and Judicial Activism' (1996) 21 E L Rev 199, 205.
fathers, who entrusted to it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an 'ever closer union among the peoples of Europe.'

However, as we have seen above, the preamble is sometimes referred to by the ECJ, not in order to clarify an ambiguity in the Treaty text but to create novel legal principles which go beyond the requirements of the Treaty’s operative text. Use of the preamble to a text in this way is not approved in public international law, nor in the interpretation of statutes in common law jurisdictions. In both of these contexts the creation of obligations on the basis of preambles is disapproved because of their usual generality and imprecision. Use of the preamble to the TEU has been criticized by EU law scholars on a number of related grounds.

First, it has been said that the language of the preamble is too vague to serve as a reliable ground for judicial decision-making. Scheingold notes that the specific implications of political integration or 'ever closer union' are not clarified by the preamble, which simply states a bare ambition. Indeed, it is not clear that the phrase 'ever closer union' necessarily refers to the political integration of the Member States. Near-identical language has been used to describe traditional diplomatic co-operation between states. For example, when a proposal for an Anglo-German alliance was mooted in 1898 Arthur Balfour, a member of the British Cabinet, described the German Foreign Secretary, Prince Bernhard von Bülow, as 'being in favour of a closer union between the countries.' This use of the phrase plainly did not carry any integrationist signification. McAllister states that ‘[e]ver closer union’ clearly meant a progressive growing together. It did not, however, specify the nature of an ‘end

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9 Bredimas (n3) 71.
12 Gardiner (n10) 186-187; Thomas M Cooley A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union (7th edn, Little Brown & Co, 1903) 245.
13 Stuart A Scheingold The Rule of Law in European Integration: the Path of the Schuman Plan (Yale University Press, 1965) 17.
product': it did not, for instance, speak of a single state, or state-like entity, nor a federation.'\textsuperscript{15}

Conway argues that the meaning of the phrase 'ever closer union' should be concretized by reference to the more specifically worded operative provisions of the Treaties. Specifically, he argues that the court should respect the \textit{lex specialis} principle, which is 'the principle of applying (the ordinary meaning) of the most specific relevant legal provision or source.'\textsuperscript{16} The principle 'reflects a rational principle that whatever is most specifically stipulated is more wished for by the law-maker.'\textsuperscript{17} In succeeding chapters I shall explain why it is both normatively desirable and practically possible to discover and follow the intentions of the law-maker. In addition, focussing on the preamble, to the exclusion of the operative provisions of the Treaties, creates legal uncertainty because it precludes reliance on clearly expressed provisions and forces individuals to speculate as to how the court will interpret the abstract legal provisions, which are capable of bearing a number of different meanings.'\textsuperscript{18}

Second, Scheingold notes that the fundamental principles of the Treaty ‘provide something for everyone,’ which reflects the deep divisions among the founding fathers on the nature of the project which they were setting in motion.'\textsuperscript{19} For this reason, he suggests that the court should confine its attentions to the operative language of the Treaty, which is expressed more concretely.'\textsuperscript{20} As discussed above, in connection with the assertion by the ECJ of a jurisdiction in the field of human rights in \textit{Internationale Handelsgesellschaft}, the EEC Treaty was considerably less integrationist than the failed EEC Treaty, because of Member State objections to the federalizing tendencies of the latter.'\textsuperscript{21} When this fact is considered, it becomes impossible to attribute to the framers of the Treaties an unqualified commitment to European integration.'\textsuperscript{22} They certainly believed in integration, but their commitment was to integration of a particular kind, \textit{ie} limited integration in a discrete set of fields, with a considerable residue of autonomy, and the concomitant power to determine the future direction of integration, reserved to Member States.

\textsuperscript{15} Richard McAllister \textit{From EC to EU: An Historical and Political Survey} (Routledge, 1997) 2.

\textsuperscript{16} Gerard Conway \textit{The Limits of Legal Reasoning and the European Court of Justice} (CUP, 2012) 153.

\textsuperscript{17} ibid, 154.

\textsuperscript{18} ibid, 157.

\textsuperscript{19} Roger-Michel Chevallier ‘Methods and Reasoning of the European Court in its Interpretation of Community Law’ (1964) 2 Common Market L Rev 21, 30.

\textsuperscript{20} Scheingold (n13) 19, 22-23.

\textsuperscript{21} Gráinne de Búrca ‘The Evolution of EU Human Rights Law,’ Chapter 16, Paul Craig and Gráinne de Búrca (eds) \textit{The Evolution of EU Law} (OUP, 2011).

\textsuperscript{22} See also, Conway (n16) 246. However, for a somewhat different view, see G Bebr \textit{Judicial Control of the European Communities} (Brill, 1981) 10.
2.1.3 The Intention of the Framers

Arnall connects the invocation of the preamble's reference to 'ever closer Union' with the vision of Europe's founding fathers. He says:

> If there is an agenda pursued by the Court, it is therefore one set by the Treaty's authors. The Court can hardly be criticized for striving to construe the Treaty in a way which gives effect to its authors' overall design.\(^{23}\)

In addition to relying on the texts of the Treaties to justify integrative teleological interpretation, commentators have also invoked the authority of the framers of the Treaties and have argued that they intended the Treaties to evolve constantly in the direction of further European integration.

Other scholars have refuted such views and have demonstrated that the founders of the EU believed themselves to be concluding an international treaty in the traditional sense.\(^{24}\) Indeed, in the most comprehensive study of the history of European integration, Milward has demonstrated beyond all doubt that the framers of the Rome Treaty were not committed to integration \textit{simpliciter}. Rather, they were committed to integration to the extent that it facilitated the preservation and consolidation of the post-war European political consensus, which involved greater state provision of welfare and services than had ever been seen before. In order to pay for this expansion of the welfare state, an expansion of foreign trade was required. As Milward puts it, '[t]he will of the European nation-state to survive as an organization entity depended on the prosperity which sustained the domestic post-war political compromises everywhere. The importance of foreign trade to that prosperity was great...'^{25} While political concerns, such as the desire to consolidate the post-war peace settlement through closer Franco-German cooperation, and the desire to increase Europe's waning voice in world affairs, also influenced the drafting of the Treaty of Rome, Milward demonstrates that such concerns were far less important than the economic imperatives driving integration.\(^{26}\)

Moreover, the rejection of the EPC and the EDC by the states of western Europe, which had represented a genuine attempt to establish a European federal state, and which is discussed

\(^{23}\) Anthony Arnall 'The European Court and Judicial Objectivity a Reply to Professor Hartley' (1996) 112 L Q R. 411 413.


\(^{25}\) Alan S Milward \textit{The European Rescue of the Nation-State} (2\textsuperscript{nd} Ed, Routledge, 2000) 223.

\(^{26}\) ibid 208. For further discussion of the motivations of the leaders of Europe in establishing the EEC, see Tony Judt \textit{A Grand Illusion: an Essay on Europe} (Penguin Books, 1996) 10-16; Michael Burgess \textit{Federalism and Federation in Western Europe: the Theoretical Discourse} (Croom Helm, 1986) 64.
in detail in Chapter 4 of this thesis, affirmatively establishes that the framers of the Treaty of Rome were not committed to comprehensive European integration; rather, they favoured limited integration in discrete fields, with the pace and scope of any future integration to be determined by the Member States themselves.

2.1.4 The 'Integrity' of the Legal Order

We have thus far been discussing arguments for integrative teleological interpretation based upon particular provisions of the Treaties and the intentions of their authors, which are said to support the goal of European integration. Some commentators, however, who are supportive of such methods, have made their argument in more systemic terms. Bengoetxea, Mac Cormick, and Sorrano, invoking Dworkin's conception of integrity, argue that it is crucial to the rule of law that 'the [legal] system be conceived as embodying a mutually compatible set of values such that detailed norms and rules can be seen as instantiations of more fundamental principles.' They go on to say that the most fundamental principle underlying EU law, 'the raison d'être of the very Treaty establishing the European Community' is that of European integration.

Such coherence-based arguments may be criticized on a number of grounds. First, it has been argued that they render judicial decision-making largely discretionary, thereby reducing legal certainty. Second, Dworkin's claim that a constitution may be justified by reference to a single political theory, and that political communities are characterized by adherence to a scheme of shared principles does not fit the practice of modern democratic societies. On the contrary, modern democratic constitutions and ordinary legislation in a democracy, more usually reflect compromise between competing interests than the prevalence of one unified philosophical viewpoint or political theory. Monaghan has argued in the American context that: '[o]ur constitutional origins suggest a different perspective: the constitution as a superstatute. Like important statutes, the constitution emerged as a result of compromises struck after hard bargaining.' Moreover, modern democratic communities do not resemble Dworkin's 'community of principle,' and they too are driven by trade-offs.

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28 Joxerramon Bengoetxea, Neil MacCormick, L Moral Sorrano 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Grainne de Búrca and Joseph HH Weiler The European Court of Justice (OUP, 2001) 47.
29 ibid, 82; Bengoetxea (n1) vi.
30 Conway (n16) 245.
between competing interests, reflecting no particular general principles. Altman argues, in the American context, that ‘the ideal simply does not fit nearly enough of actual political practice.’ He further notes, and I agree with him, that: ‘[w]here politics is not committed to hammering out normative principles to guide the life of the polity, it makes no sense for legal interpretation to proceed as though the products of political activity were the expressions of underlying principles.’ It is plain to demonstration that the EU is an organization founded on compromise between different values. To take merely one example, the reference in the preamble to ‘ever closer Union’ is arguably integrationist in import. However, this contrasts sharply with the principle of conferral, under which ‘the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.’ The arguably integrationist tenor of the ‘ever closer union’ phrase in the preamble also contrasts with the principle of subsidiarity, under which ‘in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

Therefore, it is submitted that Dworkin’s claims that modern constitutions may be justified by reference to a single political theory, and that modern political communities can be said to be committed to certain abstract principles are erroneous, at least insofar as they purport to describe modern democracies, such as the European Union.

2.1.5 Neo-Functional Arguments
Tridimas argues that the economic integration implied by ‘[t]he dismantling of national frontiers and the free movement of the factors of production have perforce a subversive character’ and that ‘[t]hey contain the seeds of destruction of the State’s monopoly on authority.’ On this basis, he argues that the ECJ should interpret EU law so as to further European integration.

52 Andrew Altman ‘Fissures in the Integrity of Law’s Empire: Dworkin and the Rule of Law,’ in Alan Hunt (ed) Reading Dworkin Critically (Berg, 1992) 157, 184.
53 ibid 181.
54 Article 5 TEU.
55 ibid.
56 Tridimas (n7) 204.
57 ibid.
Such sentiments echo those of the neo-functionalist theorists of European integration. Neo-functionalists advocated the establishment of international institutions to manage discrete sectors of the transnational economy. It was thought that economic integration in one area of the economy would create pressure for integration in other economic sectors, which would eventually result in comprehensive economic integration. This was known as the 'spillover effect.' In addition, neo-functionalists believed that, as material well-being improved as a result of the efforts of the international institutions, the loyalty of those who benefitted would transfer from their nation states of origin to the international organisation.

The arguments of the neo-functionalists may be objected to on the basis that previous epochs of economic integration in Europe did not, in fact, lead to political integration. During the 19th century a boom in international trade between the various European powers led to significant economic integration across the continent. Between 1780 and 1840, global international trade trebled in value. Between 1830 and 1870 an increase of similar magnitude was recorded. Such trends continued between 1870 and the outbreak of the First World War. According to Milward and Saul, 'Both the volume and value of world trade more than trebled between the late 1870s and 1914 and Western Europe enjoyed the lion's share of the expansion.' Craig and Fisher note that such trade 'inspired both capital and labour flows and encouraged the diffusion of the ever-changing modern technology.' This increase in the international trade of goods and services and the increased flow of capital across borders led to a rapid convergence in the business cycles of the major European economies.

Indeed, Milward notes that 'some measures of the extent of interdependence suggest that it was in fact greater between 1890 and 1914 than in the 1950s.'

However, legal regulations reflecting the autarky of former times remained in force in many European states and, as Lyons notes, 'To get rid of these restrictions, to make the fullest possible use of the new techniques and opportunities, it was necessary that governments should be brought together and persuaded so far as possible to act in unison...’ To that end,

35 Milward (n25) 8.
37 Alan S Milward and SB Saul The Development of the Economies of Continental Europe: 1850-1914 (George Allen and Unwin, 1977) 472.
38 Lee A Craig and Douglas Fisher The Integration of the European Economy: 1850-1913 (St Martin's Press, 1997) 193.
39 Milward and Saul (n41) 510; Craig and Fisher (n42) 278-281.
40 Milward (n25) 9.
numerous international organizations were established to regulate discrete sectors of the transnational economy, with varying degrees of success. These included the Telegraphic Union in 1865, the Radiotelegaphic Union in 1906, the Universal Postal Union in 1878, a Convention for the regulation of freight rail in 1890, the International Sugar Union in 1902, and the International Institute of Agriculture in 1905.46

However, this efflorescence of cosmopolitan initiatives, both economic and political, did not prevent the outbreak of the First World War and the destruction of the integrated European economy. Ferguson notes that 'the First World War undid the first, golden age of economic globalization.'47 Thus, the history of Europe between from the beginning of the 19th century to 1914 conclusively refutes any suggestion that political integration is a necessary by-product of free trade or of economic cooperation between states. The history of the period shows, as Milward puts it, that 'interdependence can be rejected by an act of national political will.'48

Raymond Aron has similarly rejected the assumption that the economic integration of the European continent must inevitably lead also to its political integration. He says:

the big mistake was to mix up logical implication and historical determinism. True, in order for the European Community to reach its logical and archetypal form, it should have evolved through the mere concentration of national policies to the condition of a federal state. But this was no reason to conclude either that any of the governments involved would ever lift a finger to bring about this perfect archetypal Community or that the imperfect vision would inevitably perish from the earth.49

Thus, Tridimas' neo-functional argument in favour of the ECJ's teleological approach must be rejected.

I shall now move on to discuss the traditional justifications which have been adduced to justify the interpretative approach of the ECJ.
2.2 Traditional Justifications

Three traditional justifications are frequently put forward to justify the teleological approach of the ECJ: first, it is said that the ECJ’s approach closely reflects the interpretative practices extant in public international law forums; second, it is argued that the court’s approach reflects those of courts in civil law jurisdictions; third, it is argued that, because the ECJ has adopted a teleological approach to interpretation thus far, that it should continue to do so for reasons of precedent and in order to safeguard the stability of the EU legal order; and, fourth, it has been argued that, where a particular decision of the ECJ has not been overruled by means of treaty amendment, the acquiescence of the Member States can be taken to indicate their approval of the decision in question.

Strictly speaking, arguments of this sort are not justifications for the teleological approach. After all, the mere fact that other courts have employed particular interpretative methods does not say anything about their normative desirability.® Indeed, the principal object of those invoking traditional arguments, of the first and second sort just mentioned, appears to be to debunk any suggestion that the ECJ’s methods are radically heretical or out of the ordinary.

2.2.1 Teleological Interpretation and Public International Law

Several EU legal scholars have suggested that the ECJ’s teleological method of interpretation mirrors that employed in public international law forums, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Those articles are widely considered to codify rules of customary international law. Article 31 VCLT provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Arnulf has argued that Article 31 VCLT represents ‘a good summary of the method adopted by the Court.’®² This is certainly true of the first category of cases discussed above, ie those in

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®® Arnulf (n23) 414. See also, Lord Howe of Aberavon ‘Euro Justice: Yes or No?’ (1996) 21 E L Rev 187, 192; David Edward ‘Judicial Activism – Myth or Reality? Van Gend En Loos, Costa v ENEL, and the Van Duyn Family Revisited’ in Angus IL Campbell and Meropi Voyatzí (eds) Legal Reasoning and
which the court has interpreted the text of EU law provisions in accordance with their ordinary meaning. However, Article 31 VCLT cannot be interpreted as allowing decisions which exceed or contradict the text of the law. Although Article 31 VCLT prescribes that the ‘object and purpose’ of a treaty are to be considered in its interpretation, it is plain from the structure and wording of that provision that ‘object and purpose’ are subordinate to the ordinary meaning of the treaty as *indicia* of meaning. Specifically, a treaty is to be interpreted ‘in accordance’ with ordinary meaning, which is to be discerned ‘in the light’ of its object and purpose. Thus, the VCLT allows object and purpose to be used in the discernment of ordinary meaning but does not envisage their being used to contradict ordinary meaning or in order to create obligations in addition to those flowing from the ordinary meaning of the treaty’s terms.\(^5\)

This is reflected in the practice of international law tribunals. Slotboom notes that the WTO Appellate Body interprets WTO provisions in accordance with their wording whereas the ECJ interprets the EU Treaties according to ‘the overall object and purpose of the treaty in question.’\(^5^4\) The International Court of Justice\(^5^5\) and other international tribunals\(^5^6\) also regard object and purpose as a means of clarifying the terms actually used in the treaty being interpreted, rather than as an independent source of meaning.

The interpretative approach of the ECJ violates the VCLT in a number of other respects as well. Article 32 VCLT prescribes that *travaux préparatoires* are to be used where the ordinary meaning, context, or the object and purpose of a Treaty provision are obscure. Thus, it can be seen that object and purpose, as those terms are understood by the VCLT, refer to the object and purpose pursued by the framers of the Treaty.\(^5^7\) However, this is not the sense in which object and purpose are understood in EU law. The purposive approach of the ECJ has been described as Dworkinian, because it represents an attempt to give the best account possible of the EU legal order\(^5^8\) and, as we have seen, the account favoured by the court has usually been one in which the EU is seen as moving towards closer economic and political

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\(^5^5\) See, Land, Island and Maritime Dispute (El Salvador/Honduras: Nicaragua intervening) [1992] ICJ Reports 351, paras 375-376, extracted from Gardiner (n10).

\(^5^6\) See, USA, Federal Reserve Bank v Iran, Bank Marhazti Case A28 (2000-02) 36 Iran-US Claims Tribunal Reports 5, para. 58, extracted from Gardiner (n10).

\(^5^7\) Gardiner (n10) 324.

\(^5^8\) Bengoetxea (n1) vi.
integration. Thus, quite logically according to its own lights, the ECJ rarely considers the *travaux préparatoires* of the Treaties,\(^59\) though this marks a deviation from the prescriptions of the VCLT.\(^60\)

Thus, the first traditional argument in favour of the court's teleological approach, that it mirrors that applied in international law forums, fails upon closer examination. The ECJ's interpretative method, which permits the court to exceed, and occasionally contradict, the text of the EU Treaties is not a method approved by the VCLT or by international law tribunals or scholars.

### 2.2.2 Teleological Interpretation and Civil Law Jurisdictions

By 'civil law' I mean 'the private law which prevails in the countries which have inherited or followed the Roman tradition.'\(^62\) Many scholars have argued that the interpretative approach of the ECJ mirrors that applied by courts in civil law jurisdictions. Dehousse has stated that '[b]y focusing on the aims of the treaty and its institutional objectives, the ECJ's case law places itself firmly within the continental legal tradition.'\(^63\) Edward, while emphasizing the differences between the EU legal order and continental civil law systems, states that the ECJ's methods of interpretation reflect civilian methods by 'taking a rational overview of the law as a whole, relating one part to another so as to form a structure or system.'\(^64\)

One respect in which the ECJ's approach has certainly been influenced by the civil law tradition is in in the style of the court's judgments. The judgments of the ECJ have been described in the following terms:

ECJ decisions are short, terse, and magisterial decisions that demonstrate tremendous interpretive confidence and suggest a certain logical compulsion. They are written in an

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\(^{59}\) ibid, 252; Stone Sweet (n3) 27; Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: a Critical Reading of Article 30 of the EC Treaty* (Hart Publishing, 1998) 11; Bredimas (n3) 72.

\(^{60}\) Schermers and Walbroek (n5) 16.

\(^{61}\) Koslowski (n2) 129-130.


\(^{64}\) David Edward 'The Role and Relevance of the Civilian Tradition in the Work of the European Court of Justice' in David L Carey Miller and Reinhard Zimmerman *The Civilian Tradition and Scots Law* (Duncker & Humblot, 1997) 318.
impersonal and institutional third person singular, and therefore leave little, if any trace, of individual judicial will, doubt or disagreement.®

The magisterial style of the ECJ reflects that of the French courts, of which I shall provide a brief description below.

In evaluating the claim that the teleological approach of the ECJ mirrors that of the 'the civil law,' it is important to remember that the civil law is not a homogenous tradition and that there are many variations in methodology between civil law countries.®

In analysing the methods of interpretation employed in civil law jurisdictions I have tried to remember the following dictum of Niall Ferguson: 'understand the origins of an institution or instrument and you will find its present-day role much easier to grasp.'® Therefore, although we are largely concerned here with the methods of interpretation employed in civil law jurisdictions since the establishment of the EEC in 1957, in order to properly understand those methods, it is necessary to place them in historical context.

(a) France

As the definition of civil law posited above suggests, civilian legal systems have their origins in Roman law. The first great codification occurred in France in 1804, during the reign of the Emperor Napoleon Bonaparte. Some have suggested that the codification movement was driven by the Enlightenment faith in the power of human reason to foresee and provide for the problems of the future.® Kelly remarked that the French Enlightenment reformers 'thought only in terms of making a clean sweep of the ancient structures...and starting again from scratch, building this time on purely rational principles.'® However, he also demonstrates that these forces were largely spent by the time the Napoleonic Code was actually drafted in 1804. By that date, he notes, 'disillusionment and scepticism induced by

® Baudenbacher (n66) 336; Cueto-Rua (n62) 690; Roberto G Mac Lean 'Judicial Discretion in the Civil Law' (1982-1983) 43 La. L. Rev. 45, 47.
the Revolution’s course had already ...begun to cool the ardour for reason which had fuelled
the codifying movement. 70

The principal motivations behind codification were, in fact, practical. Prior to 1804 two
distinct legal orders had existed in France. Northern France had a customary legal system
and was known as les pays de coutumes, whereas Roman law predominated in the south,
which was known as les pays de droit écrit. 71 The reason for the codification was chiefly a
desire to unify and simplify the law and to remove the difficulties caused by the bifurcation
between north and south. 72 Moreover, much of the pre-existing law was carried over into the
code. The codification of 1804 did not, therefore, ‘replace the historical and traditional
French law with a rational legal system.’ 73

The Napoleonic code was supposed to provide a comprehensive statement of the law in
force. 74 A necessary implication of this claim to comprehensiveness of coverage is that judges
need not look outside the text of the code in order to decide cases. De Vries has stated that
‘[t]he primacy of the statutory text as the source of law permeates not only the theory and
practice of statutory interpretation, but also the civil law concept of the nature of law as a
whole.’ 75 Thus, the advent of the codes also engendered a strongly positivistic conception of
the judicial function, which hemmed judges closely to the text of the law. 76 This is reflected
in Article 5 of the Napoleonic Code, which forbids judges from making regulations. This
minimalistic conception of the role of the judge was also, in part, a reaction against the
abuses of powers perpetrated by the French judiciary and the Parlements in the pre-
Revolutionary era, in which the courts had engaged in a ‘dogged defence of a privileged
class’ which ‘foreclosed all hope of moderate reform,’ and brought ‘a nation’s wrath’ upon

70 ibid 264.
71 René David French Law: its Structure, Sources, and Methodology (trans. by Michael Kindred, Louisiana
& Co, Inc, 1986) 266; Yvon Loussouarn ‘The Relative Importance of Legislation, Custom, Doctrine,
72 David (n71) 12.
73 David (n71) 12-13; Mack E Barham ‘Methodology of the Civil Law in Louisiana’ (1976) 50 Tul L Rev
474, 475; Joseph Dainow ‘The Constitutional and Judicial Organization of France and Germany and
74 John H Merryman The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and
Latin America (2nd Ed, Stanford University Press, 1985) 42; Caslav Pejovic ‘Civil Law and Common
Baudenbacher (n66) 339; Robert B Cappalli ‘At the Point of Decision: the Common Law’s Advantage
Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France’ (1997) Utah L Rev 379,
379.
76 David (n71) 15; Thomas G Watkin An Historical Introduction to Modern Civil Law (Ashgate, 1999) 136;
Kelly (n69) 312; Loussouarn (n71) 240.
the courts. Moreover, the codifiers' predilection in favour of judicial minimalism reflected the ideal of popular sovereignty, which was at the root of the French Revolution.

The orthodox view of legal interpretation after codification was, therefore, that every result arrived at was in some way dictated by the code, whether expressly or by implication or analogy, and that no law-making role was left to the judge. This conception of the judicial role is reflected in the style of French judicial opinions, which are generally short and strongly magisterial in nature, containing only the briefest recitation of the facts and the reasoning underlying the court's decision.

This orthodox view was sometimes taken to rather extreme lengths. The Cour de Cassation was established in 1790 with a jurisdiction to review the decisions of inferior tribunals for error of law. This court originally consisted of representatives of the legislature, whose function essentially consisted in keeping the judges within the limits they had previously laid down.

In spite of these efforts at constraining them, it is clear that judges charged with interpreting the Napoleonic Code engaged in creative interpretations of its provisions from the very beginning. For example, French administrative law is entirely judge-made. Such broad interpretations of the codes are facilitated by the fact that they are typically phrased at a higher level of abstraction than statutes in common law jurisdictions. This has facilitated the deployment of more flexible methods of interpretation. For instance, Article 4 of the Napoleonic Code provides that a judge who refuses to adjudicate, under the pretext of the law's silence, obscurity, or insufficiency on a particular point, is guilty of a denial of

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7 Dawson (n71) 373, 263; Mac Lean (n68) 47; GM Razi 'Guided Tour in a Civil Law Library: Sources and Basis Legal Materials in French Civil Law and Commercial Law' (1958) 56 Mich L Rev 375, 385. For an account of the role of the Parlements prior to 1789, see William Doyle Oxford History of the French Revolution (2nd edn, OUP, 2002) 37-40.
9 Dawson (n71) 375.
11 Belleau (n74) 416; Merryman (n74) 41; Dawson (n71) 378; Razi (n77) 387-388.
12 Dawson (n71) 383-386, 401.
13 Dawson (n71) 427.
14 de Vries (n75) 246; John A Usher 'The Influence of the Civil Law, via Modern Legal Systems, on European Community Law' in Carey Miller and Zimmerman (n64) 325; David (n71) 76-87; Dainow (n73) 419.
justice. Edward notes that such general formulations have enabled judges in civil law jurisdictions to assume a gap-filling function, pursuant to which 'the judge is to find the piece of the jigsaw whose shape and appearance is marked out by the existing pieces but which for some reason is missing.'

Despite the evident creativity of the judges in their interpretation of the codes, which was stimulated by their general language and laconic nature, academic writing remained wedded to the orthodox conception of the judicial function. The so-called exegetical school of thought, whose adherents maintained that the code constituted a self-sufficient and complete system, which could be discerned by an examination of the literal meaning of the code's provisions, by their context, and by preparatory work surrounding their enactment, dominated French academic writing for many years.

François Gény was the first theorist to urge judges to depart from the orthodox view of the judicial role and acknowledge the creative law-making function which the general language of the codes bestowed upon them. He argued that, in cases whose resolution was not dictated by the language of the codes, judges should make their decisions, first, on the basis of custom and, second, on the basis of their perception of societal needs. Gény called this latter form of judicial decision-making 'free scientific research,' a term which may be rather jarring to Anglophone readers but which essentially acknowledges a strong judicial discretion to decide on policy grounds cases which do not come squarely within the language of the law.

Gény's advocacy impinged somewhat upon the official narrative. The Cour de Cassation endorsed teleological interpretation, as an element in the interpretation of the law, in 1904. However, Gény never suggested, and the French courts have never accepted, that teleological interpretation should enable the courts to make decisions which are contrary to

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Edward (n64) 316.
Edward (n64) 317. See also, Dainow (n73) 41.
Loussouarn (n71) 241.
Dawson (n71) 393.
For a summary of his position by Gény himself see F Gény Methode D'Interpretation et Sources en Droit Privé Positif, vol 1, (Librarie Générale de Droit et de la Jurisprudence, R Pichan & R Durand – Auzios (Seconde Edition, 1954) 405-411. See also, BA Wortley 'Francois Gény' in I Jennings (ed) Modern Theories of Law (Wildy, Simmonds and Hill Publishing) 139; Loussouarn (n71) 243-244. For the view that Gény's views changed significantly over the years and that he ultimately abandoned his earlier advocacy of 'free scientific research' in favour of a species of neo-classicism, see Belleau (n74) 422.
Dawson (n71) 394.
de Vries (n79) 260.
the text of the law. Rather, teleological interpretation was used to supplement traditional methods where the law was ambiguous. Indeed, French judicial opinions remain strongly textualist and the style of judicial opinions continues to be magisterial and syllogistic.

(b) Germany

The German Civil Code was enacted in 1900. It was inspired by Roman law sources and was based in part on the Digest of Justinian. The Greek word for digest is ‘Pandect,’ which gave its name to the most prominent school of German legal thought at the turn of the last century, the Pandecists. The drafting of the code was heavily influenced by the thinking and doctrines of the Pandecists, which was exemplified in the work of thinkers such as Friedrich Carl von Savigny and Bernhard Windscheid. The Pandecists viewed law through an historical prism, believing that the study of the legal history of a given society could assist in identifying the elements of legal tradition most suitable for inclusion in a code. Once codification had been accomplished, as it was in Germany in 1900, the approach of the Pandecists mirrored that of the exegetes in France, emphasizing respect for the text of the law above all else, and arguing that the code should be considered a self-contained and comprehensive system, and disclaimed any role for the judiciary in the creation of law.

Maitland spoke admiringly of the exertions of the fin de siècle German man in the construction of the code: ‘he has codified the greater part and the most important part of his law; he has set his legal house in order; he has swept away the rubbish into the dustbin; he has striven to make his legal system rational, coherent, modern, worthy of his country and our century.

However, as in France, some provisions of the code were so general as to necessitate creative interpretation by the courts. For example, Article 242 of the Civil Code required contracts to be carried out in good faith. Thus, the orthodox Pandecist conception of the judicial role, to which the drafters of the code subscribed, was in tension with the highly general

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92 de Vries (n75) 260-261. For Gény’s views, see Gény (n89) 405.
93 HC Gutteridge ‘A Comparative View of the Interpretation of Statute Law’ (1933-1934) 8 Tul L Rev 1, 3-4.
94 Dawson (n71) 402; Baudenbacher (n66) 339.
95 Dawson (n71) 411.
96 Dawson (n71) 450.
97 Kelly (n69) 325.
98 Kelly (n69) 322.
99 Kelly (n69) 324; Dawson (n71) 460.
language used in some of the code's provisions. Indeed, Zimmerman has pointed out that the German judiciary engaged in creative interpretations, not compelled by the language of the code, from the time of its enactment onwards.\(^{103}\)

A factor which intensified this trend was the devastating effect of hyper-inflation in Germany. This phenomenon led to an enormous increase in the cost of performing contracts. An increase in costs was not, however, recognized by the code as a ground excusing contractual non-performance. Nonetheless, the German courts came to the aid of those afflicted and asserted that they had a 'plentitude of power,' which empowered them to protect vital social interests, even where the code did not clearly permit the actions taken in securing that end.\(^{104}\) In exercising this newly assumed jurisdiction, the courts frequently relied upon the more generally expressed provisions of the code, such as those requiring 'good faith,' and hence the judicial response to the hyper-inflation crisis came to be known as the 'flight into the general clauses,'\(^{105}\) which led to the emergence of the so-called 'free law' movement in Germany.\(^{106}\) This flight continued during the reign of the Nazi Party in Germany, with many of the same general clauses being relied upon to promote the Nazi programme.\(^{107}\) Kelly states that 'under the National Socialist regime the idea of departing from the strict language of statute and looking instead at values (which were likely to be subjectively and unpredictably appraised) like the spirit of the law...was taken to dangerous extremes.'\(^{108}\) For example, in June 1934 Hitler had a number of leading members of his regime killed, because he feared that they could pose a threat to his leadership. This event has become known to history as 'The Night of the Long Knives.' Although this action lacked any formal legal basis Carl Schmitt, sometimes referred to as the 'crown jurist' of the Nazi regime, wrote an article in which he said that Hitler's decision to murder his rivals 'was itself the highest justice.'\(^{109}\)

The movement away from the formalist doctrines of the Pandectists continued after the Second World War, when, in response to the atrocities committed, and with the adoption of

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\(^{103}\) Zimmerman (n66) 59-78, 99-100.

\(^{104}\) Dawson (n71) 473.

\(^{105}\) Dawson (n71) 475; Baudenbacher (n66) 340-342.

\(^{106}\) Kelly (n69) 359-361.

\(^{107}\) Dawson (n71) 476; Baudenbacher (n66) 342.

\(^{108}\) Kelly (n69) 360.

the German Basic Law, natural law theories experienced a revival and an indelible connection between law and ethics was proclaimed. Some even argued that, in extreme cases, judges must have the authority not to apply unjust laws.

Thus, we have seen that in France textualism has always been the predominant mode of interpretation, although the general language of the codes often requires judicial improvisation and creativity. Indeed, the textualist philosophy of one of the ECJ's first Advocates General, Maurice Lagrange, has been attributed to his background in French law. Similarly, the framers of the German Civil Code subscribed to a textualist philosophy of interpretation. However, as in France, the general language of the Code precluded the adoption of a mechanical literalism and made a modicum of judicial improvisation inevitable. The German migration away from literalism was hastened by the double-paroxysm of hyper-inflation in the 1920s and the radical break with the rule of law experienced during Nazi rule in the period between 1933 and 1945. Moreover, literal methods of interpretation were not restored to their traditional position of absolute primacy after the war. The extent of the wartime human rights violations convinced many that, in order to qualify as a law, a particular enactment had to meet a certain minimal ethical standard, and that laws which did not should not be enforced by the judiciary. However, even in Germany, judicial departure from the text of the law is extremely controversial.

(c) Other Civil Law Jurisdictions

So far I have concentrated solely on France and Germany. But what of the other civil law jurisdictions? It would appear that the ordinary or technical meaning of the terms used in legislation has presumptive validity in other jurisdictions as well. In Italy, for example, Article 111 mandates the adoption of a literalist approach to interpretation in the first instance, to be supplemented by a consideration of the intent of the legislature. Once it is established that one among the proposed interpretations of a given provision conforms to its

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109 Dawson (n71) 494; Kelly (n69) 380; E Bodenheimer 'Significant Developments in German Legal Philosophy since 1945' (1954) 3 Am J Comp L 379, 380-381.
110 Ibid, 382-387.
111 Rasmussen (n3) 274.
112 Robert Alexy and Ralf Dreier 'Statutory Interpretation in the Federal Republic of Germany' in Mac Cormick and Summers (n66) 94.
113 Mac Cormick and Summers (n66) 466; Jerzy Wroblewski 'Statutory Interpretation in Poland' in Mac Cormick and Summers (n66) 286; Aleksander Peczenik and Gunnar Berghalz 'Statutory Interpretation in Sweden' in Mac Cormick and Summers (n66) 332-333.
114 Massimo La Torre and Enrico Pattaro, and Michele Taruffo 'Statutory Interpretation in Italy' in Mac Cormick and Summers (n66) 231.
ordinary meaning, the burden shifts to the party arguing for a departure from that ordinary meaning.\textsuperscript{116}

Factors which weaken the presumptive validity of arguments from ordinary meaning include the indeterminacy of the linguistic meaning, any indication in the law that the ordinary meaning is not to be preferred, the obsolescence of the linguistic meaning of the text, the vagueness or generality of the text, and any evidence that the provision in question was casually or imprecisely drafted.\textsuperscript{117} Substantive political reasons also influence the interpretation of the laws in many jurisdictions, although such considerations are generally only admissible in the event of that the applicable legal provisions are vague or mutually contradictory.\textsuperscript{118}

Thus, it can be seen that civil law jurisdictions do not generally recognize the validity of decisions which contradict the legal text being interpreted. Rather, as under the VCLT, textual and purpose-based arguments are considered in tandem in civil law jurisdictions and are perceived as mutually reinforcing rather than antithetical.\textsuperscript{119} It is only where the meaning of the text is in some way unclear that purposive arguments become decisive. Thus, it cannot be said that the interpretative practice in civil law countries is supportive of the decisions of the ECJ which contradict the text of the law they purport to interpret.

One exception to the foregoing should be noted. Courts in all jurisdictions recognize an absurdity exception to the presumptive force of textualist arguments.\textsuperscript{120} However, this exception is narrowly limited and only applies where adherence to the linguistic meaning of the text would lead to a ridiculous result. It does not permit decisions such as Chernobyl, in which the text of the law was ignored simply in order to achieve a result deemed desirable. The conclusion dictated by the text of law in Chernobyl, \textit{ie} that Parliament did not have the power to bring an action for annulment, was not absurd in the sense of being unthinkable, as there may have been a variety of reasons why such a power was withheld. In short, the threshold for departure from the text in civil law jurisdictions is much higher than that set by the ECJ. The former recognize such departure as being legitimate in extremely limited circumstances, whereas the latter permits contradiction of the governing legislative text where this assists the court in arriving at a conclusion it merely deems desirable.

\textsuperscript{116}Mac Cormick and Summers (n66) 479-482; Alexy and Dreier (n113) 96; Aulis Aarnio 'Statutory Interpretation in Finland' in Mac Cormick and Summers (n66) 149.
\textsuperscript{117}Mac Cormick and Summers (n66) 149.
\textsuperscript{118}Mac Cormick and Summers (n66) 470.
\textsuperscript{119}See, for example, Peczenik and G Berghalz (n114) 332.
\textsuperscript{120}Mac Cormick and Summers (n66) 485.
But what of the ECJ decisions which go beyond the text? Most civil law jurisdictions recognize the legitimacy of applying legal provisions by analogy, i.e., applying a legal principle in a context in which the text of the law does not suggest it should apply but which is sufficiently similar to the circumstances in which it does apply that it is legitimate to extend its application.\textsuperscript{21} Thus, in their acceptance of the analogical application of legal provisions, civil law jurisdictions recognize, at least in this limited respect, the validity of decisions which go beyond the text of the law.

There are two reasons, however, why the civil law practice of applying legal provisions by analogy cannot justify the decisions discussed above, in which the ECJ exceeded the text of the law. First, many of the decisions of the ECJ which exceed the text of the law do not derive from the analogical application of legal principles. Of the decisions considered above, only \textit{Wachauf} could truly be justified on the grounds that it involved the analogical application of a particular legal principle. In \textit{Wachauf}, the court held that it could review Member State action for compliance with fundamental rights where they were acting as agents of the EU. This decision can be seen as the analogical application of the decision in \textit{Internationale Handelsgesellschaft}, in which the court recognized that provisions of EU law could be held invalid for breach of fundamental rights.

The second and more fundamental reason why the ECJ’s extra-textual decisions cannot be compared to analogical reasoning in civil law jurisdictions relates to the differing nature of the EU legal order as compared to those in civil law jurisdictions. At present, as we have discussed, the ECJ frequently goes beyond the text of the law. In this respect its approach mirrors that applied in civil law jurisdictions. However, unlike the codes in civil law jurisdictions, which are supposed to provide a comprehensive statement of the law in force,\textsuperscript{12} the governing treaties of the EU are based on precisely the opposite assumption. Article 5 TEU provides as follows:

\begin{quote}
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
\end{quote}

Thus, unlike the codes in civil law jurisdictions, Union law is not supposed to be comprehensive in its coverage. Matters not governed thereby remain governed by national

\textsuperscript{21} Mac Cormick and Summers (n66) 467; Rinze (n52) 57.
\textsuperscript{12} Pierre Legrand ‘Against a European Civil Code’ (1997) 60 Mod L Rev 44, 45-46; Vera Sacks and Carol Harlow ‘Notes of Cases: Interpretation, European Style’ (1977) 40 Mod L Rev 578, 580.
law. The tendency of civil law courts to act boldly in filling ‘gaps’ in the codes cannot provide support for decisions of the ECJ which exceed the text of the law, given the radically different assumptions underlying the codes and EU law.\(^{123}\)

For similar reasons, the application of legislation by analogy is not accepted in the common law jurisdictions of Britain and Ireland. The reason for this dissonance between the common law and civil law jurisdictions is that, in the wake of codification in civil law jurisdictions, legislation is recognized as the sole source of law, whereas in Britain and Ireland the common law subsists in areas not covered by any legislative enactment.\(^{124}\) Similarly in the EU context, where EU law does not cover a particular set of facts, it is presumed to be governed by national law.

Aside from their attitudes towards the legislative texts, the ECJ and civilian courts also hold divergent views on the utility of a historical approach to legal interpretation. Civilian courts often consider the *travaux préparatoires* of legislation.\(^{125}\) However, the ECJ does not utilize such sources.\(^{126}\) Thus, it may be concluded that the practice in civil law jurisdictions does not support of the court’s teleological approach.\(^{127}\)

### 2.2.3 Teleological Interpretation and Precedent

Bengoetxea, Mac Cormick, and Sorrano argue that if a particular body of law has always been interpreted teleologically then, in the interests of legal stability, it should continue to be so interpreted.\(^{128}\) However, such arguments rest on a false premise, namely that the conclusion that a particular decision, arrived at in accordance with the court’s teleological approach, was wrong as an original matter implies that the court should now overrule it. As Rasmussen has said, it is not necessary for the court to overrule every erroneous past decision.\(^{129}\) Nor would a uniform practice of overruling such decisions be desirable. In Chapter 8 of this thesis some of the criticisms which might be levelled against the proposal that the ECJ should adopt an originalist method in its interpretation of the CFR shall be considered. It is in that context that the claims of precedent shall be addressed.

\(^{123}\) Conway (n16) 169.
\(^{124}\) Mac Cormick and Summers (n66) 471.
\(^{125}\) Peczenik and Berghalz (n114) 332-333.
\(^{126}\) Rinze (n52) 61-62.
\(^{127}\) For the same conclusion, see Baudenbacher (n66) 346.
\(^{128}\) Bengoetxea, Mac Cormick, and Sorrano (n27) 47.
\(^{129}\) Rasmussen (n3) 378.
2.2.4 Member State Acquiescence

Another traditional argument advanced in favour of the teleological approach to interpretation is that the failure of the Member States to amend the Treaties to overrule decisions previously arrived at in accordance with teleological methods indicates their approval of such methods. Arnull argues that this failure of the Member States is 'hard to reconcile with any notion that there is widespread dissatisfaction among the Member States with the activities of the Court.'

However, to equate the failure of the Member States to amend the Treaty, so as to excise a decision which they oppose, with their acceptance of that decision reverses the normal rule applicable to Treaty amendment. In order to amend the Treaty, the Member States must be unanimous, whereas only one Member State need oppose a Treaty amendment for it to fall. Hartley has said that '[t]o regard failure to reverse a judgment as tacit acceptance would be just as unreasonable as to regard failure to amend the Treaty to confirm a judgment as tacit rejection. No inference can be drawn from a failure to amend the Treaty.'

2.2.5 Conclusion

In conclusion, the methods of interpretation employed in international law and in civil law jurisdictions are not the same as those employed by the ECJ. Therefore, it cannot be said that the ECJ's interpretative practices are validated by traditional practice in either the domestic or international spheres.

2.3 Practical Justifications

A number of practical arguments have been advanced in favour of the ECJ's teleological approach to interpretation. First, it has been argued that EU law is expressed in highly vague and abstract terms, which cannot be practically applied or concretized without

130 Arnull (n23) 422. For a similar argument, see Fennelly (n3) 670.
131 Hartley (n3) 107. See also, Conway (n16) 97.
132 Trevor Hartley Constitutional Problems of the European Union (Hart Publishing 1999) 57; Martin Shapiro 'The European Court of Justice' in Craig and de Búrca (n21) 321, 332.
significant judicial creativity. Second, it has been said that EU law contains gaps, which must be filled by the ECJ. Third, it has been argued that teleological methods of interpretation are necessary to ensure the effectiveness of EU law. Fourth, it has been argued that, where the legislative institutions are paralysed and consequently fail to fulfil their functions effectively, it is legitimate for the court to supply their place through a creative interpretation of EU law provisions. Fifth, it has been said that the multilingual nature of EU law, and the inevitable divergences between the different language versions of EU law, preclude the adoption of textualist methods in the interpretation of that law. Each of these points shall be considered in turn.

2.3.1 Vagueness

Lord Slynn of Hadley has argued that ‘[t]he Treaty was not a detailed code which judges simply had to apply.’" Lord Slynn of Hadley has argued that ‘[t]he Treaty was not a detailed code which judges simply had to apply.’°° Lord Slynn of Hadley has argued that ‘[t]he Treaty was not a detailed code which judges simply had to apply.’°° Lord Slynn of Hadley has argued that ‘[t]he Treaty was not a detailed code which judges simply had to apply.’°° Lord Slynn of Hadley has argued that ‘[t]he Treaty was not a detailed code which judges simply had to apply.’°° Lord Slynn of Hadley has argued that ‘[t]he Treaty was not a detailed code which judges simply had to apply.’°° Koopmans observes that ‘[t]he Treaty, although occasionally very precise, leaves many important problems unresolved.’°° Dehousses echoes such sentiments, concluding that ‘the open-textured character of many provisions, together with the purpose-oriented nature of the Treaty, lent itself quite well to the kind of teleological interpretation proposed by the ECJ.’°° Many other scholars have echoed these sentiments.

How may the vagueness of the Treaties be explained? It may be that it reflects the inability of the Member States to agree on matters of detail, which were deliberately left to be resolved by future interpreters. It may also be that the Treaties were left vague because the drafters knew that they could not foresee the future and wished to set down broad principles so that the law could be applied in changed circumstances.

There are a number of difficulties with the argument that the Treaties' vagueness justifies the teleological approach of the ECJ. First, and most importantly, many of the decisions discussed above cannot be justified on this basis. In Van Gend en Loos the background

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133 Lord Slynn of Hadley ‘Critics of the Court: a Reconsideration’ in Andenas and Jacobs (n5) 5.
135 Dehousses (n63) 76.
136 Giulio Itzovich ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10 German LJ 537, 558.
137 Pollicino (n3) 289.
principle, whereby the direct applicability of norms of international law depended on incorporation into national law, was long-established and widely known. The text of the Treaty did not expressly indicate that this rule did not apply in the EU context. Therefore, far from being justified by the vagueness of the text of the Treaty, the decision in *Van Gend En Loos* seems, rather, to rest on the desire of the court to increase the effectiveness of EU law. The same may be said of the progeny of *Van Gend en Loos*, the cases such as *Reyners* and *Van Wesemael, Defrenne*, and *Marleasing*, which expanded in various ways the principle of direct effect. The decision in *Costa*, in which the court held that EU law by its nature enjoyed primacy over national law, infringed the same international law principle, once more without any express warrant in the Treaty.

Similarly, the cases in which the court held that fundamental rights were protected by EU law, *Internationale Handelsgesellschaft* and the cases which followed, find no support in the text of the Treaties. The problem was not that some provision of EU law alluded to fundamental rights in a vague way, which left it to the court to determine how it was to be applied in concrete cases. Rather, the Treaty did not mention fundamental rights at all. Moreover, it is plain from the historical background to the Rome Treaty that this was an intentional omission.129 Thus, it is also impossible to justify the fundamental rights cases on the basis of the vagueness of the text of the Treaty.

The same may be said of the state liability cases. Nowhere did the Treaty give citizens a remedy in damages for breach of EU law by a Member State, nor was there any general reference to reparation or anything which could reasonably be construed to confer such a right. Vagueness, then, also cannot explain the *Francovich* line of cases.

The *Larsen* case did not concern a vague treaty provision either. The Treaty had prohibited discriminatory taxes on imports, which the court construed as also applying to exports. The word 'import' is not vague and it cannot reasonably be understood to include exports. Similarly, as has been shown, the decision in *Continental Can* expanded the EU's competence into the field of mergers on the basis of a text which plainly only covered abuses of a dominant position, not the acquisition by merger of a dominant position in the marketplace. As discussed in detail above, there was nothing vague about the legal provisions applicable in *Continental Can*.

The same applies to the cases concerning the power of the European Parliament. In *Les Verts* the provisions of the Treaty necessarily implied that an action for annulment did not lie in

129 de Búrca (n21).
respect of an act of the Parliament and, in Chernobyl, the provisions of the Treaty implied with unmistakeable clarity that the Parliament did not have standing to bring an action for annulment in respect of decisions of the Council. Similarly, the concept of 'public service' is not vague and cannot reasonably be defined as restrictively as the ECJ did in Commission v Belgium. Moreover, the conclusion of the court in Environmental Crimes, that criminal penalties could be imposed by the European Community on the basis of its general competence in the area of environmental protection, was not reasonable when one considers the issue in the light of the former three pillar structure of the EU, which unmistakeably confined criminal matters to the intergovernmental third pillar. When considered systemically, the Treaties cannot be said to have been vague on this point.

Thus, as has been shown at perhaps too great a length, many of the decisions of the ECJ in which a teleological approach to interpretation was adopted did not involve vague treaty provisions. Rather, in many cases clear legal provisions, and omissions from the text which were plainly intentional, were ignored by the court in favour of a broad construction of EU law principles.

A second response to the claim that the vagueness of the treaties justifies the ECJ’s teleological approach is that vagueness is a vice which afflicts national law, such as the continental civil codes, and international legal texts, such as treaties, as much as provisions of EU law and yet neither national nor international courts have adopted a teleological method of interpretation analogous to that of the ECJ. In both the domestic and international law contexts, as has been shown, textualism predominates, with teleology playing a subordinate role. Decisions which contradict the text of the law are forbidden in both national and international law, save in extremely limited circumstances, as discussed above. Moreover, decisions which exceed the text of the law are only deemed permissible in civil law jurisdictions in limited circumstances and by reference to an argument, ie the supposed comprehensiveness of the civil codes, which have no applicability in the context of EU law, which is not based on a presumption of comprehensiveness but rather the opposite, that of limited competences. This point has been discussed in more detail above.

2.3.2 Gaps

160 Conway (n16) 82, 144.
The second practical argument in favour of the teleological approach of the ECJ shall now be discussed. This is the claim that EU law contains ‘gaps’ which must be filled by the court if EU law is to work effectively in practice. Everling has stated that ‘[t]he provisions of the Treaty...are fragmentary and incomplete.’\textsuperscript{142} Similarly, Slynn has stated that ‘[t]he Court has to deal...with a Community structure containing gaps which it is intended should be filled by one means or another.’\textsuperscript{142} Arnull expresses similar views, noting that ‘[i]t cannot be inferred that...there was agreement that the Treaty did not cover issues that were not expressly dealt with.’\textsuperscript{143} Article 19.1 TEU is frequently cited in order to justify the ECJ’s assumption of a gap-filling role. It provides as follows:

> The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

It is frequently argued that the contradistinction in this provision between ‘the Treaties’ and ‘the law’ indicates that the law which it is the duty of the court to observe consists of more than the sum total of the Treaties’ provisions and, thus, that the EU legal order contains gaps. Pescatore was among the first to seize upon this contradistinction and to use it as a basis for teleological, gap-filling, interpretation. He said that ‘the law created by the Treaties, and all that stems from it, is merely the nucleus of a more extensive legal order, that of ‘law simpliciter, observation of which the Court of Justice must ensure.’\textsuperscript{144} He went on to suggest that the duty to observe this cosmic ‘law’ ‘leaves the Community judge complete liberty in the construction of judicial solutions.’\textsuperscript{145} Pescatore, for his part, believed that the ECJ was required to examine general principles of law and comparative law in the construction of such solutions.\textsuperscript{146} Rinze similarly invokes Article 19 TEU as validating the ECJ’s gap-filling.\textsuperscript{147} Rasmussen has responded to such invocations of Article 19 TEU by saying that, simply because the word ‘law’ means something different to ‘Treaties’ does not mean that the ECJ may imbue it with whatever content it pleases.\textsuperscript{148} Conway similarly notes that the word ‘law’ in Article 19 TEU could just as easily be interpreted to refer to ‘something fixed and stable that the Court is to apply and ensure is upheld, but not to change or supplement

\textsuperscript{141} Ulrich Everling ‘On the Judge-Made Law of the European Community’s Courts’ in O’Keefe and Bavasso (n134) 33.
\textsuperscript{143} Arnull (n23) 412. See also, Gulmann (n3) 192.
\textsuperscript{144} Pescatore (n4) 75.
\textsuperscript{145} ibid 84.
\textsuperscript{146} ibid 75-77.
\textsuperscript{147} Rinze (n52) 58-59.
\textsuperscript{148} Rasmussen (n3) 207.
Hence, it is implausible to seize upon a single, rather nebulous, linguistic curiosity in the Treaty as a basis for undermining the structures and rules established with greater precision in the remainder of the document. It is submitted, therefore, that Article 19 TEU cannot justify decisions which either contradict or exceed the text of the law. However, let us assume for a moment that Article 19 TEU does, indeed, confer a gap-filling role on the court.

The first question that must be addressed is how to define a ‘gap.’ As Conway has noted, every legal system recognizes claims that fail. Thus, if a judicial gap-filling function is recognized, without clear limits being imposed upon it, judicial power becomes unlimited.\(^\text{190}\) If, for example, one defines a gap as meaning simply the failure of a text to expressly and exhaustively address a particular issue, it is possible to justify the Chernobyl decision as filling a gap. It might be argued that, because the Treaty did not say whether or not the Parliament could take an action for annulment, the issue was left for the court to decide pursuant to its gap-filling function. However, by providing a list of the other institutions of the EU which could take such an action, and by omitting Parliament from that list, the Treaty necessarily and unmistakeably implied that the Parliament could not. Thus, such a broad definition of ‘gap’ is not acceptable, because the meaning of a text necessarily includes all that its language fairly implies. How then are we to define a ‘gap’?

Hartley states that ‘a true gap exists only where there is reason to believe that the authors of the text intended a given topic to be covered.’\(^\text{151}\) In civil law jurisdictions the notion of a gap is defined similarly. German law defines a lacuna as a ‘gap in the law which was intended and planned to be comprehensive.’\(^\text{152}\) Basing his definition on civil law sources, Curran defines a gap as ‘that unsettling vacuum in the law, that absence signaling the deficiencies of legislative foresight.’\(^\text{153}\) Thus, the civil law conception of a gap refers to an omission in the law arising from the failure of the legislature to foresee the issue before the court. The power of judges in civil law jurisdictions to fill gaps is very limited due to concerns that an expansive judicial approach to supplying supposed legislative omissions would amount to judicial legislation.\(^\text{154}\)

In the context of EU law, an additional reason for caution in this regard, as mentioned above, is that EU law is not supposed to be comprehensive in its coverage, unlike the civil

\(^{\text{190}}\) Conway (n16) 128.
\(^{\text{151}}\) Conway (n16) 168.
\(^{\text{152}}\) Hartley (n132) 44.
\(^{\text{153}}\) Rinze (n52) 57.
\(^{\text{154}}\) Curran (n80) 98.
\(^{\text{155}}\) ibid.
codes. For these reasons, the civil law conception of a 'gap,' which may properly be filled by judicial interpretation, is to be preferred to any broader conception, which would confer on the ECJ an excessive degree of power.

On this definition, can any of the decisions discussed above, which either exceed or contradict the text of EU law, be justified as legitimate exercises in judicial gap-filling? *Van Gend en Loos* certainly cannot be so justified. As noted above, prior to that decision the extent of the direct applicability of international law norms had always been determined by national law. The failure of the Treaty to expressly disavow this widely accepted practice may, therefore, be taken as an indication that the issue of the Treaty's direct applicability was foreseen by the Treaty's framers and that they intended the traditional international law rule to apply. Thus, the direct effect cases cannot be justified as legitimate exercises in gap-filling because the issue of direct applicability was not something the framers of the Treaty had omitted to deal with through inadvertence or lack of foresight. The same goes for the supremacy cases, which fall under the same background rule of international law.

As to the human rights cases, and as noted above, recent research affirmatively establishes that the omission to provide for human rights protection in the Treaty of Rome was deliberate.159 Thus, *Internationale Handelsgesellschaft* and its progeny cannot be justified as a legitimate exercise in gap-filling either.

It is also doubtful whether the state liability cases may be justified on this basis either. The framers of the Treaty had plainly foreseen the possibility of Member States defaulting on their obligations and had made provision to deal with it, namely through infringement proceedings brought by the Commission.

A regards the decision in *Larsen*, it is not credible to argue that the framers of the Treaty, who had drafted a provision which prohibited the imposition of discriminatory taxes on imports, did not foresee a need for a similar prohibition in respect of exports. Imports and exports are two sides of the same coin. Where the legislature has regulated one but not the other this is likely to have been intentionally done. Thus, *Larsen* does not address a gap in the Treaty either.

As regards the *Chernobyl* decision, it may be said with overwhelming confidence that the decision to omit Parliament from the list of institutions empowered to bring an action for annulment reflected a deliberate choice on the part of the framers of the Treaties.

159 de Búrca (n21).
Similarly, in *Environmental Crimes*, the framers of the EU Treaty system had actually established a procedure by which criminal offences could be created at the EU level, *ie* through the mechanism of the Third Pillar. By deciding that the general EU competence, under the First Pillar, in the field of environmental protection, implicitly conferred a power to create criminal offences and that environmental offences must, perforce, and for that reason, be created under the First rather than the Third Pillar, the ECJ undermined the scheme adopted by the framers of the Treaty and enhanced its own powers, given that measures adopted under the First Pillar were amenable to judicial review whereas, at the time the case was decided, those adopted under the Third Pillar were not. The foregoing, while making no claim to comprehensiveness, should suffice to demonstrate that a large number of ECJ decisions, which exemplify its teleological approach to interpretation, cannot be justified as legitimate efforts to fill genuine gaps in the law.

### 2.3.3 Effectiveness

The argument that teleological interpretation is necessary to fill 'gaps' in EU law is often allied with another, slightly different argument, that the effectiveness of EU law would be compromised if any other method were to be adopted. Thus, Everling has suggested that the contradistinction between the 'law' and 'the Treaties' in Article 19 TEU means that the court must 'develop the law to give the Community a firm legal base.' Pescatore, similarly, states that 'the building of Europe must be a design that works in practice...' According to Slynn, the court sees its role in cases such as *Van Gend En Loos* as being 'within the limits of judicial competence...to ensure that the system created worked and that the task spelled out in the Treaty was furthered...'

Gulmann has stated that 'for courts to interpret provisions in order to give them practical effect is not unusual.' In international law, the obligation contained in Article 31 VCLT, to interpret a treaty 'in good faith,' has been interpreted as importing something akin to an effectiveness requirement into treaty interpretation. The obligation is encapsulated in the Latin maxim *ut res magis valeat quam pereat*, which has been said to have a lineage

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156 U Everling 'On the Judge-Made Law of the European Community's Courts' in O'Keefe and Bavasso (n130) 35.
157 Pescatore (n4) 42.
158 Slynn (n142) 416-418.
159 Gulmann (n3) 200.
160 'So that the matter may flourish rather than perish.' See, AX Fellmeth and M Horwitz *Guide to Latin in International Law* (OUP, 2009).
stretching back to Ulpian.\footnote{ibid.} However, in international law, this obligation is confined to preferring an interpretation which would assign a meaning to a word or provision over one which would render the word or provision redundant.\footnote{Gardiner (n10) 148, 159.} This international law obligation does not impose on tribunals charged with the interpretation of a treaty an obligation to guarantee the effectiveness of the treaty as a whole.\footnote{Bredimas (n3) 78.} By contrast, as Bredimas has noted, when the ECJ seeks to justify a particular decision by reference to the need to ensure the effectiveness of EU law, ‘it puts together certain Treaty provisions and combines them in order to deduce a result that cannot be imputed with precision to either of these.’\footnote{Ibid. See also, Lasser (n65) 213.} For example, in Van Gend en Loos, the court referred to the purpose of the Treaty, as discerned from its preamble, along with other references to the involvement of individuals in the workings of the EU, to justify the holding that EU law was capable of having direct effect in national law. No provision of the Treaty expressly provided that it should have direct effect in national law.

The court’s approach to the question of effectiveness enables it to refashion the treaties so as to achieve any result it deems desirable. Any argument which enhances the power of EU institutions, amplifies the obligations imposed by EU law, or widens the scope or extent of the remedies available for its breach, is capable of being justified on effectiveness grounds. To accede to the effectiveness argument in favour teleological interpretation is to accept unlimited judicial law-making power.\footnote{Hartley (n132) 60.} Thus, the argument that the teleological approach of the ECJ may be justified by the need to ensure the effectiveness of EU law must be rejected.

2.3.4 Political Paralysis

The original adoption of a teleological approach by the ECJ has been said to have been justified on the basis that the EU legislature had not adopted the measures necessary to give effect to the principles of the Treaty of Rome by the time the transitional period had elapsed. Dehousse, for instance, has said that this legislative inactivity compelled the court to intervene.\footnote{Dehousse (n63) 128.} Scheingold notes the ‘obvious tendency to thrust upon the Court difficult jobs
that the other institutions have failed to deal with in a satisfactory manner. Madduro similarly states that 'deadlocks in the legislative process lead the Court to supplement the work of the Community legislative process.' Other scholars have echoed such sentiments.

There is no doubt that the court's teleological approach has occasionally compensated for a failure of political will among the Member States. For example, the doctrine of direct effect certainly enabled many of the objectives of the Treaty of Rome, which had been thought to require secondary legislation, to be achieved where they otherwise might not have been. For example, the doctrine made it unnecessary to adopt secondary legislation in order to give effect to the free movement principles of the Treaty, the very building blocks of EU law. Thus, the court's teleological approach can be credited with breaking or, more accurately, bypassing many a political impasse.

However, there are several reasons for believing that the argument from political paralysis cannot justify or explain the court's teleological approach. First, it is not capable of explaining a large number of the court's teleological decisions. For example, the court's decisions in the realm of fundamental rights, Internationale Handelsgesellschaft and its progeny, cannot be justified on this basis. The absence of explicit human rights protection in the Treaty of Rome did not arise from inertia on the part of the Member States but, rather, from a conscious and deliberate decision not to include a catalogue of human rights in the Treaty. Thus, fundamental rights protection was not among the objectives of the EU that were compromised by political paralysis. Indeed, it simply was not an objective of the EU. Nor can the Environmental Crimes decision be explained on that basis. In that case the ECJ stopped the Member States from improving EU standards of environmental protection as they had planned to do, through the creation of certain criminal offences under the Third Pillar, on the basis that they should have been created under the First Pillar. The motivation seems to have been to preserve the court's powers of judicial review over the resulting legislation, which existed under the First Pillar but was absent from the Third. Thus, far from supplying the deficit left by political inactivity, Environmental Crimes saw the court penalizing the political institutions for an excess of initiative.

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167 Scheingold (n12) 273.
168 Maduro (n59) 18.
169 See also, Pescatore (n4) 89.
170 Dehousse (n63) 39.
171 Rasmussen (n3) 185.
172 de Búrca (n21).
Second, the political paralysis argument in favour of the court's teleological approach arguably misconstrues the court's institutional role, as set out in the Treaties. Specifically, the court is confined to the modest task of ensuring 'that in the interpretation and application of the Treaties the law is observed.' This formulation would not appear to empower the court to supply every defect in the work of the political branches. On the contrary, as Rasmussen has said, Article 19 TEU conceives the role of the court 'in classical, continental European, Montesquieuian, third power terms.'

Third, the political paralysis argument implies that the court must make a determination as to when the political process is malfunctioning. In order to make such a determination one must have some conception of what an optimal legislative process would look like and, thus, some conception as to what the values and priorities of the legislature should be. In this respect, the argument from political paralysis raises similar issues as John Hart Ely's theory of judicial review under the U.S Constitution. Ely advocated robust judicial intervention, beyond the Constitution's text, in circumstances where it could be demonstrated that the political process was systematically malfunctioning, to the detriment of discrete and insular minorities. Bork criticized Ely's views in this regard. He says: 'How does one know that a political market, which appears to be democratic, is malfunctioning? I suspect one knows that because one dislikes the way the vote turned out.' Thus, to invite judges to determine when the political system is malfunctioning is to encourage judicial embroilment in politics. Once more, this seems to go beyond the modest role envisaged for the court in Article 19 TEU.

2.3.5 The Multilingual Nature of EU Law

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173 Article 19.1 TEU.
174 Rasmussen (n3) 202.
175 Ibid, 381.
The EU Treaties are authentic in twenty-three different languages, with each language version carrying equal weight. Many scholars have noted the problems which may arise from divergences among the various official language versions. Fennelly, for instance, states that '[d]ivergences in nuance, emphasis, and even substantive meaning are commonplace, indeed inevitable. Translation is an art, not a science.' Albors-Llorens similarly argues that '[m]ultilingualism can be a disadvantage given that certain terms may have different meanings in different languages... Pollicino echoes such sentiments: 'the multilingual nature of E.C. law...implies that the expressions contained in the Treaties are beset by the difficulties involved in expressing their meaning in various linguistic versions.' Millett has argued that 'the multilingual nature of Community legislation necessarily reduces the importance of the literal method of interpretation.' Such sentiments are commonplace throughout the scholarly literature on the ECJ’s methods of interpretation.

Thus, many scholars have sought to justify the teleological approach of the ECJ by arguing that the possibility of divergences between the different language versions of EU law renders the adoption of textualist methods of interpretation impossible. It is certainly true that divergences among the different language versions are fairly commonplace. For example, Hartley points out that the English text of the Unfair Contract Terms Directive uses the word ‘goods’ whereas the French version refers to ‘biens,’ a term wider than ‘goods,’ and capable of embracing property of any kind, whether movable or immovable. In Chapter 7 of this thesis the problems raised by the multilingualism in EU law shall be addressed and some suggestions made as to how these ought to be addressed. At this point it is simply necessary to demonstrate that the claim that the multilingual nature of EU law justifies the teleological approach of the court cannot be sustained. There are a number of reasons for this.

178 See, Article 55 TEU.
179 Fennelly (n3) 660-663.
181 Pollicino (n3) 289.
182 Millett (n3) 164-165.
184 Hartley (n128) 72. Interestingly, the Appellate body of the World Trade Organization was faced with precisely the same problem, the difference between the words ‘biens’ in French and ‘goods’ in English, in US - Softwood Lumber IV WT/DS257/AB/RW, 17, February, 2004 DSR 2004: II, 571.
First, as Fennelly has observed, ‘[l]inguistic conflict or ambiguity is not, in any sense, a pre-condition for the application of the teleological or schematic approach.’ Thus, many of the decisions of the ECJ which exemplify its teleological approach cannot be justified on the basis of a divergence between the different language versions of the Treaty. None of the cases, which I have identified above as exceeding the text of the Treaty, may be so justified. In such cases, by definition, no provision of the Treaty addressed the question before the court. Thus, the Treaty contained no provision, in any of its language versions, providing for the doctrine of direct effect or supremacy. Moreover, none of the language versions of the Treaty conferred upon the ECJ a jurisdiction in the field of human rights; thus, Internationale Handelsgesellschaft also cannot be justified on this basis. In addition, no language version of the Treaty made provision for Member State liability in damages for failure to transpose EU law provisions into national law; thus Francovich also cannot be justified on the basis of linguistic divergence. The same goes for the Larsen case. Citation seems unnecessary in order to establish that ‘import’ does not mean ‘export’ in any of the official languages of the EU. The same may be said of the decisions I have identified as contradicting the text. Thus, Les Verts, Chernobyl, Commission v Belgium and Environmental Crimes did not raise any issue of linguistic divergence. Similarly, as shall be demonstrated in greater detail in Chapter 10 of this thesis, the conclusion of the ECJ in Åkerberg Fransson, that the phrase ‘implementing Union law,’ which delineates the scope of Member States’ obligations under Article 51 of the EU CFR, can encompass derogations from EU law, cannot be justified by reference to any of the authentic language versions of the CFR. Thus, although the multilingual nature of EU law should engender caution among lawyers in relying on the apparent meaning of a single language version, it surely cannot be invoked to justify decisions of the kind criticized here, which involve either expansions of the text of the law or patent contradiction of its terms.

Second, even in cases which do involve a genuine divergence among the different language versions of the Treaty, it is not clear that teleological interpretation is necessary to bridge such divergences. Derlén identifies three approaches to resolving divergences between the different language versions of a text: classical reconciliation, reconciliation and examination of purpose, and a radical teleological approach. The respective merits of each of these approaches shall be discussed in detail in Chapter 7 of this thesis. Suffice it to note at this point that other techniques, apart from teleological interpretation, exist in order to reconcile

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185 Fennelly (n3) 665.
186 For the view that the court exceeds the meaning of the text in all language versions on occasion, see Rinze (n52) 60.
the different language versions of a particular law. The conclusion that a teleological method of interpretation must be adopted due to the multilingual character of the law being interpreted is not axiomatic.

Conclusion

In the first section of this chapter certain moral-political justifications which have been put forward by scholars to justify the teleological approach of the ECJ were examined; in the second section certain traditional arguments which have been advanced in its defence were scrutinised; and in the third section the practical arguments which have been made in its favour were considered. As discussed in detail above, none of the arguments which have thus far been advanced provides a convincing justification for the approach adopted by the court in some of its most important and well-known decisions.
3
A CRITIQUE OF THE COURT’S TELEOLOGICAL APPROACH

Introduction

In Chapter 1 of this thesis the ECJ’s teleological method of interpretation was described. It was noted that the court, in its application of this methodology, frequently exceeded and contradicted the text of the law. In Chapter 2 arguments which had been put forward to defend the teleological method of interpretation were considered. None of them were found to be capable of justifying the approach of the court. In this chapter a number of affirmative arguments shall be made in support of the conclusion that the teleological method of interpretation is fundamentally undesirable.

3.1 Teleological Interpretation and the Intention of the Law-Maker

First, the teleological approach of the ECJ assumes that the legislature wished its purposes to be pursued by the courts in their interpretation of the law. This assumption is not necessarily justified, given that legislators only ever wish to see their purposes pursued up to a certain point. For example, in Van Gend En Loos, the court stated

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states.

Thus, in Van Gend En Loos the court reasoned that, since the framers of the Treaty of Rome wished to create a common market which would be of direct concern to citizens, they must have implicitly abrogated the traditional practice, under which it was left to domestic law to determine the direct applicability or otherwise of international law principles. The premise

1 Joseph Raz Between Authority and Interpretation (OUP, 2009) 293.
2 Case 26/62; [1963] ECR 3 Van Gend En Loos v Netherlands Inland Revenue Administration.
3 ibid p. 12.
of this argument is certainly true, given the manner in which the preliminary reference procedure enabled the ECJ to contribute to the adjudication of disputes between individuals, and given the other references to individuals in the Treaty. However, the conclusion that EU law norms must therefore be capable of having direct effect does not follow logically from this premise. It is equally possible that the references to individuals in the Treaty were intended to indicate that individuals would benefit from the Treaty once its provisions had been given effect to in national law. Thus, Van Gend En Loos is an example of a case in which the ECJ sought to give effect to the purpose of a legal provision in a manner and to a degree which probably exceeded the intentions of its framers.¹

3.2 Teleological Interpretation and the Problem of Means

Second, teleological interpreters must perforce choose one amongst a variety of means of achieving the law's putative purpose. Even if the court could accurately identify the purpose sought to be advanced in the legislation under construction, it is doubtful whether the court could also identify the means the legislature would have used to achieve that purpose.² For example, in the case of Francovich and Bonifaci v Italy,³ the court held that the effectiveness of EU law would be weakened 'if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.'⁴ Thus, the court recognized an individual right to damages against Member States where they breached EU law. This right was made subject to a number of limitations.⁵ What is significant for our purposes about the Francovich decision is that there were other means of ensuring the effectiveness of EU law aside from recognizing a right to damages. Not all legal wrongs automatically give rise to a right to damages. Therefore, by creating a right to damages in Francovich the ECJ usurped the right of Member States to choose the means by which the law would be rendered effective.

3.3 Teleological Interpretation and Multiple Purposes

¹For further discussion of Van Gend En Loos, see Chapter 1 of this thesis.
²Raz (n1) 293.
³C-6/90.
⁴C-6/90 para. 33.
⁵For a detailed description of Francovich, see Chapter 1 of this thesis.
Third, laws generally reflect a compromise among competing purposes, which means that an exclusive focus on one of these, to the exclusion of all others, is inappropriate. For example, as recounted in detail in Chapter 1, in the case of Statens Kontrol Med Aedle Metaller v Larsen, the ECJ held that a ban on import taxes implied that the Treaty sought ‘to guarantee generally the neutrality of systems of internal taxation with regard to intra-Community trade’ and, therefore, that discriminatory taxes on exports were also prohibited. There may have been a variety of reasons why the framers of the Treaty of Rome prohibited taxes on imports but not on exports. Perhaps they wished to allow Member States to reduce by means of taxation the volume of exports of goods which were ‘particularly valuable or especially sought after,’ as the court itself noted. Either way, it cannot be concluded that, because a single legal provision pursues a particular objective up to a certain point, the law is solely committed to achieving that objective. Rather, the fact the objective is pursued only up to a certain point in the text indicates the existence of other objectives, which the law-maker also valued, and thus an interpreter ought to give effect to the legislature’s objectives only to the extent that these are concretized in the text. This is especially true of international treaties, which are agreements between different states which hold ‘conflicting social and political beliefs.’

3.4 Teleological Interpretation and the Level of Generality Problem

Fourth, the ECJ frequently states the purpose of the law at an extremely high level of generality. Lasser notes that the court habitually invokes a number of ‘meta purposes,’ including effectiveness, uniformity, legal certainty, and legal protection. This widens the range of the court’s interpretative options, and enables it to arrive at the conclusion it deems to be most desirable on policy grounds. In Commission v Council (‘ERTA’), the court held

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* Case 142/77.

* ibid, para. 23.

* ibid para. 26.


17 For a thorough description of the highly general nature of the court’s teleological approach, see Lasser (n14) 207-236. See also, Gerard Conway The Limits of Legal Reasoning and the European Court of Justice (CUP, 2012) 3, 22, 153, 243. For criticism of the highly generalized nature of teleological
that the Member States, by conferring on the EU authority to create common rules in the field of transportation, had alienated their right to enter into agreements with third parties in the same field. The court held that the retention by Member States of a power to enter into such agreements would compromise the ‘the unity of the Common Market and uniform application of Community law.’ No provision of the Treaty conferred a competence on the EU to enter into international agreements in the field of transportation, though it did confer such powers in other fields. In spite of this fact, the court held that the Member States could no longer unilaterally enter into international agreements in the field of transportation, and that the EU had exclusive competence in the field. Thus, in ERTA the court relied on the ‘meta-purpose’ of effectiveness in order to claim a competence which the Treaties did not confer on the EU. Moreover, the Treaty did confer the competence to conclude international agreements in areas other than transportation which suggests, applying the *expressio unius exclusion alterius* maxim, which is discussed further in Chapter 6 of this thesis, that the EU did not have such a power in the field of transportation. As discussed in the previous chapter, arguments based on the effectiveness of EU law are phrased at such a high level of generality that they enable the court to arrive at any conclusion it deems desirable, including conclusions which contradict or exceed the text of the Treaties.

3.5 Teleological Interpretation and the Rule of Law

Fifth, to permit unambiguous text to be overridden by reference to purpose is contrary to the rule of law, because it upsets the expectations of citizens, and renders all legal rules defeasible and questionable. Conway has argued that the ‘[judicial development and evolution of the law found in some of the leading cases of the ECJ is problematic with respect to the rule of law because it undermines the value of certainty and predictability of the law, while potentially subverting the idea that government — including the judicial interpretation, see Antonin M Scalia and Bryan A Garner *Reading Law: the Interpretation of Legal Texts* (Thomson West, 2012) 18-19; Frederick Schauer ‘Formalism’ (1988) 97 Yale LJ 509, 534.

14 Case 22/70.
15 ibid 30.
16 ibid para. 48. However, the court noted that Article 3 of Regulation No 543/69 had conferred a limited competence to enter into international agreements necessary to give effect to that regulation.
17 The Treaty expressly conferred competence on the EU to enter into agreements in the field of tariffs and trade (Articles 113 and 114) and empowered the EU to enter into association agreements (Article 238).
18 ibid para. 30.
19 Schauer (n15) 534.
branch of government is under the laws. For example, the case of *Defrenne v SABENA* concerned the interpretation of Article 119 of the Treaty of Rome, which guaranteed equal pay for equal work between men and women. The text of the provision was addressed exclusively to Member States. However, the court stated that the effectiveness of Article 119 would be compromised if it were not also applicable to private parties. The court, therefore, held that it could be invoked in proceedings against private parties. This outcome could not have been predicted and indeed was excluded by necessary implication by the text of Article 119. Thus, the *Defrenne* decision is an example of a case in which the court’s teleological approach to interpretation disrupted private arrangements by ascribing a meaning to the text of Article 119 which could not reasonably have been predicted in advance.

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22 Conway (n15) 87.
23 Case 43/75 *Defrenne v SABENA* [1978] ECR 1365.
24 Ibid para. 33.
PART III

THE NORMATIVE FOUNDATIONS OF ORIGINALISM
THE EUROPEAN UNION – A CONSOCIATIONAL DEMOCRACY?

‘Death by monotony, by sameness, by loss of identity is – if we are spared destruction in another war – the fate held out by the brave new world of universal control and amalgamation.’

Gerald Brenan The Spanish Labyrinth: the Social and Political Background of the Spanish Civil War (CUP, 1943)

Introduction

In this chapter a theory of democracy in the EU is set out. It is argued that the theory of consociational democracy provides an accurate descriptive account of governance in the EU, and that it is also normatively desirable to conceive of the EU in such terms.

Before entering upon this discussion it is important to contextualise it, by situating the democratic discourse of the EU in the history of post-war European integration. However, the process of European integration can only be properly understood if placed in the more general context of European diplomatic history. In the first section of this chapter the following shall be discussed: first, a tour d’horizon of European diplomatic history from the emergence of the modern system of sovereign states with the conclusion of the peace of Westphalia in 1648 until the end of the Second World War in 1945 will be provided; second, a brief historical outline of the process of European integration from 1945 shall be given, integrating in summary form the main theoretical schools of thought which seek to explain the underlying dynamics of integration; and, third, it shall be argued that an inclusive pan-European democracy on the model of that extant in the Member States of the EU cannot be established due to the existence of deep linguistic cleavages across the continent of Europe.
In the second section of this chapter the concept of consociational democracy shall be introduced. This is a form of government that aims to mediate conflicts and to arrive at satisfactory compromises in societies characterised by deep divisions among different social groupings. In the second section it shall be argued that consociational democracy provides an accurate descriptive account of governance in the EU.

In the third section of this chapter certain normative arguments shall be put forward in favour of the view that the EU ought to be conceived of as a consociational democracy. In addition, it shall be argued by reference to Sir Isaiah Berlin’s theory of value pluralism and John Gray’s theory of agonistic liberalism that nation states ought to be regarded as the centre of their citizens’ sense of political loyalty and identity. In this regard it shall be argued, first, that the emergence of nation states in the modern era liberated much of mankind from the shackles of tribal, creetal, and imperial forms of government; second, that the existence of multiple, culturally autonomous nation states in the EU facilitates mutually beneficial experimentation and competition between them; and, third, that recognising the consociational nature of the EU facilitates peaceful co-existence among nations.

In the third section of the chapter issue is joined with arguments which certain authors have made against conceiving of nation states as the centre of their citizens’ sense of political loyalty and identity and against conceiving of the EU as a consociational democracy. First, the notion that nation states are inherently aggressive is rejected as historically inaccurate; second, it is argued that the recognition of a wide range of legitimate cultural differences between states is not relativistic; and, third, it is argued that the fact that the executive branch of government dominates under a consociational system does not compromise the legitimacy of such systems.

4.1 European Integration

4.1.1 European Diplomatic History 1648-1945

1 The following discussion is derived in large measure from Henry A Kissinger World Order: Reflections on the Character of Nations and the Course of History (Allen Lane, 2014) 1-95.
The modern European system of sovereign states can trace its origins to the Peace of Westphalia concluded in 1648. This compact or, rather, succession of compacts, between the nations of Europe brought an end to the Thirty Years War. That conflict had seen the Protestant princes of northern Europe, supported by Cardinal Richelieu’s France, engage in a near-continuous war against the continent’s other Catholic powers. The effects of the conflict were devastating: a quarter of the population of central Europe perished through the combined effects of war, disease, and starvation. Belatedly, it became manifest to leaders on both sides that the decisive victory of either Protestant or Catholic forces was impossible; a *modus vivendi* would have to be found. The solution ultimately adopted was to recognise the sovereign authority of each state to determine its own religious affiliation. Charles Hill sums up the Westphalian system in the following terms:

> The system required only that its members adhere to a minimal number of practices and procedures which would make it possible for states and other international entities to engage in working relationships even though they might be committed to vastly different, even mutually antagonistic, substantive doctrines and objectives.\(^2\)

The European states pioneered the practice of establishing reciprocal diplomatic missions in each other’s capital cities. This recognition of the right of each state to govern its own internal affairs in an autonomous fashion remained the lodestar of European diplomacy for several centuries thereafter and preserved Europe from the ravages of total war until the French revolutionary wars engulfed the continent a century and a half later. Henry Kissinger notes that, in the aftermath of Westphalia, ‘[l]imited wars over calculable issues would replace the era of contending universalisms, with its forced expulsions and conversions and general war consuming civilian populations.’\(^3\) He further notes that the settlement of 1648 established the concept of the balance of power as the logical corollary of state sovereignty, the central organising principle of European diplomacy. According to that principle, the distribution of power among the major states of the continent would be such that none of them could achieve hegemony over the others.

The balance of power was preserved in Europe, and a general conflagration such as the Thirty Years War avoided, during the remainder of the seventeenth century and until the final decade of the eighteenth. This is not to say that Europe did not see war during this period but merely that the all-consuming and terrible conflict seen during the Thirty Years

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\(^3\) Kissinger (n1) 30.
War was replaced by more limited wars centred on discrete disputes among the great powers of Europe.

The French Revolution changed all that. The new republic engaged in a pattern of warfare against its neighbours ostensibly designed to liberate their peoples from the yoke of aristocratic and monarchical oppression. In adopting this course the revolutionary leaders overthrew the key assumption underpinning the Westphalian system, namely the right of states to adopt their own domestic constitutional structures and religious practices. The repudiation of this principle reached its apotheosis during the reign of Napoleon Bonaparte, who had overthrown the democratic institutions established by the Revolution after 1789 and had himself declared First Consul in 1799, eventually crowning himself Emperor of the French in 1804. Napoleon’s extraordinary military genius enabled him to conquer vast tranches of territory across the continent, extending from Spain in the west to Poland in the east, and stretching as far south as Calabria and as far north as Holland. He was finally defeated, in 1815, by a grand coalition consisting of the few continental powers which he had not succeeded in defeating militarily.

In the aftermath of the upheaval of the French Revolutionary and Napoleonic wars, the statesmen of Europe gathered at a congress in Vienna tasked with establishing a new order which would restore stability to a continent wracked by two decades of all-consuming warfare and destruction, which had seen the defenestration of the ancient aristocratic order. Though many of the crowned heads of Europe were restored to power after the defeat of Napoleon, the eternal verities of the ancien régime had been permanently discredited.

The Vienna system operated through a series of interlocking alliances. The Quadruple alliance, consisting of Britain, Prussia, Austria, and Russia had as its principal aim the maintenance of the territorial integrity of the states of Europe. The Holy Alliance, consisting of Prussia, Austria, and Russia, sought to prevent the overthrow by means of revolution of the legitimate, ie monarchical, authorities of the major European states. The Vienna system also established a system of periodical diplomatic conferences, to set out the general principles under which the system would operate and to deal with crises.

Kissinger sums up the achievements of the new international system which emerged from the Congress of Vienna as follows:

The order established at the Congress of Vienna was the closest that Europe has come to universal governance since the collapse of Charlemagne’s empire. It produced a consensus
that peaceful evolutions within the existing order were preferable to alternatives; that the preservation of the system was more important than any single dispute that might arise within it; that differences should be settled by consultation rather than by war.

He further notes that 'the period between 1815 and the turn of the century was Europe's most peaceful, and the decades following the Congress of Vienna were characterized by an extraordinary balance between legitimacy and power.'

The Holy Alliance eventually disintegrated as a result of the Crimean War in 1853-1856, in which Austria and Russia took opposing sides, while the Vienna system itself was further destabilised by the emergence of nationalism and the revolutions of 1848, which further weakened the hold of traditional aristocratic elites on power. In the final decades of the nineteenth century the emphasis of the Vienna system shifted from the preservation of a European balance of power in the collective interests of all of the great continental powers to the manipulation of the balance of power by the great powers to further purely national interests. Predictably, the result was greater confrontation between the great powers.

This began with Bismarck's ascent to power as Minister-President of Prussia. There followed a series of wars, both minor and major, between Prussia and Austria in 1866, Prussia and France in 1870, culminating in the establishment of a united Germany in 1871. This latter event permanently unsettled the European balance of power, by creating an unquestionably dominant state on the continent. Nonetheless, the peace was preserved in the period immediately following unification by Bismarck's creation of 'a dizzying series of partly overlapping, partly conflicting alliances...with the aim of giving the other great powers - except the irreconcilable France - a greater interest to work with Germany than to coalesce against it.' However, Bismarck's successors proved incapable of maintaining the finely tuned and sensitive equilibrium which he had so painstakingly established.

Multiple theories have been advanced to explain the causes of the outbreak of the First World War in 1914. It is plainly beyond the scope of this thesis to enter into that debate. However, it is important to note that it was the first general war to take place between the great powers since the Crimean War in 1853-1856. It was the first total war, involving the

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Kissinger (n1) 60-61.
Kissinger (n1) 61.
Kissinger (n1) 78.
mass mobilization of the populations of all of the great powers of Europe, since the Napoleonic Wars, which had ended almost a hundred years earlier.

In the aftermath of the First World War the great powers of Europe made no attempt to re-establish a balance of power on the traditional model, as they had done at the Congress of Vienna in the aftermath of the Napoleonic Wars. Instead, they attempted to establish a new international order based on shared principles, with international organisations such as the League of Nations being established to facilitate the arbitration of disputes between states. However, after the Bolshevik seizure of power in Russia in 1917, and the rise of fascist dictatorships in much of Europe in the 1920s and 1930s, the new international scheme of shared principle came to be rejected by an increasing number of powers. The western democracies failed to respond to numerous violations, either of existing treaties or of the charter of the League of Nations, including Italy’s invasion of Abyssinia in 1935, Hitler’s re-militarisation of the Rhineland in 1936, the Anschluss of 1938 under which Germany annexed Austria, and Germany’s annexation of the Sudetenland in 1938 and then the entirety of Czechoslovakia in 1939.

At long last, after each of these numerous violations had been permitted to occur without response and without sanction, Britain and France declared war on Germany in September 1939. The conflict that ensued soon engulfed much of the globe and, in the event, claimed somewhere between forty and fifty million lives.7

4.1.2 Democracy and European Integration: 1945 to present

The notion of establishing a transnational government, encompassing all the belligerents of the recent conflict, must have seemed a fantastically ambitious project amid the ruined cities, scorched landscapes, and starving populations of Europe on VE Day, the 8th of May 1945. Nevertheless, the destruction wrought by the Second World War, the unmitigated horror of the Shoah, and the somewhat more tangible inducement of American Marshall aid conditioned on pan-European political and economic co-operation,8 demanded a bold response on the part of the newly elected leaders of the benighted continent.

In May 1950 Robert Schuman, the French Foreign Minister, issued a statement known as 'the Schuman Declaration' which called for the coal and steel resources of Germany and France to be combined and placed under the control of a joint administration, as a means of preventing the re-emergence of Franco-German military rivalry. The European Coal and Steel Community (ECSC) was established in 1951.

In May 1952 the leaders of France, Italy, West Germany, the Netherlands, Belgium, and Luxembourg signed the European Defence Community (EDC) Treaty, which would have merged the armed forces of the signatory states had it ultimately come into effect. The EDC was followed soon after by the European Political Community (EPC) Treaty, which was signed in March 1953. Both the EDC and the EPC were unambiguously federal in nature, incorporating inter alia provisions for a common European defence and for the European Court of Human Rights to consider the compliance by the EPC institutions with the European Convention on Human Rights. The EPC and EDC proposals represented the apotheosis of federalist influence in the process of European integration but these twin projects failed after the French National Assembly rejected the EDC Treaty in August 1954. Brendan Simms notes that in the aftermath of the failure of the EDC, 'whatever else it would be, 'Europe' would not be a mighty union on the lines agreed by the thirteen American states in the late 1780s.'

In the aftermath of the failure of this federalist initiative, the project of European integration was pursued by more pragmatic and incremental means. Thus, in the early years of European integration the focus of officials in the institutions of the EU, and of integration theorists alike, was on finding solutions to concrete problems which European countries shared in common. Issues of political legitimacy and accountability were deferred till another day.

At a meeting held at Messina in June 1955 the leaders of the ECSC agreed to form a customs and economic union. The Treaty of Rome, concluded in March 1957, put this design into effect by establishing the European Economic Community (EEC). The signatories also established a common agricultural policy to subsidize agricultural incomes, at least in part in the hope that this would inoculate rural voters against the appeal of fascism, small

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farmers having been one of the strongest bases of support for the various fascist parties of Europe in the interwar years.\textsuperscript{11}

The architects of the EEC were relatively unconcerned with the issue of democratic legitimacy. Mancini has gone so far as to say that ‘the Community was never intended to be a democratic organisation.’\textsuperscript{12} Chrysochoou notes that '[t]he European Economic Community (EEC)... approximated more closely a standing diplomatic conference in which the Member States retained the right to block any decision of which they strongly disapproved.'\textsuperscript{13} Thus, it was assumed by the leaders of the original Member States of the EEC that the process of European integration would be controlled by the Member States, which were themselves democratic and, thus, that no issue as to its democratic legitimacy arose.

From the very outset of the process of integration, however, there were tensions between those who conceived of the integration project as an innovation the scope of which fell to be exclusively delimited by the Member States and those whose ultimate ambition was to establish a federal state on the model of the United States of America.\textsuperscript{14} Michael O’Neill notes that '[t]he discourse between the statecentric and supranational paradigms, in both its ideological and academic expressions, has provided the debate on European integration with its enduring axiomatic theme.'\textsuperscript{15}

In the 1960s the leading voice in favour of the state-centric conception of the EU was the President of France, General Charles de Gaulle. He stated that the Member States were ‘the only entities that have the right to command and the authority to act.’\textsuperscript{16} The General’s views in this regard received concrete expression in the Luxembourg accords of 1966, under which the Member State governments agreed that the European Council would proceed by unanimity where any of them perceived their vital national interests to be affected by the proposal being made.\textsuperscript{17} This agreement was reached after France had boycotted meetings of the Council of Ministers in protest at the EEC’s policies in the areas of finance and agriculture and in an attempt to prevent the introduction of majority voting in the Council,

\textsuperscript{11} Alan S Milward \textit{The European Rescue of the Nation State} (Routledge, 1992) 30.


\textsuperscript{13} Dimitris Chrysochoou \textit{Democracy in the European Union} (Tauris Academic Studies, 1998) 155.

\textsuperscript{14} Richard McAllister \textit{From EC to EU: An Historical and Political Survey} (Routledge, 1997) 19.


\textsuperscript{16} McAllister (n14).

\textsuperscript{17} Jonathan Fenby \textit{The General: Charles De Gaulle And the France he Saved} (Simon & Schuster, 2010) 543; McAllister (n14) 31-35; O’Neill (n15) 6.
which the General regarded as an unacceptable abrogation of French national sovereignty. Predictably, the Luxembourg accords had the effect of considerably delaying the legislative programme of the Community and succeeded in frustrating the ambitions of supranationalists until the ascent of Jacques Delors to the Presidency of the Commission in 1985.

The state-centric view of European integration held by De Gaulle found its counterpart in the work of the so-called ‘realist’ theorists of integration. Foremost among them in the early days of the EU was Stanley Hoffmann. He argued that Member State governments were the most influential force in driving the process of integration forward. In later years Andrew Moravcsik adapted the realist paradigm on EU governance into what he called the ‘liberal intergovernmentalist’ school of integration theory. He summed up his theory in the following terms:

the EC can be analysed as a successful intergovernmental regime designed to manage economic interdependence through negotiated policy co-ordination. Refinements and extensions of existing theories of foreign economic policy, intergovernmental negotiation, and international regimes provide a plausible and generalizable explanation of its evolution. Such theories rest on the assumption that state behaviour reflects the rational actions of governments constrained at home by domestic societal pressures and abroad by their strategic environment. An understanding of the preferences and power of its Member States is a logical starting point for analysis. Although the EC is a unique institution, it does not require a sui generis theory.

The most thoroughgoing defence of the view that the process of European integration has been and remains controlled by the Member States is provided by Alan Milward, the foremost historian of the EU. Milward has demonstrated that the objective of European integration was to preserve and consolidate the post-war European political consensus, which involved greater state provision of welfare and services than had ever been seen before. In order to pay for this expansion of the welfare state, an expansion of foreign trade was required. As Milward puts it, ‘[t]he will of the European nation-state to survive as an organizational entity depended on the prosperity which sustained the domestic post-war political compromises everywhere. The importance of foreign trade to that prosperity was

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18 Simms (n9) 438.
19 O’Neill (n15) 61-69; Rosamond (n10) 78-81.
great... Thus, in Milward's view the process of European integration was driven from the beginning by the priorities of the Member States.

By contrast with De Gaulle and the authors just discussed, who assert the primacy of the Member States in the governance of the EU, from the beginning there were contending voices expressing the view that integration should be driven forward at the supranational level. Neo-functionalism was the most prominent such theory. Neo-functionalists adopted and modified the functionalist theories of David Mitrany. Rosamond summarizes functionalism in the following terms:

Functionalists...chastised the nation-state as an irrational and value-laden concept. For them, the task was to secure the most efficient method of administering to the real material needs of the people. Often—perhaps predominantly—human welfare could be best served on a post-national, post-territorial basis.

Functionalist thought was technocratic in emphasis; it held the determination and fulfilment of human needs to be a purely scientific, rather than a political, challenge. For this reason, functionalist thinkers sought to substitute rule by bureaucratic directive for decision-making by citizens.

Mitrany's principles were endorsed in part and given practical effect by some of the early pioneers of European integration in the so-called 'Monnet method' of European integration. Adherents to the 'Monnet method' of integration, in common with Mitrany before them, lionized 'the economic technician, the planner, the innovating industrialist, and trade unionist...not the politician, the scholar, the poet, the writer,' and sought to bring about European integration by the mobilization of elites, without involving ordinary citizens, or developing transnational politics. Simms notes in this connection that 'Jean Monnet was so scarred by the French parliamentary rejection of the EDC that he came to believe that unity could only be achieved through stealthy cooperation between the major European states.'

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23 Milward (n11) 223.
25 Rosamond (n10) 2.
26 Rosamond describes technocracy as: 'rule by those who control the means of production, or more precisely those who are endowed with the necessary expertise to understand the complex machinery of the capitalist machinery of production.' Rosamond (n10) 57.
27 Rosamond (n10) 5. See also, O'Neill (n15) 4.
governments, beginning with the economy. However, unlike Mitrany, who believed that an exclusively technocratic approach to the problems of international relations would suffice, the neo-functionalists recognised the abiding significance of politics in international affairs.

Neo-functionalists advocated the establishment of international institutions to manage discrete sectors of the transnational economy. It was thought that economic integration in one area of the economy would create pressure for integration in other economic sectors, which would eventually result in comprehensive economic integration. This was known as the ‘spillover effect’. In addition, neo-functionalists believed that, as material well-being improved as a result of the efforts of the international institutions, the loyalty of those who benefitted would transfer from their nation states of origin to the international organisation. Thus, neo-functionalists, in spite of their focus on economic integration, had political integration as their ultimate objective from the beginning.

However, ‘spillover’ proved sporadic and uneven, and did not unfold according to the optimistic predictions of the early neo-functionalist theorists. This was especially so after the blow to the integrationist agenda delivered by the Luxembourg compromise of 1965, which introduced paralysis into the EU legislative process. In the aftermath of these reverses neo-functionalists altered their theories and scaled back on some of their more optimistic predictions.

In addition to neo-functionalists, another group in favour of the expansion of supranational government in the EU were the federalists. Their most prominent spokesman was Altiero Spinelli. Whereas neo-functionalists sought to achieve integration by means of co-operation between enlightened elites, the federalists favoured the forging of a European political consciousness at the mass level, and the establishment of central political institutions accountable to a pan-European electorate, as the optimal means of advancing the integration

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28 Simms (n9) 421.
29 O’Neill (n15) 34.
30 See also, John Pinder ‘The New European Federalism: the Idea and the Achievements’ in Michael Burgess and Alain Gaignon (eds) Comparative Federalism and Federation: Competing Traditions and Future Directions (University of Toronto Press, 1993) 45, 50.
31 Moravcsik distinguishes between two different kinds of spillover. Functional spillover occurs where incomplete integration undermines the effectiveness of existing policies, and leads to pressure for greater consolidation. Political spillover occurs where the existence of international institutions sets in motion a self-reinforcing process of institution-building. See Andrew Moravcsik (n20) 475.
32 O’Neill (n15) 37-38.
33 O’Neill (n15) 44.
34 O’Neill (n15) 39.
Spinelli argued that nation states were inherently aggressive and that the existence of an international system consisting of separate nation states inevitably led to the domination by the stronger states of the weaker ones. In the 'Ventotene Manifesto,' co-authored by Spinelli and Ernesto Rossi in 1944, the integration of Europe is presented as the only possible alternative to the triumph of totalitarianism: 'should one nation move a step towards more accentuated totalitarianism, it would immediately be followed by the others, drawn through the very same furrow by their will to survive.'

However, while intergovernmentalist and neo-functionalist perspectives on the European project both permeated the European establishment to a significant degree during its early years, the federalists remained a marginal voice, confined to the sidelines, and federalists played little or no part in the process of integration, at least in its early stages. This was due to the initial failure of the European Political Community (EPC) and European Defence Community (EDC), which had been avowedly federal in nature, and their replacement by the more modest ambition of establishing a European customs union, which was ultimately achieved with the ratification of the Treaty of Rome in 1957.

The first significant alteration of the constitution of the EU occurred with the passing of the Single European Act (SEA) in 1986. The SEA brought about a number of important innovations. First, it expanded the competence of the EU into new areas, including environmental and cohesion policy, as well as establishing forums for closer intergovernmental co-operation among Member States in foreign policy. Second, in the aftermath of the SEA qualified-majority voting became the norm in relation to all single market measures. Under the Treaty of Rome qualified majority voting was theoretically permitted but had never been employed before, as a result of the Luxembourg compromise. Third, the EP was given a greater role in the legislative process through the co-operation procedure, and moreover was empowered to veto any future enlargements of the EU. Fourth, the SEA for the first time gave formal recognition to the European Council, ie the

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33 O'Neill (n15) 23–24. See also, Francesca Vassallo 'A European Federalism: From Altiero Spinelli to the EU Constitutional Treaty' in Ward and Ward (n10) 353; Roberto Castaldi 'Altiero Spinelli and European Federalism' in Ward and Ward (n10) 315-320.
35 O'Neill (n15) 25-29.
37 N Piers Ludlow 'From Deadlock to Dynamism: the European Community in the 1980s' in Dinan (n36) 227.
regular meetings of heads of state, which had taken place since the inauguration of the European project, but which had not hitherto had a formal legal basis.\(^8\)

The Treaty of Maastricht, which came into force in 1993, was the most significant constitutional reform in the EU since the ratification of the Treaty of Rome in 1957. That treaty represented a further compromise between the intergovernmentalist and federal visions of the EU. The powers of the EP were further significantly enhanced. For example, the EP was granted the right to be consulted regarding the Member States' candidate as Commission President and to decide whether or not to approve of the appointment of the Commission as a whole. However, McAllister notes that 'Maastricht is like Janus. It faces both ways: towards intergovernmentalism, and towards some kind of 'federal vocation.' It is as ambiguous as the oracle of Delphi; as the Community itself.'\(^9\) Under Maastricht the Second and Third Pillars, dealing with the common foreign and security policy and cooperation in justice and home affairs respectively, provided for exclusively intergovernmental decision-making. Thus, the tension between intergovernmentalism and supranationalism persisted after Maastricht.

After the deepening of the process of integration with the advent of the Treaty of Maastricht in 1993, concerns over the democratic legitimacy of the EU began to be expressed more frequently. This led to an enormous outpouring of writing on the subject, which has continued to this day. The EP has been strengthened in successive treaty amendments since Maastricht. The Lisbon Treaty, ratified in 2009, established the ordinary legislative procedure, under which the EP and the Council are granted equal weight in the adoption of EU legislation.\(^10\)

However, certain commentators have rejected the view that augmenting the power of the EP enhances the democratic legitimacy of EU law-making. For example, Paul Marquardt states that '[t]he European Parliament as an institution, while formally more democratic than the other Union organs, does not have enough prestige and respect among ordinary European citizens to single-handedly bridge the Union's democratic deficit.'\(^11\) Moreover, Christopher Lord has noted that 'European elections are not much concerned with the European Union

\(^8\) Ludlow (n37) 227-228.
\(^9\) McAllister (n14) 225.
\(^10\) Berthold Rittberger 'The European Union: a Constitutional Order in the Making' in Dinan (n36) 327, 329.
or with the body that is in fact being elected, the European Parliament..." Moravcsik, for his part, has this much to say about the EP:

"Though stronger than it once was, the EP remains only one of four major actors in the EU policy-making process. Its elections are decentralized, apathetic affairs, in which a relatively small number of voters select among national parties on the basis of national issues. Little discussion of European issues, let alone ideal transnational deliberation, takes place."

But if popular elections to the EP are insufficient to guarantee the democratic quality of decision-making in the EU, in what sense may the EU be described, as Article 10.1 of the Treaty on European Union does describe it, as a 'representative democracy'?

Discussions about democracy in the EU have often degenerated into semantic and pedestrian disputes as to whether the peoples of the EU may at this stage of the Union's development be said to constitute a 'demos' or whether Europe still consists of multiple 'demoi.' These discussions inevitably raise the anterior question as to what forms of collective conscience and ways of life are sufficiently close-knit to constitute a 'demos,' and as to whether the concept of 'demos' should be construed in civic or ethnic terms. Karl Popper once remarked that 'the surest path to intellectual perdition [is] the abandonment of real problems for the sake of verbal problems.' Thus, I do not propose to partake in the quarrel as to whether the peoples of the EU may be said to constitute a 'demos' or as to what the essential attributes of a true 'demos' are.

The key question is surely whether the important virtues of democratic self-government, namely meaningful mass participation by electors and accountability on the part of officials, as exist for the most part in the Member States of the EU, can be successfully replicated on a pan-European basis. Curtin states that:

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In order for a sense of democratic legitimacy to exist it is argued that there must be a basic system of electoral accountability with a match between the level at which the decisions are being taken and the level to which the electorate can, in the final analysis, hold the decision-makers to account.⁴⁶

Eriksen states similarly that the central problem of EU governance is 'how is the popular will(s) reflected in the EU's political institutions and how can popular opinion be brought to bear upon the decision-makers.'⁴⁷ Chrysochoou defines accountability as 'a continuous process by which those who govern are publicly held to account for their actions and inactions by the elected representatives of the demos.'⁴⁸ Thus, in what follows I propose to avoid verbal hair-splitting and to concentrate instead on the practical challenges confronting those who seek to establish a pan-European democracy in the EU, or those who make the even more ambitious claim that the EU has already acquired that status.

In my view it is impossible to organise a pan-European democracy of a conventional kind in the EU, in which ordinary voters can meaningfully participate and in which officials can be held responsible for their exercise of public power. There is a lack of any significant pan-European political activity or collective political consciousness.⁴⁹ This is largely due to the fact that the continent is riven by deep linguistic cleavages.⁵⁰ Larry Siedentop has stated that 'the American experience might reasonably be understood as establishing that a shared

⁴⁹ Andersen and Eliassen (n42) 7; Marquardt (n41) 271; Simon J Bulmer 'The European Council and the Council of the European Union: Shapers of a European Confederation' (1996) 26 Publius 18; Agustín José Menéndez 'The European Democratic Challenge: the Forging of a Supranational Volonté Générale' 15 ELJ 277 291; Andrew Moravcsik (n43) 605, 619; Joseph HH Weiler The European Court of Justice (OUP, 2001) 5; Thatcher (n42) 342; Eric J Hobsbawm Globalisation, Democracy and Terrorism (Little Brown, 2007) 118; Larry Siedentop Democracy in Europe (The Penguin Group, 2001) 15; Curtin (n46) 293.
⁵⁰ Beate Kohler-Koche and Berthold Rittberger 'Charting Crowded Territory: Debating the Democratic Legitimacy of the European Union' in Beate Kohler-Koche and Berthold Rittberger Debating the Democratic Legitimacy of the European Union (Rowman & Littlefield Publishers, Inc, 2007) 7; Thatcher (n42) 342; Schmidt (n42) 262.
language is a prerequisite for a workable federal system, providing an indispensable civic bond.\(^5^1\) Beate Kohler-Koch and Berthold Rittberger similarly state that '[t]he EU is obviously not a community of communication with multilingualism hampering the emergence of common structures of communication and understanding...\(^5^2\) Jan Fidrmuc, Victor Ginsburgh, and Shlamo Weber have carried out an analysis of the levels of linguistic disenfranchisement that would result if the EU were to reduce its number of official languages. In the course of their analysis the authors note:

...even though English is the most widely known language, it would nevertheless leave 62.6 percent of EU 27 citizens disenfranchised if it were the only official language. Moreover, there are only seven countries were [sic] less than 50 percent of the population would be disenfranchised. But the EU-wide disenfranchisement rate rises to 75.1 and 80.1 percent if English were replaced by German or French, respectively, and it would be even worse if Italian or Spanish were chosen (86.7 and 88.9 percent respectively)...Thirdly, with the exception of English, German, French, Italian and Russian, no language is spoken by more than five percent of the population in more than two European countries.\(^5^3\)

Thus, the linguistic divisions on the continent of Europe conclusively rule out the possibility that any of the principal European languages could serve as a *lingua franca* in a pan-European democratic debate in which even a bare majority of European citizens could meaningfully participate.

However, three points have been made in reply to the suggestion that no pan-European democratic discourse is possible. First, it has been argued that the so-called 'quality press' is circulated across Europe and that this could contribute to the formation of a pan-European political identity.\(^5^4\) However, the 'quality press' which is circulated continent-wide is not read by anything other than a tiny percentage of the population and, thus, cannot in any sense act as a counterweight to the barriers to communication which arise from the continent's deep linguistic cleavages.

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\(^5^1\) Siedentop (n49) 12.
\(^5^2\) Kohler-Koche and Rittberger (n50) 6-7.
\(^5^4\) Klaus Eder and Hans-Jörg Trenz 'Prerequisites of Transnational Democracy and Mechanisms for Sustaining It: the Case of the European Union' in Kohler-Koche and Berthold Rittberger (n50) 177-178.
Second, Zuleeg argues that no empirical evidence has been adduced to support the notion that no transnational democratic discourse exists in the EU. However, it is invidious in a debate of any sort to insist that one’s opponents prove a negative. If Zuleeg wishes to maintain that a transcontinental democratic discourse exists in Europe, contrary to the lived experience of each of us, and overwhelmingly against the odds given the linguistic barriers to the development of any such discourse, the burden is surely on him to prove it.

Third, it has been argued that Europe’s deep linguistic divisions do not pose an insurmountable obstacle to political discourse, given the possibility of making use of translations. However, the burden of translating exclusively legal documents into each of the official languages of the Union is enormous, both from the point of view of time and cost. The notion that the much more voluminous quantity of political publications and discussions constituted by national democratic discourses, or even a significant proportion of them, could be similarly translated seems highly unrealistic, to put it mildly. Aside from the overwhelming practical obstacles facing any such effort, the inherent difficulties of translating from one language to another also apply, namely that due to the distinctive texture of each individual language translators can only ever hope to achieve an approximate equivalence between the different language versions of a particular text.

A striking feature of many theories of EU democracy is their profoundly wishful nature, contingent as they are on fundamental changes taking place in the habits of European electorates and in the behaviour of European political elites. While the culturally fissiparous nature of the EU cannot be plausibly denied by anyone, the hope that it might be transcended by the creation of genuinely accountable and responsive pan-European political institutions, serving a pan-European electorate, has proven surprisingly durable. Chrysochoou, for example, has stated that ‘the struggle for transnational democracy will be won when the emerging European demos consolidates its civic personality and sees the purpose of its own activities in the total structure.’ He further states that transnational

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56 Zuleeg (n55) 525. For the view that linguistic plurality can be successfully combined with political unity, see Raymond Aron ‘Is Multinational Citizenship Possible?’ (1974) 41 Social Research 638, 645.
57 Fidrmuc, Ginsburgh, and Weber (n53).
59 Chrysochoou (n13) 16.
democracy is 'a promising alternative to the logic of secretive, technocratic and unaccountable governance.' Similarly, Marquardt has stated that '[o]nly a fundamental political mobilization and transformation will create the sense of dual citizenship the European Union needs to truly legitimate its power.' Mancini has echoed such sentiments, stating that 'the problem of democracy cannot be tackled at national level. It must be confronted where it was engendered, in the very fabric of the Union.' Zuleeg has asked rhetorically, '[w]hy should it not be possible that, in the course of time, a conviction of Europeans to belong together and to solve problems in common develops like in the United States?' Many other scholars have echoed such sentiments.

Thus, it is submitted that it would be impracticable to establish a popularly based pan-European democracy. This might be thought to imply that the EU must be, and must forever remain, an undemocratic organisation. However, this is not necessarily so, if it turns out to be possible to legitimize EU decision-making through pre-existing national democratic structures. Thus, it must be considered whether the intergovernmental institutions of the EU, the Council and the European Council, at which the interests of the EU Member States are represented, may be said to enjoy democratic legitimacy.

4.2 The European Union as a Consociational Democracy – the Factual Argument

Ronald Dworkin famously wrote that, in order for an interpretation of a particular social practice to be persuasive, it must both fit and justify the practice. In this thesis it is contended that the theory of consociational democracy provides both an accurate descriptive fit and a strong normative justification of governance in the EU. In this section I shall seek to demonstrate that it is accurate as a descriptive matter to characterize the EU as a consociational democracy. In the next section of the thesis a number of normative arguments are put forward in favour of conceiving of the EU as a consociational democracy.

60 Chrysochoou (n13) 63.
61 Marquardt (n41) 266.
62 Mancini (n12) 66.
63 Zuleeg (n55) 522. However, for the view that at the time of the founding the people of the United States already constituted a single cohesive community, see Alex De Tocqueville Democracy in America, vol. 1 (trans. by Henry Reeve, Amereon House, 1976) 145.
64 For example, see Elise Feron, John Crowley, and Liana Giorgi 'The Emergence of a European Political Class' in Liana Giorgi, Ingmar von Homeyer, and Wayne Parsons (eds) Democracy in the European Union (Routledge, 2006) 113; Warleigh (n12) 110-121.
In contrast to the highly aspirational and impractical conceptions of European democracy put forward by some authors, the consociational conception of EU democracy takes the deep divisions of the EU as a given and recognises that they are most unlikely to disappear. Lijphart states that the approach of consociational democracy 'is not to abolish or weaken segmental cleavages but to recognise them explicitly and to turn the segments into constructive elements of stable democracy.'

Insofar as the governing structures of the EU are designed to accommodate the diverging needs of many communities, whose individual interests are perceived as distinct, the EU may be described as a consociational democracy. Lijphart has defined consociational democracy in the following terms: '[c]onsociational democracy means government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy.' The EU arguably satisfies this definition on the basis that it has a fragmented political culture and on the basis that it has historically been, and remains, deeply divided on national, ethnic, religious, and linguistic grounds. The EU consists of twenty-eight Member States, some of which are multinational states. Many different faiths are practised in the EU, with a large number of Catholics, Protestants of many different denominations, and an increasingly large number of Muslims, together with many other religious groups, living within its borders. Indeed, as discussed in section 4.1.1 above, the religious wars which took place in seventeenth century Europe were the reason behind the development of the Westphalian system of sovereign states in the first place. Moreover, and as discussed above, such is the level of linguistic diversity in the EU that it would be impossible to organise a pan-European political discourse in which even a bare majority could participate or which a bare majority could understand. Thus, the EU certainly fulfils the first precondition to being characterized as a consociational democracy identified by Lijphart, namely that it has a fragmented political culture.

Christopher Lord has offered the following definition of consociational democracy:

[c]onsociationalism is fundamentally a model in which the public trust their national government to represent them at Union level; in which they provide them with substantial

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leeway in this task; and in which they refrain from transnational links with democratic characters in other Member States, whether through cross-border debate or coalition-building.**

It is submitted that the EU also satisfies this latter definition, given that Member States representatives are fundamentally at large concerning what negotiating stance to adopt in their dealings with other Member States in the intergovernmental institutions of the EU. Moreover, and as discussed above, very little transnational democratic activity can occur in the EU due to the insuperable obstacle posed by the multilingual nature of the EU.

Chrysochoou has offered a similar definition of consociational democracy:

consociationalism, both as a process of consensual decision-making and a pattern of elite behaviour, can be better understood as a strategy of cooperative conflict resolution whereby the segment elites attempt to transcend inter-group fragmentation by enforcing the terms of institutionalised compromise through the politics of accommodation.**

As shall be discussed further below, the process of intergovernmental decision-making in the EU is overwhelmingly consensual in nature and is dominated by the executive branch of the Member State governments and is designed to achieve compromise between the competing priorities of the various Member States. S. J. R Noel has offered a similar definition of consociational democracy. He notes that ‘[t]he distinguishing feature of a consociational political system is the relative weakness of popular national sentiment and the overcoming of this weakness through a process of élite accommodation.’ As plainly there is no pan-European ‘national sentiment,’ since Europe is not a nation. In addition, the process of European integration has been dominated from its inception by national élites, operating through the means of intergovernmental negotiation. For this reason, it is submitted that the EU also satisfies Noel’s definition of consociational democracy.

Perhaps the most comprehensive definition of consociational democracy is that provided by Arend Lijphart. He argued that consociational democracies share four specific distinguishing characteristics: first, they are governed by coalitions of elites from all sections of society; second, each section of society has a veto over important decisions affecting it; third, proportionality is the principal standard of political representation and for the allocation of offices and public funds; fourth, each section of society enjoys a significant

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88 Lord (n42)
89 Chrysochoou (n13) 179.
70 SJR Noel 'Consociational Democracy and Canadian Federalism' in McRae (n67) 265.
degree of autonomy, which allows it to govern its own internal affairs without external interference.\textsuperscript{71} Adapting this terminology to the EU context, we may treat the EU as our subject political society and the Member States as sections of that society. The EU shares the first, second, and fourth of these characteristics.\textsuperscript{72}

First, EU decision-making processes are dominated by national political elites. Specifically, the most important legislative institutions, the European Council and the Council, are populated exclusively by members of the executive branch of the Member States. It has been noted by many scholars that the domination of the European Council and the Council by national executives enables the latter to evade national parliamentary control.\textsuperscript{73} Chryssochoou states that

 vigourous intermingling of national and European political actors has greatly facilitated the consolidation of a process leading towards the ‘recentralization’ of national political power in favour of ‘executive-centred elites’ and, inevitably, at the expense of traditional representative institutions.\textsuperscript{74}

Second, decision-making in the Council and the European Council is overwhelmingly consensual in nature, notwithstanding the fact that qualified majority voting is provided for in the treaties. In practice, Member States have a veto over decisions which they perceive as affecting their vital interests. As a last resort, moreover, Member States may opt out of particular initiatives, which means the Member State governments exercise considerable control over the effects EU decision-making will have on their nationals.

The standard of political representation in the EU intergovernmental institutions is not proportionality; in fact, it is parity, which marks a deviation from the third characteristic of consociational democracy identified above. However, far from undermining our characterization of the EU as a consociational democracy, this deviation from Lijphart’s definition reinforces it, because it represents a deviation in favour of more sensitive cleavage accommodation. In other words, given that the overarching purpose of consociational democracy is to facilitate stable and consensual government in highly fragmented societies,

\textsuperscript{71} Lijphart (n66) 25.
\textsuperscript{72} For the view that the EU satisfies the definition of a consociational democracy, see Chryssochoou (n13) 199.
\textsuperscript{73} Chryssochoou (n13) 11. Indeed, the dominance of national governments in the process of law-making in the EU has also been said to undermine the power of individual states in Member States of the EU which have a federal system of government. See, Michael Burgess and Franz Gress ‘The Quest for a Federal Future: German Unity and European Union’ in Burgess and Gaignon (n28) 170.
\textsuperscript{74} Chryssochoou (n13) 8.
the EU's recognition of Member State parity may still be characterized as consensual in nature. In the EU, the equal representation of the Member States in the European Council, the Council, and the Commission, and the disproportionately high representation of smaller Member States in the EP, are necessary to ensure that smaller Member States and their nationals will recognize the legitimacy of EU decisions, contributing to stable government in the EU, and thereby satisfying the definition of consociational democracy quoted above.

Fourth, EU Member States enjoy a high degree of internal autonomy and, therefore, the EU also shares the fourth characteristic of consociational democracy adumbrated above. EU Member States retain a considerable degree of fiscal autonomy and control over purely domestic matters such as social policy, education, and healthcare. For these reasons, it is submitted that it is descriptively accurate to describe the EU as a consociational democracy. 

4.3 The European Union as a Consociational Democracy – the Normative Argument

Introduction

Above, it was argued that the label of consociational democracy provided an accurate descriptive account of the EU. However, consociational structures frequently exist within nations which are designed to mediate conflicts between cultural sub-groups. For example, in Northern Ireland such a structure exists in order to facilitate mutually acceptable accommodations between the nationalist and unionist communities. Thus, if the central argument in this thesis is to succeed it must be demonstrated not merely that the EU is capable of being conceived of in consociational terms but also that the Member States ought to be regarded as the constituent units of an EU consociational democracy, rather than some distinct cultural sub-grouping being so regarded based on, for example, language or ethnicity. It is argued below that John Gray’s theory of agonistic liberalism provides a basis for this conclusion. Gray’s theory is a subspecies of the wider philosophical doctrine of value pluralism, which was pioneered and popularized by Sir Isaiah Berlin, one of the leading British philosophers of the last century.

In section 4.3.1 Berlin’s theory of value pluralism shall be briefly described. In section 4.3.2 it shall be argued that the ‘agonistic’ conception of that doctrine is to be preferred to the

75 For the same view, see Chrysochoou (n13) 199.
alternatives. The agonistic conception of value pluralism implies that it is normatively desirable for wide cultural differences to be permitted to exist between different states. In section 4.3.3 a number of arguments shall be put forward to show why the existence of such cultural diversity among the Member States of the EU is normatively desirable and is to be preferred to the alternatives.

4.3.1 The Nature of Value Pluralism

The predominant Western philosophical tradition is monist. That is to say that most Western philosophy comports with the Platonic ideal, the tenets of which were described as follows by Sir Isaiah Berlin:

in the first place that, as in the sciences, all genuine questions must have one true answer and one only, all the rest being necessarily errors; in the second place that there must be a dependable path towards the discovery of these truths; in the third place that the true answers, when found, must necessarily be compatible with one another and form a single whole, for one truth cannot be incompatible with another – that we knew a priori.

In response to the dominant monistic strain of Western philosophy Berlin interposed value pluralism, which he summed up as follows:

If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.

Although the theory of value pluralism is most frequently associated with Berlin, versions of the idea may be identified in the works of earlier writers. This central idea pervades the entirety of Berlin’s oeuvre and he has many suggestive insights to offer in relation to it, though its implications are not fully drawn out in his own writings. Indeed, the true meaning of Berlin’s value pluralism is still heavily contested among his acolytes and others.

successors. Several different formulations of the theory of value pluralism have been provided by different authors. For example, Steven Lukes has stated that

[t]he key idea, then, is that there is no single currency or scale on which conflicting values can be measured, and that where a conflict occurs no rationally compelling appeal can be made to some value that will resolve it.\textsuperscript{79}

4.3.2 Value Pluralism and Consociational Democracy in the EU

(a) Introduction

One significant issue which falls to be addressed is whether Berlin's theory should be understood as valuing individual liberty in the pursuit of goods; as valuing the autonomy of cultural sub-groups to choose to pursue their own heterodox vision of the good, which may not respect the liberty of the individuals of which that sub-group is composed; or as valuing the right of states to enshrine their vision of the good in their law and public policies. George Crowder is the principal exponent of the first view, William Galston of the second, and John Gray of the third. Crowder describes his theory as the 'liberal autonomy' conception of value pluralism, Galston describes his theory as the 'liberal diversity' conception and Gray describes his theory as 'agonistic liberalism.' It is only if Gray's version of Berlin's theory is preferred that it may be argued that it lends support to the argument advanced in this thesis, that the EU ought to be conceived of in consociational terms, because the theory of agonistic liberalism, along among the three theories just considered, recognizes the virtue of states being permitted to maintain a considerable degree of cultural autonomy. Thus, it is unnecessary to consider the theories of Crowder and Galston in any great detail.

The significance of Gray's theory for present purposes is that, if the agonistic conception of value pluralism is more normatively desirable than the alternatives, it means that a significant degree of cultural diversity between the Member States of the EU ought to be

preserved. This, in turn, implies that the ECJ should be respectful of local traditions and should not be overzealous in establishing uniform human rights standards across the EU under the aegis of the CFR. Thus, in what follows the theory of agonistic liberalism shall be described and normative arguments made in favour of accepting its key tenet, namely that value pluralism is best mediated through a system of individual states, each of which is expected to pursue the values it deems to be most important.

(b) Agonistic Liberalism

Gray interprets Berlin's *oeuvre* as supporting the view that cultural differences between societies are an indelible feature of human life, and as condemning the Enlightenment ideal that human beings should eventually converge around a single set of values, as both impracticable and undesirable. He says:

It is a distinctive feature of Berlin's liberal outlook that, while remaining steadfastly committed to Enlightenment values of toleration, liberty and human emancipation from ignorance and oppression, it rejects the Enlightenment conception which sees universalizing reason as the mark of man, and a rational society, in which particularism has been transcended or else domesticated, as the *telos*, the aim, god, or end of history. In locating the most centrally constitutive mark of the species in the capacity for self-creation through choice-making, and in perceiving each of the diversity of identities so created to be particularistic in its essence, Berlin's thought reveals its affinity with that of the Romantics...  

Gray further argued that the natural repository of the divergent identities which human beings construct for themselves lay in the modern system of nation states. He writes as follows: 'Berlin perceives that a liberal civil society cannot rest upon abstract principles or common rules alone, but needs a common national culture if it is to be stable and command allegiance.'

However, Gray makes it clear, and this is in any event manifest from the most casual reading of Berlin's writings, that he does not endorse vulgar nationalism. He also recognises the fact that nationality is sometimes not coterminous with the boundaries of modern day

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80 Gray (n78) 145.
81 Gray (n78) 135.
nation states. He further accepts that most people have plural identities, embracing a range of different inheritances, and that nationality is rarely the sole or even the dominant component of anyone's identity.

(c) Example

Before concluding our discussion of value pluralism, it may be useful to outline by way of a concrete example from European human rights law the divergent implications of adopting the rival theories Crowder, Galston, and Gray.

The issue of the Islamic headscarf has caused a great deal of controversy recently in European societies with significant Muslim populations. In the case of Dahlab v Switzerland, the European Court of Human Rights (ECtHR) held that Switzerland could, consistently with Article 8 of the European Convention on Human Rights which guarantees freedom of thought, conscience, and religion, prohibit a schoolteacher from wearing the Islamic veil at work. We may leave aside for the moment the specific reasoning employed by the court in reaching that conclusion. What is important to note at this juncture is that three different outcomes would have been arrived at under liberal diversity, liberal autonomy, and agonistic liberalism.

The decision of the court in Dahlab may be justified under Crowder's theory of liberal autonomy. This is because the decision of the authorities to prohibit schoolteachers from wearing the veil could have the dual effects of empowering Islamic women within a culture which arguably does not respect the equality of the sexes and of preventing children from being proselytised by a religion which arguably does not place particular value upon autonomous and fully-informed rational decision-making.

By contrast, under Galston's theory of liberal diversity, the applicant would have been allowed to continue to wear her veil at work, as this conception of liberalism emphasizes the universal authority of 'negative liberty,' and seeks to enable non-liberal forms of life, which unquestionably includes traditional Islam, to co-exist within the same society alongside other ways of life, with no group being permitted to impinge upon the internal cultural autonomy of the others.

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82 This is a point also made by Crowder (n79) 185.
83 Gray (n78) 139.
84 Application No. 42393/98.
In a multinational union of states which adhered to the tenets of Gray's theory of agonistic liberalism, each state within the union would be permitted to decide in accordance with its own cultural norms and societal mores whether or not schoolteachers would be permitted to wear the veil.

4.3.3 Normative Arguments in Favour of Conceiving of the EU in Consociational and Agonistic Terms

In section 4.2 above I argued that it was descriptively accurate to characterise the EU as a consociational democracy for the following reasons: first, because it is governed by coalitions of representatives drawn from all of the Member States; second, because each Member State has a veto over important decisions affecting it; third, because parity between Member States is the principal standard of political representation and for the allocation of offices and public funds in the EU; and, fourth, because each Member State enjoys a significant degree of autonomy, which allows it to govern its own internal affairs without external interference.85

As this listing makes plain the raison d'etre of consociational democracy is to manage disagreement between different groups in a particular society in a way that will minimise the occurrence of conflict and facilitate mutually beneficial co-operation between them. Thus, the theories of consociational democracy and agonistic liberalism overlap to a considerable degree, in the sense that they both place emphasis on the indelibility of cultural divergences between different nations and groups and on the importance of arriving at practical accommodations in the wake of those differences. It was suggested above that any constitutional theory must both fit and justify the regime it purports to describe. It has been already explained why, in my view, the theory of consociational democracy accurately describes the EU. In what follows a number of arguments shall be put forward in order to demonstrate that Gray's theory of agonistic liberalism provides a strong normative justification for conceiving of the EU as a consociational democracy and of conceiving of the individual Member States of the EU, rather than some cultural sub-group, as the principal focus of their citizen's sense of political loyalty and identity. In other words, certain normative arguments shall be put forward in favour of the view, which accords with the

theory of consociational democracy described, that the various Member States of the EU ought to be accepted as the principal focus of their citizens' loyalty and political identity. Normative arguments shall also be put forward in favour of the view that the Member States of the EU ought to be permitted to maintain a considerable degree of cultural autonomy, which is also one of the characteristics of consociational democracies outlined above.

(a) The Origins of the Nation State

Roger Scruton has argued that '[n]ationality is not the only kind of social membership, nor is it an exclusive tie. However, it is the only form of membership that has so far shown itself able to sustain a democratic process and a liberal rule of law.'® It is important to note in this connection that nation states are not naturally occurring phenomena. They developed out of mankind's transcendence of tribal and creedal forms of government. Scruton states that belonging to a nation state 'involves a genuine 'we' of membership: not as visceral as that of kinship; not as uplifting as that of worship; but for those very reasons more suited to the modern world and to a society of strangers in which faith is dwindling or dead.'® Moreover, according to Pádraig Ó Snodaigh, nation states and nationalism have in the modern world also often emerged as a response by native cultures to domination by imperial powers.®®

Thus, far from being bastions of reaction and atavism, the advent of nation states liberated much of mankind from oppression by tribal, clerical, and imperial overlords. This was certainly true of the development of most of the nation states of Europe and the Middle East, many of which were carved out of the remnants of the vanquished German, Habsburg, and Ottoman Empires in the aftermath of the Great War.®® The failure of many of the states in the Middle East to achieve popular legitimacy in the modern age, and the consequent failure of democratic institutions to take root there, has been attributed to the threat posed to the concept of statehood by radical Islamists, who reject the concept of statehood because of the secular character of the Westphalian system, and because that system arbitrarily fragments God's people who should, by the lights of radical Islam, form a single political community.®®

(b) Experimentation

®® Roger Scruton England and the Need for Nations (Civitas, 2004) 10. See also, Hobsbawm (n49) 98.
®® Scruton (n86) 15.
®® Hill (n2) 115-117.
A second argument which might be made in support of agonistic liberalism and its alter ego consociational democracy is that it encourages experimentation, with each individual nation adopting policies according to its own individual circumstances, some of which will fail while others succeed, thus providing both useful and cautionary precedents to neighbours as they seek to grapple with analogous problems of their own. Moreover, where different nations pursue divergent policies, and thus offer their residents distinct bundles of public goods, individuals may move from societies with values that they find uncongenial to ones in which they feel more at home.

In the context of a discussion on the benefits of the federal system of government in the United States Judge Michael McConnell states that the federal system enhances the scope for experimentation by protecting ‘the liberty that comes from diversity coupled with mobility.’ He argues that, if free movement exists between the states of the federation in question, this will ensure that citizens can move to member states with laws congenial to them if they are dissatisfied with the laws of the member state in which they reside.

McConnell’s argument in this regard is based on two assumptions. First, it assumes that citizens of the federation have a right to move freely between the member states of the federation. This may be taken as a given in the EU, in which the right to move freely is enshrined in the fundamental law of the EU and is vigorously defended in the case law of the ECJ. Second, McConnell’s argument assumes that there is significant diversity in the laws of the various states of the federation, which reflects the existence of cultural divergences between them. Nobody could deny that an extremely high degree of cultural diversity exists between the Member States of the EU of a much more fundamental kind than that which separates the individual states of America. Thus, the recognition of the consociational nature of the EU would have the benefit of facilitating experimentation by the different European states and of assisting in the development of mutually beneficial competition among them in the provision of public goods to their citizens.

Calabresi explains the logic underpinning this asserted benefit of federation in the following terms:

The possibility of competition among jurisdictions creates incentives for each jurisdiction to provide bundles of goods that will maximize utility for a majority of the voters in that

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jurisdiction. These bundles will not be the same, of course, because we have stipulated already that jurisdictional tastes and preferences differ, and, therefore, jurisdictional utility curves differ as well. Many jurisdictions will seek to maximize utility by trying to gain the tax dollars of residents and industry from other states. Some jurisdictions conceivably might put less emphasis on this particular goal so as to maintain a higher quality of life for current residents.

In any event, the possibility of competition will lead inexorably to experimentation and product differentiation. In a competitive situation, state governments, as competing sellers of bundles of public goods, must strive constantly to improve the desirability of their bundle lest they lose out. The end result is an incentive for state governments to experiment and improve.\(^2\)

Indeed, it is important to note that this is not merely an educated hypothesis; it has strong historical foundations. Hugh Trevor-Roper argues that the development of independent states in Europe after the fall of the Roman Empire was beneficial because ‘[t]hanks to it, the heretic, the nonconformist, could always find a new base, and so ideas and experiments, however unacceptable to present power, could not be stifled.’\(^3\) Trevor-Roper himself notes that some of the most distinguished historians and philosophers of the Enlightenment, including Voltaire and Pietro Giannone, who adopted a critical attitude towards the Church, found refuge from clerical oppression far from home, in the Calvinist cities of Geneva and Lausanne in Switzerland.\(^4\)

By contrast, Edward Gibbon notes that during the reigns of the tyrannical Roman Emperors, ‘the slavery of the Romans was accompanied with two peculiar circumstances, the one occasioned by their former liberty, the other by their extensive conquests, which rendered their condition more completely wretched than that of the victims of tyranny in any other age or country. From these causes were derived, 1. The exquisite sensibility of the sufferers; and, 2. the impossibility of escaping from the hand of the oppressor.’\(^5\) Thus, the more

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\(^2\) Calabresi (n91) 777.
\(^3\) Hugh Trevor-Roper History and the Enlightenment (Yale University Press, 2010) 152.
\(^4\) Trevor-Roper (n93) 1-16. For discussion of the economic benefits arising from political competition between the states of Europe from the early modern period onward, see Niall Ferguson Civilization: the Six Killer Apps of Western Power (Penguin Books, 2012) 36-43.
extensive the territory ruled over by a particular government, the more difficult it is for a citizen dissatisfied with its laws and mores to escape to more hospitable regions.

Thus, the existence of freedom of movement between the constituent states of a federation, when coupled with significant divergences in culture between them, incentivizes experimentation and competition by encouraging citizens to ‘vote with their feet’ and to move from states in which their preferences are not enshrined in law to those whose laws and mores are more congenial to them. McConnell mentions the migration of homosexuals to San Francisco in an attempt to find a more welcoming home, and the migration of natives of Massachusetts to New Hampshire in search of lower rates of taxation, as examples of this phenomenon. One example of this phenomenon in the EU context is the exercise by Irish women of their right to freedom of movement in order to procure abortions in the United Kingdom, abortion being prohibited in most circumstances under Irish law. Another is the choice of the Netherlands as a destination for tourists interested in sampling drugs such as marijuana, which are illegal in most other Member States of the EU.

However, it has been pointed out that citizens of the EU may be impaired in making use of their right to freedom of movement by the existence of language barriers. Specifically, Fidrmuc, Ginsburgh, and Weber note that ‘cross-border mobility is limited in the EU: English, French, German, Hungarian, Polish, Portugese and Spanish are the only languages with more than half a million native speakers outside their native countries.’ The existence of language barriers undoubtedly affects the ability of citizens of the EU to take advantage of their right to free movement. Nevertheless, the right still exists and could be made use of in circumstances in which a citizen found himself living under a regime to which he had fundamental objections.

(c) Peaceful Co-Existence Among Nations

As discussed above, consociational democracies exist in order to minimise the level of conflict between different groups in highly fragmented societies. For the purposes of my

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86 McConnell (n91) 1503.
88 Aron (n56) 647.
89 Jan Fidrmuc, Victor Ginsburgh, and Shlamo Weber (n53) 7.
argument it may, therefore, be said that the consociational system of government which has been established in the EU has helped to considerably reduce levels of conflict between the states of Europe since the Second World War. Other factors have no doubt been of significance too but the contribution to European peace of the intergovernmental institutions established by the EU, which have allowed Member State governments to negotiate and arrive at mutually satisfactory compromises with each other and to resolve disputes through dialogue rather than confrontation, cannot be overstated.

Chrysochoou has contended that the consociational conception of democracy is less desirable than alternative conceptions because it demands 'neither a sense of community at the popular level not a popular affirmation of commonly-shared values, nor the existence of a single and undifferentiated *demos* united by the overarching power of a higher civic we-ness.' Indeed, even Arend Lijphart, the pioneering scholar of consociational democracy agrees that consociational democracy 'is not a system of government that fully embodies all democratic ideals, but one that approximates them to a reasonable degree.'

However, in replying to the contention that consociational democracy is defective in not recognising the necessity for a relationship of fraternity to exist between its citizens, Lijphart states that 'peaceful coexistence should not be belittled. The relevant question is not which of the two is in abstract terms the most desirable objective but which goal is realistically attainable.' The period between the conclusion of the Treaty of Rome and the present day has been one of uninterrupted peace in Western Europe. This is a formidable achievement and presents a favourable contrast with the blood-soaked decades which immediately preceded it, in which tens of millions were killed in two devastating world wars. It is plain that the Member States of what would become the EU would not have been willing, in 1957 or at any time thereafter, to cede their sovereignty to a pan-European federal government answerable to a pan-European electorate; the retention of a considerable degree of autonomy by the individual Member States was and remains a *sine qua non* to their acquiescence in the process of European integration, as evidenced by the rejection of the EDC Treaty by the French National Assembly. Once it is recognised that the only feasible form of pan-European governance in the period was one which was predominantly intergovernmental in nature, the criticism of consociational democracy as insufficiently communitarian may be recognised for what it is: an egregious example of making the great

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100 Chrysochoou (n13) 180.
101 Lijphart (n12) 4.
102 Lijphart (n12) 49.
the enemy of the good. In summary it may be said that, while characterising the EU as a consociational democracy may fall short of making the citizens of Europe brothers (and sisters), it may at length prevent them from being mortal enemies. The consociational conception of the European Union, while it falls short of recognising the fraternity and common destiny of all Europeans, at least holds out some hope of enabling the Member States of the EU to enter into fruitful co-operation with their neighbours, to the benefit of all.

4.3.4 Criticisms of the Consociational and Agonistic Conception of the EU

(a) The Depredations of Nation States

The first argument made against conceiving of nation states as the focus of individuals' loyalty and sense of belonging is that nation states have on occasion wreaked enormous destruction and committed terrible crimes against humanity. The crimes of the Third Reich are frequently invoked in this regard.

In the 'Ventotene Manifesto,' authored by Altiero Spinelli and Ernesto Rossi during the Second World War in 1941, the authors inveighed against the evils of the nation state:

> [t]he absolute sovereignty of national States has given each of them a desire to dominate, since each one feels threatened by the strength of the others, and considers, as its living space, an increasingly vast territory wherein it will have the right to free movement and can rely on itself without any other help. This desire to dominate cannot be placated except by the predominance of the strongest State over all the others.

As a consequence of all this, the State is no longer the guardian of civil liberty but it has been transformed into the master of vassals bound to servitude, and it holds within its power all the faculties needed to achieve the maximum war-efficiency. Even during peacetime, considered to be a pause during which to prepare for subsequent, inevitable wars, by now the military class predominates over civilian societies in many countries, by making more and more difficult the good working of free political systems. Expressions of civil policy, therefore, such as schools, research, productivity administrations, act with difficulty and are mainly directed towards increasing military strength. 333

333 Spinelli and Rossi (n34).
These passages are entirely unexceptionable as descriptions of the triumph of extreme nationalism, xenophobia, and fascism in several European nations during the 1920s and 1930s, and of the headlong rush to war which that entailed. However, it cannot be seriously maintained that the Europe they describe bears any resemblance to the continent in which we live today. Extreme nationalism and racism of that kind, while by no means dead, simply do not have the upper hand on the forces of liberalism and moderation in any of the EU Member States in the early years of the twenty-first century. Nor are the societies of EU Member States being placed on a war footing or their civic life being asphyxiated by authoritarian oppression.

A number of arguments may be made against regarding the crimes of the Third Reich as a conclusive and iron-clad argument in favour of emasculating nation states. The first and most obvious is that the diplomatic history of Europe simply does not substantiate the assertion of Spinelli and Rossi that the existence of rivalries between states must inevitably lead to warfare between them and the domination of the weaker powers by their more powerful neighbours. Indeed, the descent of Europe into war in 1914 was caused by the collapse, for whatever reason, of the balance of power system inaugurated by the Congress of Vienna. As noted above, the Vienna system had been established in the aftermath of the Napoleonic wars in 1815 and had largely preserved the peace of the continent for just under a century. Moreover, the Second World War did not break out simply because of the existence of multiple states with divergent interests on the continent of Europe. Rather, it arose due to the unwillingness of the western democracies to take up arms in defence of the principles of international law which they themselves had enshrined in the Treaty of Versailles of 1919, in the face of a recrudescence of a particularly poisonous and vulgar variety of German nationalism. The thesis of Spinelli and Rossi, that the existence of rivalries between nation states must inevitably issue in calamity and total war utterly fails to explain the long interval of relative peace in Europe between the Congress of Vienna in 1815 and the outbreak of the Great War in 1914, and the similarly protracted period of calm between the Peace of Westphalia in 1648 and the outbreak of the French Revolution in 1789. When these facts are considered, the conclusion of Spinelli and Rossi, that rivalries among nation states must inevitably issue in calamity and total war, has to be seen as a piece of historical

104 For the view that it is a ‘serious mistake’ to equate nation states and power politics, see Aron (n56) 654.
provincialism with little application beyond the immediate circumstances in which they wrote.

Second, Scruton notes that simply pointing to examples of nation states having conducted themselves in violent or aggressive ways does not prove that transnational states will be any less belligerent or violent.105 Indeed, transnational and universal ideologies have arguably been more sanguinary than their nationalist counterparts. The most obvious example is the international communist movement. As is well-known, adherents to that movement sought to establish communist government worldwide and engaged in numerous revolutionary and subversive acts in seeking to attain that end. In addition, the principal communist power, the Soviet Union, engaged in expansionist activities across the globe, with the result that many countries suffered the trauma of totalitarian government in the era between the end of the Second World War in 1945 and the fall of the Berlin Wall in 1989. Indeed, many societies around the world, particularly those in Asia, continue to languish under authoritarian forms of government as a direct legacy of communism.106

The point of this digression is to illustrate that nation states and nationalism have not been the sole source of international warfare and bloodshed in the modern era. Arguably, the universalist and anti-nationalist forces of international communism caused even greater destruction than their ghastly fascist and national socialist counterparts. This is not to imply any moral equivalence between the movement for European unity and the Communist International, though it is important to note that such a comparison would be no more absurd than to regard the Westphalian order, which has served as the basis of the international system for three and a half centuries, as nothing more than the midwife of fascism and genocide.

A third response to the invocation of Nazi Germany as a warning against the supposed pathology of nation states is that Nazi Germany could never have been defeated had it not been for the existence of cohesive and strong nation states, most notably in Russia, the United States, and Great Britain. Scruton makes the point that Nazi Germany could never have been defended 'had it not been for the national loyalty of the British people, who were determined to defend their homeland against invasion.'107 Alan Milward states similarly that

105 Scruton (n86) 3.
106 For a history of world communism and its legacy, see Robert Service Comrades: Communism a World History (Macmillan, 2007), especially at 473-482.
107 Scruton (n86) 18.
'[s]urely the feelings engendered by resistance were patriotism and even nationalism.'\textsuperscript{108} Thus, to invoke the Nazi regime as a warning against the dangers of nationalism ignores the fact that the Third Reich was largely defeated by men and women who were, at least in part, strongly motivated by nationalism.

Moreover, the invocation of the crimes of the Third Reich as a reason for emasculating nation states overlooks the fact that the latter have a superior record of preventing or arresting genocide and crimes against humanity than transnational organisations such as the EU. For example, during the Yugoslav wars in the 1990s the regime of Slobodan Milosevic committed genocide against the Bosnian Muslim population of the former Yugoslavia. Tony Judt describes the inadequate response of the EU to the mass slaughter in the following terms:

\[\ldots\text{despite establishing high-level commissions to enquire and arbitrate and propose, the European Community and its various agencies proved quite helpless - not least because its members were divided between those, like Germany and Austria, who favoured the seceding republics and others, led by France, who wanted to retain existing borders and states and who for this reason among others were not altogether unsympathetic to Serbia.}\textsuperscript{109}\]

He states that the United Nations proved equally ineffective in responding to the Yugoslav crisis\textsuperscript{110} and notes that peace was re-established in the Balkans only after the United States became involved.\textsuperscript{111} This single example, while admittedly in no sense conclusive on the point, does suggest, \textit{pace} Spinelli and Rossi, that nation states are better equipped to prevent crimes against humanity and genocide than international organisations.

Fourth, it has been argued that nationalism becomes stronger, rather than weaker, when nations and the desires of their peoples are ignored. Judt makes the following intriguing argument:

\begin{quote}
The Soviet Union once appealed to many Western intellectuals as a promising combination of philosophical ambition and administrative power, and "Europe" has some of the same allure. For its admirers, the "Union" is the latest heir to the enlightened despotism of the eighteenth century. For what is "Brussels," after all, if not a renewed attempt to achieve the ideal of
\end{quote}

\textsuperscript{108} Milward (n11) 16.

\textsuperscript{109} Judt (n8) 676.

\textsuperscript{110} ibid. 678. Hill (n2) 101.
efficient, universal administration, shorn of particularism and driven by reason and the rule of law, which the reforming monarchs—Catherine the Great, Frederick the Great, Maria Theresa, and Joseph II—strove to install in their ramshackle lands? It is the very rationality of the European Union ideal that commends it to an educated professional class which, in east and west alike, sees in “Brussels” an escape from hidebound practices and provincial backwardness—much as eighteenth-century lawyers, traders, and writers appealed to modernizing royals over the heads of reactionary parliaments and Diets.

But there is a price to be paid for all this. If “Europe” stands for the winner, who shall speak for the losers—the “south,” the poor, the linguistically, educationally, or culturally disadvantaged, underprivileged, or despised Europeans who don’t live in golden triangles along vanished frontiers? The risk is that what remains to these Europeans is “the nation,” or, more precisely, nationalism; not the national separatism of Catalans or the regional self-advancement of Lombards but the preservation of the nineteenth-century state as a bulwark against change. For this reason, and because an ever-closer bonding of the nations of Europe is in practice unlikely, it is perhaps imprudent to insist upon it. In arguing for a more modest assessment of Euro-prospects I don’t wish to suggest that there is something inherently superior about national institutions over supranational ones. But we should recognize the reality of nations and states, and note the risk that, when neglected, they become an electoral resource of nationalists.\footnote{Tony Judt ‘Europe: the Grand Illusion’ (1996) 43, No. 12 (July) New York Review of Books.}

Thus, because European integration tends to be driven by national elites and to be somewhat inaccessible to the masses, any intensification or furthering of that process has the potential to cause the generality of the population to feel disempowered. To such feelings nationalism has often provided a ready refuge. Thus, European integration, far from inoculating the continent against the dangers of nationalism, may well induce those who feel excluded from the process to embrace nationalism as a means of arming them against a cosmopolitan behemoth, which they do not understand, and which they have no means of controlling but which, nevertheless, claims the right to control their lives and that of the communities in which they live.\footnote{See also, Tony Judt Reappraisals: Reflections on the Forgotten Twentieth Century (Vintage Books, 2009) 11-12.}
The second ground upon which agonistic liberalism and consociational democracy might be criticised is that it is indistinguishable from mere moral relativism. For example, Crowder states that '[i]f... value pluralism involved an acceptance of cultural pluralism on a level with the plurality of goods, then there would be nothing to separate pluralism from cultural relativism.\textsuperscript{114}

Harry Bunting provides the following definition of moral relativism:

\begin{quote}
[t]raditional moral relativism therefore normally involves the theses that different societies hold incompatible basic moral principles, that each of these incompatible principles is in some sense correct, that morality has its foundations in varying human affective dispositions and that, as a consequence, there is no single true morality.\textsuperscript{115}
\end{quote}

For example, the state of Israel recognises necessity as a defence to a charge of committing torture.\textsuperscript{116} The ban on torture is one of the few universally recognised principles of international human rights law. By recognising a defence of necessity to torture, based on a plea of unique circumstances, the Israeli case illustrates the potential for pleas of national peculiarity to degenerate into excuses for barbaric conduct contrary to even the most minimal imaginable conception of universal human rights. As has been pointed out by many authors moral relativism is an internally paradoxical position because its adherents simultaneously maintain both that there are no universal moral principles and that the relativism of moral principles is itself a universal principle.\textsuperscript{117}

However, Berlin has argued that recognising the plurality of cultures does not imply relativism because value pluralists recognise the existence of a basic minimum of values common to all cultures, which constitute an objective moral minimum. In other words, agonistic liberalism recognises that not all ways of life qualify as having value but recognises that there is a very wide range of legitimate variation among those that do. Berlin states the matter thus:

\begin{quote}
\textsuperscript{114} Crowder (n79) 136.
\textsuperscript{115} Harry Bunting 'A Single True Morality? The Challenge of Relativism' in Archard (n77) 73.
\textsuperscript{117} James A Sweeney Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the post-Cold War era' (2005) 54 I C L Q 459, 461.
\end{quote}
There is a limit beyond which we can no longer understand what a given creature is at; what kind of rules it follows in its behaviour; what its gestures mean. In such circumstances, when the possibility of communication breaks down, we speak of derangement, of incomplete humanity. But within the limits of humanity the variety of ends, finite though it is, can be extensive.  

This formulation suggests that the core of morality common to all men and all societies is thin indeed. Other authors have expanded upon the distinction between value pluralism and relativism and upon the idea of the 'moral minimum.' In a festschrift in honour of Conor Cruise O'Brien, Richard English and Joseph Skelly capture well the distinction between value pluralism and relativism. They say:

In Isaiah Berlin’s taxonomy, Conor Cruise O’Brien too is a fox. But he is not a relativist. He realises that all ideas are not equal: dangerous ideas exist and have destructive consequences. They compete with more judicious ones for the allegiance of individual consciences and the welfare of society’s soul.

Gray describes the moral minimum as 'the uneasy equilibrium that makes for decency in human affairs, which is the true upshot of Berlin’s understanding of value-conflict.'

Crowder has argued that the invocation of this moral minimum does not provide an adequate defence to the charge that agonistic liberalism is inherently relativist on the basis that the minimum degree of morality it prescribes is inadequate. He says:

nothing is required by the common horizon except that conduct count as recognizably human. Even the narrower notion of the 'central core' is not substantial enough to support a case for the rights mentioned. No such rights, or even their ethical substance (eg prohibitions on slavery), have actually been accepted by all human societies.

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118 Isaiah Berlin ‘Alleged Relativism in Eighteenth Century Thought’ in Berlin and Hardy (n76) 83.
120 Gray (n78) 32.
121 ibid, 144. See also, Galipeau (n79) 116.
However, John Gray argues in response that Berlin did not intend in that passage to prescribe a single authoritative conception of the moral minimum, to be inflexibly applied in all times and places. He states:

The moral minimum that Berlin has in mind is universal in the sense that it is to be sought everywhere. That does not mean it will be everywhere the same. Changing with circumstances and reflecting differing choices and judgements, the baseline is not fixed but necessarily and continuously shifting.\textsuperscript{122}

Thus, the 'moral minimum' prescribed by Gray’s agonistic liberalism is a historically conditioned one, which will vary as between cultures, and within cultures over time. This reflects the fact that different human beings and different cultures are defined as much by their differences as by their similarities or, to adopt the wording used by Gray, that human beings are ‘subject to self-transformation through choice-making, and whose most essential mark is cultural difference.’\textsuperscript{123} In succeeding chapters of this thesis I shall indicate how the originalist method of interpretation provides a means of preserving the cultural distinctiveness of the Member States of the EU while simultaneously preserving a minimum standard of human rights protection. In sum, agonistic liberalism may not be stigmatized as relativistic since it recognizes the existence of an objective moral minimum of values beneath which no society ought to be permitted to fall.

(c) Executive Dominance

A third basis upon which agonistic liberalism and consociational democracy have been criticised is that they concentrate power in the hands of the executive branch of government. It has frequently been observed that the concentration of power in the hands of national governments in the intergovernmental institutions of the EU reduces democratic accountability.\textsuperscript{124} Such executive dominance sits uneasily with classical legal liberalism,

\begin{thebibliography}{99}
\bibitem{Gray1} Gray (n78) 20.
\bibitem{Gray2} Gray (n78) 101.
which regards the existence of strong institutional checks and balances as a necessary security against despotic encroachments. In this section I will attempt to show that executive dominance is a practical necessity in the modern era, that it is democratically legitimate, and that executive power is not as unconstrained as critical accounts claim.

A significant point to be underlined at the outset is that executive dominance over the legislature is a general feature of modern liberal democracies; it is not a phenomenon peculiar to intergovernmental decision-making in the EU. Moreover, governance in countries where the executive is hobbled by a recalcitrant and disruptive parliament has tended to be marred by sclerotic policy-making and instability to a greater extent than those in which the executive is firmly in charge.

In my view, there are three principal reasons for the dominance of the executive over the legislature in the Member States of the EU. These are, first, the imperatives of diplomacy; second, the development of the modern administrative state; and, third, the development of highly centralized and disciplined political parties.

The authors of The Federalist refer to a number of qualities which the executive possesses but which the legislature lacks, and which are advantageous in foreign negotiations, to wit secrecy, dispatch, the power of directing and employing the common strength, accurate and comprehensive knowledge of foreign politics, and a uniform sensibility to national character. These are the arguments which have traditionally been put forward to justify executive dominance in the field of treaty-making and foreign affairs generally.

Robert Howse The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (OUP, 2001) 38; JHH Weiler 'Federalism Without Constitutionalism: Europe’s Sonderweg' in Nicolaidis and Howse, ibid., 55; Chryssochoou (n13) 11-12, 17, 59, 120, 190-191; Christopher Lord (n42) 17-18; Mancini (n12) 31; Curtin (n46) 34-35, 41-43, 48; Warleigh (n12) 2, 8-9; John W Schiemann ‘Hungary: the Emergence of Chancellor Democracy’ in Nicholas DJ Baldwin (n48) 139. For a somewhat different view, see Schmidt (n42) 3; Kohler-Koch and Rittberger (n50) 8; Moravcsik (n43) 156.


Marquardt (n41) 272; Chryssochoou (n13) 70, 114; Tony Wright Citizens and Subjects: an Essay on British Politics (Routledge, 1994) 6, 24, 47-48, 134; Thomas (n48) 8; Curtin (n46) 303; Asher Arian and David Nachmias and Ruth Amir Executive Governance in Israel (Palgrave, 2002) 3; Subhash C. Kashyap ‘Executive-Legislative Interface in the Indian Polity’ in Baldwin (n48) 289; Nicholas DJ Baldwin ‘Concluding Observations: Legislative Weakness, Scrutinising Strength?’ in Baldwin (n48) 297.

Alexander Hamilton, John Jay, James Madison The Federalist Papers (Arlington House, 1966) No. 64, 74, 75. Posner and Vermeule (n125) 14-17, 26-27, 33, 61, 174. For discussion, see Arthur M. Schlesinger, Jr. The Imperial Presidency (André Deutsch, 1974) 283, where he argues that the executive should not be
In the EU context, there is a premium on speed and flexibility in intergovernmental negotiations, given that members of the executive frequently do not know, or in any event do not know for certain, the negotiating stance their counterparts from other Member States will adopt. This means that it would be unwise for members of the executive to accept rigid directions from members of the legislature prior to negotiations because members' assumptions regarding the tenor of the negotiations and the disposition of key players may turn out to be wrong; indeed, frequent errors in this regard are inevitable in a Europe with twenty-eight Member States. Representatives of the Member States must adapt quickly to the negotiating positions of their colleagues from other Member States and must attempt to secure the best outcome possible for their Member State, which will be constrained and shaped by the disposition of their colleagues. Pre-negotiation directions from the legislature, given that legislators cannot possibly know with anything approaching precision the negotiating environment into which their representatives are about to enter, will inevitably be marred by unrealistic expectations. Moreover, the prior imposition of rigid negotiating 'bottom lines' by the legislature may prevent representatives from seizing unexpected opportunities presented during the negotiating process. For these reasons, executive autonomy in intergovernmental negotiations, in the European Council, the Council, and in Intergovernmental Conferences, is both necessary and desirable.

However, the alacrity with which the executive branch of government can dispose of business is significantly attenuated in the EU context by the fact that twenty-seven national executives must agree. Indeed, it is a recognised feature of consociational democracy that the search for consensus among different groups can slow down decision-making significantly.

A second reason for executive dominance in modern democracies is the development of the administrative state, which provides public services in a vast and expanding array of fields. This has perhaps been the principal factor driving this concentration of power. Legislatures do not have the resources to supervise and direct the activities of the behemoth the sole organ in foreign affairs and that power in that area should be shared between Congress and the President. See, ibid, 297-298.

122 Ulf Sverdrup 'Precedents and Present Events in the European Union: an Institutional Perspective on Treaty Reform' in Neunreither and Weiner (n44) 258.
123 Lijphart (n12) 52.
124 Curtin (n46) 28; Nicholas DJ Baldwin 'Concluding Observations: Legislative Weakness, Scrutinising Strength?' in Baldwin (n48) 297.
which the modern state has become. Executive, by contrast, can employ a variety of mechanisms to ensure that the bureaucratic machine is administered in a manner which is congenial to them. The development of big government has also increased the speed with which action must be taken by the state in a rapidly changing policy-making environment. The executive has significant advantages over the legislature in this regard, given its ability to deal with matters arising with dispatch and decisiveness; legislatures are more fragmented and less capable of coming to a clear decision in a tight timeframe.

A third reason for the concentration of power in the executive branch in modern states is the consolidation of mass political parties, characterized by a high degree of discipline. Parties in a parliamentary system contribute to executive dominance by their hierarchical organization, which places parliament in a subordinate role. Typically, in a parliamentary system, the members of the executive are also the most senior members of the governing party or coalition of parties which holds a majority in parliament. Those legislators who are not members of the government typically follow the lead of their superiors in executive office, which contributes to the empowerment of the latter. Party leaders have a variety of means at their disposal by which to discipline recalcitrant backbenchers, which increase the incentives of backbenchers to obey.

The only meaningful parliamentary oversight of executive decisions under such a system will come from the opposition, whose analysis is likely to be skewed by its desire to gain partisan advantage, which is likely to be maximized if it succeeds in embarrassing the executive or making it look inept. It is hard to disagree with the conclusion that this is not an arrangement conducive to dispassionate and mature discussion and oversight. In any event, with a parliamentary majority guaranteed, the executive can afford to ignore criticism, no matter how earnest and well-reasoned it may be.

Taking this context into account, it is plain that national parliamentary oversight of executive proposals, including proposed treaty amendments, is likely to be a weak constraint on executive conduct. The only kind of discussion and criticism capable of seriously threatening the passage of an executive proposal, in a parliamentary system, is that

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132 Posner and Vermeule (n125) 4, 10, 29; Wright (n126) 4, 49; Arian, Nachmias, and Amir (n126) 3.  
133 Posner and Vermeule (n125) 12.  
134 Posner and Vermeule (n125) 14-17, 33, 61.  
135 Posner and Vermeule (n125) 28; Curtin (n46) 29; Wright(n126) 6.  
136 Arian, Nachmias, and Amir (n126) 19.  
137 Posner and Vermeule (n125) 10.  
138 Arian, Nachmias, and Amir (n126) 19.
which takes place within the governing party or coalition of parties. Article 10.4 TEU goes some way towards constitutionalizing the role of political parties in ensuring governmental accountability which is generally overlooked in traditional constitutional documents and analyses. However, it must be acknowledged that party political oversight of legislative proposals is somewhat weak, given the fact that the discussions which matter, those between government ministers and parliamentarians, usually take place behind closed doors; their impact is, accordingly, impossible to assess. However, one may surmise that, in a system based on adversarial party competition, secret internal party meetings will see parliamentarians speaking in a much more forthright way than they might in a public forum such as parliament. In public criticism of executive proposals will harm the party; in private it might save it from a costly blunder. Thus, it may be assumed that internal party discussion has some constraining force on executive action, though it is impossible to assess its extent, given the often secret nature of such discussions and, as such, it would be unsafe to rely excessively on it as a mechanism of accountability or of democratic legitimation.

Therefore, the preceding discussion suggests that the reasons for executive dominance in the modern state are: first, the diplomatic imperatives of speed and flexibility; second, the development of the complex machinery of the modern administrative state; and, third, the development of modern party political machines. It shall now be considered whether such dominance is compatible with democracy.

Formally speaking, the answer to this question is undoubtedly in the affirmative. Voters in parliamentary elections, in virtually all European democracies, may make educated guesses as to the composition of the executive in the event of a particular party or bloc prevailing in an election. Moreover, voters often know who the rival contenders to lead the executive are and, therefore, who the head of government will be if they vote this way or that. Thus, in choosing who to vote for, voters are frequently making a conscious decision as to who

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139 For example, Wright (n126) mentions on numerous occasions the role of party discipline in reducing meaningful parliamentary oversight of executive activities. However, he fails at any point to note that, in a disciplined party system, open parliamentary oversight is often replaced by hidden but nonetheless rigorous party oversight.

140 Posner and Vermeule (n125) 42.

141 It has been suggested that another reason for the increasing power of the executive in modern democracies has been the increasing scope and intensity of media scrutiny of politics. Nicholas D.J Baldwin 'Concluding Observations: Legislative Weakness, Scrutinising Strength?' in Baldwin (n48) 297. However, I do not agree that this is a reason for the growth of executive power in the modern era. On the contrary, it may be that increasing media scrutiny has provided an alternative means of holding the executive branch accountable; in this sense media attention may constrain, not enhance, executive power. See Posner and Vermeule (n125) 209; Wright (n126) 104.
should hold executive office. Moravcsik further notes that national officials participating in intergovernmental institutions in the EU are directly answerable to national executives, which are themselves democratically elected.\textsuperscript{142} However, formal selection by the electorate may be insufficient to satisfy the requirements of democracy. To limit the inquiry to finding evidence of such selection would reduce democracy to a form of elective dictatorship.\textsuperscript{143}

An additional requirement of democratic legitimacy is the existence of checks and balances, which serve to constrain the freedom of action of the executive. The discussion in the previous section indicates that legislative constraints on executive power are, and should be, weak in relation to intergovernmental decision-making in the EU. But it would be a mistake to equate the absence of legislative checks on the legislature with an absence of checks \textit{simpliciter}. In reality, a variety of different checks limit executive freedom of action.

Andrew Moravcsik identifies a number of different checks on intergovernmental decision-making processes in the EU. First, he notes that the EU has limited powers at its disposal. Specifically, he notes that the EU enjoys limited legislative and fiscal competence, and that EU law falls to be implemented for the most part by national officials.\textsuperscript{144}

Second, he notes that intergovernmental decisions are usually subject to approval by other bodies. Specifically, he notes that most decisions of intergovernmental institutions in the EU must be approved by the EP or, in the case of treaty amendments, by Member State parliaments or electorates. Moreover, he notes that Member State governments retain a veto power over many intergovernmental decisions.\textsuperscript{145}

A third constraint on the executive branch of government, which exists in democratic societies more generally, is the re-election constraint. Political leaders in normal circumstances wish to perpetuate their rule; in order to do so, they must be periodically re-elected. Their desire to secure re-election will induce politicians to pay close attention to public opinion throughout their period in office.\textsuperscript{146} However, it has been argued that the re-election constraint, devised as it was to constrain the limited \textit{laissez-faire} state of the nineteenth century, cannot be sufficient in a state whose scope and size has grown

\begin{thebibliography}{9}
\bibitem{142} Moravcsik (n43) 612. 
\bibitem{143} Wright (n126). 
\bibitem{144} Moravcsik (n43) 607-609. 
\bibitem{145} Moravcsik (n43) 609-610. 
\bibitem{146} Posner and Vermeule (n125) 12. 
\end{thebibliography}
exponentially since then, particularly in the last sixty years. McC Wright (nl26) 34.

The re-election constraint is of limited usefulness in certain other respects too. First, the bundling of distinct issues in party’s election platform means that voters must endorse a party with which they agree in respect of certain issues but not all. Second, elections enable those with wealth to have greater influence over election results than the average citizen can hope to have. However, the advantage of wealth has been diluted in many European countries by laws which limit the amount individuals may spend in elections. Third, voters may lack the information necessary to make informed choices between rival candidates. Fourth, the time lag between elections means that voters may forget executive transgressions before the next election takes place. For discussion of these weaknesses of the electoral constraint, see Posner and Vermeule (nl25) 115.

These considerations compel the conclusion that, though the electoral constraint is a real one, it is not sufficient in itself to constrain an executive branch.

The fourth major constraint on executives is provided by the media. Media scrutiny of politics and the activities of state bodies generally has become a ubiquitous feature of modern democracy. The media probe the performance of politicians and force them to account for failings. The interaction between politicians and the media, in the modern age, has become the principal determinant of the public’s perception of its leaders. For this reason, politicians must surrender to the jurisdiction of the media, so to speak, and must continually answer difficult and unwelcome questions from that quarter. This is a powerful constraint on the activities of the executive, ensuring that all decisions will be thoroughly scrutinized by a (relatively) independent body, thus acting as a disincentive to the abuse of their power by politicians.

Fifth, as the power of the legislative branch has atrophied, that of the judiciary has grown. Courts, previously so deferential to legislative and executive determinations of the public interest, have in recent times begun subjecting executive and legislative conduct to ever more intensive scrutiny, under a variety of rubrics, including constitutional, administrative, and human rights law. Courts have proven themselves willing to strike down laws, and to overturn decisions, which they consider to violate the rights of citizens. This acts as a powerful protection against executive abuses of power. Posner and Vermeule (n43) 613.

For discussion of these weaknesses of the electoral constraint, see Posner and Vermeule (n125) 115. Posner and Vermeule (n125) 209; Wright (n126) 104.
Thus, I have concluded that executive branch dominance does not undermine the democratic legitimacy of consociational systems for the following reasons: first, because it is necessary in the modern world, in which governmental action and regulation are ubiquitous; second, because executive dominance is in no sense a feature unique to consociational systems of government; and, third, because the executive under such systems remains subject to a variety of checks and balances, which provide some assurance that it will exercise its powers in an accountable manner.

(d) Conclusion

In this section of the thesis I have considered and sought to rebut the following criticisms of consociational democracy: first, that nation states are innately aggressive and likely to engage in crimes against humanity; second, that it is relativistic in its aversion to uniform human rights standards and its acceptance of the innate value of diversity and experimentation; and, third, that it places the executive in a dominant position relative to the other branches of government. I have sought to demonstrate that none of these criticisms of consociational democracy is well-founded.

Accordingly, given the conclusion in sub-section 4.3.4 above, that the consociational conception of democracy is a desirable one, on the basis that it is to be preferred to the forms of government which preceded it; on the basis that it facilitates experimentation and competition; and on the basis that it assists in achieving peaceful co-existence among nations, and given the conclusion in this sub-section that none of the criticisms which have been made of consociational democracy are convincing, it is submitted that it is normatively desirable to conceive of the EU as a consociational democracy.

Conclusion

In the first section of this chapter I described in summary form the diplomatic history of Europe between the conclusion of the Peace of Westphalia in 1648 and the end of the Second World War in 1945. I also described the evolution of the EU in the post-war period and the gradual development of a scholarly discourse in which the democratic credentials of the EU were considered and discussed.
Dworkin famously argued that any theory of interpretation should both fit and justify the social practice it purports to interpret. In the second section of this chapter I put forward a number of factual arguments in seeking to demonstrate that the theory of consociational democratic provides an accurate descriptive account of governance in the EU and, thus, is a good ‘fit.’ Specifically, it was argued that the EU could accurately be described as a consociational democracy for the following reasons: first, because it is governed by coalitions of elites from all Member States of the EU; second, because each Member State has a veto over important decisions affecting it; third, because the Member States of the EU have equal voting power in the context of intergovernmental decision-making in the EU and because the smaller Member States hold a disproportionate number of seats in the EP; and, fourth, because each Member State enjoys a significant degree of autonomy, which allows it to govern its own internal affairs without external interference.

It was argued in the third section of this chapter that the theory of agonistic liberalism expressed by John Gray provides a strong normative justification for conceiving of the EU as a consociational democracy. In that regard I made the following arguments: first, that nation states arose in human history out of mankind’s transcendence of tribal, creedal, and imperial forms of government; second, that it encouraged mutually beneficial experimentation and competition between states; and, third, that it facilitates peaceful co-existence between nations.

All this implies that tribunals charged with interpreting international human rights instruments ought to permit a significant degree of diversity to exist in the standard of human rights protection in different nation states, while insisting that each observe a basic minimum standard of morality. As Waldron has stated, ‘in politics the question is always how disagreements among the citizens are to be resolved.’[^5] Where it is alleged that an EU Member State has violated a fundamental right and there is intense controversy over whether the measure concerned amounts to such a violation it is undesirable, if one accepts the tenets of value pluralism, tha the ECJ, or any other tribunal charged with the elucidation of fundamental rights norms, should substitute its view of what is reasonable in the circumstances for the considered views of the citizens of the Member State concerned, absent cogent justification for adopting that course. The succeeding chapters of this thesis

will be devoted to considering what might constitute such a cogent justification and in what circumstances, and by reference to what principles, the ECJ should overrule the judgement of a Member State concerning issues of fundamental rights.

In the next chapter of this thesis it shall be argued that conceiving of the EU in agonistic and consociational terms implies that the ECJ should adopt an originalist approach in its interpretation of the CFR. It shall be contended that the adoption of an originalist approach would enable the Member States of the EU to preserve a significant measure of cultural diversity while simultaneously ensuring that each of them observes a minimum standard of human rights protection.
THE NATURE OF THE MEMBER STATES' AUTHORITY

Introduction

In the previous chapter of this thesis it was argued that it is both factually accurate and normatively desirable to conceive of the EU as a consociational democracy. The normative arguments made in the last chapter in favour of conceiving of the EU as a consociational democracy, and in favour of allowing Member States to preserve a significant degree of cultural autonomy, were the following: first, that the nation state was preferable to the forms of polity which preceded its emergence, namely tribal, creedal, and imperial forms of government; second, that it was normatively desirable to preserve the cultural autonomy of the Member States of the EU because this facilitated experimentation and competition in providing public goods to citizens between the Member States of the EU; and, third that the preservation of the cultural autonomy of the Member States of the EU had helped to enable states with widely different and colliding values to co-exist peacefully with one another. Issue was also joined with certain of the arguments which have been made against conceiving of the EU as a consociational democracy. First, the contention that nation states are inherently violent and likely to commit crimes against humanity was rejected as historically inaccurate; second, it was argued that the theory of consociational democracy, in its acceptance of the desirability of preserving cultural differences between nation states, was not relativistic because the value pluralist position was subject to the caveat that no nation state should be permitted to fall beneath a basic minimum standard of human rights protection; and, third, it was argued that the fact that the executive branch predominates over the other branches under a consociational system of government is readily defensible and does not undermine democratic accountability.

On the basis of all of these arguments it was concluded that it was normatively desirable to conceive of the EU as a consociational democracy. This implies that each Member State ought to have the authority to veto any decision with which it fundamentally disagrees, the purpose of this veto power being to enable each Member State to maintain its cultural distinctiveness. However, the CFR imposes on all Member States equally the obligation to
respect the fundamental rights enshrined therein. The objective of maintaining the cultural
distinctiveness of each Member State of the EU, which derives from its consociational
nature, is in tension with the logic underpinning the CFR, which is to guarantee a uniform
standard of human rights protection across the EU. The fundamental purpose of this thesis
is to argue that adopting an originalist method of interpretation is the only means by which
this tension may be resolved. These conflicting purposes can only be reconciled if the CFR is
interpreted in a manner which does not circumvent the right of each Member State to
maintain its veto power over decisions with which it fundamentally disagrees. It is
axiomatic that no Member State of the EU would have understood the terms of the CFR, at
the time it was given legal effect in 2009, as leading to decisions with which that Member
State fundamentally disagreed or which imperilled the maintenance of the cultural
distinctiveness of that state. On this view, the ECJ must interpret the CFR in a manner which
does not violate the fundamental values of any Member State.

For example, in A, B, and C v Ireland,\(^1\) the ECtHR refused to hold that the right to private and
family life under Article 8 of the ECHR encompassed a right to abortion. The court arrived
at this conclusion in spite of the fact that abortion was widely available in most signatory
states to the ECHR.\(^2\) If the same question were to be presented to the ECJ under the
equivalent provision of the CFR, Article 7 thereof, it would be necessary in my view for the
ECJ to answer that discrete question in the same fashion. This is because abortion has long
been fundamentally at odds with the moral views of inter alia the Irish people, though this
may have changed more recently. Nevertheless, the right to life of the unborn child
continues to have equal status to that of the mother under Article 40.3.3 of the Irish
Constitution. For this reason it would be appropriate for the ECJ, in the hypothetical case
just considered, to hold that the CFR does not protect a right to abortion, on the basis both
that the text of the CFR does not compel the conclusion that a right to abortion is protected,
and because abortion is fundamentally opposed to the moral views of the citizens of a
Member State.

However, this is not to suggest that the CFR should invariably be interpreted in accordance
with the transient whims of every Member State. The theory of consociational democracy
does not give its constituent communities a veto over every decision with which they
disagree. Rather, it gives them a veto over decisions which affect them and to which they are

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2. Paolo Ronchi 'Crucifixes, margin of appreciation and consensus: the Grand Chamber ruling in Lautsi
   v Italy' (2011) 13 Ecc LJ 287, 296.
fundamentally opposed. The line between mere opposition to a disfavoured decision and a fundamental affront to the morality of a Member State is a difficult one to draw with any precision. Nevertheless, the Irish abortion case is a plainly apposite example, since it provides an instance in which a Member State decided after much public controversy to adopt a particular disposition, one which differed fundamentally from that which obtained in virtually all other Member States of the EU, and which had been inscribed in law in the most solemn way imaginable, namely in the form of a constitutional right.

The conclusion that the more abstract rights provisions of the CFR ought not to be interpreted in a manner to which any Member State may be said to be fundamentally opposed is fortified when one considers the means by which the CFR was given legal effect in the first place. This was done via treaty amendment, as one of the innovations inaugurated by the Lisbon Treaty in 2009. Article 48 of the Treaty on European Union (TEU) prescribes that treaty amendments must be unanimously approved by the Member States, as the Lisbon Treaty eventually was. If the CFR had not been so ratified, and if it had not received the unanimous *imprimatur* of the Member States, hence assuming the status of fundamental law, there would be no reason to pay attention to it or to regard its dispositions as binding upon us. This has implications for its interpretation. Richard Kay has made the following statement concerning the connection between the source of a law’s validity and its interpretation:

> If the Constitution does derive its legitimacy, its power to restrain, from assumptions about this historical-political act that created it, the idea that it is to be understood in any of the various senses that might be supported by its words as a matter of contemporary usage becomes insupportable. What commands obedience is not a mere set of words, but the expression of an intentional historical-political act. Any attempt to to apply the Constitution’s terms in a sense not intended by the human beings participating in that historical-political act, therefore, fails to invoke the only phenomenon that marks the Constitution off as worthy of obedience. Treating the Constitution as composed of meanings unrelated to its history makes it a different text, one no more legitimate for the purpose of limiting government than the constitution of another state or the rules of major league baseball.

It follows that the implementation of a regime of constitutional restraints entails the interpretation and application of the fixed rules (rules committed to writing) created by the
constitution-makers and in the sense understood by those constitution-makers. It calls, that is, for adherence to the "original intent" of the constitutional enactors.3

Similarly, Diarmuid Rossa Phelan has argued that a link ought to be preserved between the source of a law's validity and its source of proximate authority. The legal force and validity of the CFR derives from the fact that it was adopted unanimously by the Member States of the EU; its source of proximate authority is the ECJ, the body with the authority to determine its meaning and effect in concrete cases. Phelan states:

[s]ince Eden, law has been used as an instrument and cover for the pursuit of power. The proximate authority has manipulated the division between itself and the source of validity of the law in order to establish new regimes while preserving the gloss of continuity.4

The only approach to fundamental rights adjudication which pays due regard to the 'intentional historical-political act' of those who adopted the CFR is an originalist approach. In succeeding chapters the finer details of originalist theory shall be discussed. For present purposes suffice it to say that originalists claim that the Constitution should be interpreted in accordance with the founding generation's understanding of its provisions. However, originalism has not commanded anything approaching widespread support. Thus, in order to contextualise the discussion in succeeding chapters it shall be necessary to provide a brief overview of the predominant theory of human rights adjudication and to put forward my reasons for rejecting it. Due to constraints of space this discussion will of necessity be of a strictly summary nature.

5.1 Contemporary Human Rights Discourse: a Summary and Critique

The dominant contemporary view is that fundamental rights adjudication should proceed on the basis of what judges consider to be desirable from the point of view of political morality. Waluchow has argued that to interpret human rights instruments and constitutions, the language of which are frequently vague and abstract, is 'to develop a contentious moral theory...'.5 On this view, the task of judges in interpreting a constitution is to supply any indeterminacy in its language by deciding cases in accordance with the requirements of morality.

3 Richard S Kay 'American Constitutionalism' in Larry Alexander (ed) Constitutionalism (CUP, 1998) 31. For similar views, see Michael Perry 'What is the Constitution?' in Alexander, ibid, 100.
4 Diarmuid Rossa Phelan It's God We Ought to Crucify: Validity and Authority in Law (Four Courts Press, 2000) 65.
This view has received widespread support in the contemporary discourse on human rights and constitutional law. In the United States, in the recent Supreme Court opinion in *Obergefell v. Hodges* Justice Kennedy made the following statement concerning the role of the courts in fundamental rights adjudication:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

Similarly, the European Court of Human Rights stated, in *Tyrer v. UK* and subsequent cases that ‘the Convention is a living instrument which...must be interpreted in the light of present-day conditions.’ For its part, the Supreme Court of Canada has stated that the Canadian Charter of Rights and Freedoms is a ‘living tree’ and that its meaning evolves over time to accommodate social change. In the case of *Gormley v White* the Irish Supreme Court, speaking by Clarke J., stated that ‘this Court has consistently held that the Constitution is, as it were, a living document which requires to be interpreted from time to time in accordance with prevailing norms.’

The evolutive approach referred to in these *dicta* is generally defended on the basis that it is necessary to protect minorities from oppression by the majority. It is also frequently argued in favour of the evolutive interpretation of human rights instruments that the law must be kept up-to-date and that we should not permit ourselves to be bound by the so-called ‘dead hand’ of the past. I shall deal with this latter argument in section 5.3 below.

It is submitted that the contemporary consensus is wrong and that it would therefore be most undesirable if the ECJ were to adopt an evolutive approach in its interpretation of the CFR. There are a number of reasons for this.

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7 *Tyrer v UK* (1978) 2 EHRR 1.
8 Ibid 31.
10 [2014] IESC 17.
11 Ibid para. 8.4.
12 Ronald Dworkin *Taking Rights Seriously* (Duckworth, 1977) 278.
First, there is no pan-European conception of morality; to the contrary, and as discussed in detail in Chapter 4 of this thesis, the EU is characterized by deep divisions among the Member States in relation to many issues of public policy and by an almost infinite degree of cultural diversity, with a myriad of languages, faiths, and political ideologies competing and co-existing with one another. Conway has argued that where there is no consensus as to the requirements of morality it is inappropriate for judges to rely on their own conceptions of morality in determining legal disputes:

The objection to such an approach is that it suggests that outcomes can be evaluated independently of democratic will, but the criteria for such evaluation are unclear in the context of contemporary pluralism as to ethical beliefs...a conception of government based on good outcomes could justify a system of government not democratic in any way, and democracy is inherently proceduralist...  

Second, interpreting a constitutional provision in accordance with the putative requirements of morality renders the public discussion which took place prior to its adoption meaningless. If the people understood the provision in a particular way, and the judges charged with interpreting it conclude that the requirements of morality dictate that a different meaning should be ascribed to it, then the consent of the people to the adoption of that provision will be vitiated and fundamental rights adjudication will become democratically illegitimate.

Third, if judges determine issues of fundamental rights by reference to their own perceptions of morality, the law will be in a constant state of flux, since the composition of courts changes regularly, and it is inevitable that the moral perceptions of the court will shift as its composition alters. If such shifts were to occur in the ECJ’s interpretation of the CFR it would amount to a species of informal amendment. As noted above, the unanimous consent of the Member States is necessary to effect an amendment to the fundamental law of the EU and this exclusive right of the Member States would be undermined if the court were to arrogate to itself the power to amend the CFR by means of innovative interpretation. Such unrestrained judicial innovation also causes the additional problem of legal uncertainty by making it difficult, if not impossible, to accurately and consistently predict in advance how CFR provisions will be interpreted.

13 Gerard Conway The Limits of Legal Reasoning and the European Court of Justice (CUP, 2012) 96.
14 Ibid, 103.
15 Ibid, 112.
16 Ibid, 115.
Fourth, the justification most frequently put forward in favour of the evolutive approach, namely that judges are more likely to be solicitous towards minorities than democratic majorities, fails upon closer examination. For example, it is undoubtedly true that judges internationally have been less solicitous towards the rights of the unborn than popularly elected legislatures. For example, in the cases of Roe v Wade[^17] and R v Morgentaler[^18], the Supreme Courts of, respectively, the United States and Canada declared prohibitions on abortion to be unconstitutional, with the result that abortion became freely available. Aside from the context of abortion it cannot be said that judges adhering to an evolutive approach to constitutional interpretation have been consistently hospitable to claims of minority rights against encroachments by the majority. For instance, in the case of Korematsu v United States[^19] the Supreme Court of the United States upheld as constitutional Executive Order 9066, adopted after the Japanese attack on Pearl Harbour, which had required that all Japanese Americans be committed to internment camps for the duration of the war with Japan. A further difficulty with the minority protection justification for evolutive interpretation is that 'any anti-majoritarian claim can be presented as a matter of minority protection.'[^20]

For these reasons, it is submitted that an approach to the interpretation of the CFR which involved resolving indeterminacy in the language of a constitution by reference to the subjective moral beliefs of judges would be undesirable.

The objective of this thesis is to advocate the adoption of a method of interpretation which will prevent the kind of manipulation described by Phelan and which will obviate the need for judicial philosophizing regarding moral issues. Tersely put it is argued that, because only the Member States acting unanimously had the authority to adopt the CFR, the ECJ ought to defer to that authority in its interpretation by adhering to the original understanding of its provisions held by the Member States. But what is the nature of the Member States' authority? It is to a consideration of that question that the remainder of this chapter will be devoted. The remainder of this chapter shall be structured as follows. In the section 5.2 the concept of authority shall be discussed in detail as shall the rival conceptions thereof which have been put forward by different authors. In section 5.2.5 it shall be submitted that the Member States of the EU should be recognized as possessing influential authority to direct the interpretation of the CFR. To recognise the influential authority of a

[^20]: Conway (n13) 122.
law-maker is to recognise the moral importance of respecting the wishes of that law-maker. In the previous chapter certain normative arguments were put forward in favour of recognising the right of the Member States of the EU to maintain a considerable degree of cultural autonomy. These also constitute moral reasons not to interpret the CFR in a manner with which any of the Member States of the EU would fundamentally disagree.

In the section 5.3 it shall be argued that the authority of the Member States to direct Charter interpretation ought to be considered to have been exercised by them at the time of the ratification of the Lisbon Treaty and that the ECJ ought to be considered bound by that authority in its interpretation of the CFR in the future. In other words, it shall be argued that the importance of deferring to the authority of the Member States in interpreting the CFR does not diminish with the passage of time. In support of this position it shall be argued that the adoption of the CFR ought to be considered to be an exercise in self-government by the peoples of Europe acting in accordance with their individual constitutional requirements, and that the theory of ‘self-government over time’ ought to be adopted in preference to theories of self-government which prize the instantaneous inscription of the will of the people into law.

5.2 The Concept of Authority

5.2.1 Authority in General

The first task of this chapter shall be to define precisely the nature of the Member States’ authority. Theorists have offered many different accounts of authority. Any analysis of the concept must begin with Hannah Arendt’s seminal essay ‘What is Authority?’ written in 1954. In it she traced its origins to ancient Rome; for once the Greeks had not thought of it first. On the basis of this historical analysis she suggested that authority was, by its nature, incompatible with both coercion and persuasion, and placed it somewhere between these two extremes. She said: ‘if authority is to be defined at all, then, it must be in contradistinction to both coercion by force and persuasion through arguments.’

The most celebrated model of authority was developed by the German sociologist Max Weber. He recognized three separate categories of authority: legal, traditional, and

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charismatic. Weber defines legal authority as ‘resting on a belief in the ‘legality’ of patterns of normative rules and the right of those elevated to authority under such rules to issue commands.’ He defines traditional authority as ‘resting on an established belief in the sanctity of immemorial traditions and the legitimacy of the status of those exercising authority under them.’ Charismatic authority is said to rest ‘on devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him.’ Weber identifies the authority possessed by leaders of democratic governments as a species of charismatic authority. As the discussion in the previous chapter reveals, my argument does not rest on any claim that democratic leaders are individually endowed with exceptional qualities and, therefore, must be obeyed. Accordingly, I shall not employ Weber’s model of authority in what remains of this chapter.

A particularly useful model of authority is provided by Heidi Hurd. She identifies four separate categories of authority which a lawmaker may be said to possess. They are: inspirational authority, influential authority, practical authority, and theoretical authority. Hurd’s model is extremely useful because, unlike Arendt and Weber, she addresses the authority possessed by lawmakers exclusively, rather than engaging in a general discussion of the concept. I shall now consider whether the Member States may claim authority, with respect to the interpretation of the CFR, in any of these four senses.

5.2.2 Inspirational Authority

An individual who recognizes the inspirational authority of the lawmaker acts as the lawmaker requires for the reasons that motivated the lawmaker to enact the law in the first place. By definition, to attribute inspirational authority to a lawmaker commits one to an intentionalist approach to interpretation. In addition, attributing inspirational authority to a particular body commits one to privileging the intention of that body, in issuing particular directives, over the text of those directives. To take an example from the United States debate on constitutional interpretation, so-called ‘hard’ originalists in the United States, by

23 ibid 328.
26 Hurd (n24) 408.
prioritizing the intention of the founding generation over the text of the Constitution,27 attribute inspirational authority to the people of the founding generation.

But should we attribute inspirational authority to the Member States? It is submitted that it would be wrong to do so, for two reasons. First, to prioritize the intentions of lawmakers over the text of the laws they enact is contrary to the rule of law, by upsetting the expectations of citizens who have relied on that text, the only publicly accessible evidence of the content of the law.28

Second, an exclusive focus on intention fails to recognize the fact that what we say inevitably reflects both more and less than what we intend.29 In other words, no matter how fastidious the legislative draftsman, there will inevitably be cases which he would, on reflection, have wanted to be embraced by the rules, but which, on a linguistic construction, fall through the cracks. Similarly, there will always be cases, which are embraced by the strict wording of the legislation, which the legislators did not foresee, and which they would not have wanted to include had they contemplated the possibility.30

For these reasons, we should not regard the Member States of the EU as possessing inspirational authority to determine the direction of Charter interpretation in the EU.

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29 Joseph Raz Between Authority and Interpretation (Oxford University Press, 2009) 230.

5.2.3 Practical Authority

An individual who recognizes a lawmaker as having practical authority over him accepts that the law provides reasons for action which supplant all other reasons.\(^{31}\) The justification usually proffered for attributing practical authority to a particular body is that that body possesses greater knowledge, expertise, and wisdom than the addressee of the law.\(^{32}\) Given this justification, in cases of vagueness, an interpreter should seek the mental states of individual legislators since it is these legislators who possess special expertise. However, if the text being interpreted is clear, to go beyond that text and consider authorial intentions would be to cast doubt on the wisdom of the authority. As the theory of practical authority rests on an assumption of superior legislative wisdom, departure from the plain meaning of the text cannot be justified under a system of practical authority, because a wise legislature will presumably be capable of expressing its intention accurately.

The normative arguments made in the previous chapter in favour of recognizing the authority of the Member States over Charter interpretation rests on reasons of political morality and not on the empirical argument that the leaders of the Member States possess greater wisdom than any alternative repository of authority. Therefore, it is not claimed that the Member States of the EU possess practical authority.

5.2.4 Theoretical Authority

The directives of a theoretical authority constitute a source of evidence as to the requirements of morality.\(^{33}\) Theoretical authority is plainly the weakest form of authority considered thus far. There is no reason for deferring to the views of a theoretical authority, except to the extent that one agrees, on reflection, with the moral perceptions of that authority, as embodied in its enactments. It is arguable that the term ‘theoretical authority’ is a misnomer, since a theoretical authority’s ability to direct the activities of those subject to its jurisdiction is so attenuated and contingent.

5.2.5 Influential Authority

\(^{32}\) Hurd (n24) 415.
\(^{33}\)Hurd (n24) 418.
An individual who recognizes the influential authority of the lawmaker treats legal injunctions as analogous to requests, which give people new reasons for action, to be balanced against existing motivations. There is no reason for doing as the authority says for the reasons that motivated the authority; it is sufficient to discern the meaning of the authority's request. According to Hurd, the reason for complying with the decisions of an influential authority is the moral importance of obeying the authority. The previous chapter put forward certain normative arguments in favour of conceiving of the EU as a consociational democracy and in favour of recognising the Member States as central to the process of law-making in the EU. Although attributing influential authority to the Member States would exhibit an appropriate level of deference to the Member States of the EU, the fact that influential authority is based on the importance of obeying the law-maker has led Hurd to conclude that it is necessary to look beyond the plain meaning of their directives, if there is reason to believe that the plain meaning does not reflect the will of the authority.

However, this latter conclusion does not necessarily follow. Hurd is correct to say that the intentions of the legislature should, in theory, take priority in all cases under a method of interpretation which seeks to justify itself by reference to the authority of the legislature. Although this point is unimpeachable as a matter of abstract logic, the conclusion it suggests, that intentions should always prevail over text, is foreclosed by compelling considerations pointing in the opposite direction, namely that the prioritization of intention over text, with the implication that the former could amplify the obligations imposed by the latter, is contrary to the rule of law value of predictability, and of enabling citizens to tailor their conduct so as to comply with the law. Moreover, given that the drafters of legal texts in advanced societies such as ours are linguistically competent individuals, it is surely not unreasonable to assume in the first instance that law-makers, the Member States of the EU in the context of the interpretation of the CFR, have expressed themselves accurately.

Therefore, we may say that the Member States have influential authority to determine the direction of Charter interpretation in the EU but that considerations of predictability preclude the adoption of an interpretative practice which would lead to the subordination of text to the intention of the legislature. In other words, it ought to be assumed that the text of the law reflects the intentions of the Member States such that, if the text is clear, there ought

34 Hurd (n24) 409-412.
35 Hurd (n24) 412.
*See the references at (n28) above.
to be no further investigation of legislative intent. In the next chapter of this thesis the rule of law values underpinning textualism will be explained in greater detail.

Thus, it is submitted that the Member States of the EU ought to be considered to possess influential authority to direct the process of law-making in the EU. The question that next arises is whether the authority of the Member States to direct the manner in which the CFR is to be interpreted should be subject to temporal limits, such that a deviation from their understanding of its provisions at the time of its enshrinement in law in 2009 should be permitted after the passage of a certain period of time.

5.3 Self-Government Over Time

Joseph Raz has argued that, after a certain (unspecified) period of time, the validity of the law no longer derives from the authority of the lawmaker but, rather, from widespread acceptance of citizens in the present day. He suggests that the democratic argument in favour of recognizing the authority of lawmakers is of little force in the case of old laws, the original makers of which are long dead.\footnote{Raz (n29) 295-297; Adam M Samaha ‘Dead Hand Arguments and Constitutional Interpretation’ (2008) 108 Colum L Rev 606, 617; Cass Sunstein The Partial Constitution (Harvard University Press, 1993) 100.}

One might legitimately query the relevance of this point in relation to Charter interpretation in the EU, given that the Charter was given legal effect quite recently. However, the question still needs to be faced because the Charter is likely to be around for a long time.

Therefore, in order for the central claim advanced in this thesis to succeed, \textit{ie} that the ECJ in interpreting the Charter ought to give effect to the Member States' understanding of its provisions at the time of the ratification of the Lisbon Treaty, arguments must be put forward to demonstrate that the basis of the validity of the CFR remains the original consent of the Member States thereto, even after the death of the generation which adopted it.

Michael McConnell rejects the notion of self-government in the present in favour of 'self-government over time.'\footnote{Michael McConnell ‘Textualism and the Dead Hand of the Past’ (1997-1998) 66 George Wash L Rev 1127.} On this conception of self-government the corpus of law extant in a given society at a particular moment need not derive their authority from the existing
society in which they operate; these laws and practices owe their validity to the authority of the generation which devised them. This means that each generation can add to, and alter, the achievement of its predecessors, and change the law to that end. The innovations of each generation, however, owe their continuing legal validity, even after the passing of the generation that brought them about, to the authority of that generation to amend the law. However, each generation possesses their right to take from and add to the law. Several arguments might be advanced against this position.

Another argument which might be advanced against the concept of self-government over time is that it requires one to believe that the founding generation was wiser than the current generation or a meshing of the identity of the latter with that of the former. Any such a priori belief in the superiority of one generation compared to another could, with justice, be described as a repugnant form of atavistic ancestor worship; fortunately, it is not the argument advanced in this thesis. It would, moreover, be quite wrong to assume that this is the only possible argument which can be made in favour of recognizing the enduring authority of the Member States. Under McConnell’s concept of self-government over time, the present generation remains entirely free to amend the laws made by its predecessors; all that one needs to recognize is that those aspects of the corpus juris which remain, after such amendments, owe their continuing authority within the legal system to the generation which adopted them or, as Burke put it, ‘the idea of inheritance furnishes a sure principle of transmission; without at all excluding a principle of improvement.’

However, the fact that self-government over time is a defensible conception of self-government does not necessarily establish that it is preferable to self-government in the

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40 McConnell (n38) 1135-1136. The ‘notion of self-government over time’ effectively reconciles popular sovereignty with Burke’s notion of solidarity between generations. See, Edmund Burke Reflections on the Revolution in France (Penguin Books, 2004) 120.
44 Burke (n40) 120.
present, as espoused by Raz, among others.\textsuperscript{45} To repeat, under that conception of self-government, old laws retain their authority, but they do so because of the acceptance of the current generation, rather than the authority of the generation that enacted them. This implies that, in interpreting indeterminate old laws, judges need not defer to the understanding of the generation that enacted those laws. Rather, in their interpretation of old laws, they should seek to solve contemporary problems.\textsuperscript{46} This effectively vests a limited power to amend legislation in the hands of the judiciary, to exist side-by-side with the power of the legislature to amend law. In the context of Charter interpretation in the EU it vests a power to amend the Charter in the ECJ, to exist alongside that of the Member States.

Such an arrangement would be contrary to the right of self-government, as adumbrated in the last chapter of this thesis. The right of the Member States to alter or repeal the CFR necessarily includes the right to determine the precise extent to which it should be changed and, hence, embraces a right to choose \textit{not} to change it at all. To vest a right in the judiciary to amend the CFR, by means of an innovative interpretation, breaches this right of the Member States to choose not to change it. Dennis Goldford has argued that the entire originalist enterprise is beguiled by a paradox: that it seeks both to bind the future to a fixed fundamental norm and to allow current majorities to rule.\textsuperscript{47} McConnell’s conception, of self-government subsisting over time, rather than being reducible to the exercise of the people’s sovereign will at a particular moment, in my view successfully harmonizes these two elements. The current generation’s agreement to be bound by the enactments of past generations carries the corollary that it enjoys a right to bind future generations. This enables citizens to plan their affairs more effectively, secure in the knowledge that the rights they enjoy today will also be secured to them tomorrow.\textsuperscript{48}

Nor is it an answer to this point to say that the Member States may reverse such judicial amendments of the CFR, if they so wish. This would reverse the normal rule applicable to Charter amendments, whereby the Member States must unanimously approve of changes. If the burden of reversing judicial amendments of the CFR were to be placed on the Member

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\textsuperscript{46} Raz (n29) 317.

\textsuperscript{47} Goldford (n27) 281.

\textsuperscript{48} Steven G Calabresi ‘Introduction’ in Calabresi (n43) 8; Steven G Calabresi and Livia Fine ‘Two Cheers for the Professor Balkin’s Originalism’ (2009) 103 Nw U L Rev 663, 683.
States, a single Member State could prevent reversal; in other words, a consensus would be required not to permit amendment of the CFR.  

Moreover, it is to be observed that those who object to the rule of dead generations, on the basis that they have no right to constrain the current society, are not typically arguing that current legislative majorities should be at large concerning what policies to adopt. Rather, they are arguing that judges should be permitted to impose limits on current majorities, by ascribing to the text of the law, in this case the CFR, a meaning which it did not previously have. Thus, the objection to the rule of dead generations is perhaps better understood as a claim to constrain current majorities on a basis other than the authority of the people, dead or alive. 

Conclusion

In the first section of this chapter the concept of authority was analysed and its various permutations. It argued that the Member States of the EU ought to be considered to possess influential authority over the interpretation of the CFR and, thus, that it ought to be interpreted in a manner consistent with the Member States’ understanding of its provisions. In the second section it was argued, by reference to the theory of self-government over time, that the understanding held by the Member States at the time of the adoption of the CFR, rather than any subsequent understanding they might have, ought to be adopted by the court. In the next three chapters arguments shall be put forward to demonstrate that recognising the influential authority of the Member States over the process of interpretation means that priority ought to be given to the text of the CFR in its interpretation and that the drafting and ratification history of the CFR and European legal tradition ought to be consulted in circumstances where its meaning is unclear.

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Robert H Bork, Speech at the University of San Diego Law School, November 18th, 1985 in Calabresi (n43) 88
TEXT IN ORIGINALIST EXEGESIS

Introduction

In the previous chapters of this thesis a number of arguments were made. First, in chapter 4, I argued that the EU ought to be considered a consociational democracy. This means that unanimity among the EU Member States is necessary to legitimize all of the important activities which it undertakes. The EU Charter of Fundamental Rights (CFR) was given legal effect according to the ordinary procedure for treaty amendment, i.e. by the unanimous consent of the EU Member States. Second, in chapter 5, I argued that, because the CFR depended on the unanimous consent of the Member States for its validity, it ought to be interpreted according to their understanding of its provisions at the time of its adoption in 2009.

This chapter shall be structured as follows. In the first section a number of arguments shall be made in favour of the view that the influential authority of the Member States of the EU to direct Charter interpretation in the EU implies that the ECJ should, in the first instance, adopt a textualist approach to its interpretation. It shall be argued that the intentions of the Member States should only be relied upon after a thorough consideration of the text of the CFR has failed to yield a determinative answer to the interpretative problem with which the court is faced. Thus, this thesis advocates the adoption of a two-step process in the interpretation of the CFR, one which considers its text in the first instance and, where the text fails to provide a complete answer, the intentions of the Member States with respect to that text. In the remaining sections of this chapter I propose to deal with the first of these steps: I shall set out some key canons of linguistic interpretation, which ought to be brought to bear in reading the CFR. I shall return to a discussion of the meaning, significance, and the means of unearthing the intentions of the Member States in the next chapter of this thesis.

In the second section of this chapter I shall discuss the nature of canons of interpretation in general; in the third section I shall discuss the ordinary meaning canon, which shall include a discussion of the correct use of dictionaries; in the fourth section the whole-text canon and its implications, including the presumption of consistent usage, the presumption against
surplusage, and the *generalia specialibus non derogant* canon shall be discussed; in the fifth section the *expression unius exclusio alterius* canon shall be discussed; and, in the sixth section, the prefatory materials canon shall be discussed. Reference shall be made throughout to the jurisprudence of Justices Scalia and Thomas of the U.S Supreme Court, the two most prominent American originalists, and specifically how they have applied each of these principles. For reasons of space the analysis below is self-evidently not a comprehensive account of textualist methodology but merely discusses what I consider to be the most salient aspects thereof.

6.1 Influential Authority, Textualism, and the Rule of Law

In the previous chapter of this thesis it was argued that the Member States of the EU possess influential authority to direct the manner in which the CFR is to be interpreted. I argued that that authority should be considered to have been expressed in the text of the CFR. In addition, I argued that adherence to a textualist method in interpreting the CFR was necessary in order to vindicate certain rule of law values. I shall now develop that argument in greater detail. Randy Barnett has argued that putting a Constitution into writing serves four essential purposes. First, he argues that putting the Constitution in writing serves an evidentiary function, *ie* it shows what the terms of the Constitution actually are. Citizens should be able to find out easily what their rights are and governments should know the extent of their powers; this is the very purpose for which the CFR was put into writing. According priority to its text facilitates the more ready acquisition of this knowledge.

Second, he argues that it serves a cautionary function, *ie* putting the Constitution in writing ensures that its terms have been the subject of deliberation. As I shall demonstrate in my discussion of the drafting history of the CFR in chapters 11 and 12 of the thesis, its provisions were the subject of intense deliberation and discussion at the Convention at which it was drafted. Third, he argues that putting the Constitution in writing serves a channeling function, *ie* it informs those who wish to modify the Constitution what

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procedures they must adhere to. Fourth, it serves a clarifying function, *ie* the act of writing causes the meaning of the Constitution to be clarified.\(^2\) Barnett has explained that:

> [w]hen a writing can be contradicted by testimony of a differing understanding, the purposes for which the agreement was put in writing in the first place is undercut.\(^3\)

Thus, if clear text could be overridden by extrinsic evidence of meaning, the very purpose of written law would be undermined. Moreover, most texts have a hard core of meaning and, thus, the text is capable of answering many questions with relative certainty,\(^4\) though of course resort to other *indicia* of meaning will also often be necessary.

In addition to the points made by Barnett, several additional arguments might be made in favour of a textualist approach to the interpretation of the CFR. A fifth point which could be made in this regard is that because most texts have a hard core of meaning, about which there can be no disagreement,\(^5\) adherence to the text constrains judicial discretion. Although there is ample room for disagreement as to the meaning of a particular text,\(^6\) there are certain meanings that a text simply cannot bear. Therefore, according priority to the text reduces judicial discretion, though it certainly does not entirely eliminate such discretion.\(^7\)

Sixth, to the extent that the Charter is linguistically unambiguous, it can be assumed that it reflects the intent of the Member States. As noted in the previous chapters, the drafters of laws in advanced legal systems are linguistically competent individuals and can be presumed to mean what they say.\(^8\)

### 6.2 Canons of Interpretation Generally

The word ‘canon’ originally derives from the Greek word, meaning a straight reed which can be used for accurate measurement.\(^9\) The canons of interpretation discussed below are not

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\(^2\) See also, Steven G Calabresi and Livia Fine ‘Two Cheers for Professor Balkin’s Originalism’ (2009) 103 Nw U L Rev 663, 671.


\(^5\) ibid.

\(^6\) David M Zlotnick, ‘Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology’ (1999) 48 Emory LJ 1377, 1408.


\(^8\) Reed Dickerson, ‘A Peek into the Mind and Will of the Legislature’ (1974-1975) 50 Ind LJ 206, 218.

chains with which to shackle an interpreter but, rather, ‘presumptions about what an intelligently produced text conveys.’ In the context of a particular case, different canons may pull the interpreter in opposing directions: they are not in the nature of absolute rules.

The canons of interpretation, which for generations occupied a prominent role in the interpretation of statutes in common law countries, have been the subject of much criticism in recent decades. Because of the tendency of the canons to point in opposing directions, it has been suggested that they are radically self-contradictory and that for every canon which favours a particular disposition, there is invariably another which suggests the opposite. In addition, it has been said that generalized canons do not aid interpretation due to the unique complexion of every individual interpretative problem. However, if one treats the canons as mere indicators of meaning, which sometimes operate in dynamic tension with one another, the first of these criticisms melts away. The difficult task for the interpreter is to choose the most linguistically and contextually reasonable among the competing inferences suggested by the canons.

Moreover, any criticism of ‘canons’ in general is somewhat otiose given that the category is open-ended and contested: the legitimacy of many particular canons continues to be disputed by courts and scholars. Thus, the debate should not focus on the usefulness of canons in general but, rather, on the validity of particular canons.

Canons may be divided into two categories: linguistic and substantive. The linguistic canons of interpretation have been described in the following terms:

Language canons consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of

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14 For example, Scalia instances Llewellyn’s deployment of a number of ‘faux canons,’ which have never been widely accepted, in his critique of canons in general. See Scalia (n12) 27.
those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes.\(^5\)

It has been said that the linguistic canons can be usefully deployed in determining the meaning of particular words and phrases, in accordance with the rules of grammar, and in a manner which makes sense of those words and phrases in the context in which they appear.\(^6\) For present purposes, 'context' means other parts of the text being interpreted.\(^7\) Other aspects of context shall be discussed in succeeding chapters, including drafting history, pre-existing law, and post-ratification interpretations. Thus, this chapter is concerned with those linguistic principles which ought to govern the interpretation of a text in the first instance.

Substantive canons have been said to:

[r]eflect judicially-based concerns, grounded in the courts' understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.\(^8\)\(^9\)

Examples of substantive canons include the presumptions in common law jurisdictions that remedial statutes are to be liberally construed and that penal statutes are to be strictly construed.\(^10\) Substantive canons, which incorporate certain a priori policy preferences into the interpretive calculus, have been criticized as enabling judges to surreptitiously inscribe their own political preferences into law.\(^11\) It is submitted that, for this reason, all substantive canons ought to be disregarded in the interpretation of the CFR. The CFR forms part of the fundamental law of the EU. As a constitutional document,\(^12\) it is addressed to the people themselves and is designed to be understood by them. For this reason its unvarnished text, construed in accordance with ordinary linguistic usage, and in its full context, ought to

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\(^{17}\) For other definitions of 'context,' see Reed Dickerson, 'Statutory Interpretation: the Uses and Anatomy of Context' (1971-1972) 23 Case W Res L Rev 353, 357.

\(^{18}\) Brudney and Ditslear (n15) 13.

\(^{19}\) For criticism of these and substantive canons in general, see Scalia (n12) 27-29.


\(^{21}\) See Chapter 4 of this thesis for my discussion of the consociational nature of the EU polity.
Thus, the discussion in what remains of this chapter shall be confined to linguistic canons.

6.3 Ordinary Meaning Canon

6.3.1 The Canon Stated

The ‘ordinary meaning canon’ is the most fundamental of all of the linguistic canons. Indeed, it provides the centre of gravity for the others, in the sense that the function of all linguistic canons is to assist in determining the ordinary meaning of the language used in the text.

The ordinary meaning canon has been variously stated. In District of Columbia v Heller,\(^2\) which has become the locus classicus of modern originalist exegesis, Justice Scalia stated:

> In interpreting this text, we are guided by the principle that the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.\(^3\)

Justice Thomas has expressed himself in similar terms. In McDonald v Chicago,\(^4\) he stated: ‘the objective of this inquiry is to discern what “ordinary citizens” at the time of ratification would have understood the...[c]lause to mean.’\(^5\)

Ordinary meaning is to be determined not word-by-word but, rather, by a consideration of the entirety of the statute’s context.\(^6\) The context may, however, indicate that a technical meaning ought to be ascribed to the word or phrase being interpreted in preference to the ordinary meaning. For example, the word ‘consideration’ means something different in

\(^2\) Thomas M Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union (7th edn, Little Brown & Co, 1903) 93.

\(^3\) 554 U.S. 570 (2008).


\(^6\) 561 U.S. 3025 (2010).

\(^7\) Burrows (n24) 4, 75; De Sloovére (n13) 219-221; Summers and Marshall (24) 220-223; Jim Evans, Statutory Interpretation: Problems of Communication (OUP, 1988) 49.
ordinary English than it does in legal English. Thus, where a term is used in a context in which it usually bears a technical signification, that signification ought to be adopted, unless there is evidence that another was intended. This is justified because the linguistic meaning of a phrase includes the meaning ascribed to it by experts working in a specialist field or, to put it another way, the ordinary meaning of a term, when used in a specialist context, is the specialist meaning.

6.3.2 Discerning Ordinary Meaning

(a) Dictionaries in Originalist Exegesis

In District of Columbia v Heller, Justice Scalia cited founding-era dictionaries, including Samuel Johnson’s Dictionary of the English Language (1755), T. Sheridan, A Complete Dictionary of the English Language (1796), and Timothy Cunningham’s A New and Complete Law-Dictionary (1771) in support of his holding that the right ‘to keep and bear arms,’ contained in the Second Amendment of the Constitution, meant the right to have weapons. He used the same dictionaries in interpreting the phrases ‘well-regulated’ and ‘militia,’ used in the prefatory clause of that provision, to mean ‘well trained’ and ‘all males physically capable of acting in concert for the common defense,’ respectively.

Justice Scalia has used founding-era dictionaries in seeking to discern the original meaning of many other constitutional terms. In Morrison v Olson, he used them in seeking to ascertain the meaning of the term ‘inferior officers’ used in Article II of the Constitution; in Grady v Corbin, he consulted them in order to determine the meaning of the word ‘offence’

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28 Scalia and Garner (n10) 74.
29 Dodd (n9) 133; Langan (n24) 264; Burrows(n24) 68.
33 ibid 720.
in the Double Jeopardy Clause of the Fifth Amendment; in *Maryland v Craig*, he cited them in seeking to discern the original meaning of the word 'witness' in the Sixth Amendment; in *Freytag v Commissioner*, he quoted them in seeking to determine the original meaning of the word 'department' used in the Appointments Clause of Article II of the Constitution; in *Harmelin v Michigan*, he used them in discerning the meaning of the word ‘unusual’ in the Eighth Amendment to the Constitution; in *National Endowment for the Arts v Finley*, he cited them in order to discern the original meaning of the word ‘abridge,’ which was used in the First Amendment; in *INS v St. Cyr*, he used them in discerning the original meaning of ‘suspend,’ as used in the Suspension Clause of Article I, Section 9, of the Constitution.

Justice Thomas has also placed a high value on definitions contained in founding-era dictionaries. In *Helling v McKinney*, he used them in holding that the word 'punishment' in the Eighth Amendment referred to judicially-imposed penalties and could not be extended to conditions of confinement while in prison. In *United States v Lopez*, he cited them in support of the view that the word ‘commerce,’ at the time of the Constitution’s adoption, referred to buying and selling and not manufacturing and agriculture. On the basis of this definition, he advocated a much narrower conception of the power of Congress to regulate commerce than that which had prevailed in recent Supreme Court cases. In *United States v Bajakajian*, he used founding-era dictionaries in support of the view that the Excessive Fines Clause of the Eighth Amendment required proportionality between the crime and the fine imposed. In *Camps Newfound/Owatonna, Inc. v Town of Harrison*, he quoted these sources in seeking to discover the original meaning of ‘impost’ under Article I, Section 8. In *Utah v

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35 ibid 529.
37 ibid 865. See also, Justice Thomas *United States v Hubbell* 530 U.S. 27, 50-51 (2000).
39 ibid 1828.
43 ibid 337.
45 ibid 38. See also, *Farmer v Brennan* 511 U.S. 825, 859 (1994).
47 ibid 585-586.
49 ibid 335.
51 ibid 637-638.
Evans, he cited them in support of his view that the requirement of an 'actual enumeration' in the Census Clause of Article I, Section 2, of the Constitution required an actual counting of the population rather than an estimate. In Rothgery v Gillespie County, he cited them in support of the conclusion that the original understanding of the Constitution recognized three methods of prosecution: presentment, information, and indictment. In Baze v Reese, Justice Thomas cited such materials in favour of the view that the original meaning of the word 'cruel,' as used in the Eighth Amendment, was the intentional infliction of pain on others.

(b) Dictionaries in Originalist Interpretation: Criticisms and Response

Antonin Scalia and Bryan Garner support the use of dictionaries on the basis that lexicographers will have already addressed many of the interpretative problems which come before the courts. For this reason, 'it would be a mistake not to consult them.'

However, other scholars and courts have rejected the use of dictionaries. The use of dictionaries in interpretation has been criticized on a number of different grounds. First, it has been said that dictionaries take words out of context and, thus, that the definitions they provide are of limited use. Raymond Randolph has described dictionaries as 'word zoos' on the basis that, though they give us an abstract sense of the meaning of words, they deprive us of any sense of how words operate in their native environment, *ie* in the context in which they were employed in the text being interpreted. This is certainly true, to the extent that the meaning of particular words is largely determined by the context in which they appear.

'Keep off the grass,' to use a well-known example, means something very different coming from a grounds keeper than it does coming from a narcotics counsellor. By way of response to this line of criticism it may be said that though dictionary definitions are acontextual in nature, they do provide us with a sense of the various ways in which a word may be employed, as well as informing us as to the limits of a word's meaning. The word 'dog'

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55 ibid.
56 553 U.S. 35 (2008)
57 Scalia and Garner (n10) 72.
59 Reed Dickerson, 'Statutory Interpretation: Core Meaning and Marginal Uncertainty' (1964) 29 Mo L Rev 1, 8-9.
cannot mean ‘cat’ no matter what the surrounding context. Thus, dictionaries reduce the range of possible meanings a word may bear, while leaving much else to be clarified by context.60

A second criticism which has been made of the use of dictionaries is that they do not provide us with any means of choosing between the various definitions which they may contain for particular words.61 This is certainly true. However, that does not mean that it is inordinately difficult to choose between competing definitions. The context in which the disputed word appears will in most instances unambiguously indicate which definition to adopt, as in our earlier ‘Keep off the Grass’ example.62

Third, reference to dictionaries has been criticized as indeterminate, on the basis that rival dictionaries define the same terms differently.63 This is a problem which occurs in other fields as well. For instance, a legal practitioner will frequently have a number of textbooks at his disposal which each purport to describe the same area of law. He will select the most authoritative among them by reference to the reputations of the several textbooks. Lawyers interpreting legal texts should similarly rely on the most authoritative dictionaries, general and legal, which are available to them and, where there are multiple authoritative dictionaries, should cross-refer among them.64

A fourth difficulty presented by the use of dictionaries is that not all colloquial usages of language are contained in the dictionary.65 Where language has been used in a clearly colloquial fashion in the text being interpreted, judges should rely on their own knowledge and experience of the language and should adopt the colloquial usage.66

Thus, we may conclude that dictionaries ought to be referred to in seeking to discover the ordinary meaning of the terms being interpreted but that the limitations of dictionaries as indicia of meaning ought to be kept in view.

(c) Guidelines for Using Dictionaries

60 De Sloovere (n13) 231.
61 Stanley Fish, ‘There Is No Textualist Position’ (2005) 42 San Diego L Rev 629, 644; Adler (n12) 77-78.
62 Summers and Marshall (n24) 220-223; Dickerson (n59) 10.
64 See, Scalia and Garner (n10) 415-425 for a guide to the most reliable English-language dictionaries.
65 Gold (n30) 32.
66 Scalia and Garner (n10) 36-38.
Scalia and Gamer\(^\text{67}\) suggest that the following 'primary principles' should be remembered by those using dictionaries in legal interpretation. First, dictionaries state a term's core meaning and 'cannot delineate the periphery.' Second, and as discussed, context ought to be used in order to select among the various dictionary definitions of a term. Third, the prefatory material ought to be consulted in order to understand the principles upon which the dictionary was compiled. Fourth, it is important to remember that dictionaries lag linguistic usage somewhat. Fifth, it is important to note that historic dictionaries should not be used for terms which have experienced a recent shift in their meaning. Sixth, it is important to use a dictionary roughly contemporaneous with the adoption of the text being interpreted; this is because the meaning of words tends to evolve over time.\(^\text{68}\)

Once these principles are kept in mind, together with the other limits of dictionary definitions we identified earlier, the use of dictionaries could greatly assist the interpretative process. Thus, the starting point in the discernment of ordinary meaning ought to be with an examination of the definitions of the disputed terms, as provided by the most authoritative dictionaries available. However, as noted above, dictionaries cannot provide a complete answer and the definitions they provide are capable of being overridden by other indicia of meaning. It is to a consideration of these, the other canons of interpretation, which I now turn.

### 6.4 Whole Text Canon

This canon provides that 'the text must be construed as a whole.'\(^\text{69}\) This means that an interpreter should not ascribe a meaning to a particular part before he has considered the text in its entirety. This canon is especially significant in the interpretation of a constitutional document such as the CFR, which express broad general principles rather than laying down detailed technical rules.\(^\text{70}\) A holistic view is especially necessary to clarify the general

\(^{67}\) Bryan Garner is a leading legal lexicographer and Editor-in-Chief of *Black's Law Dictionary* (West, 2009), the leading law dictionary in the United States, and thus his views are especially instructive on this point.

\(^{68}\) Scalia and Garner (n10) 418-419.

\(^{69}\) Scalia and Garner (n10) 167. For similar formulations, see Dodd (n9) 208; Langan (n24) 47, 58-60; Black (n11) 23; Randall (n11) 309; Burrows (n24) 46, 62-65; Cooley (n22) 91; Broom (n24) 390; de Slooëvre (n5) 219-200, 227.

\(^{70}\) Black (n11) 17.
language used in such documents. The canon may be divided into a number of distinct sub-canons.

6.4.1 Presumption of Consistent Usage

First, it implies that where a term is used more than once in a text it has the same meaning throughout. The originalist justices have construed constitutional rights in light of the entire text of the Constitution. For instance, in District of Columbia v Heller, Justice Scalia rejected the argument that 'the right of the people to keep and bear arms' was a right reserved to members of a government-organized militia. In doing so, he had regard to six other provisions of the Constitution, which used the term 'the people' to refer to all members of the political community rather than a subset thereof.

The corollary also applies: different terminology is presumed to bear a different meaning. In Kelo v City of New London, Justice Thomas interpreted the words 'nor shall private property be taken for public use, without just compensation' to mean that any property taken by the state would have to be actually used by the state. It was impermissible for the state to deprive a citizen of his property, and then to transfer that property to another private party, even if such transfer advanced the public interest in some way. Justice Thomas justified his position by resort to the literal meaning of 'public use.' Crucially for present purposes, he also cited other power-conferring constitutional provisions, where broader language, such as 'the general welfare' was used, in support of his narrow reading of the phrase 'public use.'

This presumption of consistent usage is readily rebuttable by context, however, and must be treated with caution. Henry Campbell Black has stated that 'it does not follow...that because a word is found in one connection in the constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs.' Much depends on the intent exhibited by the text as a whole. For instance, in District of Columbia

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71 ibid 19-20.
72 Scalia and Garner (n10) 170; Dodd (n9) 154; Langan (n24) 278; Randall (n11) 358.
74 Scalia and Garner (n10) 170; Langan (n24) 282; Randall (n11) 360; Burrows (n24) 75.
75 545 U.S. 469 (2005).
76 Langan (n24) 279; Randall (n11) 73.
77 Black (n11) 24.
78 Cooley (n22).
v Heller,^{79} Justice Scalia recognized that the word ‘state’ was used in various senses in the Constitution.

6.4.2 Presumption Against Surplusage

A second implication which arises from the whole-text canon is that all terms used in the text carry a meaning; thus, no word or phrase is presumed to be mere surplusage.^{80} In United States v Lopez,^{81} the meaning of the Commerce Clause of Article I of the Constitution was in dispute. That provision states:

The Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes

The majority of the Supreme Court held that this provision gave Congress the power to regulate any activity which ‘substantially affects’ interstate commerce.^{82} Justice Thomas, however, regarded this as an inappropriately broad reading of the clause. He referred to the specific enumeration of other powers of the federal government in Article I, such as the power to establish a post office and the power to coin money, both of which could have a substantial effect on interstate commerce, and observed that these clauses would be redundant if the court’s reading of the commerce clause were correct.^{83}

6.4.3 Generalia Specialibus Non Derogant

The *generalia specialibus non derogant* canon means that ‘[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails.’^{84} The rationale for this rule is that the specific provision more precisely addresses the issue before the court and, therefore, ought to be accorded priority.^{85}

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^{80} Scalia and Garner (n10) 174-180; Dodd (n9) 123, 165; Randall (n24) 364; Burrows (n24) 62; Dwarris (n24) 110.
^{82} However, it should be noted that drafters do sometimes repeat themselves needlessly and adopt what has been described as a ‘belt-and-suspenders’ approach to drafting. See, Scalia and Garner (n2) 177.
^{83} Scalia and Garner (n10) 183; Burrows(n24) 102; Dwarris (n24) 110, 117.
^{84} Scalia and Garner (n10) 183; Dwarris (n24) 197.
The originalist justices have employed the *generalia specialibus* canon, either explicitly or implicitly, in numerous instances. In *Baze v Reese,* Justice Stevens suggested that the death penalty was contrary to the constitutional prohibition on 'Cruel and Unusual Punishments' contained in the Eighth Amendment. As both Justices Thomas and Scalia pointed out in their opinions in that case, the Fifth Amendment to the U.S Constitution expressly contemplates the imposition of the death penalty. It requires an indictment or presentment of a grand jury to hold a person for 'a capital, or otherwise infamous crime,' and prohibits the deprivation of 'life' without due process of law thus implying that, provided due process is observed, people may be put to death. The general prohibition on 'cruel and unusual punishments' could not overpower the more specific constitutional recognition of the power of the state to impose the death penalty.

Similarly, in *Vieth v Jubelirer,* the applicant argued that political gerrymandering violated the Equal Protection Clause of the Fourteenth Amendment, which provides that 'No State shall...deny to any person within its jurisdiction the equal protection of the laws.' Justice Scalia refused to accept this argument, noting that the Constitution already provided a remedy for gerrymandering when it empowered Congress, in Article I, Section 4, of the Constitution to 'make or alter' the federal election districts drawn by state legislatures. Because the Constitution provided a specific remedy to the problem of gerrymandering, the generally phrased equal protection clause could not be invoked to supplement that remedy.

### 6.4.4 *Expressio Unius Exclusio Alterius*

This principle means that '[t]he expression of one thing implies the exclusion of others.' It applies only where the 'mention of one or more things of a particular class may be regarded as silently excluding all other members of the class.' This canon is peculiarly defeasible by context and applies with greater force where the relevant class is defined with a high level of specificity.

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* Scalia and Garner (n10) 107. See also, Broom (n24) 443-444.

* Langan (n24) 293.

* Scalia and Garner (n10) 107.

* ibid 108.
John Mark Keyes identifies three circumstances in which the *expressio unius* canon may be applied. First, it may be invoked where a law has made specific provision for a particular set of circumstances, the limits of which can be defined with reasonable certainty. Justice Scalia has applied the *expressio unius* principle in cases concerning the separation of powers. In *Mistretta v United States*, Justice Scalia, in a dissenting opinion, voted to invalidate the U.S Sentencing Guidelines, which had been promulgated by the U.S Sentencing Commission, on the basis that the exercise of law-making power by the Commission was contrary to Article I, Section 1 of the Constitution, which provides as follows:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

In light of this specific reservation of legislative power to Congress, Justice Scalia could see no place in the American constitutional system for the Sentencing Commission, which he termed 'a sort of junior varsity Congress,' whose only function was the making of laws. In *Morrison v Olson*, in another dissenting opinion, Justice Scalia declared the Independent Counsel Act unconstitutional. This Act had established the office of Independent Counsel with a mandate to investigate certain alleged misconduct by executive branch officials and to prosecute wrongdoers. The President's control over the conduct of the Independent Counsel under the Act was extremely attenuated. Justice Scalia concluded that, because the investigation and prosecution of crime was an executive function, the Independent Counsel Act violated Article II, Section 1, of the Constitution, which provided that:

[t]he executive Power shall be vested in a President of the United States of America.

In Justice Scalia's view this unqualified grant of power 'does not mean *some* of the executive power, but all of the executive power.' For this reason, he regarded the Independent Counsel Act as an unconstitutional usurpation of the powers of the President.

Second, this maxim also applies where there is an asymmetry in the language used. Where the legislature has dealt expressly with an issue in one provision, and has been silent on the same issue in another provision, the legislature is 'unlikely to have overlooked its inclusion in one case and not the other.' An example offered by Keyes is the case of *Crease v Board of
Commissioners of Police. The case involved the interpretation of two provisions which governed discipline in the police force, one of which provided for suspension without pay and another which provided for suspension but made no reference to the issue of pay. The court held that suspensions under the latter provision had to be with pay.

Third, the canon can be applied where a number of different provisions appear to overlap. For instance, where a law purports to set out exhaustively the rules applicable in a particular area, the court will not apply a general provision to the facts governed by that law. Keyes explains this facet of expression unius in the following terms:

If a set of provisions deals specifically with all aspects of a particular subject matter, then it constitutes a code and excludes the application of any other provisions to that subject-matter.

6.5 Prefatory Materials Canon

Scholars differ as to the weight to be accorded to a preamble in the interpretation of a text. Scalia and Garner support the use of preambles, both in determining whether a provision is ambiguous and in suggesting which of several textually permissible meanings ought to be adopted. A different view, articulated by Fortunatus Dwarris, and known as the 'no recourse rule,' would refuse to consider the preamble where the text of the law is clear. Thus, the preamble would not be resorted to in addressing the threshold question of whether the text was ambiguous.

The better view would appear to be that expressed by Black, that '[t]he preamble to a constitution...may furnish some evidence of its meaning and intention; but arguments drawn therefrom are entitled to very little weight.' Because preambles frequently speak in broad and general terms, it is unlikely that they will be of decisive importance very often. This is because the operative part of the text will usually be more precisely worded and, thus, will determine the meaning ascribed to the preamble, rather than the other way

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96 (1976) 11 OR (2d) 159.
97 See Keyes (n15) 7.
98 ibid 23.
99 Dwarris (n16) 108.
100 Black (n11) 34. See also, Dickerson (n24) 371.
around, as required by the *generalia specialibus* maxim, which has been dealt with above.\(^{102}\) However, where the preamble does specifically address a certain issue, it should be admissible both in determining whether the text is ambiguous and in resolving the ambiguity. This is because it is a part, albeit a non-operative part, of the text being interpreted and, thus, it must be considered throughout the interpretive process, in accordance with the whole-text canon.

In light of their general language the principal use of preambles should be to indicate what mischief the law was intended to address.\(^{103}\) General expressions of purpose in preambles should not, however, be permitted to add to or cut down on the dispositions in the operative text,\(^{104}\) nor should the court consider itself bound by erroneous statements of the law contained in the preamble.\(^{105}\) In chapter 10 of this thesis I shall carry out an originalist analysis of Article 51 of the CFR. An important item of evidence in the interpretation of that provision is the Explanations attached to the CFR. The courts are obliged to have ‘due regard’ to the Explanations in their interpretation of the CFR.\(^{106}\) However, they are not legally binding. It is submitted that they are in the nature of prefatory materials and that they should be treated accordingly, in accordance with the principles just discussed.

### 6.6 Originalist Deviations from Textualism

In at least one context, however, the originalist justices have subordinated the text of the Constitution to what they regard as its historic purpose. The best example of this is their acceptance of the Supreme Court’s Eleventh Amendment sovereign immunity jurisprudence. The Eleventh Amendment states as follows:

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

On its face, this provision ‘precludes individuals from bringing suit against states in the federal courts only when the basis of jurisdiction is state-citizen diversity; it says nothing about precluding suits against the states in federal court that are based on the existence of a

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\(^{102}\) Cooley (n22) 245.

\(^{103}\) Dwarris (n16) 187; Winckel (n99) 185.

\(^{104}\) Scalia and Garner (n10) 219-220; Dwarris (n16) 110.

\(^{105}\) Burrows (n24) 60; Winckel (n99) 187, 210.

\(^{106}\) Article 6(1) Treaty on European Union.
federal question. Nonetheless, both Justice Scalia and Justice Thomas have held that this provision precludes a citizen from suing his home state in federal court without the consent of that state. The justification given for this holding by the justices is that sovereign immunity was an essential aspect of the background of the Constitution, which the ratifiers of the Constitution had not meant to sweep away. In this limited context, at least, the originalist justices have exhibited a willingness to allow pre-ratification tradition to prevail over the text of the Constitution. However, according priority to common law tradition in this way undermines the whole basis for putting the Constitution in writing in the first place. As discussed in the previous chapter, one of the reasons for writing the Constitution down is to inform citizens and others as to its requirements. This is what Barnett called the ‘evidentiary function’ of writing a Constitution, as opposed to allowing one to develop organically. The position of the originalist justices on the issue of sovereign immunity, however, sends a signal to citizens that it is unsafe to rely on clear constitutional text, thus undermining the evidentiary function served by putting the Constitution in writing.

6.7 Criticisms of Textualism

Certain authors have argued that any attempt to establish principles to govern the interpretation of texts is futile on the basis that all language is radically indeterminate, thus rendering all interpretations innately subjective and contestable.

For example, Samantha Miller has stated that a textualist approach to interpretation involves appraisals every bit as subjective as non-textualism. This criticism, if accurate, would undermine the entire project of a legal system based on the written word. 5,000 years of experience, in every human civilization that we know of, has shown the capacity of writing to convey and to preserve knowledge across generations and across cultures. As Bork has said:

109 Pennsylvania v Union Gas Co ibid 31-32.
[i]f the incomprehensibility of the past were a notion to be taken seriously, the study of Aristotle, Plato, and all ancient authors would be utterly fruitless, as would all historical investigation.

Similarly, in addressing radically sceptical accounts of language, Richard Kay has stated that these are 'at odds with the everyday successful verbal communication we all experience.' Indeed, courts depend on the ready comprehensibility of language in order to secure compliance with their own judgments. That is not to say, of course, that texts are always entirely determinate but it is surely an overstatement to suggest that all textual readings are inherently contestable and problematic; words do, as Scalia has put it, 'have a limited range of meaning, and no interpretation that goes beyond that range is permissible.' For instance, Bryan A. Wildenthal has argued that Scalia’s dissenting opinion in *Maryland v Craig,* discussed in chapter 8 below, demonstrates the capacity of textualism to constrain judges and, by so constraining them, to prevent them from discarding inconvenient constitutional rights.

In chapters 8 and 9 below I discuss the manner in which originalists have responded to the problem of textual indeterminacy and what materials they have considered in seeking to cast light on the meaning of the text when the import of the text itself is not entirely clear.

**Conclusion**

During the course of this chapter I set out certain basic principles which, I argued, ought to govern the interpretation of the CFR. Specifically, I discussed: the nature of canons of interpretation in general; the ordinary meaning canon, including a discussion of the correct use of dictionaries; the whole-text canon and its implications, including the presumption of consistent usage, the presumption against surplusage, and the *generalia specialibus non derogant* canon; the *expressio unius exclusio alterius* canon; and the prefatory materials canon, and the manner in which each of these principles has featured in the jurisprudence of Justices Antonin Scalia and Clarence Thomas of the U.S. Supreme Court.

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113 Conway (n112) 132.
115 Wildenthal (n7) 1390.
MULTILINGUAL INTERPRETATION

Introduction

The previous chapter of this thesis concerned the general principles which originalists, in particular Justices Scalia and Thomas of the U.S Supreme Court, employ in their interpretation of the Constitution.

One significant interpretative issue, which originalists in the United States have not had occasion to confront, but which presents itself acutely in the context of EU law, is that of multilingualism. The CFR is authentic in twenty-three different languages,1 with each language version carrying equal weight.² Needless to say, the drafters of the CFR were not conversant with all of these languages; most of the authentic language versions are translations.³ In translating from one language to another it is extraordinarily difficult, if not

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1 The practice of having multiple authentic versions of international treaties is a modern one. The ancients used a lingua franca, variously Greek, Samarian, and Akkadian in the conduct of diplomacy. From the height of the Roman Empire until the eighteenth century, European treaties were negotiated and drafted in Latin; thereafter, French took the place of Latin, and remained the language of diplomacy for two centuries. See, Dinah Shelton ‘Reconcilable Differences: The Interpretation of Multilingual Treaties’ (1997) 20 Hastings Int’l & Comp L Rev 611, 614. The monopoly of French was broken with the ratification of the Treaty of Versailles in 1919, the English version of which was also recognized as authentic. The recognition of five authentic languages in the Charter of the United Nations, to wit Chinese, French, Russian, English and Spanish began a new era of multilingual treaty drafting. See, Paul Eden, ‘Plurilingual Treaties: Aspects of Interpretation’ in Alexander Orakhelashvili and Sarah Williams, (eds) 40 Years of the Vienna Convention on the Law of Treaties (British Institute of International and Comparative Law, 2010) 156-160; John King Gamble and Charlotte Ku ‘Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice’ (1992) 3 Ind Int’l & Comp L Rev 233, 236-238.

2 It is important to note at the outset that the ‘text’ of the Treaties consists of all the different language versions. Article 55 TEU:

1. This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

impossible, to achieve an exact rendering of the original. Each language possesses its own inherent genius, which makes translation an imprecise art. Given the difficulty in achieving an exact rendering, even in translating from one language to another, it is utterly impossible to do so when there are so many language versions. The existence of divergences between different language versions is one of the perennial problems presented by EU law. Such divergences are capable of having significant consequences and of causing considerable uncertainty. For example, Hartley points out that the English text of the Unfair Contract Terms Directive uses the word 'goods' whereas the French version refers to 'biens,' a term wider than 'goods,' and capable of embracing property of any kind, whether movable or immovable. How are such divergences to be reconciled? The ECJ has stated that all of the different language versions should be compared, even where there is no doubt as to the meaning of the language version relied on in Court. The Court has also imposed an obligation on national courts, interpreting EU law under the acte clair doctrine, to refer to all

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8 Initially, it had been thought that a threshold condition for resort to other language versions was that the version relied on before the Court was unclear in some way. See Case 19/67 Sociale Verzekerringsbank v Van der Vecht [1967] ECR 445; Case 80/76 North Kerry Milk v Minister for Agriculture and Fisheries [1977] ECR 425; Case C-64/95 Konservenfabrik Lubella v Hauptzollamt Cottbus [1996] ECR I-5105 , para 17. The Court later appeared to hold that no such threshold condition exists. See Case C-219/95P Ferriere Nord SpA v Commission of the European Communities [1997] ECR I-865, para31. For analysis of this jurisprudence, see Derlén (n3) 31-36.

9 Under the acte clair doctrine, a national court may choose not to refer a question to the ECJ if the meaning of the provision in issue is so obvious as to leave no room for reasonable doubt. See CILFIT (n7) paras 16-20.
language versions of the Treaties. However, the jurisprudence of the Court on this issue is inconsistent, such that it is unclear in what circumstances reliance may be placed on one language version to the exclusion of others. Thus, the approach of the Court is rooted in a comparison of different language versions, though it is unclear precisely when comparison is necessary, and when it is not.

Mattias Derléen states that 'no theory can comprehensively explain which methods are used by the Court.' Nevertheless, Derléen identifies three broad approaches to resolving divergences between language versions: (i) classical reconciliation, (ii) reconciliation and examination of purpose, and (iii) radical teleological interpretation. He describes classical reconciliation in the following terms:

'[t]his method involves a genuine comparison of the language versions, after which they will be reconciled based on some principle. There is no separate discussion of the purpose of the rule in question and it is claimed, implicitly or explicitly, that the purpose is demonstrated by a comparison of all the language versions.'

There are threads of a classical approach running through the jurisprudence of the ECJ. Under the second approach identified by Derléen, reconciliation coupled with an examination of purpose, 'the Court of Justice starts off by doing classical reconciliation but then examines the result against the purpose and/or context of the rule.' The ECJ has also adopted this approach on occasion.

According to Derléen the radical teleological method 'concentrates on the purpose and/or the context of the rule in question, and leaves the level of linguistics as soon as a discrepancy is observed between the language versions.' Although this approach has also featured in the jurisprudence of the Court, it is not, as already noted, the method uniformly adopted by the Court.

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10 CILFIT (n7) para 18. See also Case 30/77 R v Bouchereau [1977] ECR 1999, para 13; Case C-296/95 The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham [1998] ECR I-1605, para 36. This requirement has been criticized on the basis that the limited resources of national courts cannot possibly accommodate it.
11 See Derléen (n3) 36.
12 ibid 43.
14 Derléen (n3) 45.
16 ibid 47.
17 Case 80/76 North Kerry Milk v Minister for Agriculture and Fisheries [1977] ECR 425.
The objective of this chapter is to argue that the classical approach to reconciliation should be adopted by the ECJ. It is submitted that the adoption of this approach is necessary in order to respect the authority of the EU Member States.

7.1 The Vienna Convention on the Law of Treaties

Before undertaking an analysis of the jurisprudence of the ECJ in which each of these approaches has been applied, it is important to have regard to Article 33 of the Vienna Convention on the Law of Treaties (VCLT), which provides as follows:

*Article 33*

*Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.18

Before proceeding to analyse this provision, it is important to recall that the EU is not a party to the VCLT; therefore, the rules of Treaty interpretation prescribed therein are not strictly binding. However, Article 33 VCLT has long been understood as a codification of pre-

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existing customary international law and, for this reason, the ECJ should accord it significant weight in addressing the problems posed by multilingualism in EU law. That is not to imply, of course, that EU law is analogous to international law in the traditional sense. Indeed, it is implicit in the discussion carried out in this thesis that it is more appropriate, when discussing the EU at the present stage of its evolution, to use the language of constitutionalism, rather than that associated with international law. My discussion of the VCLT in what follows, therefore, simply takes the principles set out therein as useful guidelines, to be applied by analogy in the context of Charter interpretation, rather than as binding rules of law.

Article 33.4 VCLT provides that regard may be had to the ‘object and purpose’ of a treaty provision in seeking to reconcile divergences between different language versions thereof. Thus, it is important at the outset to determine the meaning of the terms ‘object and purpose.’ When one speaks of a purposive approach in the EU context one is not usually referring to an interpretative method that seeks to give effect to the intentions of the framers or ratifiers of the law. ‘Purpose’ in this context is gleaned from a constructive interpretation of the EU legal order as a whole, and the place of the particular provision under construction in that ensemble, rather than from an investigation of the wishes of the law-maker. The purposive approach of the ECJ has been described as Dworkinian, because it represents an attempt to give the best account possible of the EU legal order and, as discussed in chapter 2 of this thesis, the account favoured by the Court has usually been one in which the EU is seen as moving towards closer economic and political integration.

Article 32 VCLT makes it plain, however, that ‘object and purpose’ in Article 33 should not be understood in this Dworkinian vein. The former article permits the use of travaux

préparatoires⁵⁴ in the interpretation of treaties in order to confirm an interpretation resulting from an application of Article 31 VCLT. This provision requires that treaties be interpreted in accordance with their ordinary meaning, and in light of their object and purpose, or as an aid to interpretation where the application of Article 31 ‘leaves the meaning’ of the treaty ‘ambiguous or obscure.’ Article 32 VCLT prescribes that travaux préparatoires are to be used where the ordinary meaning, context, or the object and purpose of a treaty provision are obscure. Thus, it can be seen that object and purpose, as those terms are understood by the VCLT, refer to the object and purpose pursued by the framers of the treaty,⁵⁵ as revealed by the travaux préparatoires, not to any object or purpose which an interpreter may deem to be immanent in the legal order, the latter being the sense in which object and purpose are understood in EU law.⁵⁶ Moreover, and as the Iran-US Claims Tribunal stated in USA, Federal Reserve Bank v. Iran, Bank Markazi case,⁵⁷ ‘purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text.’ Moreover, under the VCLT object and purpose, as indicia of textual meaning, are clearly subordinate to the ordinary meaning of the text. Article 31 VCLT provides in relevant part as follows:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

⁵⁴ The travaux préparatoires of a Treaty are historical documents which can shed light on the perceptions of those who were connected with its drafting and negotiation. See, the decision of the Permanent Court of Arbitration in the Iron Rhine case, 24 May, 2005, para 48, where the court described travaux préparatoires as ‘illuminating a common understanding’ by the parties to the Treaty of its provisions. The decision is available at <http://www.pca-cpa.org/upload/files/BE-NL%20Award%2020405%2005.pdf>. See also, L Neville Brown 'The Linguistic Regime of the European Communities: Some Problems of Law and Language' (2011) 15 Val U L Rev 319, 325; Bredimas (n22) 19.

⁵⁵ See the decision of the International Court of Justice in Land, Island and Maritime Frontier Dispute (El Salvador/Hondura: Nicaragua Intervention) [1992] ICJ Reports 351, 584 where the court stated that the ‘object and purpose’ of the Treaty was synonymous with the common intention of the parties thereto.

⁵⁶ For the same view, see Bredimas (n20) 58, 64.

⁵⁷ 36 Iran-US Claims Tribunal Reports 5.
Gardiner has explained that the role of 'object and purpose' under this provision is 'to shed light on the terms actually used in their context, rather than introduce an alternative option for finding a meaning.' This interpretation of Article 31 is confirmed by the organization of that article. Ordinary meaning is mentioned before object and purpose, and it is provided that the former is to be understood in light of the latter. However, it is plain that ordinary meaning is what is being sought; the examination of object and purpose is merely a means towards the attainment of that end.

What, then, does this discussion of the VCLT tell us about multilingual interpretation in EU law? It is submitted that, of the three approaches to reconciling different language texts mentioned above, (i) classical reconciliation, (ii) reconciliation plus examination of purpose, and (iii) the radical teleological method, the VCLT favours the second approach. The VCLT recognises a role for object and purpose in helping to identify the ordinary meaning of treaty terms. Therefore, the approach prescribed is not entirely separate from considerations of purpose, as the Derlén definition of classical reconciliation requires. However, the role of object and purpose in reconciling divergences among language versions is much more attenuated under the VCLT than under the radical teleological approach. The latter approach demands that an interpreter cease to engage in linguistic analysis once a divergence between any of the various language versions has been identified.

For these reasons, one is compelled to conclude that the VCLT prescribes a composite approach to the reconciliation of divergent language versions, an approach which incorporates both linguistic analysis and consideration of purpose. However, as has been discussed above, object and purpose cannot, under the VCLT, be deployed in order to arrive at a conclusion which is not justified by the ordinary meaning of the terms used in the treaty. Rather, object and purpose in this context are factors of relevance in determining what the ordinary meaning of the treaty is.

I shall now proceed to further discuss the different methods which the ECJ has employed in attempting to reconcile divergences between the different language versions of the treaties and secondary legislation. Occasional reference will also be made to the decisions of other international tribunals, where these can shed light on issues of multilingual interpretation in the EU.

38 Gardiner (n4) 192.
7.2 Classical Reconciliation

Derlén states that classical reconciliation involves resolving divergences by reference to some 'principle.' A number of principles have been propounded by international tribunals to assist in the task of reconciliation. These include: majority meaning, restrictive interpretation, clear meaning, successive interpretation, and deference to the negotiated text. In what follows each of these competing approaches shall be addressed in turn.

7.2.1 Majority Meaning

Under the majority meaning approach, 'the meaning supported by most versions would prevail.' This approach has occasionally found favour with the ECJ, but mostly in cases involving the interpretation of technical terms. A good example of the ECJ deploying this approach is the case of Ludwig-Maximilians-Universität München v Hauptzollamt München-West. The principal question in the case was whether glass flasks, used for the preservation and cultivation of tissue cultures of human cancer cells in sterile conditions, could avail of a customs duties exemption for scientific equipment or apparatus, provided for under Article 3 of Regulation 1798/75 on the Importation Free of Common Customs Tariff Duties of Educational, Scientific and Cultural Materials. The Court construed the words 'instruments and apparatus' in Article 3 narrowly, concluding that they referred only to 'items possessing objective characteristics which make them particularly suitable for pure scientific research.' Items intended for storage only did not satisfy this definition. However, the German text of the Regulation referred not merely to 'instruments and apparatus' but also to 'utensils' or 'gerate,' which has a somewhat wider meaning, and might have embraced items used for storage. Nevertheless, the Court dismissed the German version without hesitation, stating: 'that [it] cannot confer upon that linguistic version a wider meaning than that implied by the other versions which do not contain that word.'

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29 Derlén (n3) 40.
30 ibid.
32 ibid para 9.
33 ibid para 13.
This approach has been criticised for two reasons. First, it has been said to deprive the language versions which are in the minority of their authentic status by refusing *a priori* to accord legal significance to nuances and subtleties of meaning contained therein.\(^{34}\) This is certainly true if this approach is adopted on a purely numerical basis, *ie* if the meaning of the majority of versions is accepted *tout court*, on the basis of its commanding majority support alone. Second, it may lead to the absurd consequence that legislation would have to be interpreted differently before and after an enlargement of the Union.\(^{35}\) This would indeed be an unwelcome outcome. However, once more, this could only come to pass in circumstances where the majority meaning approach was regarded as an absolute rule.

However, if we regard the majority meaning approach as only one among many *indicia* of the intent of the Member States, rather than as a rule in and of itself, it may be of some use. It may be capable of identifying the meaning intended by the Member States when drafting the CFR. Where one language version of the CFR diverges from all of the others in some material respect, the Court should, by examining evidence surrounding the drafting of the text, consider whether that isolated divergence is the product of an error in translation.

On this view, evidence that a large majority of versions are in agreement would give rise to an inference that there had been an error in translating into the minority of language versions in which the divergence in meaning appears. The larger the majority the stronger this inference would be and the more difficult it would be to rebut. Therefore, the approach of the ECJ in *Universität München*, where one discrepancy was identified among all the language versions, was correct because the deviation between it and the other texts was likely the result of imprecise translation rather than a true reflection of legislative intention.\(^{36}\)

### 7.2.2 Restrictive Meaning

\(^{36}\) Derlén (n3) 26.
Derlén states that ‘[p]reference for the most restrictive interpretation means adoption of the common content of the diverging language versions.\textsuperscript{22} In practice, this means adopting the meaning of the language version which imposes the least onerous obligations on the parties to the treaty. The original justification for this approach was that it gave effect to the presumption against derogations from state sovereignty.\textsuperscript{33} This principle has received a mixed reception in public international law forums. In \textit{Mavrommatis Palestine Concessions Case,}\textsuperscript{33} a case concerning the British Mandate in Palestine in the interwar years, the International Court of Justice had cause to consider this point. The Greek government sued Great Britain for its failure to vindicate the contractual rights of a Greek national, who had entered into contractual relations with the former sovereign power in Palestine, the Ottoman Empire. Article 11 of the League of Nations Mandate permitted the British government to exercise ‘public control’ over the development of the natural resources of Palestine and over public works, services, and utilities. The Mandate existed in two versions, English and French. The Court concluded that the French word ‘controle’ was capable of embracing a power to annul existing concessions but that the English word ‘control’ could not be understood so broadly.\textsuperscript{36} The Court then went on to make the following statement of principle on the reconciliation of divergences between different language versions of international treaties:

\begin{quote}
The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English.\textsuperscript{41}
\end{quote}

It is important to be clear as to the true meaning of this statement. The approach of the Court is nuanced and preference for the restrictive version is made subject to two restrictions.

\textsuperscript{22} ibid 26, 41.
\textsuperscript{33} David A Wirth, ‘Multilingual Treaty Interpretation and the Case of SALT II’ (1980) 6 Yale Stud World Pub Ord 429, 446.
\textsuperscript{36} \textit{Mavrommatis}, ibid 38-40.
\textsuperscript{41} ibid 40.
Firstly, the Court notes that the most restrictive interpretation in that case was ‘doubtless in accordance with the common intention of the Parties.’ Second, in preferring the English text of the Mandate, the Court notes that English was the language in which the Mandate was originally drafted. Therefore, as that case concerns multilingual interpretation, Mavromattis is authority for the proposition that the most restrictive version of a multilingual text should be preferred, but only where this restrictive meaning is in accordance with the intentions of the parties, and only where the language version preferred was the one in which the text was originally drafted, as the passage quoted above demonstrates.

This approach seeks an interpretation which coheres with the intention of the parties to a treaty. In this way, it furthers the essential purpose of treaty interpretation, which is to reconcile the methods of interpretation applied in the construction of treaties, with the authority of the sovereign states that concluded them. However, the restrictive approach to linguistic reconciliation has been criticised for a number of reasons. First, Shelton argues that, in many cases, it is unclear which language version is the more restrictive. This occurs particularly where a treaty imposes reciprocal obligations on the parties thereto. Second, it has been said that the restrictive approach represents a violation of the principle of parity between different language versions.

Where a divergence has been identified between the various language versions, it will be necessary to attribute a meaning to at least one of these versions that is not strictly natural from a linguistic point of view. One benefit of the restrictive approach is that the less restrictive versions will be ascribed a meaning which, though unnatural, will not impose obligations on Member States which are not apparent on the face of their own language versions of the treaty. However, this can work both ways, and it is also likely that the restrictive approach will mean that rights enjoyed by Member States will be interpreted in a more limited way than their own language versions would suggest. On the other hand, one possible benefit of this approach is that it would force negotiators to carefully review all language versions before reaching an agreement. This would ensure that the parties to the treaty express their intentions with a maximum degree of clarity, which would greatly simplify the interpretative process.

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\(^{27}\) For discussion, see Hardy (n39) 76-80.
\(^{29}\) Shelton (n1) 629.
\(^{30}\) Derlén (n3) 27.
Germer states that, once the principle of restrictive interpretation is abandoned, an interpreter must look beyond the text. According to him, once that happens, the process of treaty interpretation ceases to be one of reconciling different language versions. However, there is no justification for an *a priori* assumption, applicable in all cases of linguistic divergence, that the Member States intended the most restrictive reading. That may be true in some cases but it is not necessarily true in all. In cases of textual ambiguity, of which linguistic divergence is merely a subset, the intention of the Member States must be identified. As restrictive interpretation will only correspond to Member State intentions haphazardly, it is not a suitable method of interpretation for the Court to apply generally.

7.2.3 Clear Meaning

The preference for clear meaning holds that 'an unambiguous wording prevails over an ambiguous wording.' In other words, if one language version is more clearly expressed than another, the clearer version will take precedence. Derlén states that, prior to the ratification of the VCLT, international tribunals routinely employed this principle in resolving divergences between different language versions of international treaties. A more recent example of the use of this principle is provided by the judgment of the Court of Appeal of Alaska in *Busby v State of Alaska*. Mr. Busby had had his driving licence revoked while he was a resident of Alaska. He subsequently moved to Nicaragua, where he obtained an international driving permit pursuant to the United Nations Convention on Road Traffic. He later drove from Central America to Alaska, where he was charged with the misdemeanour of driving while his licence was revoked, once the authorities became aware that his Alaskan driving licence had been revoked.

The principal matter in dispute in the case was the meaning of Article 24, Section 5 of the Convention, the English version of which permitted signatory states to:

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47 See, Wirth (n38) 450-451.
48 Derlén (n3) 40.
49 ibid 25.
...withdraw and retain the permit until the period of the withdrawal of use expires or until the [permit-] holder leaves the territory of the State...if the driver has committed a driving offence of such a nature as would entail the forfeiture of his driving permit under the legislation and regulations of that State.

Mr Busby argued on the basis of this wording that, in order to deprive him of his right to drive in Alaska, the authorities would have to deprive him of the physical possession of his international driving permit, which they had not done. However, the Court rejected this argument because, according to the French version of the Convention, which was deemed clearer than the English version, a national or sub-national authority could deprive someone of the use of their international driving permit, without needing to physically remove the permit from the possession of that person. The Court stated that, because the ambiguity in the English version threatened to cause a divergence between it and the other versions of the Convention, the clearer French version should be preferred, and the meaning it suggested adopted by the Court.

The principal justification for preferring the clear version of a multilingual text is that it must be presumed to better reflect the intentions of its framers than a more ambiguous version. However, if one of the authentic versions of the CFR is expressed more clearly than the other versions, it is not necessarily true that that version more perfectly reflects the intentions of the framers. Multiple languages were used in the drafting of the CFR. Therefore, it is far more likely that the relative clarity of a particular version of the CFR is attributable to errors in translation, which oversimplify the meaning the Member States intended the provision in issue to bear.

7.2.5 Successive Interpretation

Successive interpretation means requiring individuals to satisfy, separately and successively, the requirements of the text in each language. This approach seeks to sidestep the problem of divergence, by purporting not to choose between the diverging interpretations. A good example of successive interpretation is the decision of the Appellate Body of the World

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51 Derlén (n3) 26.
52 Guggeis, ibid 115-116.
53 Hardy (n39) 108.
Trade Organisation in the *US-Softwood Lumber* case. This case concerned the interpretation of Article 1.1(a)(1)(ii) of the Agreement on Subsidies and Countervailing Measures ('SCM Agreement') and the question of whether un-harvested trees could constitute 'goods' for the purposes of the Agreement. The Appellate body noted that the English word 'goods' had a narrower meaning than the corresponding French and Spanish word, 'biens' and 'bienes,' respectively. The Appellate body then stated that, in construing terms in a multilingual treaty, an interpreter should 'seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language.' Accordingly, the appellate body concluded that the term 'goods' should be interpreted so as to embrace un-harvested trees.

By requiring litigants to satisfy the requirements of every text, the Court is in fact favouring the text which imposes the most onerous requirements. This is evident from the decision in *US-Softwood Lumber*. Therefore, successive interpretation maximises the burdens imposed upon both the individuals and the states. Given that the law was ambiguous from the outset and, thus, did not afford affected parties a fair warning, it can be argued that this approach leads to unfairness.

7.2.6 Preference for the Negotiated Text(s)

Gardiner has suggested that the resolution of divergences between different language versions may ultimately involve the Court selecting a single language version and giving effect to it in preference to the others. This is because the divergences between different language versions may be such as to preclude resolution, save by successive interpretation or radical teleological interpretation which, as we have seen, both pose fundamental problems of their own.

What criteria should be used to determine which language version should take preference over the other texts? Preference for the negotiated text of the law might be thought to offer the best hope of arriving at an interpretation consistent with the intentions of its framers. This is because the negotiated text is the one which was actually signed by all the Member

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35 ibid 59.
36 Gardiner (n4) 380.
37 ibid 360.
States of the EU; other authentic versions are subsequent translations, which were not necessarily approved by all the Member States. Jan Fidrmuc, Victor Ginsburgh, and Shlamo Weber state that 'national delegations may agree on a text prepared in a single language such as English, even though it is the translated text that is eventually incorporated into national law and becomes legally binding.'

Preferring the negotiated text is an approach which has received some support in the jurisprudence of international tribunals and national courts. The Guastini case, which came before the Italian-Venezuelan Commission, concerned the interpretation of a protocol to the Italian-Venezuelan Treaty of 1861. Specifically, it was suggested that there was a difference in meaning between the English word 'injury,' as used in the protocol and the Italian word 'danni.' Ultimately, the Court found that no divergence existed in the legal meaning of the two terms. However, before making this finding, the Court stated:

These negotiations were carried on almost altogether in English, and the drafts (afterwards becoming protocols) were in English. It is therefore evident that the basic language is English, and in case of difference of translation resort should be had to it.

In the English case of R v HM Treasury this issue was again considered. This case concerned the interpretation of Article 15 of the Chicago Convention on International Civil Aviation, which prohibited signatory States from discriminating against non-national aviation in the imposition of airport and related charges. Stanley Burton J justified preference for the negotiated text by reference to the intentions of the parties to the treaty. He stated that '[t]he texts in the other languages are translations from the English, and could not have been intended to change the meaning of the English.' The American Supreme Court has also preferred the negotiated text in interpreting multilingual treaties.

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58 Shelton (n1) 635; See also the sources quoted in (n35).
61 ibid 579.
63 ibid 80. Gardiner states that 'if...the texts in other languages were later translations, the conclusion that these were intended to reflect the same concept as the English original seems cogent.' Gardiner (n4) 368.
However, a fundamental difficulty with preferring the negotiated text is that it appears to be contrary to the EU Treaties, which provide that all authentic languages are of equal value in interpretation. It will be recalled that the purpose of the principles of classical reconciliation, of which preference for the negotiated text is an example, is to reconcile different language versions of the treaty. However, preference for the negotiated version of the treaty does not necessarily constitute a breach of this provision. Where a divergence between different language versions has been identified, the threshold condition of ambiguity necessary to justify recourse to supplementary means of interpretation will have been satisfied. This is because the 'text' of the treaties consists of all the different language versions collectively, rather than any single version. Therefore, in addressing linguistic divergences, an interpreter should have regard to the purpose of the lawmaker. In the context of EU fundamental law, the lawmaker is the Member States of the EU acting together in their collective capacity.

In this context it is worth noting that the Appellate Body of the World Trade Organisation follows a similar approach. It treats the English language version of the Treaties and Agreements on trade as a *de facto* master text. The International Court of Justice also tends to concentrate its attention on the English and French versions of the UN Charter.

However, one obvious difficulty with adopting this approach to reconciling divergent versions of the CFR is that the business of the convention at which the CFR was negotiated and drafted was carried out in multiple languages. Thus, preference for the negotiated text, while perhaps justifiable in the interpretation of EU law generally, for the reasons adumbrated above, cannot be applied in the context of the Charter interpretation.

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60 See, (n2).
7.3 Reconciliation and Examination of Purpose

Under this method the court starts by conducting a purely linguistic analysis of the different language versions of the treaties and then proceeds to consider whether the meaning yielded by this analysis is consistent with the purpose of the provisions being interpreted. The ECJ has adopted this approach on a number of occasions. A case in point is the decision of the Court in *Denkavit Internationaal and Others v Bundesamt für Finanzen*. The meaning of Directive 90/435/EEC was in issue here. Article 5(1) thereof provides that profits, which a subsidiary has allocated to its parent company are to be exempt from withholding tax, where the latter holds a minimum of 25% of the capital of the subsidiary. Article 3(2) provides that a parent company may be deprived of this exemption if it 'does not maintain such a holding for an uninterrupted period of at least two years.' The court began its analysis by examining the different language versions of this provision. All versions of Article 3(2), other than the Danish version, used the present tense of the verb 'maintain.' In the view of the Court, this made it clear that the holding of the parent company need not have come to an end at the time the tax exemption was granted.

The court then went on to observe that this reading of Article 3(2) was also consistent with the purpose of that provision. Thus, the court addressed itself to the text of the Directive in the first instance, and then went on to consider its purpose. This is consistent with the requirements of the VCLT, which directs that both text and purpose be considered, but accords priority to the former over the latter. It is worth highlighting that the same result could have been reached in *Denkavit* by means of classical reconciliation. Specifically, had the court accorded priority to the majority of the language versions, the difficulty presented by the Danish version could have been avoided.

The reason why these classical methods of reconciliation are to be preferred to a purposive approach is that they render judicial decisions more predictable. Linguistic interpretation is an exercise conducted according to well-established and widely accepted conventions. By contrast, purpose is an elusive and manipulable concept. In ascribing a purpose to a text, an interpreter may choose either a very specific, or a very general, purpose. In their book

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*Case C-283/94; [1996] ECR I-5063.*

*For other cases in which the court has combined classical reconciliation with an examination of purpose, see Derlen (n3) 45-46.*
Reading Law: the Interpretation of Legal Texts, Antonin Scalia and Bryan Garner offer a hypothetical example which may help to clarify this point:

A law against pickpocketing, for example, has as its narrowest purpose the prevention of theft from the person; and them, in ascending order of generality, the protection of private property; the preservation of a system of private ownership; the encouragement of productive activity...; and, finally, the furtherance of the common good.71

7.4 The Radical Teleological Method

Under this method, once a divergence is identified between the different language versions of the text, the analysis of the Court will cease to be linguistic in nature. Instead, the Court will adopt the interpretation which, in its view, best effectuates the purpose of the provision being interpreted. The ECJ has adopted something resembling this approach on a number of occasions. For example, it is evident in the Borgmann case,72 which concerned the interpretation of Article 3(2) of Regulation No 536/93. That provision set out a time limit for the delivery, by milk processors, of certain information relating to their product to their respective national authorities. The Regulation provided that they should forward this information to the authorities before the 15th of May every year. A majority of language versions appeared to require that this information be sent before the 15th of May; the remaining language versions required that it must actually have been received by the national authority before that date. The Court made the following statement of principle:

Where there is divergence between the various language versions of a Community text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.73

Applying this approach, the Court went on to state that the purpose of the time limit was to facilitate the smooth operation of the scheme. However, in the Court’s view, this did not require that national authorities be in possession of all the relevant information by the 15th of

73 ibid para 25.
May deadline. Accordingly, the Court interpreted the Regulation as requiring only that the information be sent by that date.\(^4\)

The decision of the ECJ is somewhat worrying insofar as it seems to have implicitly accepted that the resolution of divergences between different language versions of legislation should be accomplished by ascribing to the legislation the meaning which is most desirable from a policy point of view. This conflicts with the duty of an interpreter, which is to ascribe to laws their ordinary meaning and, in cases of ambiguity, a meaning consistent with both the ordinary meaning of the law and the intention of its framers. In the *Borgmann* case, the two approaches might well have yielded the same result but they are fundamentally opposed to one another conceptually. The application of a radical teleological approach to interpretation, by empowering judges to elevate their own perceptions of policy to the status of legal imperatives, is certain, in due course, to yield outcomes which cannot be justified by reference to either the wording of the law under construction or the intentions of its makers. As such, this approach is inconsistent with the VCLT. Indeed, it is doubtful whether the radical teleological method, which subordinates the text to the putative purpose of the Treaties, is accurately characterized as reconciling divergent language versions. Rather, this method immensely enhances the Court’s power.\(^5\) Furthermore, it undermines the textual and, indeed, the linguistic basis of the law.\(^6\) For this reason, it is submitted that the radical teleological method should not be deployed by the ECJ in reconciling divergences between the different language versions of EU law.

**Conclusion**

It is appropriate at this point to recapitulate the arguments advanced in this article. First, Article 33 VCLT, in spite of its endorsement of object and purpose as legitimate referents of textual meaning, does not endorse the Dworkinian, or the radical teleological approach, to interpretation frequently employed by the ECJ. Object and purpose, as those terms are used in the VCLT, refer to the historically verifiable purposes pursued by real historical actors,

\(^4\) ibid paras 26-29.
\(^5\) Tadas Klimas, 'Interpretation of European Union Multilingual Law' (2005) 2 Int'l J Baltic L 1, 10.
\(^6\) Robert Huntington, 'European Unity and the Tower of Babel' (1991) 9 BU Int'l L J 321, 336; Urban (n80) 55; Monateri (n80) 217.
which are to be sought in the *travaux préparatoires* of the Treaty and in the terms of the Treaty itself.

Second, the ‘majority meaning’ approach to reconciling divergences between different language versions of the Treaties should not be regarded as an absolute rule. However, the fact that a preponderant majority of the language versions of the CFR support ascribing a particular meaning to one of its provisions is strong evidence that the Member States intended the provision to bear that meaning.

Third, the restrictive approach to Charter interpretation is not justified by reference to the intentions of the Member States. There is no justification for assuming *a priori* that the Member States intended the CFR to bear only the meaning common to all language versions. It is entirely possible that one or more of the language versions of the CFR were translated incorrectly. Therefore, it would be unsafe to adopt a rule favouring the most restrictive reading of the CFR.

Fourth, the Court should not necessarily adopt the meaning of the language version which is most clearly expressed. It is possible that one text is clearer than another as a result of an error in translation. Therefore, the clearest version may not reflect the wishes of the Member States. For this reason, it would be unsafe to adopt preference for the clearest version as a general principle.

Fifth, the Court should not require parties appearing before it to satisfy the requirements of all of the language versions of the CFR simultaneously. This is because it would be unduly burdensome for national courts, and perhaps even the ECJ, to conduct an in-depth comparative exegesis of the terms used in all twenty-three language versions of the CFR.

Sixth, as a general matter it might be appropriate for the Court to regard the meaning of the negotiated text of EU legal provisions as especially cogent evidence of the intention of its framers. However, because the CFR, unusually when compared to other species of EU law, was drafted and negotiated in multiple languages simultaneously, preference for the negotiated version has no application in the context of Charter interpretation.
The ECJ has employed a mixed classical and purposivist approach in many cases. The use of this method will often yield the same result as that produced by applying purely classical methods of interpretation. The radical teleological approach to interpretation, which the ECJ has frequently adopted, and which it has justified, *inter alia*, by reference to the multilingual nature of EU law, should be abandoned because it relegates the text of the Treaties, and all its language versions, to a position of insignificance and vests excessive discretionary power in the hands of the Court. As discussed above, the manipulation of the level of generality of a text, which the radical teleological approach facilitates, enables judges to arrive at their preferred policy outcomes. However, according to the argument advanced in this thesis, a faithful interpreter of the CFR should seek the policy outcome that its language dictates, and which the Member States intended, not that which is most congenial to the members of the Court.
8

DRAFTING AND RATIFICATION HISTORY IN ORIGINALIST EXEGESIS

Introduction

As discussed at the beginning of chapter 6, this thesis advocates the adoption of a two-step process in the interpretation of the CFR, one which considers its text in the first instance and, where the text fails to provide a complete answer, the intentions of the Member States with respect to that text. Chapter 6 set out certain general principles, which it was argued should be adopted by the ECJ in its interpretation of the CFR. Chapter 7 set out the principles, which I believe the ECJ should adopt in seeking to reconcile the various language versions of the CFR. Thus, I have exhausted my discussion of the role of text in originalist exegesis. I shall now move on to discuss the second step of originalist exegesis. The following three chapters shall be devoted to a discussion of the means by which the intentions of the Member States of the EU, with respect to the text of the CFR, might be discerned. In chapter 5 of this thesis I argued that the influential authority of the Member States of the EU to direct the interpretation of the CFR implied that the intention of the Member States of the EU, with respect to the text of the CFR, should be deferred to where its text is ambiguous.

In the first section of this chapter I shall explain what I mean by the ‘intention of the Member States.’ In the second section of the chapter I shall examine the manner in which Justices Scalia and Thomas have made use of the records of the Convention at which the Constitution was drafted in their interpretation of its provisions. In the third section, I shall examine the manner in which they have made use of the records of the state ratification debates at which the Constitution was ratified. In the fourth section I shall examine the manner in which they have employed private founding-era sources in their interpretation of the Constitution. In the fifth section I shall examine the manner in which they have used the writings of the Anti-Federalists, who failed in their opposition to the ratification of the Constitution, but succeeded in obtaining undertakings, as a condition of its ratification, that a Bill of Rights would subsequently be added to it. In the sixth section I shall examine the manner in which Justices Scalia and Thomas have made use of the debates of the First Congress, at which the Bill of Rights was drafted, in their interpretation of the Constitution.
8.1 Influential Authority and the Intention of the Law-Maker

8.1.1 Introduction

As discussed in chapter 5 of this thesis, the principal concern of an interpreter who recognises the influential authority of the law-maker is to give effect to the will of the lawmaker. In the context of the interpretation of the CFR the law-maker is the Member States of the EU. It might legitimately be asked how an inanimate corporate entity, such as a state, could be said to have intentions. Since only individuals can have actual cognitive experiences, any attempt to ascribe intentions to corporate entities is inevitably somewhat artificial. What, then, is meant by the intentions of the Member States of the EU? Member States differ in their respective constitutional requirements for treaty ratification and amendment, which was the process by which the CFR was given the force of law. A majority require parliamentary approval; the rest require a referendum. Therefore, when we refer to the intentions of the Member States of the EU, it is to the intentions of these legislators and electorates that we are referring.

There are, broadly speaking, three ways in which one can conceive of group intentions. These are: the majority model, the agency model, and the institutional model. I shall deal with each in turn.

8.1.2 The Majority Model

The majority model requires an interpreter to collect information regarding the intention of each legislator and then to aggregate these individual intentions in such a way that they represent the intentions of a majority of the group.

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This approach is fundamentally flawed, however, for three reasons. First, individual legislators and voters are unlikely to have intentions regarding specific applications of the laws they enact; they are likely in many circumstances to only have intentions regarding its meaning at a very high level of generality. Second, the majority approach ignores the fact that the validity of the CFR as a matter of law derives from the authority of the Member States of the EU acting unanimously. The idea that the intentions of a simple majority of the electorates and parliaments that ratified the CFR should be given effect to is contrary to the Treaty on European Union, which requires the unanimous approval of the Member States. Moreover, given the fact that the ECJ does not have unlimited resources at its disposal, any attempt to enquire into the intentions of literally millions of individuals would be impossible. For these reasons, the majority model of intention should be rejected in the interpretation of the CFR.

8.1.3 The Agency Model

The agency model of intention suggests that the majority of the law-maker typically has only one identifiable intention with regard to the laws it enacts: to delegate the task of drafting and shepherding the law through the legislature to a small group of their colleagues.

Most Member States approve amendments to the fundamental law of the EU by parliamentary vote; a minority are required by their domestic constitutional orders to hold a referendum. Therefore, in order for the agency model of interpretation to succeed, it would have to be shown that these parliaments and electorates unanimously wished to delegate the power of giving meaning to the CFR to the delegates at the Convention at which it was drafted.

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9 Art. 48, Treaty on European Union (TEU).
The agency model has been criticized on the basis that it is implausible that the majority intended to delegate the power to determine the meaning of the law to its drafters or sponsors. This is an empirical question, which can only be accurately answered on a case-by-case basis. In theory, in the context of the interpretation of the CFR, this would involve examining the aggregate intentions of multiple legislatures and electorates. As noted above, this is simply an impossible task. Therefore, it cannot plausibly be suggested that the ECJ should undertake an exercise of this kind in its interpretation of the CFR.

If, therefore, we wish to retain the agency model of intention, only a blanket assumption, to the effect that the will of the drafters and sponsors of the CFR represents the will of the Member States, will suffice. Is such an assumption justified? It is impossible, in the abstract, to arrive at a satisfactory answer to this question. Equally, and as noted above, it is impracticable to resort to an empirical enquiry given the impossibility of inquiring into the subjective states of mind of literally millions of people. For these reasons, the agency model of legislative intention must be rejected. That is not to say that the intentions of the members of the Convention are irrelevant but simply that it cannot be maintained a priori that the electorates and parliaments which gave the CFR the force of law unanimously wished the intentions of those delegates to be determinative of its legal meaning, where its text was ambiguous.

8.1.4 The Institutional Model

Under the institutional model, intention is derived not from a single historical law-making act but from a series of activities over time, stressing their context and plans. The aggregate and the agency model of intention both rest on the premise that group intent is parasitic on the subjective intentions of individuals and cannot exist apart from such subjective intentions. The institutional model challenges this individualist orientation and posits, controversially, that it is possible to impute intention to a group without identifying an individual member of the group who holds that intention. Opinions diverge as to whether one can accurately speak of group intentions, as distinct from the intentions of the

7 See, Movsesian (n6) 1185; Inwinkelried (n6) 961.
8 Voganauer (n2) 37.
individuals who make up the group. Some see any such 'group intention' as a mere metaphor.9

However, it is possible to treat the law-maker as if it were a single author. In seeking to establish the intention of the law-maker, one would examine all data related to the enactment process, with a view to determining what a reasonable author would have had in mind.10 This has also been described as the 'black box' approach to discovering the intention of the law-maker.11

Can this approach, in its rejection of the concrete intentions of individual law-makers as the touchstone of legal meaning, be said to give effect to the intentions of the Member States? I believe it can. No law-maker can act except by enacting laws. This was the basis for my earlier conclusion that clear text must always take precedence over evidence of contrary legislative intention. The act of adopting a legal text presupposes that that text carries meaning, according to the linguistic conventions of the community to which it is addressed.

A text is indeterminate if it carries meaning at too high a level of generality to resolve the dispute before the court. According to the original text and institutional understanding approach, it is assumed that the intention of the law-maker is captured in the text. Resorting to extrinsic evidence of legislative intention is merely an attempt to uncover plausible linguistic constructions of the text, taking the context of its enactment into account. The text is taken as a complete statement of legislative intent, albeit an occasionally unclear one. The function of extrinsic materials is to elucidate the text which, being the only thing formally and unanimously approved by the Member States, is the only authoritative evidence of their intention.

8.1.5 The Meaning of 'Intention'

The previous sub-section makes it plain that an originalist interpreter should seek the intention a reasonable reader at the time of the enactment of the law would have had with respect to the text. It is also plain that such intentions should not be invoked in order to contradict the text or to import requirements which cannot plausibly be attributed to the text.

9 Allan (n1) 693.
10 Bice (n3) 27-28.
11 ibid 27.
However, it remains to be clarified what precisely is meant by 'intention' in this context. Kavanagh characterises Justice Scalia’s approach as one which seeks to give effect to the ‘original text and understanding where the ‘understanding’ refers to the ways in which the Constitution would have been commonly applied at the time of its enactment.’ That this is an accurate characterization will become evident from the description of Justice Scalia’s judgments below.

An example may help to illuminate this definition. Suppose a particular constitution prohibits ‘cruel and unusual punishments’ simpliciter. An individual invokes this provision in order to challenge the constitutionality of a statute which permits the imposition of the punishment of hanging for a particular offence. Evidence is placed before the court which demonstrates that reasonable people at the time of the Constitution’s adoption uniformly believed that hanging was not a ‘cruel and unusual punishment’ for the purposes of this provision. Applying the original text and understanding approach, the court would be required to uphold the constitutionality of this provision.

By contrast, Kavanagh argues that the court in our hypothetical case should only give effect to the ‘expressed intent’ of the enacting generation. All that has been formally enacted is the prohibition of ‘cruel and unusual punishments.’ The constitutionality of hanging has not been specifically referred to in the constitutional text. Kavanagh argues that in those circumstances the court should consider whether hanging is in fact cruel and unusual and should not defer to the views of the enacting generation in that regard. She argues that there is no justification for deferring to the views of the enacting generation with respect to the application of the constitutional text where those views have not been formally enshrined in law.

It is submitted that Kavanagh’s approach would enable judges charged with determining fundamental rights controversies to substitute their own views for those of the enacting generation. Where the views of the enacting generation regarding specific applications of the text they adopted can be discerned those views should be deferred to by the courts. The argument that these views should be disregarded on the basis that they have not been formally enacted is unconvincing, since in circumstances where the meaning of the text is indeterminate resort will have to be had to interpretive indiciā other than the enacted text in


\[2\] Kavanagh (n12).
any event. A choice must be made between deferring to the views of the enacting generation regarding specific applications of the text and permitting the judiciary to inscribe into law their own views regarding the most normatively desirable interpretation of the text. In both cases the meaning of the text is determined by reference to views which have not been enshrined in law. On the basis of the arguments made in Chapters 4 and 5 of this thesis in favour of recognising the influential authority of the Member States, it is submitted that the views of the enacting generation must be preferred to the subjective views of the judiciary in the interpretation of the CFR.

The views I have expressed thus far regarding the meaning of intention may be summarised as follows: the intention sought is that which a reasonable member of the enacting generation would have had with respect to the constitutional text and with respect to the application of that text at the time it was adopted. I shall describe this as the ‘original text and institutional understanding’ approach.

8.1.6 Criticisms of the Original Text and Institutional Understanding Approach

This approach might be criticized on a number of different grounds.

First, it has been argued that since it will frequently be the case that reasonable people at the time of enactment had conflicting views concerning the meaning of the provision being interpreted, the original meaning may be indeterminate. Waluchow notes in that connection that ‘if historical intentions are incompatible with one another in some cases and we must make a choice among them, then that choice will have to be made in terms of something other than original intent.’ Second, even in the absence of a crystallized disagreement concerning the meaning of the text at the time of enactment, its original meaning may nevertheless be indeterminate. How should an originalist interpreter respond where the historical materials do not unequivocally demonstrate that reasonable people at the time of the text’s enactment intended a particular right to be protected by the Constitution or, for our purposes, the CFR? I shall deal with each of these criticisms as one, since they are both

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\textsuperscript{14} Waluchow (n4) 62.

\textsuperscript{15} Ibid 61.
concerned with circumstances in which the text and the intention of the enacting generation with respect to that text are unclear.

In the case of *Liquormart Inc v Rhode Island,* Justice Scalia stated that, where the text of the Constitution, pre-ratification practice, the Constitution's ratification history, and post-ratification practice collectively do not provide an answer to the question before the court, he would defer to the court's prior decisions. Justice Scalia made these statements during a discussion over the appropriate standard of review to apply to restrictions on commercial speech under the First Amendment. The standard applied by the court was that of 'intermediate scrutiny,' under which the court considers whether the restriction on constitutional rights is substantially related to important governmental objectives.

In *McIntyre v Ohio Elections Comm*n,* Justice Scalia stated that, because the original meaning of the First Amendment was unclear on the question as to whether anonymous political speech was protected, the court should defer to the longstanding tradition, under which the several states had been permitted to proscribe such speech. Similarly, in the *Michael H case,* discussed in the previous chapter, Justice Scalia stated that he would only recognize new rights under the Due Process Clause of the Fourteenth Amendment if they were deeply rooted in national traditions, widely accepted by society, and narrowly defined, which is another way of saying that new rights will only be recognized if legislatures have long accepted their existence and resisted their encroachment. In *Troxel v Granville* the plaintiffs argued that they had a natural right to direct the upbringing of their children under the Ninth Amendment, which provides that '[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.' Justice Scalia responded to this invocation of the Ninth Amendment in the following terms:

the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.

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Thus, Justice Scalia’s judgments in McIntyre, 44 Liquormart Inc, Michael H, and Troxel suggest that the court should defer to the political branches where the original meaning of the Constitution is unclear. However, it is important to note that Justice Thomas, the other originalist justice, disagreed with Justice Scalia in McIntyre, 44 Liquormart Inc, and Troxel. He had not yet joined the court at the time Michael H was decided.

This difference of opinion between the originalist justices may be attributed to the divergent philosophical premises which led them to mutually embrace originalism. Justice Scalia has justified originalism on the basis that it facilitates democratic self-government, as the extract from Troxel just quoted demonstrates; Justice Thomas, on the other hand, has embraced a natural rights justification for originalism. In McDonald v Chicago Justice Thomas stated:

[b]y the time of Reconstruction, it had long been established that both the States and the Federal Government existed to preserve their citizens’ inalienable rights, and that these rights were considered “privileges” or “immunities” of citizenship.

Thus, in Justice Scalia’s view, where the Constitution is ambiguous, the community must be permitted to chart its own course without judicial interference. Justice Thomas, on the other hand, regards government as merely a vehicle through which the rights of individuals are protected. Thus, if a particular right was protected against governmental interference at the time of the founding, but was not included in the Constitution, such as parental rights, Justice Thomas is likely to hold that right to be a privilege or immunity of U.S citizens under the Fourteenth Amendment, as he suggested in McDonald, whereas Scalia is unlikely to do so, unless the right continues to receive the support of democratic majorities, as he suggested in Michael H and Troxel.


McDonald v Chicago 561 U.S. 3025 (2010).

22This division between Justice Scalia and Justice Thomas roughly corresponds to a dichotomy in the Western philosophical tradition posited by Professor Lee J Strang, that between the Aristotelian and the Enlightenment traditions. Because the Aristotelian tradition sees government as indispensable in assisting individuals in their pursuit of the good life, Justice Scalia can be said to embrace it. On the other hand, the Enlightenment tradition, at least as that tradition is defined by Strang, is sceptical of government and sees it as a necessary evil, designed to preserve peace between individuals who would otherwise be at war with one another. For this reason, the constitutional philosophy of Justice Thomas may be said to be grounded in Enlightenment thought. See, Lee J Strang ‘The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition’ (2004-2005) 28 Harv J L & Pub Pol’y 909.
The difference between the two is as follows: Justice Thomas will accord a right protection, under the open ended provisions of the Constitution, where the right was widely respected and regarded as fundamental at the time of the founding, whereas Justice Scalia, on the other hand, requires a showing that the right was intended by the founding generation to receive *constitutional* protection before he will recognize it. Thus, we may tentatively posit that the originalism of Justice Thomas presumes that fundamental rights protected at the founding were carried over into the Constitution, since it is the purpose of government to protect rights, whereas that of Justice Scalia assumes that all rights not unambiguously immunized from majority rule by the Constitution remain vulnerable to the vicissitudes of the democratic process.  

Given the democratic justifications I have given for the adoption of an originalist approach in chapters 4 and 5 of this thesis, and for the reasons given in those chapters, I must take Justice Scalia’s side in this dispute. Thus, in my view, if there is a high degree of uncertainty as to whether those who ratified the CFR intended it to protect a particular right, the court should withhold recognition of that right. This is justified by the democratic theory set out in chapters 4 and 5. In addition, this approach is justified by the doctrine of departmentalism, discussed in chapter 8, under which each organ of state has the authority to interpret the Constitution, the CFR for our purposes, with the judiciary having merely the final say as to its meaning. However, absolute certainty is not required either; a high level of historical probability will suffice.

A third criticism which might be made of the original text and institutional understanding approach is that the sanctification of the intentions of the enacting generation in the interpretation of constitutional texts fails to take account of relevant changes in society. Waluchow puts the point in the following way:

> contemporary life is often very different from the life contemplated by the authors of the Constitution. As a result, many intended applications may now seem absurd or highly undesirable in light of new scientific and social developments and improved moral understanding.  

Thus, Waluchow criticizes originalism as failing to take both factual changes and changes in public opinion and moral understanding into account.

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23 For the view that Justice Scalia's deference to the democratic process has led him to a crabbed view of the Free Exercise Clause of the First Amendment, see David Boling 'The Jurisprudential Approach of Justice Antonin Scalia: Methodology Over Result' (1991) 44 Ark L Rev 1143, 1201.

24 Waluchow (n4) 63.
As regards the latter charge, it must be observed that one of the primary functions of a constitution is to restrain the majority from violating certain rights. Thus, if constitutional interpretation were to track changes in public opinion concerning moral issues the Constitution (the CFR for our purposes) would lose much of its utility. Moreover, if judges charged with interpreting the CFR were to substitute their views for those of both its enactors and contemporary public opinion, this would amount to an arrogant and peremptory usurpation, the effect of which would be that the judges' perception of morality would be elevated above that of the citizenry in respect of matters about which reasonable disagreement is inevitable, as discussed in Chapter 4. Jeremy Waldron has stated that delegating to judges the task of resolving the most intense moral controversies of society in accordance with their own perceptions of the requirements of right morality imports an aristocratic component into our government, amounting to 'the rule of the few best.'

As regards the suggestion that originalism ignores changing social facts, it is perhaps appropriate at this point to observe that the originalist justices have applied the Constitution to phenomena of which the framers were unaware. They recognize that the text of the Constitution must be applied to modern phenomena which did not exist during the founding generation. For example, the Takings Clause of the Fifth Amendment to the Constitution was not originally understood to apply to so-called 'judicial takings.' At the time of the founding, judges were regarded as having the authority to declare what the law was, rather than to change it, in accordance with common law tradition. However, with the emergence and eventual triumph of the legal realist school of thought, the naive view that common law adjudication consisted in merely declaring the pre-existing law, was discarded, and the reality of judicial law-making came to be accepted. In light of this development, the originalist justices, in the case of Stop the Beach Renourishment, Inc. v Florida Dept. of Environmental Protection, held that the Takings Clause of the Fifth Amendment, which prohibits 'private property' from being 'taken for public use, without just compensation,' applied to judicial modifications of the law of property. As Justice Scalia put it in that case,

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26 For a general overview, see JH Schlegel 'American Legal Theory and American Legal Education: A Snake Swallowing its Tail' (2011) 12 German LJ 67.

27 130 S. Ct. 2592 (2010).
'[w]here the text they adopted is clear, however, what counts is not what they envisioned but what they wrote.'

In *United States v Jones,* Justice Scalia, in a concurring opinion, held that the placing of a global positioning satellite device on a person's car constituted a 'search' within the meaning of the Fourth Amendment, which prohibits *inter alia* 'unreasonable searches and seizures.' In support of this holding, Justice Scalia quoted founding-era cases which outlawed the physical occupation of a person's property by law enforcement officers. Thus, the Fourth Amendment was interpreted so as to prohibit searches of property carried out by means of technological innovations which the founding generation could not have foreseen. In this way the constitutional right was preserved in its full breadth and vigour.

Calabresi has justified such non-expected applications of the Constitution, by saying that it is necessary for the court to ensure that new forms of government regulation do not violate timeless constitutional values. However, Strauss has stated that the exercise of translating founding era values to modern phenomena is one fraught with uncertainty. Such uncertainty, it is charged, permits judges to give effect to their own personal predilections in applying the Constitution to new phenomena. There is some substance to this criticism, in the sense that analogies between different phenomena are always loose. To take the *Jones* example, it might be possible to argue that the placing of a GPS device on a car is not analogous to a search of the car because it is less intrusive than a physical search by law enforcement officers. However, deciding this question requires the deployment of the kind of reasoning in which judges have always engaged, *ie* deciding whether some phenomenon or other is embraced by a certain legal rule. It does not involve the kind of substantive revision of societal values and mores, which originalism seeks to guard against, and which modern human rights law, and modern constitutional law, facilitates.

A fourth criticism of adopting the original text and institutional understanding approach, in a legal system in which such an approach has not been latterly employed, is that it would lead to instability, because it would constitute a radical break with what went before and could potentially lead to many prior decisions, which did not flow from originalist premises,

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28 ibid.
31 David Strauss 'Panel on Originalism and Precedent' in Calabresi (n30) 218.
32 David M Zlotnick 'Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology' (1999) 48 Emory LJ 1377, 1412.
being overruled. It is plain that the adoption of an originalist approach to constitutional interpretation in EU law, a system in which a purposive approach to interpretation has long held sway, has the potential to be quite disruptive. The wholesale adoption of originalism in EU law could cause chaos because it would involve the abandonment of many doctrines which have become embedded in the fabric of the EU legal order, and which have generated certain expectations among the citizenry of the EU as to their legal rights and obligations. Therefore, it is plain that a compromise must be reached between settled doctrine and the demands of originalism.

Thomas W Merrill identifies several important advantages of following precedent as opposed to the original understanding. First, he states that precedent is a thicker body of norms than the historical materials considered under an originalist approach. This is because the historical actors which created them were engaged in a quite different task to a modern day interpreter. The role of the latter is to answer specific questions as to what the Constitution requires in a given set of circumstances. The materials created by the former were generated either by pre-ratification actors who, of course, knew nothing of the Constitution or by those who debated and voted on the Constitution at the various stages of its ratification. Because they had to vote on provisions in their entirety, they did not consider many specific applications of the provisions on which they were voting. Thus, Merrill’s first criticism may well be correct. However, to prioritize precedent over the original meaning of a particular provision, simply because the precedents are more precise as to the Constitution’s requirements, gives insufficient weight to the legitimacy of those precedents. If they constituted illegitimate arrogations of power by the courts, contrary to the authority of the Member States in the EU’s consociational democracy, as discussed in chapters 4 and 5 of this thesis, then it is not self-evident that their clarity is a determinative reason for adhering to them. H.L.A Hart once observed of Oliver Wendell Holmes that 'Holmes was sometimes clearly wrong; but...when this was so he was always wrong clearly.' Clarity of thought is a great intellectual virtue. Therefore, being wrong clearly is a lesser crime than being wrong obscurely. However, being wrong clearly does not excuse one from being clearly wrong. If a precedent is clearly wrong, even if it provides a more determinate answer to the question before the court than historical materials indicating the original understanding of the provision in issue, the court should in principle be free to depart from that precedent.

3 HLA Hart ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harv L Rev 593, 593.
Second, Merrill argues that historical materials are often inaccessible, in contrast to case law, which can be obtained in any law library. Third, he has argued that reasoning from precedent is more in keeping with the skills of judges than carrying out the type of historical analysis required by originalism. Steven Calabresi has responded to these last two criticisms by arguing that lawyers and judges should simply be taught the skills necessary to identify relevant sources and carry out effective historical analysis. It would be an onerous undertaking to include a crash course on historical method in every constitutional law course. However, if, as I have argued in chapters 4 and 5, this is the only way of ensuring that constitutional decisions will be democratically legitimate, it may well be a price worth paying.

Fourth, Merrill argues that originalism ensures the like treatment of like cases, thereby guaranteeing equality between litigants. This is a very important consideration: palm tree justice, consisting of ad hoc and unprincipled determinations by judges, undermines equality between litigants. However, Merrill once more fails to explain why strict equality between litigants is more important than the legitimacy of decisions. If the decided cases amounted to illegitimate incursions on the authority of the political branches of government, then concern for equality between litigants may have to be sacrificed in the interests of legitimacy.

However, as I shall discuss at greater length below, several factors must be considered in deciding whether to overrule a particular decision and the fact that a particular decision was erroneous according to the tenets of originalism does not, without more, justify its abandonment.

David A Strauss identifies a fifth reason to prefer a precedent-based system to one rooted in originalism: under the former system decision-makers are more candid regarding the moral and political choices they make; under an originalist system, he suggests, such choices are dissimulated. This criticism simply assumes that originalist interpreters dissimulate the

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34 Thomas W Merrill 'Panel on Originalism and Precedent,' in Calabresi (n30) 226.
political choices that they make. It is difficult, without carrying out an exhaustive empirical analysis of originalist opinions, and without psychoanalysing the originalist justices, to determine whether this criticism is true. However, several observations may be tentatively made which tend to reduce the effect of this criticism of originalism. The first and most obvious is that reliance on precedent, like reliance on the original meaning of the Constitution, denies that the interpreter has made a personal value choice in reaching his decision. The doctrine of precedent, and that of originalism, both rest on the authority of somebody other than the court: originalists rely on the authority of the founding generation, whereas judges in a system based upon precedent rely on the authority of past judicial decisions. Personal moral judgements are abjured in both cases. It seems an unfair criticism of originalism, therefore, especially coming from an advocate for a strict doctrine of precedent, to accuse originalism of avoiding explicit value judgements.

However, this response elides the broader question as to whether, under originalism, value judgements are merely obscured, rather than truly avoided. It is certainly true that originalism rests on a normative theory of legitimate political authority. Originalist scholars typically justify originalism as necessary to democratic self-government. In chapters 4 and 5 of this thesis I argued that the democratic authority of the Member States of the EU mandates the adoption of an originalist approach by the ECJ in its interpretation of the CFR. Therefore, originalism rests on a prior moral choice in favour of democracy or, more precisely, self-government over time. Whether subjective moralizing survives in the originalist justices' disposition of discrete constitutional issues is an empirical question, which is beyond the scope of this thesis to answer fully. However, it is perhaps worth observing that many of the scholars who have criticized the originalist justices for particular decisions they have made have suggested that the historical materials supported a different


It goes without saying that, as jurists in a common law system, both Justice Scalia and Justice Thomas accept the doctrine of \textit{stare decisis} as a general principle. They have both written many constitutional opinions which rely solely on the jurisprudence of the Supreme Court and which do not consider the original meaning of the Constitution.\footnote{Justice Scalia has acknowledged that originalism does not totally eliminate willfulness. See, Antonin Scalia \textit{A Matter of Interpretation} (Princeton University Press, 1997) 140; Antonin Scalia 'Originalism: the Lesser Evil' (1989) 57 U Cinn L Rev 849, 863.} However, Justice Scalia has proven to be less willing than Justice Thomas to reconsider prior decisions. Justice Scalia has not, for instance, entirely abandoned substantive due process. Instead, he has argued for a much narrower reading of the doctrine, whereby if a historically approved practice is adhered to, the requirements of the Due Process Clause will be held to have been satisfied.\footnote{Price Marshall 'No Political Truth: \textit{The Federalist} and Justice Scalia on the Separation of Powers' (1989-1990) 12 U Ark Little Rock L J 245.} This approach, which requires widespread and longstanding national consensus before recognizing any new substantive rights under the Due Process Clause, reconciles the doctrine of substantive due process with democratic self-government, with which it has always had an uneasy relationship. For example, the Supreme Court recognized a right to abortion under the Due Process Clause in \textit{Roe v Wade},\footnote{Justice Scalia has done so in, for example, \textit{Nollan v California Coastal Comm'n} 483 U.S. 825 (1987) Justice Thomas has done so in, for example, \textit{Foucha v Louisiana} 504 U.S. 71 (1992).} invalidating the abortion laws of all fifty states in the process. Both Justice Scalia and Justice Thomas have strongly resisted these undemocratic aspects of substantive due process.\footnote{\textit{Roe v Wade} 410 U.S. 113 (1973).}

Justice Thomas, on the other hand, has proven more willing to discard precedents which contradict the original understanding of the Constitution. For example, he has advocated overruling longstanding precedents in the Commerce Clause context. The Supreme Court has broadly construed the scope of the Congress' regulatory powers under the Commerce

\footnote{Michael H. v Gerald D 491 U.S. 110 (1989).}
Clause. In *United States v Lopez*, Justice Thomas rejected this broad reading and advocated a return to the Clause’s original meaning, a reading which would have permitted Congress to regulate interstate trade but nothing else. Any holding to this effect would severely reduce the regulatory powers of Congress and lead to the invalidation of a host of federal programs. Justice Thomas regards the original meaning of the Constitution as superior to virtually all precedent. There have been a variety of other cases in which Justice Thomas has advocated the abandonment of longstanding precedents and a return to the original meaning of the Constitution. Though Justice Thomas has proved more willing than Justice Scalia to overrule erroneous prior decisions, they each consider certain common criteria in deciding whether or not to overrule a particular precedent.

First, the originalist justices have argued that prior decisions should be overruled where they had no basis in constitutional text or tradition when they were decided. Their mutual commitment to constitutional text has led the originalist justices to strongly reject certain Supreme Court doctrines which rest on an atextual reading of the Constitution. For example, they have both strongly rejected the excesses of the doctrine of substantive due process, under which many novel substantive rights have been read into a Due Process Clause of the Fourteenth Amendment, which guarantees only that certain rights shall not be denied without ‘due process of law,’ thus indicating that those rights may be denied, provided due process is observed. As noted above, however, Justice Scalia has advocated the retention of a heavily circumscribed version of the doctrine. Robert H Bork, a former Federal Court of Appeals Judge and a leading advocate for originalism, agrees with the originalist justices in this regard. He has stated that prior decisions which represent a good faith attempt to apply the original understanding are entitled to greater respect than those which deviate far from the original meaning.

A second basis upon which the originalist justices have rejected precedents is that the principles they articulate are incapable of principled or consistent application and, thus,

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6 ibid 584-588. See also, Justice Thomas, United States v Morrison 529 U.S. 598, 627 (2000); Justice Thomas Gonzales v Raich 545 U.S. 1 (2005).
involve the court in legislative or policy appraisals. For example, in *Planned Parenthood of
Southeastern Pa. v. Casey,* the Supreme Court held that restrictions which impose an ‘undue
burden’ on a woman’s constitutional right to abortion violate the Fourteenth Amendment.
Justice Scalia heavily criticized this malleable standard, saying it was ‘as doubtful in
application as it is unprincipled in origin.’ He stated that the application of this standard
would empower lower court judges to give effect to their own predilections in assessing the
constitutionality of abortion restrictions. However, in my view the clarity of particular
precedents ought not to be considered a determinative reason for either retaining or
overruling them. This is because not all provisions of the Constitution are set out with rule­
like certainty; frequently, the language used and the surrounding history are vague. To
interpret constitutional provisions, which contain malleable standards, in a rigid and rule­
like fashion, would represent a betrayal of originalism, which requires that interpreters take
the Constitution as they find it, and always resist the temptation to change it. However, it
has been suggested that adherence to clear pre-determined rules allows judges to be
courageous in enforcing individual rights in cases involving unpopular plaintiffs. For
instance, as we saw in our discussion of *Maryland v Craig,* Justice Scalia’s aversion to
balancing led him to robustly defend the constitutional rights of a person accused of
sexually abusing a child, a class of persons which is widely hated and vilified by the mass

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57 See, for example, the opinion of Justice Scalia in *Department of Revenue of Mont. v Kurth Ranch* 511
U.S. 767, 803-805 (1994); For an opinion of Justice Thomas in similar terms, see *Holder v Hall* 512 U.S.
874, 901 (1994).


59 ibid 985.

60 ibid 992.

61 Edward Gary Spitko ‘A Critique of Justice Antonin Scalia’s Approach to Fundamental Rights
Adjudication’ [1990] Duke LJ 1337, 1344-1345; David A. Strauss ‘Tradition, Precedent and Justice
Pol’y 657, 660; Randy E. Barnett ‘Scalia’s Infidelity: a Critique of Faint-Hearted Originalism’ (2006) 75
U Cin L Rev 7, 12; David A. Strauss ‘On the Origin of Rules (with Apologies to Darwin): A Comment
Calabresi and Livia Fine ‘Two Cheers for Professor Balkin’s Originalism’ (2009) 103 Nw U L Rev 663,
672.

62 Autumn Fox and Stephen McAllister ‘An Eagle Soaring: the Jurisprudence of Justice Antonin Scalia’
(1996-1997) 19 Campbell L Rev 223, 298. For the opposite view, see Daniel S. Goldberg ‘I Do Not
Think It Means What You Think It Means: How Kripke and Wittgenstein’s Analysis on Rule
Following Undermines Justice Scalia’s Textualism and Originalism’ (2006) 57 Clev St L Rev 273, 274-
275.

media and the general public. Another case in which Justice Scalia stood firmly in defence of the rights of an individual was *Hamdi v Rumsfeld*, which concerned a *habeas corpus* application by a person who had been identified as an enemy combatant by the executive. In that case, Justice Scalia would have ordered the applicant's release, in spite of the fact that he was regarded as a grave threat to national security by the President. However, in those cases, as discussed, Justice Scalia considered that the Constitution clearly prescribed a rule; where it does not, however, it would be wrong for originalists to pretend otherwise. Thus, although the pursuit of crystal clear rules is not mandated by originalist theory, where the text and history of the Constitution are clear the judges tasked with interpreting its provisions should not corrupt it with unnecessary refinements and complications. Clear rules may also serve rule of law values, such as notice and predictability, as discussed in chapter 5 of this thesis.

Judge Robert Bork has identified certain other criteria which an originalist judge, faced with a non-originalist precedent, should take into account in deciding whether or not to overrule the errant decision. Thus, a third factor which he thinks originalist judges should consider is the vintage of the impugned precedent. He has said that greater respect should be accorded to early constitutional precedents, rendered by judges who were presumably more familiar with the original meaning of the Constitution. I disagree with Bork that early judicial decisions construing the Constitution should be accorded special respect by originalist interpreters. If early interpreters did not seek to read the Constitution in accordance with the tenets of originalism there would appear to be no good *a priori* reason why their decisions should be treated with greater respect.

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59 For the view that Justice Scalia's constitutional opinions in the area of criminal procedure are contrary to his own personal political preferences, see George Kannar 'The Constitutional Catechism of Antonin Scalia' (1989-1990) 99 Yale LJ 1297, 1302.
63 Ibid 157.
A fourth factor identified by Bork is whether the errant decision has engendered significant reliance by society. Calabresi has rejected the notion that judges should take into account the extent of societal reliance on non-originalist decisions in deciding whether they should be overruled; he says that this is a quintessentially legislative task. Thus, he has stated that a constitutional decision contrary to the original meaning of the Constitution should only be upheld, in accordance with the doctrine of *stare decisis*, where all branches of government have accepted the validity of the decision. This is the fifth factor considered by originalists in deciding whether or not to overrule a particular precedent. If the decision continues to generate significant political opposition years after its having been rendered, and if there was no basis for it in the original meaning of the Constitution, an originalist judge should return to the original understanding of the Constitution. On this view, the political branches of state will consider the reliance interests engendered by the erroneous decision in deciding whether to ask for it to be overruled. Calabresi has also argued that the practice of the Supreme Court overruling its precedents and returning the nation to first principles is part of American legal tradition.

Randy Barnett takes a more radical approach. He has chided Justice Scalia for his adherence to many non-originalist court precedents and has argued that the Supreme Court should always overrule its own precedents where these conflict with the original meaning of the Constitution. However, he has also suggested that respecting reliance interests can be harmonized with overruling non-originalist decisions. On this view, the state would be obliged to make good on its obligations to individuals, who had detrimentally relied on the pre-existing law, but once the errant decision had been overruled, no fresh reliance interests would accrue.

Thus, we can see that originalist judges and scholars apply a variety of criteria in seeking to determine whether a particular decision should be overruled. Certain scholars have argued

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[a]: ibid 158; Stephen Markman 'Originalism and Stare Decisis' (2011) 34 Harv J L & Pub Pol 111.
[c]: Steven G Calabresi 'Introduction' in Calabresi (n 30) 22.
that this broadly discretionary approach allows originalists to pick and choose the precedents which are most congenial to them and to discard the rest.\(^{20}\)

In my view, this criticism is unjustified. It is important to note that the issue only arises once it has been established that the decision was unjustified on originalist grounds at the time it was decided. Once this question is answered in the affirmative, and the initial illegitimacy of the decision is established, then the remaining factors come into play.

8.1.6 Materials Considered Under the Institutional Model

What materials may be considered under an institutional approach to intention in the EU context? Naturally, any material related to the debate on the Lisbon Treaty in each of the Member States, which concerned the conferral of the status of fundamental law on the CFR is, in principle, admissible under this approach. But this embraces an enormous range of material and routine consideration of same, by the ECJ or the lawyers appearing before it, would be impracticable and, indeed, would compound the problems presented by the multilingual nature of EU law, which have been discussed in previous chapters.

What is the solution to this problem of excess information? Because the instrument being interpreted, the CFR, is part of an agreement between several different parties, rather than a legislative act by a single legislature, it is plain that only extrinsic evidence, which may plausibly be said to reflect a consensus among the Member States, may be admitted. Any other approach would violate the consociational nature of the EU, which was discussed in chapter 4 of this thesis.

Evidence from the parliamentary and public debates which took place in each Member States in relation to the Lisbon Treaty and, more particularly, the CFR should be considered, but only where those utterances likely reflected the intentions of all the Member States. We must also remember that, as noted above, the only function of extrinsic evidence in Charter interpretation should be to elucidate the linguistic meaning of the text; stand-alone intentions, with no cognizable roots in the Charter, should not be given effect to.

So far in this chapter I have discussed what is meant by 'the intention of the Member States.' In the remainder of the chapter I shall discuss the various historical sources to which Justices

\(^{20}\) Zlotnick (n32) 1413.
Scalia and Thomas have had regard in seeking to uncover the meaning of the intentions of the founding generation in relation to the provisions of the Constitution.

Prior to doing so, however, it is important to note that objection might be made to my characterization of the interpretative philosophies of Justice Scalia and Justice Thomas as intentionalist in nature. Neither of them explicitly claims to follow an intentionalist method. To the contrary, it has been said that Justice Scalia is an adherent to 'public original meaning' originalism, whereas Justice Thomas adheres to a 'general original meaning' approach. The putative difference between these two approaches is that Justice Thomas accords weight to the drafting history of the Constitution, the state ratifying conventions which ratified it, and to the original public meaning of the words used in the Constitution at the time of its adoption, whereas Justice Scalia tends to focus disproportionately on the latter to the exclusion of the others. While there may be some divergence between the interpretative methodologies of Justice Scalia and that of Justice Thomas, we shall see in what follows that they are both concerned with interpreting the Constitution in a manner consistent with the understanding of reasonable people at the time it was ratified. In this sense the approach of each may be said to be analogous to the 'original text and institutional understanding' of the founding generation, in the sense in which that term has been explained above. Moreover, in performing this task they each employ all of the sources listed in the introductory section to this chapter, namely the records of the Constitutional Convention, the records of the state ratifying conventions, private founding-era sources, Anti-Federalist writings, and the records of the First Congress. It may be that they accord the different sources a slightly different weighting though this is not evident from the analysis carried out below.

8.2 The Constitutional Convention

Justice Scalia has quoted the records of the Constitutional Convention in several cases since his elevation to the Supreme Court. In *Morrison v Olson*, he discussed the evolution of the

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Appointments Clause at the Constitutional Convention, and stated that it demonstrated that the word ‘inferior’ was, then as now, a synonym for ‘subordinate.’

In Honig v Doe, Justice Scalia quoted an exchange in the Constitutional Convention between James Madison and Dr William Samuel Johnson in support of his conclusion that Article III, which conferred jurisdiction on the federal courts over ‘cases and controversies,’ codified the pre-existing common law limits on the judicial power and, for this reason, ruled out judicial decisions on abstract questions divorced from the facts of a particular case.

Justice Thomas has made extensive reference to the Constitutional Convention in his opinions. In Camps Newfound/Owatonna, Inc. v Town of Harrison he quoted a resolution proposed by George Mason and seconded by James Madison which demonstrated that the founding generation applied the words ‘import’ and ‘export’ to both foreign trade and to interstate trade.

In the case of Haywood v Drown the applicant challenged a New York statute which stripped state courts of subject matter jurisdiction over certain federal claims, on the basis that it violated Article IV of the Constitution, which established the supremacy of federal law. Justice Thomas, in a dissenting opinion, traced the development of Article IV, through several drafts in the Constitutional Convention, and noting that a proposal to require state courts to entertain federal cases had been rejected, in support of his conclusion that Article IV did not require state courts to entertain federal business.

Thus, the foregoing cases illustrate that the Constitution’s drafting history may be used for at least three purposes in originalist exegesis. First, it gives interpreters a sense of the meaning of the words used by the drafters in the context in which they appear in the text which is being interpreted. Second, it gives interpreters a sense of how the drafters of the law expected the law they were drafting to interact with pre-existing legal principles and conventions, and the mischief with which the law was expected to deal. Third, the evidence of drafts rejected by the framers may give an interpreter an indication as to what the final text was not intended to mean. I shall employ the drafting history of the CFR in each of these...
three senses in my discussion of the original meaning of Article 51 CFR in chapter 10 and in my discussion of the original meaning of Article 52(3) in chapter 11 of this thesis.

8.3 State Ratification Convention Debates

In his dissenting opinion in *Mistretta v United States,* Justice Scalia argued that the U.S. Sentencing Commission, which had purported to set down legally binding sentencing guidelines, violated the constitutionally prescribed separation of powers, by empowering a body which was not the Congress to make laws. Justice Scalia quoted the views expressed by James Madison in *The Federalist,* No. 47, in support of his conclusion.

The case of *Plant v Spendthrift Farm Inc* concerned a challenge to a congressional statute which directed the courts to re-open finally determined proceedings. Justice Scalia, writing for the court, quoted *The Federalist,* Nos. 48, 78, and 81 in support of his conclusion that one of the abuses the founding generation had sought to eliminate by providing for an independent judiciary under Article III of the Constitution had been the practice, common before the founding era, of legislatures overturning final court determinations. For this reason, Justice Scalia voted to invalidate the impugned enactment.

The case of *United States v Lopez* concerned the meaning of the Commerce Clause of Article I of the Constitution, which gives Congress the power 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.' Justice Thomas cited *The Federalist,* Nos 4, 17, 24, 33, 34, 35, 36, 42, 45 in support of his conclusion that the word 'commerce,' as used in the clause, referred to 'trade,' rather than all productive activities. For this reason, according to Justice Thomas, the federal government lacked the power to regulate activities other than trade, such as manufacturing and agriculture.

In *US Term Limits v Thornton,* Justice Thomas held that the list of qualifications for members of Congress, contained in the Constitution, did not preclude state legislatures from imposing additional limitations. In support of this conclusion, he quoted *The Federalist,* Nos 39, 52, and 59, in support of the view that the sovereign power of the U.S, 'We the People,' was the

10ibid 586-593.
peoples of the several states, not the undifferentiated people of the United States as a whole. He also noted certain statements in the various state ratifying conventions to the same effect.

In *Johanns v Livestock Marketing Association,* Justice Thomas, in a concurring opinion, cited the *Federalist,* No. 12, in its recognition of excise duties, in support of his conclusion that targeted taxes to fund government operations were consistent with the provisions of the Constitution. In that case, a charge on all sales of beef which was devoted to funding, *inter alia,* beef promotional campaigns by the Beef Promotion and Research Board, had been challenged.

In *Baze v Rees,* Justice Thomas, in a concurring opinion, quoted from the state ratification debates of Virginia and Massachusetts in support of the view that the Eighth Amendment to the Constitution, which prohibits 'cruel and unusual punishments,' was intended only to prohibit torturous punishments and did not ban methods of execution which posed a substantial risk of severe pain, as the majority of the court had held.

In *McDonald v Chicago,* Justice Thomas quoted the *Federalist,* No. 84 and the proceedings of the First Congress, which drafted the Bill of Rights, in support of the view that the purpose of government was to protect the natural rights of its citizens. In the same case, he cited newspaper articles contemporaneous with the Constitution’s adoption in support of his view that the phrase ‘Privileges and Immunities,’ used in the Fourteenth Amendment was understood at the time as a synonym for ‘fundamental rights.’

The originalist justices have cited the state ratification debates in a variety of other cases.

The preceding discussion illustrates that the originalist justices use the debates in the state ratifying conventions for much the same reasons as they deploy the records of the Constitutional Convention. Specifically, they examine such debates in order to determine the purpose for which constitutional provisions were adopted and in order to determine the meaning of the provisions of the Constitution at the time of its ratification.

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*ibid 846, 901-902, and 863 respectively.
* ibid 860-862.
*61 U.S. 742(2010).
* See, for example, *Hamdan v Rumsfeld* 548 U.S 557(2006).
8.4 Private Founding-Era Sources

The originalist justices have also employed private founding-era sources in interpreting ambiguous constitutional provisions. For example, in *Hamdi v Rumsfeld,* Justice Scalia quoted correspondence between Thomas Jefferson and James Madison in support of the view that the Constitution required the writ of *habeas corpus* to be suspended before U.S. citizens could be held by the executive without trial. He also noted the concern of the framers, evinced in no less than ten of the papers in *The Federalist,* about the dangers of standing armies. Justice Scalia reasoned that any suggestion that the executive could use military force, rather than the force of law, against citizens on U.S. soil, would sit uneasily with the framers' fear of standing armies. In the same case, Justice Thomas reached the opposite conclusion. He relied on *The Federalist* Nos 21, 31, 41, 70, 74 in support of the view that the executive branch was the leading organ in foreign affairs. For this reason, he advocated deference to the President's determination that the applicant was an enemy combatant and, thus, was not entitled to avail of the protection of the U.S. civilian courts.

8.5 Anti-Federalist Writings

The originalist justices have employed the writings of the Anti-Federalists, the principal opponents of the Constitution, for much the same purpose: as evidence of the agreed meaning of its terms in the first instance and also as persuasive evidence of the mischief with which its various provisions were intended to deal.

In *Missouri v Jenkins,* Justice Thomas suggested that the broad equitable powers exercised by the federal courts in remediying the lingering effects of racial segregation, which had included the management of governmental institutions, went beyond the original understanding of the equitable power. He quoted Anti-Federalist writings, in which the dangers arising from the conferral of equitable power on U.S. courts had been discussed, and noted that the supporters of the Constitution had addressed such concerns by arguing that the federal courts' equitable jurisdiction would be confined within traditional limits. Given the high level of agreement among the participants in the debate on the Constitution's ratification, that the U.S. courts' equitable powers should be narrow in scope, Justice Thomas

argued that so-called 'structural injunctions,' which required ongoing supervision by the federal courts, were not within the power of those courts to issue. In District of Columbia v Heller, Justice Scalia quoted the views of Brutus, a pseudonymous Anti-Federalist pamphleteer, in support of the view that the words 'security of the free state,' used in the prefatory clause of the Second Amendment, meant the security of a free country. In Camps Newfound/Owatonna, Inc. v Town of Harrison, Justice Thomas quoted Anti-Federalist writings in support of his conclusion that the words 'import' and 'export' used in Article I of the Constitution had been originally understood to apply to both foreign and interstate trade.

8.6 The First Congress and the Debate on the Bill of Rights

The First Congress is significant in American constitutional history for two principal reasons: first, it was there that the Bill of Rights was drafted and, second, in its exercise of the powers which the newly ratified Constitution had conferred upon it, the First Congress indicated its understanding of the meaning, and hence that of the founding generation, of many of the Constitution's provisions.

In Helling v McKinney, Justice Thomas relied on silence in the First Congress, which drafted the Eighth Amendment prohibiting 'cruel and unusual punishments,' in support of his view that, like its antecedent in the English Bill of Rights of 1689, it referred to judicially imposed punishments rather than conditions of confinement. Similarly, in McIntyre v Ohio Elections Commission, Justice Thomas noted the silence of the First Congress, which drafted the First Amendment, on the question as to whether it protected anonymous political speech. He stated that, in the event of silence among the founders as to whether a particular practice is protected, an originalist should examine historical practice in seeking to answer this question. However, in Thornton Justice Thomas stated that it was perilous to rely on

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8 ibid 126-130.
11 ibid 632.
13 ibid 38.
14 514 U.S. 334.
15 ibid 360.
silence as evidence of original meaning because the historical record was often fragmentary and incomplete. As a general matter, it is submitted that silence ought not to be regarded as persuasive evidence of the intention of the law-maker, since silence cannot be taken to signify either assent to or dissent from a particular proposition. There is much to be said, however, for the approach of Justice Thomas in \textit{McIntyre}, which examines founding-era practice in circumstances where both the drafters and ratifiers of the law have been silent on a particular point. This is because such practice can give an interpreter an insight into the framers' understanding of a particular principle which has not been exhaustively defined in the Constitution itself, and the outer limits of which have not been comprehensively delineated either during its drafting or ratification.

Justice Thomas also referred to the practices of the First Congress in \textit{Rosenberger v Rector and Visitors of Univ. of Virginia}, which concerned the meaning of the First Amendment's Establishment Clause, which provides that 'Congress shall make no law...respecting an establishment of religion.' In that case Justice Thomas concluded that the federal government could, consistently with this clause, give aid to religion, provided this was done on a denominationally neutral basis. He noted the fact that the First Congress had employed a chaplain in support of this holding. He also quoted a statement made by James Madison, the principal author of the First Amendment, in support of this reading of the clause.

The case of \textit{United States v Hubbell}, concerned the meaning of the word 'witness,' as used in the Fifth Amendment. Justice Thomas referred to statements made in the First Congress in support of his view that the term was intended to have a broad signification, to cover all those who gave evidence.

In \textit{McCreary County v American Civil Liberties Union of Kentucky}, Justice Scalia noted that the First Congress, ie the very body which had drafted the First Amendment, had opened its sessions with a prayer. For this reason, he rejected the claim of the applicant in the case that the display of the Ten Commandments on a courthouse lawn violated the Establishment Clause of the First Amendment, which prohibits the federal government from making any law 'respecting an establishment of religion.'

\textsuperscript{101} ibid 900.  
\textsuperscript{102} 515 U.S 819(1995).  
\textsuperscript{103} ibid 858.  
\textsuperscript{104} ibid 856.  
\textsuperscript{105} 515 U.S. 819(1995).  
\textsuperscript{106} ibid 53-54.  
\textsuperscript{107} 545 U.S. 844 (2005).
In the case of *Baze v Rees*, Justice Scalia quoted certain criminal statutes providing for the death penalty, which had been adopted by the First Congress, in support of his view that the Eighth Amendment, which prohibits 'cruel and unusual punishment,' did not ban the death penalty. Justice Scalia reasoned that, since the First Congress had ratified both sets of provisions, it was reasonable to assume that they were not self-contradictory.

**Conclusion**

In the first section of this chapter I explained what I meant by the 'intention of the Member States.' Specifically, I argued that an interpreter of the CFR should follow an 'original text and institutional understanding' approach to discerning the Member States' intention at the time of the ratification of the CFR. I noted that in performing this task an interpreter must examine all data related to the enactment process with a view to determining what a reasonable author would have had in mind by using the words under construction. In the second section of the chapter I examined the manner in which Justices Scalia and Thomas have made use of the records of the Convention at which the Constitution was drafted in their interpretation of its provisions. In the third section I examined the way in which they have made use of the records of the state ratification debates at which the Constitution was ratified. In the fourth section I examined the manner in which they have employed private founding-era sources in their interpretation of the Constitution. In the fifth section I examined the manner in which they have used the writings of the Anti-Federalists and, in the sixth section, I examined the manner in which they have made use of the debates of the First Congress for the same purpose.

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9

TRADITION IN ORIGINALIST EXEGESIS

Introduction

One of the key sources of evidence deployed by originalists in their exegesis is legal tradition. In the first section of the chapter it shall be argued that the influential authority of the Member States, the nature of which was discussed in detail in chapter 5 of this thesis, requires that European legal tradition should be examined where the text of the CFR and its drafting and ratification history fails to conclusively establish its original meaning.

In the second section the manner in which the originalist justices' deploy legal traditions which predate the ratification of the Constitution, in seeking to discern its original meaning, shall be examined. In the third section the originalist justices' deployment of legal traditions which post-date the ratification of the Constitution shall be discussed.

In this chapter numerous historical analyses undertaken by both Justice Scalia and Justice Thomas will be described. Some of these historical analyses have been the subject of criticism by scholars, historians, and other judges. In chapter 8 of this thesis one of the most frequently articulated criticisms of originalism was examined, ie the claim that it enables judges to construct tendentious historical narratives, thus enabling them to surreptitiously inscribe their personal preferences into law. For the purposes of the analysis below I shall take at face value the historical analyses offered by Justice Scalia and Justice Thomas in their opinions.

9.1 Influential Authority and Tradition

The text of a given law and the debates surrounding its enactment will often fail to provide the ECJ with a determinate answer as to its original meaning. This is because, in many instances, the words used will be vague rather than ambiguous. Professor Randy Barnett has explained the distinction between 'ambiguity' and 'vagueness' in the following terms:
A word is ambiguous if it has more than one meaning and it is unclear which meaning is intended...In contrast, vagueness is the problem of applying a term to a marginal object.¹

The word ‘arms,’ for example, could refer to either weapons or body parts; it is, therefore, ambiguous rather than vague. By contrast, Article 1 CFR provides that ‘Human dignity is inviolable.’ It would be impossible to exhaustively enumerate each and every aspect of ‘human dignity’ and the term is, therefore, vague. Unlike the drafting of ordinary legislation, where precision and comprehensiveness are the chief objectives, in the case of the drafting of a constitution or human rights instruments, competing imperatives come into play. Constitutions and human rights instruments are both law and manifesto.² In their legal application, they must provide sufficient guidance to whichever court is called upon to interpret them, in order to enable that court to resolve disputes over their meaning; in their function as manifesto they must, first, be understood by ordinary citizens and, second, and to a lesser extent, they must inspire their loyalty and assent. For example, a lawmaker might, for the sake of accessibility and economy, decide to guarantee simply ‘equality before the law,’ in preference to a specific prohibition of discrimination on enumerated grounds.

It is submitted that the source best capable of clarifying vague provisions of the CFR is tradition. Tradition is a fairly malleable concept, capable of bearing a number of different meanings.³ Nancy McCahan offers a useful definition, which I shall deploy in my analysis. She defines tradition as ‘the combination of norms and practices of a particular culture.”³ Tradition should be deployed by the ECJ in seeking to ascribe a meaning to the CFR in the face of obscure text and ratification history because it ensures that Charter interpretation will be consistent with democratic decisions which the people themselves have taken.⁴ In order to establish a right under the CFR, which its text and ratification history do not unambiguously indicate that the Member States wished to protect, it should be necessary to show, first, that it can plausibly be situated within one of the vaguer provisions of the CFR,

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thus satisfying the requirement that the law-maker exercise its authority exclusively by the formal enactment of law and, second, that the right in issue was not traditionally strongly disapproved of in by the people of any of the Member States. As discussed in Chapters 4 and 5 above, this requirement of unanimity is the only way of reconciling the recognition of a particular right under the CFR with the consociational conception of the EU, in circumstances in which the asserted right does not receive unambiguous support either in the text of the CFR or in its drafting and ratification history.

9.2 Pre-Ratification Tradition

One of the background sources most frequently consulted in originalist exegesis is the background legal tradition against which the Constitution was adopted. Referring to this background tradition can indicate both the origins of the constitutional provision under construction and the mischief with which it was intended to deal. It is important to note, however, that in the view of both Justice Scalia and Justice Thomas pre-ratification tradition cannot trump text as evidence of original meaning. In addition, it is important to state that the reason they accord great weight to pre-ratification traditions in the interpretation of the Constitution is that the Bill of Rights was seen at the time of its adoption as codifying pre-existing rights rather than creating new ones. Similarly, many of the rights enshrined in the CFR can trace their origins to the European Convention on Human Rights (ECHR) and to national constitutions.

The case of Hamdi v Rumsfeld concerned a habeas corpus application by an American citizen, who was being held without trial by the federal government, on suspicion of being a Taliban fighter. The Supreme Court held that the applicant was entitled to contest his detention before a neutral decision-maker but stopped short of ordering his immediate release. Justice Scalia wrote a dissenting opinion arguing that the applicant was entitled to be released. He quoted Blackstone's Commentaries and common law cases from the 14th century onwards in support of the view that citizens accused of bearing arms against their country could not be

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held at the pleasure of the executive and, where the writ of *habeas corpus* had not been suspended, must either be charged with treason or released.

The case of *Boumediene v Bush* concerned a *habeas corpus* application by a person detained as an enemy combatant in Guantanamo Bay Cuba as part of America’s War on Terror. Justice Scalia quoted common law cases, founding-era treatises and Blackstone’s *Commentaries on the Laws of England* in concluding that the writ of *habeas corpus* could not be availed of by aliens abroad. Justice Scalia’s opinions in *Hamdi* and *Boumediene* provide a good example of one instance in which originalism has constrained a justice from giving free reign to his own personal predilections in the interpretation of the Constitution. In *Hamdi*, Justice Scalia would have ordered the release of an alleged enemy combatant whereas, in *Boumediene*, he argued that another such person could not even make a *habeas corpus* application. Nothing in Justice Scalia’s personal views can explain this discrepancy. Rather, it is attributable to a long tradition of treating traitors and foreign enemy combatants differently: the latter had traditionally been put on trial for treason whereas the former had usually been detained until the cessation of hostilities.

In *City of Boerne v Flores* Justice Scalia quoted founding and colonial era laws and practices in holding that the free exercise of religion under the First Amendment was not understood at the time of its ratification to require exemptions to be crafted from a generally applicable laws, which were not specifically aimed at suppressing the religious practice in question, in order to accommodate heterodox religious practices.

In *McConnell v Federal Election Commission* Justice Scalia, in a dissenting opinion, discussed the 18th century newspaper wars in Britain, where newspapers had been taxed penally and half of them had closed, and the founding generation’s opinions about that event, in support of the view that money should be understood, in an economy founded on the division of labour, to constitute speech for the purposes of the First Amendment. He also quoted founding-era cases in support of the view that the excessive taxation of the press was a violation of the right of free speech and, therefore, that financial impositions implicated free speech concerns. He also quoted the Declaration of Independence for the view that citizens

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6 For other cases in which Justice Scalia has consulted tradition in interpreting the *habeas corpus* clause of the Constitution, see Justice Scalia *INS v St. Cyr* 553 U.S. 289, 337-345 (2001); *California v Roy* 519 U.S. 2 (1996).
8 ibid 538-543.
banding together, and combining their resources in pursuit of a common end, was a constitutionally protected activity. In addition, he showed how corporations were a ubiquitous feature of life in the 18th century and, given the fact that the text of the Constitution did not exclude them from its protection, argued that the court should treat corporate speech in the same manner as it treated individual speech. For all of these reasons, Justice Scalia held that the imposition of restrictions on the quantity of corporate donations to candidates for political office should be regarded as an unconstitutional violation of freedom of expression.

In the case of *McIntyre v Ohio Elections Comm'n* Justice Thomas discussed the 1735 Zenger trial, in which a printer had been charged with seditious libel and had been acquitted by a jury when charges were brought against him for refusing to reveal the names of authors who had attacked the Crown. Justice Thomas argued that the outcome of the Zenger trial supported the view that 'anonymity and the freedom of the press were intertwined in the early American mind.' For this reason he held that anonymous political speech was protected by the Free Speech Clause of the First Amendment.

In *District of Columbia v Heller,* Justice Scalia, writing for the court, quoted founding-era usages of the term 'to keep and bear arms,' including a House of Lords debate and newspaper publications, in support of his conclusion that the phrase did not have an exclusively militia-related connotation and protected an individual right. He also cited the English Declaration of Rights of 1689, which had long been understood as the predecessor of the Second Amendment, which clearly protected an individual right to bear arms, unrelated to service in the militia, and state constitutional provisions unambiguously protecting an individual right, in support of the court's conclusion that the Second Amendment codified the pre-existing right of individuals to bear arms for purposes other than militia service.

In similar vein, in *McDonald v Chicago,* Justice Thomas, in a concurring opinion, considered the meaning of the phrase 'Privileges and Immunities' used in Fourteenth Amendment. As a matter of background, it is important to note that most provisions of the Bill of Rights, by their text, apply only against the federal government and do not apply to the several states.

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15 ibid 361.
16 *Heller* (n7).
17 561 U.S. 3025 (2010).
By contrast, the Fourteenth Amendment, by its text, applies exclusively against the states. In seeking to discern the original meaning of 'Privileges and Immunities,' Justice Thomas cited Blackstone’s Commentaries, 19th century treatises, antebellum case law, and certain 19th century Treaties, to which the U.S was a party, in support of the view that the phrase was used as a synonym for ‘fundamental rights’ at the time of the adoption of the Fourteenth Amendment in 1868. He reasoned that the rights protected by the U.S Constitution should be understood to be fundamental in nature. He, therefore, held that the Second Amendment’s ‘right to bear arms’ must be understood to apply to the several states under the Privileges and Immunities Clause.

In Doggett v United States, the question before the court was whether an eight and a half year delay in bringing a prosecution violated the Speedy Trial Clause of the Sixth Amendment, which provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy...trial.’ Justice Thomas, in a dissenting opinion, quoted the background principles of common law against which the Clause had been adopted and concluded that its purpose was to prevent delay related prejudice to the defendant’s liberty. Since the defendant had been at liberty during the entire period of prosecutorial delay, Justice Thomas held that the Speedy Trial Clause had not been violated.

In Harmelin v Michigan, Justice Scalia traced the genesis of the Cruel and Unusual Punishments Clause of the Eighth Amendment, from the English Declaration of Rights of 1689, and through early state constitutional provisions. He quoted Blackstone’s Commentaries on the Laws of England and other founding-era treatises for the view that the clause was designed to prevent abuses, such as had occurred at Lord Jeffrey’s Bloody Assizes in 1685, at which special punishments had been invented and meted out. On this basis, Justice Scalia concluded that the clause prohibited certain types of punishment but did

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18 However, the Supreme Court has long departed from the text of the Constitution in this regard. Specifically, the court has held that the Due Process Clause of the Fourteenth Amendment applies all of the protections of the Bill of Rights against the states as well. See, Robert Fairchild Cushman, ‘Incorporation: Due Process and the Bill of Rights’ (1965-1966) 41 Cornell L.Q 467.

19 For further discussion of the Privileges and Immunities Clause by Justice Thomas, see Saenz v Roe 526 U.S. 489, 523-525 (1999).


21 ibid 660.


23 ibid 966. For another case in which an originalist justice has used state constitutional provisions in elucidating the meaning of provisions of the U.S Constitution, see United States v Hubbell 530 U.S. 27, 52 (2000).
not require that the punishment imposed on an offender be proportional to the offence he had committed.\textsuperscript{24}

In \textit{Michael H. v Gerald D.},\textsuperscript{25} Justice Scalia sought to anchor the doctrine of substantive due process in a rule of law, which required that, for any right to be protected under the Due Process Clause, it must be deeply rooted in national tradition. In that case, on the basis of an examination of founding-era and 19\textsuperscript{th} century treatises, Justice Scalia held that the adulterous father of a child born to a woman, who was married to another man, had no right of access to that child. Justice Scalia insisted that, in order for a tradition to give rise to constitutional rights under the Due Process Clause, that tradition must protect the specific right asserted, rather than a more generalized one.\textsuperscript{26} For instance, in \textit{Michael H}, it was insufficient that there was a long tradition of protecting fathers’ rights of access to their children, because there was an equally long, and more specific, tradition of conclusively presuming that a child born to a married woman was the offspring of her husband, and not a third party.\textsuperscript{27}

9.3 Post-Ratification Tradition

Of the sources considered thus far post-ratification tradition is plainly the least important evidence of the original understanding of the Constitution. This is because it is removed from the circumstances of the Constitution’s adoption and, thus, it cannot shed light on the thinking of those who were involved in the debate over its adoption. Moreover, given that post-ratification tradition, by definition, post-dates the ratification of the Constitution it cannot give us any insight into the nature, content, and scope of the rights the Constitution was intended to codify. What, then, is the justification for examining post-ratification tradition in seeking to discern the original meaning of the Constitution?

One justification may be found in the notion of departmentalism, whereby each organ of state, and not merely the judiciary, has authority to interpret the Constitution.\textsuperscript{28} On this view, post-ratification legal traditions, eg laws prohibiting certain conduct, can be seen as

\begin{itemize}
\item \textsuperscript{24} ibid 968-975.
\item \textsuperscript{25} 491 U.S. 110 (1989).
\item \textsuperscript{26} ibid fn 6, opinion of Justice Scalia.
\item \textsuperscript{27} ibid 127. See also, Justice Thomas in \textit{Bennis v Michigan} 516 U.S. 442, 454-455 (1995).
\end{itemize}
interpretations of the Constitution by coordinate branches of government, interpretations which, according to the departmentalist point of view, are worthy of respect and ought to be deferred to by the judiciary. The principal justification for departmentalism is deference to democratic institutions. In the case of *Rutan v Republican Party of Illinois*, Justice Scalia stated:

> when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down... When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

Thus, in the EU context, and for similar reasons, the ECJ should defer to decisions made by the other institutions of the EU, as these are possessed of a greater democratic legitimacy than the court itself, as explained in Chapter 4 of this thesis.

It is important also to clearly spell out the limits to the invocation of tradition in this way. In *Pacific Mutual Life Insurance v Haslip*, Justice Scalia made it clear that deviating from a tradition does not violate the Constitution, unless that tradition is embodied in some provision or other of the constitutional text. Tradition cannot override the constitutional text and is of relevance only when the latter is ambiguous. However, if a statute under challenge adheres to a longstanding tradition then it is presumptively constitutional. This, it may be said, given the consociational nature of the EU, that in order for a post-ratification tradition to generate a presumption that it complies with the CFR, it must be one

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32 ibid 31-35.
unanimously endorsed by the Member States. In addition, in order to give rise to a presumption of validity, the tradition in issue must be one of longstanding. 36

In the case of Hamdi v Rumsfeld, 37 an American citizen, who had been designated by the executive branch as an enemy combatant, challenged his detention. As discussed above, Justice Scalia argued, unsuccessfully, that he should be released. He examined post-ratification tradition in support of this conclusion. In particular he noted that during the Civil War it had been necessary for Congress to suspend the writ of habeas corpus in order to allow for the indefinite detention of American citizens. Because the writ had not been suspended as part of America’s War on Terror he held that the prisoner should be released. Justice Thomas approached the case from a different perspective. He quoted certain 19th century cases for the view that a presidential determination, made in good faith, that a particular individual was an enemy combatant could not be judicially reviewed.

Perhaps the most interesting case in which post-ratification tradition assumed a prominent role in the analysis undertaken by the originalist justices was McIntyre v Ohio Elections Comm’n. 38 There, legislation requiring those responsible for publications in connection with an election to disclose their identities was challenged on First Amendment grounds. As noted above Justice Thomas referred to the ubiquity of anonymous political speech in the founding era in support of his conclusion that anonymous political speech was protected by the First Amendment. Justice Scalia, in a dissenting opinion, arrived at the opposite conclusion. He noted that the text of the First Amendment did not definitively resolve the question. He also acknowledged that anonymous political speech was practiced at the time of the founding. However, he stated that the simple fact that particular conduct was not proscribed at the time of the founding did not mean that citizens had a constitutional right to engage in that conduct. 39 He stated that, where the historical understanding of the bearing of a constitutional provision on a particular issue is unclear, longstanding societal traditions must be considered dispositive of constitutional meaning. 40 Here, there was a longstanding tradition, dating from the end of the nineteenth century, of prohibiting anonymous political

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39 ibid 373-375.
40 ibid 375.
speech; for this reason, Justice Scalia argued, unsuccessfully, that the impugned statute should be upheld.\footnote{ibid 376.}

Justice Scalia has also invoked post-ratification tradition in seeking to determine the original meaning of the Establishment Clause of the First Amendment. In Lee v Weisman,\footnote{505 U.S 577 (1992).} the Supreme Court held that including prayers as part of public school graduation ceremonies psychologically coerced the minors present to participate and, thus, violated the Establishment Clause of the First Amendment, which provides that ‘Congress shall make no law respecting an establishment of religion.’ Justice Scalia dissented from this holding and discussed the unbroken tradition of God being invoked in presidential speeches, from the time of the founding to the present day, in support of his conclusion that the non-sectarian invocation of God at public ceremonies did not violate the Establishment Clause.\footnote{ibid 634. See also, Justice Scalia McCreary County v American Civil Liberties Union of Kentucky 545 U.S. 844 (2005); Justice Thomas Rosenberger v Rector and Visitors of University of Virginia 515 U.S. 819, 858-863 (1995).}

The case of United States v Virginia,\footnote{518 U.S 515 (1996).} concerned a challenge to the male only admissions policy of the Virginia Military Institute (VMI). The plaintiffs invoked the Equal Protection Clause, which provides that ‘no state shall ... deny to any person within its jurisdiction the equal protection of the laws.’ Justice Scalia relied on the longstanding and continuing tradition of single-sex education in holding that discrimination on the basis of sex did not violate the Fourteenth Amendment.

In Lawrence v Texas,\footnote{539 U.S. 558 (2003).} Justice Scalia noted the widespread existence of anti-sodomy laws, from the adoption of the Fourteenth Amendment in 1868, up to recent decades, in support of his conclusion that the right to engage in sodomy was not deeply rooted in national tradition and, therefore, should not, as he explained in Michael H, be recognized as a constitutional right.\footnote{ibid 594-598.}

In the case McDonald v Chicago,\footnote{McDonald (n17).} at issue was the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment, which provides that: ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...’ Justice Thomas quoted 19th century cases, decided after the ratification of the Fourteenth Amendment.\footnote{ibid (n17).}
Amendment, in support of his conclusion that the phrase required the states to respect the rights protected by the Bill of Rights which, recall, was originally applicable only to the federal government. The originalist justices have cited post-ratification tradition in seeking to discern the meaning of the Fourteenth Amendment in many other cases as well.  

See, for example, *Castle Rock v Gonzales* 545 U.S 748 (2005).
PART V

CASE STUDIES
10

Article 51 CFR: The Scope of Application of the Charter

Introduction

In this chapter I propose to analyse Article 51 of the Charter of Fundamental Rights (CFR), which sets out the Charter’s scope of application, in accordance with the textualist and originalist principles described in the previous two chapters. Article 51 of the CFR provides as follows:

Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

It is plain from Article 51.1 that all of the activities of the EU institutions and bodies themselves are subject to Charter review. That much is uncontroversial. However, the extent of Member States’ obligations under the Charter is hotly disputed. In this chapter an originalist analysis of art 51 CFR is carried out.

10.1 The Text of Article 51 CFR

Article 51 of the Charter states that ‘[t]he provisions of this Charter are addressed to...the Member States only when they are implementing Union law.’

There is a fundamental difference of opinion as to the meaning of the phrase ‘implementing Union law.’ One side in the debate suggests that implementing Union law’ has a narrow meaning and only covers situations where the Member States are acting as agents of the EU and does not apply to Member State derogations therefrom. The other side in the debate suggests that ‘implementing Union law’ is synonymous with the phrase ‘within the scope of Union law.’ This latter formulation marked off the scope of application of the ECJ’s pre-
Lisbon human rights jurisprudence. As noted above, under that jurisprudence Member States were obliged to respect the fundamental rights protected by EU law when acting as agents of the EU, for instance in the transposition of secondary EU legislation, as well as in cases where they derogated from EU law principles. Thus, the dispute over the meaning of Article 51 of the Charter largely revolves around whether derogations should be held to be embraced by the words ‘implementing Union law.’

In this chapter I shall carry out an originalist analysis of the meaning of this phrase. The objective of originalist exegesis, it will be recalled, is to find ‘the meaning ascribed to’ the word used in the text under construction ‘at the time of their ratification.’¹ In accordance with the methodology outlined in the previous three chapters, in undertaking this task, I shall examine, first, the meaning of the phrase ‘implementing Union law’ in the context of the Treaties as a whole. Second, I shall examine the drafting history of the Charter in order to see how its drafters understood that phrase. Third, I shall examine the manner in which the phrase has been interpreted by the courts of the European Union and by scholarly commentators since the proclamation of the Charter on the 7th of December 2000.

H.W Fowler in his celebrated Modern English Usage noted that the verb ‘to implement’ is ‘derived from the barbarous jargon of the Scotish (sic) bar.’² He also notes that the word is synonymous with the phrase ‘to carry out.’³

The Oxford English Dictionary defines the verb ‘to implement’ in the following terms: ‘l.a. trans. To complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise).’ The American Heritage Dictionary of the English Language contains the following entry: ‘1. To put into practical effect; carry out: implement the new procedures.’ The Merriam-Webster Collegiate Dictionary uses similar terms: ‘1: carry out, accomplish; especially: to give practical effect to and ensure of actual fulfillment by concrete measures.’

All of these dictionaries indicate that the verb ‘to implement’ refers to an affirmative action, as opposed to an omission. The last, in particular, appears to confirm this reading. It is doubtful, therefore, whether the wording of Article 51 of the CFR, ‘the Member States only when they are implementing Union law,’ could refer to a Member State which had not taken

² H.W Fowler Modern English Usage (1st edn, OUP, 1926) 260.
³ ibid 259.
some positive action designed to give effect to a provision of EU law. For instance, any divergence between national regulations may be capable, according to the pre-Lisbon jurisprudence of the ECJ, of bringing a particular situation within the scope of EU law. Because the existence, by mere happenstance, of diverging regulations in different Member States does not involve an affirmative attempt to give effect to any EU law principle, such a situation cannot be said, using an originalist method of analysis, to involve the implementation of EU law.

The Oxford Dictionary of Law contains the following entry for the noun ‘implementation’: ‘[t]he process of bringing any piece of legislation into force. EU directives, which are not directly applicable...are implemented at national level by member states by Act of Parliament or regulation. In the UK this may be done by statute or by statutory instrument or regulation.’

This entry seems to suggest that the phrase ‘implementing Union law’ should be understood to mean the transposition and application of EU legislation. Although directives are specifically mentioned, the formulation ‘any piece of legislation’ encompasses all EU secondary legislation and, possibly, directly effective treaty provisions.

Garner’s Dictionary of Legal Usage states disparagingly that ‘implement’ is: ‘a vogue word beloved by jargon-mongers, in whose language policies are implemented. The phrase carry out is usually better, and certainly less vague.’ Although Garner condemns its vagueness, his equation of the verb ‘to implement’ with the phrase ‘carry out’ tends to confirm what I have said above, namely that it refers to an affirmative action rather than to a situation in which Member States have been entirely passive.

10.2 Other Language Versions

Because the 'text' of Article 51 consists of all twenty-three language versions of the CFR, it is important to ensure that the other language versions support, or at least do not contradict, the reading of Article 51.1 laid out above.

Multiple languages were used in the drafting of the CFR. I have already carried out an in-depth analysis of the English version of Article 51. For reasons of space, I shall discuss only a small selection of the authentic language versions in the main body of the text and shall confine the remainder to footnotes. There are obvious limits to an exercise such as this in comparative lexicography. No lawyer is fluent in all twenty-three of the official languages of the EU; therefore, reliance must be placed on multilingual dictionaries. Though these are useful aids, they are a poor substitute for fluency in a language, and cannot indicate subtle shades of meaning a particular word may contain. Nonetheless, the only alternative option to using them is to ignore the fact that the EU Treaties are authentic in twenty-three different languages, an approach which would violate Article 55 TEU.

All of the language versions, however, appear to confirm the inference just drawn, namely that an affirmative action by the Member States, designed to give effect to a provision of EU law, is required in order for Member State activity to be reviewable under the CFR. The French version of Article 51 uses the phrase 'mettre en oeuvre,' which has been recognized as a synonym for the verb 'to implement.' The German version uses the phrase 'Durchführung' which has been translated as 'carrying out; ...performing.' Similarly, the Italian version of the CFR uses the word 'attuazione' to describe the circumstances in which Member States are bound by the CFR. This word translates as 'implementation; ...carrying out.' In the case of Pfleger, AG Sharpston argued that '(predictably) there is a degree of linguistic variation in the texts of the Charter in different equally authentic languages.' Specifically, she suggested that the Spanish and Portuguese versions of Article 51 CFR were broader than the German and English language versions thereof. The Spanish version uses

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6 Article 55 TEU provides as follows:

1. This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.

8 Concise Oxford German Dictionary (OUP 2005) 139.
9 Oxford Italian Dictionary (OUP 1997).
10 Case C-390/12.
11 Ibid para 40.
the verb ‘aplicar,’ which translates as ‘to put into practice, apply.’ The Portuguese version of Article 51, similarly, uses the verb ‘aplicar,’ which has been translated as meaning ‘to apply.’ Neither of these translations of the relevant Spanish and Portuguese terms appears broader than the English text and both appear to suggest that the term ‘implementing’ has the same meaning in these language versions as it does in English, namely ‘to give effect to.’

It is perhaps unfortunate that AG Sharpston did not indicate in what respect she believed the Spanish and Portuguese language versions of the CFR to be broader than the English version thereof. Nor did she quote any multilingual dictionaries in support of that proposition. In those circumstances, it would be unsafe to conclude that the Spanish and Portuguese versions of Article 51 CFR justify ascribing to the CFR a scope of application broader than the analysis of the English text carried out above would suggest is appropriate.

The other language versions would also appear to support the view that, in order to be bound by the CFR, the Member States must be engaged in some positive activity designed to give effect to a provision of EU law.

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14 The Dutch version of the CFR uses the phrase ‘ten uitvoer brengen,’ which has been translated as meaning ‘to implement.’ See The New Routledge Dutch Dictionary (N. Osselton & R Hempelman, Routledge 2003) 643. The Danish version of Article 51 uses the verb ‘gennemfører,’ which has been translated variously as ‘to implement,’ ‘to carry through,’ and ‘carry through;...carry out; implement ...effect...go through with...finish.’ See B. Kjaerulf Nielsen Engelsk-Dansk Ordbog (Gyldendalske 1964) 557; Anna Garde Danish Dictionary (Routledge 1991) 442; Jens Axelsen The Standard Danish-English/English-Danish Dictionary (Cassell 1994) 174, respectively. The Swedish version uses the verb ‘tillampa,’ which means ‘to apply.’ See, Swedish Dictionary (Routledge, 1995) 32; O.R Reuter Swedish-English Dictionary (George Allen & Unwin Ltd 1964) 10. The Finnish version uses the verb ‘soveltao,’ which has been translated as ‘to apply.’ See, Raija Hurme, Maritta Pesonen, Olli Syvaajo (eds), English-Finnish General Dictionary (3rd edn, Werner Sodestrom Osakeyhtiö) 46. The Estonian version uses the verb ‘kohaldama,’ which means ‘to apply.’ See, Paul F. Saagpakk Estonian-English Dictionary (Koolibri, 1992) 303. The Lithuanian version uses the verb ‘igyvendinti,’ which has been translated to mean ‘to implement.’ See, Bronius Piesarkas & Bronius Svecevicius (eds) Lithuanian Dictionary: English-Lithuanian / Lithuanian – English (Routledge 1995). The Latvian version uses the verb ‘istenat,’ which has been translated as meaning ‘to realize, to carry out, to put into practice.’ See E. Turnika Latviesu – Angļu Vārdnīca (Avats 1982) 179. The Irish version uses the phrase ‘cur chun feidhme.’ This phrase is a variant of the more typically used phrase ‘cur i bhfeidhm,’ which means ‘put sth into operation.’ See, Tomás de Bhaldraithe Níall Ó Dónaill: Forálair Gaeilge-Béarla (Government of Ireland 1977) 530. The Hungarian version uses the verb ‘végrehajt,’ which has been translated to mean ‘execute, effect, fulfil...carry/follow out...enforce’ and ‘to enforce;...to fulfil...to implement.’ See, Magyar-Angol Keziszótár (7th edn, Akadémiai Kiado, Budapest, 1976) 103 and Lucy Mallows English-Hungarian/Hungarian-English Dictionary (ibs Books (UK), 2011) 324 respectively. The Romanian version uses the verb ‘aplica,’ which has been translated to mean ‘to apply; to implement; to put into practice,’ ‘to bring/put the law into operation’ and ‘to apply.’ See, Mihai Miriou Romanian-English/ English-Romanian Dictionary (Hippocrone Books, 1996) 26; Leon Levitchi Dictionar Romîn-Englez (Editura Stiintifica, Bucharest, 1960); Georgeta Laura Dutulescu English-Romanian/Romanian-English Combined Dictionary (ibs Books (UK), 2011) 14 respectively; The Maltese version uses the verb ‘implement,’ which translates as ‘implementation...To implement; to fulfil...; to put into effect.’
How does all of this bear upon the central controversy in the interpretation of Article 51 of the CFR, ie whether the CFR applies to Member State derogations from EU law or not? Derogating from EU law involves a limited negation of some EU law principle or other, usually with the objective of securing a policy objective deemed important by national authorities. For instance, in the *Familiapress case*, the Austrian authorities sought to justify a prohibition on advertising games of chance, which undoubtedly constituted a restriction on the free movement of goods, in the interests of preserving press diversity. Thus, derogating from EU law involves excluding the operation of an EU law principle from a particular area and allowing national priorities to dominate, in circumstances in which they would otherwise have to yield by virtue of the doctrine of EU law supremacy. For this reason it would be linguistically perverse to describe a Member State derogating from EU law as being involved in the implementation of EU law.

10.3 'To implement': a Contextual Analysis

10.3.1 Usage in the CFR, TFEU, and TEU

In seeking to discern the meaning of ‘implementing Union law’ it is useful to examine other usages of the phrase, or close variants thereof, in the three texts which together constitute the EU Treaty system, the CFR as well as the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU). The same word should be

‘stosowac,’ which translates as ‘to apply;...to administer.’ See, Prof. Dr. Hab. Jacka Fisioka Collins Polish-English Dictionary (1996) 350. See also, Iwo Cyprian Pogonowski Unabridged Polish-English Dictionary (Hippocrene Books 1997), 2391, which translates ‘stosowac’ in the following terms: ‘use; employ; resort to (force, etc); observe; to put into practice; put into operation; adopt; suit; apply...’

The Slovene version uses the word ‘izvajanje,’ which translates as ‘execution, executing, performing...carrying out, implementation, deduction; derivation;...implementation of policy.’ See, Anton Grad, Henry Leeming Slovene-English Dictionary (DZS 1993). The Czech version uses the verb
‘uplatnit,’ which translates as ‘apply, put across,...enforce...’ See, Anglicko-Cesky/ Cesko-Anglicky Velky Slovnik (Lingea 2010) 1446. The Slovenian version uses the verb ‘vykonot,’ which translates as ‘to execute...to perform,...to achieve...to do...to carry out.’ See, Dr J Vilikovska & P. Vilkovsky Slovensko- Anglicky Slovnik (Slovenski Pedagogicko Nokladatelstvo Bratislava, 1971) 456. The Greek version uses the word ‘• • • • •’, which means ‘to apply, put into practice.’ See George A. Magosis Standard Greek Dictionary (Langenscheidt 1990) 592. In the Bulgarian version, the word ‘••••••••’ is translated as ‘1. Apply, execute, exercise; enforce a law / a decree;...application, execution.’ See, Bulgarian-English Dictionary, (3rd edn, Vol. II, 1990) 734.

15 Case C-368/95 *Familiapress* [1997] ECR-I-3689

16 Diarmuid Rossa Phelan Revolt or Revolution: the Constitutional Boundaries of the European Community (Sweet & Maxwell 1997) 400.

presumed to bear the same meaning throughout a text unless the context indicates otherwise.18

I shall begin by attempting to discern what light, if any, the text of the CFR and the TFEU can shed on the meaning of the verb ‘to implement.’ Aside from Article 51, the verb ‘to implement,’ is used once more in the CFR and repeatedly in the TFEU. Beginning with the CFR, Article 35 thereof states in relevant part as follows:

Article 35

Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

In this provision, the verb ‘to implement’ seems to refer principally to EU secondary legislation, since EU policies are generally given effect by means of such legislation. However, it probably also embraces the application of directly effective treaty provisions, since these are sometimes applied without the need for intervening secondary legislation, in the field of competition law for instance.

The usages of the verb ‘to implement’ in the TFEU also tend to confirm that it must be understood to embrace the application of EU secondary legislation and directly effective treaty provisions.19 The verb ‘to implement’ has also been used to refer to measures adopted

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19 See, Title I, Articles 26.2, 28.1, 31, 32, 36, 42.5, 45.1 of the TFEU speaks of the implementation of decisions of the Council in relation to the Common Foreign and Security Policy; Title II, Articles 164 and 178 empower the European Parliament and Council to adopt ‘implementing regulations’; Title II, Article 207.2, refers to the implementation of regulations; Title II, Article 311, speaks of the Council adopting ‘implementing measures... by means of regulations.’; Title II, Article 322, speaks of ‘implementing the budget... by means of regulations.’ Article 51.9 of Protocol No. 3 of the Treaties On the Statute of the Court of Justice of the European Union speaks of the implementation of a Council decision.

20 Title I, Article 11, of the TFEU, which creates for a right of petition for EU citizens, speaks of ‘implementing the Treaties’; Title II, Article 91, TFEU speaks of the implementation of ‘Article 90’ of the TFEU; Title II, Article 95.3 TFEU speaks of the implementation of the rule contained in Article 95.1 thereof; Title II, Article 225, speaks of ‘implementing the Treaties.’
by the Commission\textsuperscript{21} and those adopted under national law designed to give effect to
binding principles of EU law.\textsuperscript{22}

Some provisions of the TFEU in which the verb is used do not specify the particular form of
law to which they relate: for instance Articles 9, 10, and 12, Title II, TFEU speak of the
implementation of the Union’s ‘policies and activities.’ Title II, Articles 13, 43 TFEU thereof
speak of the implementation of the Union’s ‘policies.’ Title II, Articles 182.3, 185, 186 to the
implementation of a framework programme, to be devised by the European Parliament and
Council, and to include all of the activities of the Union. Title II, Article 263 speaks
somewhat opaquely of ‘implementing measures.’

Usages of the phrase in the TEU also tend to confirm the inference that the verb ‘to
implement’ applies to application of secondary legislation\textsuperscript{23} and directly effective Treaty
provisions.\textsuperscript{24} In addition, Article 8.2 of the TEU speaks of implementing agreements with
neighbouring countries. Many articles of the TEU speak of implementing the common
foreign and security policy.\textsuperscript{25} Certain usages of the word ‘to implement’ in the TEU, like the
TFEU, are ambiguous, though none of these can be taken to refer to Member State
derogations.\textsuperscript{26}

10.3.2 Declarations

An important clue as to the meaning of the phrase ‘implementing Union law’ is contained in
the Declaration by the Czech Republic on the Charter of Fundamental Rights. It states that
‘its provisions are addressed to the Member States only when they are implementing Union
law, and not when they are adopting and implementing national law independently from
Union law.’ This declaration strongly suggests that the Member States are only
‘implementing Union law’ when giving effect to binding provisions of EU law, such as
secondary legislation and directly effective treaty provisions. It is arguable that this
formulation supports the view that the provisions of the CFR do not apply to Member States

\textsuperscript{21} Title II, Article 291.2, states that ‘[w]here uniform conditions for implementing legally binding
Union acts are needed, those acts shall confer implementing powers on the Commission.’

\textsuperscript{22} Title II, Article 291.1, speaks of ‘measures of national law necessary to implement legally binding
Union acts.’

\textsuperscript{23} Article 22.1 TEU speaks of the implementation of Council decisions.

\textsuperscript{24} Article 11.4 TEU speaks of ‘implementing the Treaties.’

\textsuperscript{25} Articles 24, 25, 26, 27, 28, 31, 35, 36, 38, 40, 41, 42, 43, 44, 45 TEU.

\textsuperscript{26} The preamble of the TEU speaks twice of implementing policies, Article 12 (c) TEU deals with the
role of national parliaments in monitoring the implementation of Union policies, Article 12.3 TEU
speaks of the implementation of Union external policy.
when derogating from EU law since, as noted above, in cases of derogation, Member States are engaged in a discrete negation of some EU law principle or other. Thus, in such circumstances, national authorities are seeking to maintain independence from EU law. Thus, in the words of the Czech Declaration, when Member States derogate from EU law they may be said to be 'implementing national law independently from Union law.' For this reason, the Czech Declaration on the CFR appears to suggest that the Member States are not bound thereby when they are derogating from EU law.

10.3.3 Explanations Relating to the CFR

One major item of evidence as to the meaning of 'implementing,' which has been said to contradict the lexicographical and contextual evidence adduced above, is contained in the Explanations Relating to the CFR prepared by the Convention that drafted the CFR. The status of these Explanations is somewhat anomalous. Article 6(1) TEU provides as follows:

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Thus, although there is no affirmative requirement that the CFR be interpreted in accordance with the Explanations, the ECJ must have 'due regard' to the Explanations in its interpretation of the CFR. The Explanations, therefore, appear to fall somewhere between law and other species of parol evidence in the hierarchy of legal norms: they must always be considered by the court in its interpretation of the CFR, unlike other forms of extrinsic evidence, but only to the extent that is 'due' in particular circumstances. It might be said that the Explanations are in the nature of prefatory materials, such as preambles and recitals. They are not part of the operative text of the law but must be taken into account in its interpretation.

Scholars differ as to the weight to be accorded to a preamble in the interpretation of a text. Scalia and Garner support the use of preambles, both in determining whether a provision is ambiguous and in suggesting which of several textually permissible meanings ought to be adopted. A different view, articulated by Dwarris, and known as the 'no recourse rule,'

Scalia and Garner (n17) 218. For the same view, see Anne Winckel 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 Melb U L Rev 184, 185, 189.
would refuse to consider the preamble where the text of the law is clear. Thus, the preamble would not be resorted to in addressing the threshold question of whether the text was ambiguous. The better view would appear to be that expressed by Henry Campbell Black, that '[t]he preamble to a constitution...may furnish some evidence of its meaning and intention; but arguments drawn therefrom are entitled to very little weight.' Because preambles frequently speak in broad and general terms, it is unlikely that they will be of decisive importance very often. This is because the operative part of the text will usually be more precisely worded and, thus, will determine the meaning ascribed to the preamble, rather than the other way around, as required by the *generalia specialibus* maxim, which has been dealt with above. However, where the preamble or other prefatory material does specifically address a certain issue, it should be admissible both in determining whether the text is ambiguous and in resolving the ambiguity. This is because it is a part, albeit a non-operative part, of the text being interpreted and, thus, it must be considered throughout the interpretive process.

Let us, therefore, consider what light the Explanations may throw on the meaning of the phrase 'implementing Union law.' They provide in relevant part as follows: '[a]s regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law...'

By equating the phrase 'implementing Union law,' contained in Article 51 CFR, with 'acting within the scope of Union law,' used in the jurisprudence of the ECJ, and by specifically invoking the *ERT* case, which involved a derogation from EU law, the Explanations could be taken to suggest that Member State derogations from EU law should be held to fall within the scope of the CFR.

We have already seen that the semantic meaning of the phrase 'Member States only when they are implementing Union law' indicates that an affirmative action by a Member State, designed to give effect to an EU law principle, is required to bring that Member State within the scope of the CFR. Thus, derogations from EU law are excluded from the scope of the CFR on a semantic reading. The Explanations, which must be considered in any

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28 Dwarris (n18) 108.
29 Black (n18) 34. See also, Dickerson (n17) 371.
30 Thomas M Cooley *A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union* (7th edn, Little Brown & Co, 1903) 93.
interpretation of the CFR, point to the opposite conclusion. Nic Shuibhne describes the Explanations as adding ‘a reconciliatory gloss’ to the plain meaning of Article 51, designed to give the impression of continuity with the court’s pre-Lisbon fundamental rights jurisprudence.  

As noted above, however, the Explanations should be admissible in order to both establish an ambiguity and to resolve one. There certainly appears to be a divergence between the text of Article 51 and the Explanations. This justifies recourse to the other indicia of meaning discussed in the Introduction.

10.4 Pre-Ratification Law and Usage

10.4.1 Pre-Ratification Law in Originalist Exegesis

As discussed in chapter 9 referring to the background law against which a provision was adopted can indicate both the origins of the provision under construction and the mischief with which it was intended to deal.  

It is important to note, however, that pre-ratification law cannot trump text as evidence of original meaning, as this would undermine the purpose of putting the law into writing, which is to inform citizens of their rights and obligations. Pre-ratification usage refers to the manner in which the disputed words or phrases in the law being interpreted were used prior to its ratification.

10.4.2 The Law Prior to the Ratification of art 51 CFR

I shall begin my discussion of the meaning of art 51 CFR with a description of the state of the law prior to the ratification of the Lisbon Treaty.

As discussed above, between 1957 and 2009 the EU did not have a legally enforceable bill of rights. Nonetheless, after a period of some uncertainty, it was held by the ECJ that it was a condition of the legality of Union action that it respected such rights. In this section I intend to focus exclusively on the scope of the obligations that jurisprudence imposed on Member States.

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33 Heydon’s Case (1584) 3 Rep 7a. For an example of background law being cited in originalist exegesis, see Justice Scalia in Summers v Earth Island Institute 129 S Ct 1142 (2009).
34 For discussion see de Bürca, ‘Evolution of EU Human Rights Law.’
Once the Court had recognised human rights as general principles of EU law, which it was
the duty of the Court to protect, it was rapidly accepted that the Court would review
Member States’ implementation of EU law for compliance with human rights. In the ERT
case it was held that derogations were also subject to human rights review by the ECJ.
Thus, the text of art 51 of the CFR is considerably narrower, in terms of the scope of its
application to Member States, than the pre-Lisbon case law of the ECJ.

10.4.3 Pre-Ratification Usage in Originalist Exegesis

Pre-ratification usage denotes the manner in which the word or phrase, the meaning of
which is in dispute, was used prior to its inclusion in the text. From an originalist
perspective, the justification for examining such prior usage is that, if a particular word or
phrase bore a clear legal meaning before the adoption of the text under construction, it is
reasonable to presume that the usage of the word in the text corresponds to that pre-existing
legal meaning.

10.4.4 ‘Implementing Union Law’: Pre-CFR Usage

(a) ECJ Cases

Due to constraints of space, it is not possible to include all pre-ratification usages of the
phrase ‘implementing Union law’ in this article. Instead, I will give examples to illustrate the
meaning of the phrase. In many cases decided prior to the drafting of the CFR, the phrase
‘implementing Union law’ or close variants thereof were used by members of the Court to
describe Member State activities. In none of these cases was it used to describe a situation in
which a Member State was derogating from EU law.

The phrase ‘implementing Union law’ and its variants did not apply to derogations from EU
law. The phrase and its variants seem to have been used to describe measures giving effect
to all species of secondary EU legislation, including regulations and directives. They were

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See, for example, Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.
ibid.
C-213/99, José Teodoro de Andrade v Director da Alfandega de Lexoes [2000] ECR I-11083, Opinion of
AG Fennelly, para 43.
C-300/95 Commission of the European Communities v United Kingdom of Great Britain and Northern
also used to describe actions taken by Member States designed to give effect to directly effective Treaty provisions.\(^4\)

(b) Secondary Legislation

An examination of secondary legislation prior to the drafting of the CFR tends to confirm the view that the phrase applied to Member State efforts to give effect to such legislation.\(^5\)

(c) Other Official Documents

An analysis of usages of the phrase and its variants in other official documents confirms what I have said above: the provisions of the CFR apply to Member States where they give effect to EU secondary legislation – directives,\(^6\) regulations,\(^7\) decisions,\(^8\) and directly effective Treaty provisions.\(^9\) It is also plain that Member State regulatory measures designed to supplement a legal regime established by EU law may also be understood as ‘implementing Union law’.\(^10\)

(d) Scholarly Commentary

Pre-CFR scholarly commentary also uniformly employed the phrase ‘implementing Union law’ and analogous phrases to mean the implementation of directives,\(^11\) regulations,\(^12\)

\(^6\) There are numerous usages of the verb ‘to implement’ to describe the Member States giving effect to directives in official documents. See, for example, the sixteenth annual report on monitoring the application of Community law of 07/12/1999, COM/99/0301.
\(^7\) See, for example, Report from the Commission for the Biarritz European Council on the Community’s strategy for safety at sea, COM/2000/0603 final, 4.
\(^8\) European Union Preparatory Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation of Decision 3052/95/CE 1997 and 1998.
\(^10\) See, for example, European Union Information and Notices Council Resolution on 20 June 1994 on the electronic dissemination of Community law and national implementing laws and on improved access conditions [1994] OJ C179, 1.
\(^11\) See, for example, Edward T Swaine, ‘Subsidiarity and Self-Interest: Federalism at the European Court of Justice’ (2000) 41 Harv Int’l LJ 1, 23.
\(^12\) See, for example, John P Flaherty and Maureen E Lally-Green, ‘Fundamental Rights in the European Union’ (1997–98) 36 Duq L Rev 249, 265, 318–19.
decisions, and directly effective Treaty provisions. I have uncovered no instance in which a Member State derogating from EU law was described as implementing that law.

(e) Conclusion

My research has uncovered no instance in which the phrase ‘implementing Union law,’ or any variant thereof, was used prior to the drafting of the CFR to describe a Member State derogating from EU law. This constitutes strong evidence that the phrase was not understood to encompass such derogations at the time of the drafting of the CFR.

10.5 Drafting and Ratification History

10.5.1 Drafting and Ratification History in Originalist Exegesis

Below, I shall consider only the drafting history of the CFR. A full treatment of the ratification history of the CFR, incorporating all public discussion surrounding its adoption in every Member State, would be, for linguistic reasons, beyond the capacity of any single scholar. Each Member State was, however, represented in the Convention at which the CFR was drafted. Thus, by confining my analysis to the drafting history of the CFR, the views of the Member States are, in fact, taken into account.

As discussed in chapter 8, the drafting history of a provision provides especially significant evidence of its original meaning. This is because it gives an interpreter an insight into the way in which the disputed words in the text were understood in the specific context in which they were used. It is important, however, to note that the search is not for the intention of a single flesh and blood author; most legal texts, including the CFR, are the work of collective bodies. Therefore, it is necessary to treat the legislature as if it were a single author, by examining all data related to the enactment process, with a view to determining what a reasonable author would have had in mind when using the words that

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52 The countries which had yet to accede to the EU were granted the right to make observations in the Convention and, thus, were able to make known their views as to the meaning of the CFR. For access to documentation relating to the drafting of the CFR, see http://www.eucharter.org/home.php?page_id=65. Visited 27/11/2014.
53 For a case in which the originalist justices examined the Constitution's drafting history, see Justice Scalia in Morrison v Olson 487 US 654 (1988).
were ultimately included in the text. However, it is important to be clear that the beliefs and ideals of its drafters have authority only to the extent that they received concrete expression in the CFR itself.

10.5.2 The Drafting History of art 51 CFR

The CFR was drafted at a Convention consisting of representatives of the European Parliament, of national parliaments, of Member State governments, and of the European Commission. The Convention also included observers from the European Court of Justice, the Committee of the Regions, the Economic and Social Committee, the Ombudsman, and the Council of Europe. The records of the proceedings of the Convention strongly support the view that the drafters' use of the phrase 'implementing Union law' represented an attempt to narrow the scope of application of the ECJ's human rights jurisdiction.

It was at the Cologne European Council of 3–4 June 1999 that the decision was made to establish a body to draft a human rights charter for the EU. Annex IV of the Cologne European Council Presidency Conclusions states that the Council 'recognises that fundamental rights are indivisible by making the charter... (g) binding upon the Member States when applying or transposing provisions of Community law'. Thus, the Council's mandate empowering the body to draft a charter of fundamental rights required that the latter be confined, in its application to Member States, to circumstances in which they were implementing EU law.

At the First Meeting of the Body Responsible for Preparing a Draft Charter of Fundamental Rights of the EU, on 17 December 1999, later renamed 'the Convention', Roman Herzog, chairman of the newly created body, stated that the CFR would be principally addressed to the institutions of the EU.

Other members of the Convention had more expansive ambitions. For instance, Mr Mendez de Vigo, the EP's representative, suggested that the CFR should be applicable to Member

56 Cologne European Council Presidency Conclusions, Annex IV.
57 ibid Part F; First Meeting of the Body Responsible for Preparing a Draft Charter of Fundamental Rights of the EU (17 December 1999) 12–21.
58 14073/99 (Presse 418).
59 ibid 9.
State governments without restriction. Thus, the battle lines were drawn early between those in the Convention who wished to see the proposed charter apply to all Member States activities and those who envisaged its having a narrower scope of application. The rest of the CFR’s drafting history makes it clear that the latter faction prevailed.

Early drafts of art 51 used a broader formulation than ‘implementing Union law’. The Secretariat Paper on Horizontal Questions of 20 January 2000 adopted the wording used in the jurisprudence of the ECJ and proposed that the CFR should apply to Member States when they act ‘within the scope of EU law’.

Draft Charter Articles presented to the Convention by the Praesidium on 15 February 2000 adopted a narrower formulation, stating that the provisions of the proposed charter ‘are binding on the Member States only where the latter transpose or apply the law of the Union…’.

The representatives of several Member State governments made proposals in response to this initial Praesidium draft, in which they expressed concerns over the potential of the charter project to interfere with the autonomy of Member States. Lord Goldsmith QC, the representative of the United Kingdom government, proposed a much narrower formulation under which the provisions of the CFR would be ‘addressed to the bodies and institutions of the European Union in the exercise of the responsibilities and tasks assigned to them by the Treaties’.

While Member States representatives worried about the CFR’s potential to reduce their autonomy, the EP was keen to ensure that Member States not be given an entirely free hand either. The EP passed a resolution, which stated that it would lend its support to the CFR on condition inter alia that it be made: ‘binding upon the Member States when applying or transposing provisions of Community law…’

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60 ibid 12. See also, Letter from Mr Buttiglione to Mr Mendez de Vigo, 21 February 2000, CHARTE 4118/1/00 Rev. 1, Contrib 14, 2.
62 Draft Charter Articles from the Praesidium, 15 February 2000, CHARTE 4123/1/00 Rev 1, Convent 5, 9.
63 Lord Goldsmith, 6 March 2000, CHARTE 4146/00, Contrib 36. See also, Contribution from Mr Erling Olsen, Personal Representative of the Government of Denmark, 20 March, 2000, CHARTE 4181/00, Convent 64, 2–3.
64 European Parliament Resolution (Report by Mr Duff and Mr Voggenhuber), 5 March 2000, CHARTE 4199/00, Contrib 80, 2.
Perhaps in response to such submissions, on 15 February 2000, the Praesidium submitted an amended draft to the Convention for its consideration, which provided that 'the provisions of this Charter shall be applicable... to the Member States when implementing Community law'. In a draft submitted to the Convention on 18 April 2000, the Praesidium changed this wording slightly to 'within the framework of implementing Community law'.

Several other drafts defining the scope of application of the CFR were submitted to the Convention, which would have made it applicable to all Member State activities.

Although such radical proposals were not accepted, the Praesidium vacillated somewhat between broad and narrow formulations. On 16 May 2000, the 'implementing Community law' formulation of 15 February and 18 April drafts was replaced. The working draft now read as follows: 'The provisions of the Charter are addressed... to the Member States exclusively within the scope of Union law.'

This restored the formulation contained in the draft of 20 January and again employed the language the ECJ had used up to that point in its case law, under which both Member State implementation of, and Member State derogation from, EU law, were deemed to fall within its scope. Accordingly, had this version of art 51 been adopted it would have been impossible to deny that the CFR's scope of application was co-extensive with the scope of application of the Court's pre-Lisbon human rights jurisprudence.

In a later draft the Praesidium, submitted on 23 June and described as a 'Compromise proposal', altered this wording, reverting to the original formulation used in the 15 February and 18 April drafts. This new version provided in relevant part as follows:

1. The provisions of this Charter are addressed, with due regard for the principle of subsidiarity, to the institutions and bodies of the Union and to the Member States exclusively when they implement Union law.

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65 Praesidium Draft Charter of Fundamental Rights of the European Union – New Proposal for Articles 1 to 12 (now 1 to 16), 8 March 2000, CHARTE 4123/1/00 Rev 1, Convent 5, and CHARTE 4137/00, Convent 8, 2.
66 Draft Horizontal Articles Praesidium, 18 April 2000, CHARTE 4235/00, Convent 27.
67 See Motion Tabled by PDS in German Bimdestag, 24 March 2000, CHARTE 4189/00, Contrib 72, 9; Submission by Amnesty International, on the 10 of May 2000, CHARTE 4290/00, Contrib 162, 6; Platform of European Social NGOs on the 12 May 2000, CHARTE 4286/00, Contrib 158.
68 Compromise proposal submitted by the Praesidium for arts 31 to 40 (social rights and horizontal clauses), 23 June 2000, CHARTE 4316/00, Convent 34, 5.
This was the wording, with one slight and inconsequential change, which found its way into the final draft of the CFR.

It is reasonable to suppose that the Convention was familiar with the semantic meaning, and the pattern of usage, of the phrase 'implementing Union law', which does not include Member State derogations from EU law. Thus, in its conscious decision to opt for the phrase 'implementing Union law' in preference to 'within the scope of Union law', the latter of which certainly includes derogations, it is very likely that the Convention intended Member State derogations to be excluded from the scope of the CFR. Thus, the drafting history of the CFR clearly demonstrates that the members of the Convention understood the difference between acting 'within the scope of Union law' and 'implementing Union law'. In choosing the latter formulation the Convention chose to give the CFR a narrower scope than the pre-existing human rights jurisprudence of the ECJ.

10.6 Post-Ratification Interpretations

10.6.1 Post-Ratification Interpretations in Originalist Exegesis

By post-ratification interpretations I mean the manner in which the disputed words in the text have been interpreted since their ratification by courts and others. As discussed in chapter 9 post-ratification interpretations ought to be considered in originalist exegesis, as they alert the interpreter to how other reasonable interpreters have understood the text. However, the views of such interpreters cannot override the plain meaning of the text.

10.6.2 'Implementing Union Law': Post-Ratification Interpretations

I now turn to examine how Article 51 of the CFR has been interpreted since the Convention concluded its work, in case law and in scholarly writings.

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* A later draft, submitted on 28 July 2000, substituted the words 'only when they are implementing Union law' for 'exclusively when they implement Union law', which are linguistically synonymous. See also the Praesidium draft of 14 September 2000, CHARTE 4470/00, Convent 47, 17.

(a) EU Case Law

Article 51 of the CFR has been cited in numerous cases since the Lisbon Treaty. The ECJ has confirmed that the CFR applies to Member States in the implementation of decisions, regulations, directives, directly effective Treaty provisions, and to national law measures designed to give effect to EU law.

Several judgments of the Court and opinions of Advocates General suggest that art 51 should be given a broad interpretation and should be held to apply, not only to the implementation of secondary EU legislation and directly effective Treaty provisions, but also to Member State derogations from EU law. In addition, several Court decisions have expanded the CFR’s scope even beyond the bounds established by the Court’s pre-Lisbon human rights jurisprudence. In this respect the decisions of the ECJ have followed the prior pattern of interpretation, described above, under which text of the law was contradicted in the service of objectives the Court deemed important.

In the case of Åklagaren v Hans Åkerberg Fransson, the ECJ interpreted art 51 CFR as a codification of the position prior to the Lisbon Treaty. The Court stated that Member States were bound by the CFR when they acted ‘within the scope of European Union law’. The Court cited the Explanations to the CFR in support of this conclusion. However, as noted above, the Explanations are not law and, thus, cannot have the effect of overriding the plain text of the CFR.

Åkerberg Fransson did not involve a Member State derogation from EU law. The issue in the case was whether the Sweden authorities were ‘implementing Union law’ or not when they prosecuted the plaintiff for evasion of VAT. The Court noted that the Member States were obliged, under the TEU, the TFEU, and secondary legislation to prevent evasion of VAT, which was also the objective of the national legislation in issue. For these reasons, the Court

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72 See, for example, C-571/10 Kamberaj v Instituto per L’Edilizia Sociale della Provincia Autonoma di Bolzano (IPES) (ECJ, 24 April 2012) para 80.
73 See, for example, ibid para 85.
75 Case C-418/11 Textdata Software GmbH (ECJ, 26 September 2013) para 75; C-489/10 Prokurator Generalny v Łukasz Marcin Bonda (ECJ, 15 December 2011) Opinion of AG Kokott paras 17–20.
76 Åkerberg Fransson.
77 ibid paras 16–23.
held that the case involved the implementation of EU law. As mentioned above, Title II, art 291.1 TFEU mentions 'measures of national law necessary to implement legally binding Union acts'. This wording implies that it is possible for national legislation to be considered an EU law implementing measure, even where that legislation is not specifically described as such, provided such legislation is 'necessary' to the Member States' implementation of EU law. In Åkerberg Fransson the national legislation in issue aimed to ensure inter alia the effectiveness of VAT collection, and thus was partially aimed at fulfilling Sweden's obligations under the Treaties. Thus, the conclusion in Åkerberg Fransson is justified on an originalist interpretation of art 51 CFR. The reasoning of the Court is defective, however, in suggesting that the phrase 'implementing Union law' is synonymous with the significantly broader formula 'within the scope of Union law'.

AG Cruz Villalón expressed a view similar to that of the Court as to the meaning of art 51 CFR. He said that the Explanations to the CFR 'point to continuity rather than conflict' and that the ECJ's pre-Lisbon jurisprudence received 'concrete expression in the Charter'. In AG Cruz Villalón's view, art 51 permitted the CFR to be applied to the activities of Member States in circumstances 'where it is legitimate that the Union's interest in leaving its mark – its conception of the fundamental right – should take priority over that of each of the Member States...'. On the specific facts of the case, and in contrast to the ECJ, AG Cruz Villalón held that Sweden was not bound by the CFR in its collection of VAT. This was because VAT was merely one among many different kinds of tax collected by the Swedish authorities. In the view of the AG it would be disproportionate for the Court to review the entire Swedish taxation system for compliance with the CFR. However, this is a false dichotomy. It would have been perfectly legitimate for the ECJ to have held that the tax collection law in issue in Åkerberg Fransson constituted a measure implementing Union law to the extent that it applied to VAT collection, which is required by EU law to be effective, but not to the extent that it applied to the collection of purely domestic taxes.

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78 Åkerberg Fransson paras 24–28. For an endorsement of the view that the situation in Åkerberg Fransson does come within the traditional concept of implementation, see Filippo Fontanelli, 'Hic sunt nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (2013) 9 ECL Rev 315, 326. For the opposite view, however, see Bas van Bockel and Peter Wattel 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson' (2013) 38 EL Rev 866, 877-878.

79 ibid para 25.

80 ibid para 41.

81 ibid paras 62–63.
The holding of the court in Åkerberg Fransson, that the phrase ‘implementing Union law’ is synonymous with the phrase ‘within the scope of Union law,’ has been affirmed in several cases since. Moreover, the court has specifically held that Member State derogations from EU law are subject to the requirements of the CFR.

The court has not merely held that the scope of application of the CFR is co-extensive with the pre-Lisbon human rights jurisprudence of the court. In fact, despite the narrow language of Article 51 CFR, the court has expanded the scope of application of its human rights jurisprudence since the ratification of the Lisbon Treaty. The most significant cases in this regard are Gerardo Ruiz Zambrano v Office national de l’emploi (ONEM) and Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stivic v Bundesministerium für Inneres. In the Zambrano and Dereci cases the ECJ held that the CFR applied to all situations that were ‘covered by EU law’. According to the pre-Lisbon jurisprudence of the Court a citizen who had exercised their free movement rights automatically came within the scope of EU law. However, in the Zambrano and Dereci cases the Court held that the CFR could be relied upon by an EU citizen who had not exercised their right to free movement. Zambrano and Dereci thus represent an expansion of the Court’s human rights jurisdiction, in spite of the fact that article 51 of the CFR plainly envisaged retrenchment.

As discussed above, this interpretation of article 51 CFR contradicts the original meaning of the phrase ‘implementing Union law’. Moreover, insofar as Åkerberg Fransson, Zambrano, and Dereci cumulatively suggest that there is no area of Member State activity that can be identified a priori as falling outside the scope of the CFR, it contradicts the word ‘only’ used in article 51 thereof. Use of this word in the phrase ‘only when they are implementing Union law’ suggests that some Member State activities are not embraced by the term ‘implementing Union law’. To the extent Åkerberg Fransson, Zambrano, and Dereci contradict this logic, they are contrary to the original meaning of article 51 CFR.

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86 C-258/13 Sociedade Agrícola e Imobiliária da Quinta de S. Paio Lda v Instituto da Segurança Social IP (ECJ, Second Chamber, 28 November 2013), paras 18-20; Case C-206/13 Cruciano Siragusa v Regione Sicilia (ECJ, 6 March 2014), paras 20-22; C-198/13 Herruñdez & Ors v Reino de España (ECJ, 10 July 2014) para. 33.
87 C-390/12 Pfeiffer & Ors (ECJ, 30 April 2014) paras 30-37.
89 C-256/11 (ECJ, 15 November 2011).
90 Ibid para 72.
91 C-60/00 Carpenter [2002] ECR I–6279 paras 14, 17, and 39.
However, although the ECJ has ascribed a meaning to Article 51 CFR which is considerably broader than its wording allows, and although it is now unclear in what circumstances the CFR will be held not to apply, the court has articulated certain criteria which should be taken into account in assessing whether or not the CFR applies. In the case of *Cruciano Siragusa v Regione Sicilia,* the court made the following statement:

In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it...""
if it is capable of indirectly affecting EU law; and, third, whether there are specific rules of EU law on the matter or capable of affecting it. The judgment of the court in *Siragusa* may be criticized on the basis that the criteria it articulates are extremely unclear. Filippo Fontanelli has stated that:

the impression is that the tests in *Siragusa* are neither cumulative nor alternative: they are roughly repetitive. The Court seems to have a hard time devising a precise test and therefore proceeds by inference rather than analysis. In an inductive endeavour, the Court piled up quasi-synonymous tests whose aggregate purpose is to "give the idea". This is not necessarily a bad strategy, and is possibly the only one available if it is accepted that "implementation" in the sense of art. 51(1) of the Charter "is one of those Potter Stewart-type words that's ultimately definable only ostensively—i.e., we know it when we see it".

The refusal of the ECJ to adhere to the plain meaning of art 51 CFR in *Åkerberg Fransson* and the adoption of a malleable test for determining its scope of application in *Siragusa* has led to legal uncertainty because it has rendered it extremely difficult to determine with any precision when the CFR will apply to the activities of the Member States and have thus caused considerable uncertainty. Such uncertainty would have been considerably reduced had the court adhered to the ordinary meaning of the words used in art 51 CFR, as set out earlier in this chapter.

The court has also held the CFR not to apply in certain other cases. In the case of *Thomas Pringle v Government of Ireland & Ors*, the ECJ held that the CFR did not apply to the European Stability Mechanism (ESM). The ESM is an international organization established by means of an international treaty, concluded between the Member States of the EU outside the confines of the EU law, which established a permanent emergency fund in order to enable financial assistance to be made available to any Member State which found itself in financial difficulty. The court stated as follows:

[it must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.]

A number of arguments have been made by the court's Advocates General in support of a broad reading of Article 51 CFR. First, and as discussed above, it has been pointed out that the Explanations to the CFR would appear to envisage its having a broader scope of application than the plain text of Article 51 would appear to suggest. In *Yoshikazu Iida v Stadt*

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9 C-370/12.
Ulmm, AG Trstenjak echoed the sentiments expressed by the Court in Åkerberg Fransson, once more citing the Explanations as supporting a broad reading of art 51 CFR.

Second, Article 53 CFR has been invoked in favour of reading Article 51 broadly. In Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca, AG Bot argued that a restrictive reading of art 51 CFR:

could be regarded as being contrary to the wording of Article 53 of the Charter, which provides... that 'nothing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law...'

This latter argument is fundamentally unsound and, indeed, linguistically indefensible. Article 53 proscribes any interpretation of the CFR that would weaken the level of human rights protection under international law, Union law, the ECHR, and national constitutional law, but this injunction only applies 'in their respective fields of application'. Article 51 of the CFR purports to set out its 'field of application'. Thus, to invoke art 53 in order to justify a broad interpretation of art 51 of the CFR is to beg the question.

The decisions made by the ECJ and the opinions issued by its Advocates General since the ratification of the Lisbon Treaty have uniformly rejected the original meaning of art 51 the CFR. That Article required retrenchment in the Court's jurisprudence. However, rather than follow the original meaning of that provision, the ECJ has in fact expanded the scope of its human rights jurisdiction. This disregard of the plain meaning of the CFR's text constitutes an illegitimate arrogation of power by the Court.

(b) Scholarly Commentary

It is generally accepted among scholars that the phrase 'implementing Union law,' on a purely linguistic reading, excludes derogations from EU law from its scope. However,
certain scholars have advanced textual arguments in support of the opposite position, none of which is convincing. Grief argues that Article 6(1) EU, which provides that the CFR has 'the same legal value of the Treaties,' means that the CFR must have 'the same domestic reach as the principles enshrined in the Treaties.' However, the fact that the CFR has the same legal value as the Treaties, ie that it is equal to the Treaties in the hierarchy of legal norms, cannot have any bearing on the meaning of any of its provisions.

Grief also invokes the Explanations of the CFR, discussed above, as the basis for a broad reading. However, as Besselink has suggested, and for straightforward reasons of legal hierarchy, the Explanations, which are not law, cannot have the effect of transmogrifying a narrowly drawn legal provision, such as Article 51, into an expansive one.

Article 52.4 of the CFR provides that:


Nick Grief (n100) 209. For further scholarly invocations of the Explanations as a possible basis for a broad reading of Article 51, see Weiss (n100)90; Rogers (n100) 351; Daniel Denman ‘The Charter of Fundamental Rights’ (2010) Eur Hum R I. Rev 349, 351-353; Frank Hoffmeister ‘Litigating against the European and its Member States – who responds under the ILC’s Draft Articles on international responsibility of international organizations?’ (2010) Eu J Int’l L 723, 743; Nic Shuibhne (n114) 243.

In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

Weiss argues that this provision equates the CFR's scope of application with that of the general principles of law protected in the court's pre-Lisbon fundamental rights jurisprudence. It is true that the ECJ has frequently emphasized that the general principles of EU law result *inter alia* from constitutional traditions common to the Member States. Thus, taken in isolation, it is certainly possible to interpret Article 52.4 as referring to EU law general principles. On a superficial view, therefore, Article 52.4 might be interpreted as requiring CFR rights to be interpreted 'in harmony' with the court's general principles jurisprudence and, therefore, as implying that the scope of application of the CFR should be co-extensive with that of EU law general principles.

However, to interpret Article 52 in this way would be to ignore the fact that Article 51 purports to exhaustively set out the CFR's field of application. As discussed above, in providing that the CFR will apply to the Member States 'only when they are implementing Union law,' that article unambiguously establishes that the CFR is not to apply to Member State derogations from EU law. Thus, to rely on the less specific wording of Article 52, which speaks vaguely of 'harmony' with what went before, in order to expand the meaning of the Article 51, a provision of rare pellucidity, constitutes a violation of the common sense linguistic maxim *generalia specialibus non derogant*, discussed in Chapter 6 above, which requires that a more specifically worded provision trump a less specific one in case of an apparent conflict between them.

It might also be argued that Article 51 CFR ought to be interpreted broadly in order to ensure that its scope of application will be co-extensive with the court's pre-Lisbon fundamental rights jurisprudence. Under that jurisprudence EU human rights standards were binding on Member States when they acted within the scope of EU law, which included not merely situations in which the Member States were acting as agents of the EU but also measures derogating from EU law and measures restricting the exercise by citizens of any of the fundamental freedoms protected by the treaties. It has been suggested that the court could continue to develop its fundamental rights jurisprudence in these latter areas under the rubric of general principles if the text of art 51 CFR is deemed too restrictive to

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accommodate them. The rights protected under the court’s general principles jurisprudence overlap considerably with those protected by the CFR. To allow the court to continue to apply EU human rights standards as general principles in areas which lie beyond the scope of application of the CFR would render art 51 CFR utterly redundant and would therefore violate the presumption against surplusage, which I discussed in chapter of this thesis. In short, whatever meaning is to be ascribed to art 51 CFR, whether broad or narrow, that article should be understood to establish the outer limits of the jurisdiction of the ECJ to review Member State activities for compliance with fundamental rights.

Paul Craig advances another argument in favour of an expansive reading of Article 51. He says that, when Member States derogate from EU law, they rely on a defence provided by EU law to a claim brought in respect of a prima facie violation of that law. However, as discussed above, derogations involve Member States attempting to exclude the operation of EU law principles from a certain discrete area of policy, so as to facilitate the attainment of national objectives. It is true that in such circumstances Member States are acting in close proximity to EU law or ‘within the scope of EU law,’ as the ECJ’s pre-Lisbon jurisprudence put it. Thus, if the drafters of the CFR had intended Member States to be bound thereby, to the same degree as they had been bound by the courts’ pre-Lisbon jurisprudence, then all they had to do was to employ the terminology used in that jurisprudence. As I have said above, had they employed the phrase ‘within the scope of EU law’ there could have been no doubt but that derogations were included. However, by instead employing the phrase ‘implementing Union law,’ the drafters of the CFR quite deliberately limited the scope of application of EU fundamental rights to agency-type situations. Craig’s suggestion that ‘implementing Union law’ includes derogations is, therefore, unsound.

Indeed, at one point Craig himself seemed to recognize this fact. In the 2nd Edition of EU Law: Text, Cases and Materials, co-authored by Craig and Gráinne de Búrca, the authors explain that Member States were bound to respect fundamental rights when ‘the States were implementing a Community law or scheme, and thus in some sense acting as agent on the

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106 See section 6.4.2 above.
107 For a somewhat different view, see Herwig CH Hofmann and Bucura C Mihaescu ‘The relation between the Charter’s fundamental rights and the unwritten general principles of EU law: good administration as the test case’ (2013) 9 ECL Rev 73.
Community’s behalf.’ They go on to discuss a situation where ‘a Member State, far from implementing Community law, seeks to derogate from its provisions or to justify a restriction on Community rules in the interests of some conflicting national policy.’ Thus, there appears to be some inconsistency in Craig’s position on this issue.

10.7 An Originalist Critique

The broad meaning ascribed to Article 51 CFR by the ECJ and by numerous commentators is much broader than its plain language allows. In this subsection I shall summarize my criticisms of this broad reading and shall seek to demonstrate that it undermines each of the objectives which originalism seeks to attain, which have been discussed in detail in Chapters 6 to 10 of this thesis.

First, by broadening its jurisdiction to review Member State compliance with human rights the court has upset the expectations of those who ratified the CFR, and thereby behaved undemocratically, by ascribing to the verb ‘to implement’ a meaning it had never had before.

Second, after cases such as Dereci, Zambrano, and Åkerberg Fransson it is unclear in what circumstances Member States will be bound by the CFR. Such uncertainty undermines the clarity of the law and positively encourages litigation.

Third, the ECJ’s insistence that ‘implementing Union law’ means exactly the same as acting ‘within the scope of EU law’ ignores the fact that this latter formulation was rejected in the Convention at which the CFR was drafted, in preference to the formula found in the final version of Article 51, which was regarded as a ‘compromise proposal,’ somewhere between the expansive ambitions of the European Parliament and the conservatism of the Member States.

\[\text{\textsuperscript{110}} \text{ibid 323.}\]
Fourth, the willingness of the ECJ to prioritize indications of meaning derived from extrinsic sources, over the plain text of Article 51 CFR, undermines the purpose of having attempted to encapsulate the limits of the court’s human rights jurisdiction in writing.

Fifth, the ECJ’s broad interpretation of Article 51 CFR has conferred upon the court a jurisdiction, of broad yet uncertain scope, to review Member State activities for compliance with fundamental rights. As discussed above, it is now difficult to identify any area of Member State activity, which can be identified a priori as falling outside the scope of the CFR. This uncertainty confers excessive discretionary power upon the court, in deciding which incrementally which Member State acts are reviewable under the CFR, a discretion which would be curbed by adhering to the plain text of Article 51 CFR.

Conclusion

My objective in this chapter has been to demonstrate that the phrase ‘implementing Union law’ used in Article 51 of the CFR, in its original meaning, refers to situations in which the Member States are acting as agents of the EU, by giving effect to directives, regulations, decisions, and directly effective treaty provisions, but that the CFR does not apply to derogations from EU law.

In sections 1 and 2 I carried out a linguistic analysis of Article 51 of the CFR and concluded that the phrase ‘implementing Union law’ does not embrace Member State derogations from EU law but, rather, applies exclusively where Member States are acting as agents of the EU.

In section 3 I carried out a contextual analysis of the phrase, which suggested the same conclusion as that arrived at after carrying out a purely linguistic analysis in sections 1 and 2.

In section 4 I gave the legal background against which the CFR was adopted and showed that the pre-Lisbon fundamental rights jurisprudence of the ECJ applied to Member States both when they were implementing Union law and when they were derogating therefrom.

In Section 5 I analysed the CFR’s drafting history. I concluded that the phrase ‘implementing Union law’ was deliberately adopted, in direct preference to ‘within the scope of EU law,’ to describe the field of the CFR’s application. Thus, given that the latter formula was used in the court’s pre-CFR jurisprudence, I concluded that the drafters of the CFR intended to narrow the scope of EU law fundamental rights.
In Section 6 I examined the manner in which the CFR has been interpreted since it entered into force in 2009. It was only after the drafting of the CFR, I noted, that any suggestion was ever made that the phrase ‘implementing Union law’ applied to derogations. Nonetheless, the ECJ appears to have accepted this reading of Article 51.

However, as I have demonstrated during the course of this article, this conclusion rests on a perversion of the CFR’s clear language and, therefore, undermines democracy, legal certainty and the care and attention shown by the CFR’s draftsmen in choosing how to express themselves. Moreover, the expansive interpretation of Article 51 CFR by the ECJ may vest the court with the truly awesome power of deciding whether all Member State laws respect fundamental rights. Section 7 of this chapter was devoted to discussing the deleterious effects of the courts interpretation of art 51 CFR in further detail.
11

THE CHARTER AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Introduction

Article 52(3) of the CFR provides as follows:

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

AG Cruz Villalón has said that this provision 'raises singular difficulties.' Specifically, it raises two key issues. First, it must be determined what it means to give rights which 'correspond' to those in the ECHR the same 'meaning and scope.' In this connection it must also be determined whether the requirement that CFR rights be given the same 'meaning and scope' as corresponding ECHR rights requires the ECJ to follow the case law of the ECtHR, or merely the text of the ECHR itself.

Second, it must be determined when the CFR may be deemed to accord greater protection than is accorded to corresponding rights under the ECHR. In the remainder of this chapter I shall carry out an originalist analysis of these two questions. As described in preceding chapters, an originalist approach involves an examination of four key indicia of meaning: text, pre-ratification law and usage, drafting and ratification history, and post-ratification interpretations, with a view to discerning the public meaning of the text at the time of its ratification.

However, before undertaking an originalist analysis of Article 52(3) I shall provide a brief outline of the dynamic nature of the ECtHR's case law and whether this is compatible with originalist interpretation.

11.1 The Dynamic Nature of the ECHR and Originalist Interpretation

1 C-617/10 Åklagaren v Hans Åkerberg Fransson, Opinion of AG Cruz Villalón of 12 June 2012, para. 6.
Lock argues that ‘it is unlikely that the drafters of Article 52(3) wanted a mere reference to the 50 year old text of the ECHR, especially considering that the ECHR has for a long time been dynamically interpreted as a ‘living instrument’ by the ECHR.' However, and as discussed below, the drafting history of the CFR establishes that the drafters of Article 52(3) recognized a distinction between the ECHR itself, on the one hand, and the jurisprudence of the ECtHR on the other. Moreover, the drafting history of the CFR also plainly demonstrates that the dynamic nature of the ECtHR’s jurisprudence was fully appreciated by its framers.

The ECHR was adopted in 1950, in an attempt both to ensure that the outrages perpetrated during the Second World War would not be repeated and to protect Western Europe from Communist subversion. However, in the intervening period the ECtHR in its jurisprudence has unquestionably exceeded this limited mission, and the ECHR has been interpreted as protecting rights which its framers never intended to safeguard. It would be beyond the scope of this thesis to engage in a detailed analysis of the case law of the ECtHR. A few examples should serve to illustrate its generally dynamic tenor.

The *Tyrer v UK* case concerned a challenge to the Isle of Man’s practice of imposing birching as a punishment for certain criminal offences. The applicants in the case claimed that this practice constituted degrading treatment contrary to Article 3 of the ECHR. The court stated that

> the Convention is a living instrument which...must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments


[3] See, for example, ‘The Council of Europe’s contribution to a European Union Charter of Fundamental Rights by Mr Marc FISCHBACH Judge at the European Court of Human Rights and Mr Hans Christian KRÜGER Deputy Secretary-General’ CHARTE 4105/00 BODY 1, p. 24; ‘Opinion from the Social and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe,’ CHARTE 4116/00, CONTRIB 12, p. 4; ‘Observations by Mr Fischbach and Mr. Krüger to the document Charte 4149/00 Convent 13’, CHARTE 4176/00, CONTRIB 61, p. 3; Lord Goldsmith, Amendment 391 in ‘Amendments submitted by the members of the Convention regarding civil and political rights and citizens’ rights’ CHARTE 4332/00, CONVENT 35, p. 484.


[5] The following description of the jurisprudence of the ECtHR is not based on original primary source research but, rather, is largely based on scholarly commentary including George Letsas *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007), Harris, O’Boyle, Warbrick et al (n5), Robin CA White and Clare Ovey *The European Convention on Human Rights* (OUP, 2010).

and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. It is noteworthy that the court did not carry out a detailed analysis of Member State law in order to see if corporal punishment was, in fact, disapproved by them. Since *Tyrer* the court has rendered decisions which contradict the text of the ECHR, the intentions of its drafters, and which have overturned aspects of European legal tradition. It is in these three critical respects that the jurisprudence of the ECtHR violates the tenets of originalism.

First, there are several cases in which the ECtHR has violated the text of the ECHR. For example, in the case of *Pretto v Italy*, the court refused to read Article 6 literally. That provision states that the judgments of courts and tribunals 'shall be pronounced publicly.' The court noted that the literal meaning of the provision was at odds with longstanding civil law tradition. For this reason, the court refused to adopt that meaning.

Second, the ECtHR has on occasion violated the intentions of the framers of the ECHR, as revealed by its drafting history. The case of *Young, James, and Webster*, is a case in which the court arrived at a conclusion which contradicted the intentions of the drafters of the ECHR. Specifically, the court held that 'closed shop' arrangements, under which all workers in a particular class are compelled either to join a trade union or lose their job, were contrary to Article 11 of the ECHR, which protects the right to freedom of association. The drafting history of the provision demonstrated, however, that the framers of the ECHR had not understood Article 11 thereof to prohibit closed shop arrangements. Thus, in *Young, James, and Webster* the ECtHR 'not only recognized rights that the drafters had not clearly intended to grant but it also recognized rights that the drafters had clearly intended not to grant.'

Third, there have been cases in which the ECtHR has interpreted the ECHR in a manner which overturned longstanding aspects of European legal tradition. Generally speaking if a consensus exists among the contracting parties in relation to a particular issue the ECtHR will seek to follow that consensus, in accordance with the margin of appreciation doctrine. Aaron Ostrovsky has explained the margin of appreciation doctrine in the following terms:

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7 ibid, 31.
8 (1983) 6 EHRR 182.
9 ibid, paras. 25-26.
11 ibid, para. 51.
12 Letsas (n5) 65.
In the margin of appreciation doctrine, the European Court of Human Rights has developed a useful doctrine for encompassing the needs of the diverse membership of the European Convention for the Protection of Human Rights and Fundamental Freedoms within the core human rights agreed to by the membership. In its contemporary form, the doctrine deals primarily with the collision of values between an individual and her society. The margin of appreciation is a valuable tool in that it legitimises international tribunals adjudicating on human rights, allows human rights norms to take on local flavour, but still preserves a concept of core or universal rights.

Similar summaries of the doctrine are provided throughout the scholarly literature on the subject.

The doctrine originates in the administrative law of the continental legal systems. The ECtHR first employed it in the context of the so-called ‘derogation clauses,’ but it has since become part of the jurisprudence of the court in relation to most other parts of the Convention as well.

The Handyside case is the fons et origo of the modern margin of appreciation doctrine. That case concerned the publication of the ‘Little Red Schoolbook,’ a book originally published in Danish and subsequently translated into a number of other European languages. The book

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14 Cenap (n14) 19; Brauch (n14) 116; Yourow (n14) 118.
15 Bakircioglu (n14) 713.
16 Handyside v United Kingdom, Judgment of 7 December 1976, Series A No. 24; (1979-80) 1 EHRR 737.
was an educational guide for children, which included instructive material in relation to sex, contraception, homosexuality, masturbation, and venereal disease. The British government seized all copies of the book under the Obscene Publications Act. The applicant was fined pursuant to the same legislation. He filed an application against the United Kingdom before the Commission, claiming that his right to freedom of expression under Article 10 of the Convention had been violated. In holding that there had been no violation of the Convention on the facts of the case, the European Court of Human Rights (ECtHR) provided the following classic definition of the margin of appreciation:

48...Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force...

49. Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or ... measure taken by a legal authority or any other authority") as well as to its own case-law..."

One of the key determinants of the width of the margin of appreciation which will be afforded to Member States in particular contexts is the extent to which a European consensus may be said to exist in favour of recognising the right asserted. Generally speaking, if a European consensus exists in favour of recognising the right in question the margin of appreciation afforded to individual states will be narrower, whereas if European states are divided on the question the margin afforded to individual states is likely to be wider.  

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18 ibid paras 48-49.
For example, in *Dudgeon v United Kingdom*, the ECtHR found the right to private and family life under Article 8 of the Convention to encompass a right to engage in homosexual sodomy, on the basis that a European consensus existed in favour of regarding private consensual sexual acts between adults as falling within the core protection of Article 8. Northern Ireland was an outlier in this respect in prohibiting homosexual acts committed in private. In contrast with *Handyside*, in which the court appeared indifferent to the fact that the applicant had published his book in many signatory states but had only been prosecuted in one, the court accorded great weight to the fact that the great majority of signatory states did not criminalise homosexual activity. By contrast in the *Dahlab* case the court found that Switzerland's ban on school teachers wearing the Islamic veil was permissible, having regard to the fact that no European consensus existed in respect of the wearing of religious symbols in general and in respect of the Islamic veil in particular.

The principal rationale for employing consensus in this way is that it allows the ECtHR to defer to the sovereign authority of the signatory states to the Convention, and hence allows the Convention to fulfil its primary function as a subsidiary form of human rights protection.

However, there are a number of potential difficulties with the court's use of consensus in the determination of the substantive content of rights. First, the court has not consistently applied the consensus standard, which creates uncertainty. It is plain, for example, that the existence of a pan-European consensus in favour of a particular right is in no sense a prerequisite to the court recognising it as being protected by the Convention. For instance, in *Goodwin v United Kingdom*, the ECtHR found that transsexuals enjoyed a right to marry under Article 12 of the ECHR, which states that '[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' The court in *Goodwin* recognized a right which was protected in the domestic law of only a handful of Contracting States. Thus, the ECtHR led the charge in

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21 Brauch (n14) 131-132.
22 Ostrovsky (n14) 56-57;
23 Lewis (n14) 397.
24 Cenap (n14) 21; Brauch (n14); Yourow (n14) 158.
recognizing the right of transsexuals to marry and did not wait for a European consensus to crystallize on the matter.  

Conversely, it is plain that the court will not necessarily recognise a right to exist under the Convention even if the existence of the right is supported by a strong pan-European consensus. In *A, B, and C v Ireland*, the ECtHR refused to hold that the right to private and family life under Article 8 of the Convention encompassed a right to abortion. The court arrived at this conclusion in spite of the fact that abortion was widely available in most signatory states to the ECHR.

Second, the doctrine has been criticized on the ground that it may lead to a diminution in the level of rights protection if a particular right, formerly regarded as fundamental, falls out of popular favour. For example, in the present era concerns over the threat posed by international terrorism have been invoked to justify far-reaching restrictions on civil liberties, which would not have been tolerated in former times.

For these reasons, it is submitted that the margin of appreciation as evolved by the ECtHR does not offer sufficient security to enable one to say with confidence that the cultural autonomy of the Member States of the EU would be maintained if the ECJ were to adopt an approach analogous to that of the ECtHR in its interpretation of the CFR. In Chapter 4 it was submitted that the court should adopt an originalist approach in its interpretation of the CFR. Such an approach would require the court to defer to the legal traditions of the Member States of the EU in its exegesis, where the text of the CFR was found to be ambiguous. In addition, it would mean that the court could not recognise any rights under the more abstract provisions of the CFR if the recognition of any such particular right contravened the fundamental values of any individual Member State of the EU.

It is plain from the brief discussion undertaken above that the margin of appreciation doctrine of the ECtHR is a good deal less deferential to the views of the Member States than an originalist approach would be. Thus, if on an originalist view of its terms art 52(3) CFR requires the ECJ to adhere in all circumstances to the case law of the ECtHR, as distinct from merely the text of the ECHR, in its interpretation of Charter rights with Convention

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27 Letsas (n4) 78-79; Rasilla del Moral (n19) 617.
30 Brauch (n14) 145-147.
counterparts, then the viability of an originalist approach to Charter interpretation will be severely compromised. In the next section I shall carry out an analysis of this vexed issue.

11.2 The Status of the Case-Law of the ECtHR

11.2.1 Introduction

Before entering into a detailed discussion of the legal relationship between the CFR and the ECHR, it is important to note that the ECHR was a major inspiration behind a large proportion of CFR articles. Indeed, one the chief purposes of the CFR was to codify the rights protected by the ECJ’s general principles jurisprudence, which was in large part inspired by the ECHR and the jurisprudence of the ECtHR. Jacqueline Dutheil de la Rochere describes the ECHR as the ‘main source of inspiration’ behind the CFR. In the case of S v Maahanmuuttovirasto AG Bot stated that ‘it is useful to recall the analytical approach adopted by the European Court of Human Rights on which our case-law, to a great extent, is based.’

11.2.2 Textual Analysis

(a) ‘To Correspond’

As outlined in preceding chapters, the starting point in discerning the original meaning of a legal text ought to be with an examination of the dictionary definitions of the terms used in the text. The Oxford English Dictionary defines the the verb ‘to correspond’ in the following terms:

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33 Joined Cases C-356/11 and C-357/11 (ECJ, 27 September 2012).
34 ibid para. 65.
1. intr. To answer to something else in respect of fitness; to agree with; to be agreeable or conformable to; to be congruous or in harmony with... 2. a. To answer to in character or function; to be similar or analogous to (rarely with)... b. To answer or agree in regard to position, amount, etc...

*Webster's Ninth New Collegiate Dictionary* contains a similar entry: ‘1. a : to be in conformity or agreement... b : to compare closely... c : to be equivalent or parallel...’ It is plain from these definitions that for two things to ‘correspond’ they need not be identical. They need only be ‘similar or analogous.’ Therefore, in order for a CFR right to be deemed to correspond to an ECHR right it is not necessary that the two rights be phrased identically. Similarity between the two is sufficient. Thus, where CFR rights are phrased similarly to ECHR rights, it is necessary, pursuant to Article 52(3) CFR, to assign the same ‘meaning and scope’ to each.

This definition of the verb ‘to correspond’ is confirmed by a perusal of the leading English-language law dictionaries. *Stroud's Judicial Dictionary* contains the following entry: ‘CORRESPOND... ‘to correspond’ does not, usually or properly mean, ‘to be identical with,’ but to harmonise with,’ or ‘to be suitable to’...’ The equivalent terms used in most of the other language versions of the CFR appear to be close synonyms for ‘correspond’ and no deviation from the English version is immediately apparent.

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56 *Webster's Ninth New Collegiate Dictionary* (Merriam-Webster, 1988) 293.
57 See also, *Pocket Fowler's Modern English Usage* (2nd edn, OUP, 2012) ‘correspond. If one thing is similar or analogous to another, or related closely to it, it is said to correspond to it...’
59 The French version of Article 52(3) uses the word ‘correspondant.’ See, *Oxford Hachette French Dictionary* (OUP, 1997) 188 ‘... corresponding;... matching.’ The German version uses the term ‘entsprechen.’ See, Werner Scholze-Stubenrecht, John Bradbury Sykes, M Clark, Olaf Thyen *Oxford German Dictionary* (OUP, 3rd Ed, 2005) 228 ‘... correspond to sth...’; Clara-Erika Dietl *Dictionary of Legal, Commercial and Political Terms* (Matthew Bender & Company Inc, New York 1983) 229 ‘... to correspond to, to conform to; to be in accordance with;... to match;... to meet, answer; to comply with...’ The Italian version uses the word ‘corrispondenti.’ See, *Oxford-Paravia: Il Dizionario Inglese/Italiano, Italiano/Inglese* (3rd Ed, OUP, 2010) 1704-1705 ‘...1 corresponding...’ The Spanish version uses the word ‘correspondan.’ See, *Gran Diccionario: Espanol-Ingles: English-Spanish Dictionary: Unabridged Edition* (Larousse, 1993) 182 ‘corresponder... to correspond, to match...’ The Finnish version uses the ‘vastata.’ See, Raija Hurme, Rl. Malin, Olli Syvaoja (eds), *English-Finnish General Dictionary* (3rd edn, Werner Sodestrom Osakeyhtiö)1342-1343 ‘... correspond to... to be the counterpart of;... representative... be equivalent to...’ The Estonian version uses the phrase ‘mit vastavad.’ See Paul K Saagpakk *Eesti-Inglise Sonarnaat / Estonian-English Dictionary* (Koolibri, 1982) 1072 ‘vastav... a. corresponding (to sth.), answerable, ... adequate, appropriate, suitable... proportionate... pertinent...; condition... parallel; (case);... congruous... commensurate (to, with)... consistent (with)... to correspond (to), to answer to...’ The Irish version uses the word ‘freagair.’ See, Tomás de Bhaldraithe (ed) *Nuall Ó Dónaill Foclóir Gaeltacht Béarla* (Rialtais na hÉireann, 1977) 579 ‘1. (b) (With do) ~ t do rud, to answer, correspond, to sth...’ The Polish version uses the word ‘odpowiadać.’ See, *Oxford Essential Polish Dictionary* (OUP, 2010) 94 ‘3 – czemus correspond to sth... conform to sth’
This reading is also confirmed by the Opinion of AG Cruz Villalón in Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs (SABAM), in which he stated that 'in the circumstances of the main action, the rights guaranteed in Article 8 of the ECHR correspond...to those guaranteed in Articles 7 (‘respect for private and family life’) and 8 (‘protection of personal data’) of the Charter, just as the rights guaranteed in Article 10 of the ECHR correspond to those guaranteed in Article 11 of the Charter (‘freedom of expression and information’), notwithstanding the differences concerning the expressions used and the terms employed, respectively.' A comprehensive list of the CFR rights which correspond to the ECHR rights is provided by the Explanations to the CFR.

(b) ‘The meaning and scope of those rights shall be the same’

The Oxford English Dictionary defines ‘meaning’ in the following terms: ‘1. The significance, purpose, underlying truth, etc., of something...’ The verb ‘to mean’ has been defined in the following terms by Stroud’s Judicial Dictionary:

‘MEAN. When a statute says that a word or phrase shall “mean” – not merely that it shall “include” – certain things or acts, “the definition is a hard-and-fast definition, and no other meaning can be assigned to the expression than is put down in the definition”

Thus, the use of the word ‘meaning’ in Article 53(3) suggests that CFR rights corresponding to ECHR rights ought to be interpreted identically to the latter.

The Oxford English Dictionary defines the word ‘scope’ as ‘6... b. The sphere or area over which any activity operates or is effective; range of application or of subjects embraced; the reach or tendency of an argument, etc.; the field covered by a branch of knowledge, an inquiry, concept, etc.’ Webster’s Ninth New Collegiate Dictionary contains a similar entry: ‘1 : space or opportunity for unhampered motion, activity, or thought...3 : extent of treatment, activity or influence, or influence 4 : range of operation’

The Slovene version uses the word ‘ustrezajo.’ See, Anton Grad & Henry Leeming Slovene-English Dictionary (DZS 1993) 728 ‘ustrezati to suit; to answer, to meet, to correspond...’ The Greek version uses the word ‘•••••••••••• correspond, correlate.’

The Slovène version uses the word ‘ustrezajo.’ See, Anton Grad & Henry Leeming Slovene-English Dictionary (DZS 1993) 728 ‘ustrezati to suit; to answer, to meet, to correspond...’ The Greek version uses the word ‘•••••••••••• correspond, correlate.’
In the Convention on the Future of Europe, Petite argued that the word ‘scope’ included the limitations on rights contained in the ECHR. The word ‘scope’ in Article 52(3) CFR is perhaps best interpreted, therefore, as meaning that the imposition of limitations on CFR rights, which would not be recognized as legitimate if applied to corresponding ECHR rights, are alike prohibited by the CFR. Thus, neither ‘[t]he sphere or area’ nor the ‘range of operation’ of CFR rights could be reduced on this reading of Article 52(3).

The *Oxford English Dictionary* contains the following entry for the word shall: ‘1. An utterance of the word ‘shall’; a command, promise, or determination (such as is expressed by means of ‘shall’).’ Scalia and Garner note that the word ‘shall’ has traditionally been understood as imposing a mandatory requirement. Thus, in its traditional signification, the word ‘shall’ ‘ought to be replaceable by either *has a duty or is required to.*’ However, they also note that ‘shall’ has been misused by legal drafters, with the result that it is no longer safe to automatically adhere to its traditional meaning. However, they also argue that ‘when the word *shall* can reasonably be read as mandatory, it ought to be so read.’

A contextual reading of the CFR’s General Provisions suggests that the word ‘shall’ in Article 52(3) of the CFR ought to be understood as imposing a mandatory requirement. Article 52(5) states that ‘[t]he provisions of this Charter which contain principles *may* be implemented…’ The use of the word ‘may’ in Article 52(5) was intended to indicate that no mandatory requirement was being imposed on the addressees of that article. As discussed in Chapter 6 of this thesis, differences in terminology between closely related legal
provisions suggest a difference in meaning. In *Kelo v City of New London,* Justice Thomas interpreted the words of the Fifth Amendment to the United States Constitution 'nor shall private property be taken for public use, without just compensation' to mean that any property taken by the state would have to be actually *used* by the state. Justice Thomas cited other power-conferring constitutional provisions, where broader language, such as 'the general welfare' was used, in support of his narrow reading of the phrase 'public use':

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To ... provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope.

Thus, the variation in terminology between the words 'shall' and 'may,' in Article 52(3) and Article 52(5) respectively, suggests that the two have distinct meanings, that the former imposes a mandatory requirement, and that the latter does not.

The *Oxford English Dictionary* contains the following entry for the adjective 'same':

*A. adj. 1. Not numerically different from an object indicated or implied; identical. 1. With forward reference: Identical with what is indicated in the following context.' Thus, the requirement that CFR rights be interpreted in the 'same' fashion as corresponding ECHR rights means that they must be identically interpreted.

Thus the most natural reading of the first sentence of Article 52(3) is that CFR rights, which roughly approximate to rights in the ECHR, should be interpreted identically to those ECHR rights and that no exceptions, above and beyond those provided for under the ECHR, should be recognized as legitimate under the CFR. That this was the meaning intended by the drafters of the CFR is confirmed by a perusal of its drafting history. The Council of Europe observers at the Convention believed that the final draft of Article 52(3) ensured 'an identity of scope and meaning between the rights contained in the two instruments.'

Article 52(3) seeks to address the concern, articulated by many during the CFR Convention, and in subsequent scholarly commentary, that deviations in wording between the CFR and

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50 For a similar view, see Weiss (n45) 84.
51 'Comments of the Council of Europe observers on the draft Charter' CHARTE 4961/00, CONTRIB 356, 13 November 2000, p. 2.
52 See, for example, 'Contribution of Lord GOLDSMITH, Personal Representative of the Government of the United Kingdom' CHARTE 4146/00, CONTRIB 36, 6 March 2000, p.3-4, 'Contribution by Mr Frits KORTHALS ALTES, Personal Representative of
ECHR would lead to different interpretations of the two instruments. However, Article 52(3) does not specifically refer to the case law of the ECHR. It could, therefore, mean that the ECJ must give CFR rights corresponding to ECHR rights the same meaning as the text of the latter warrants, rather than the meaning dictated by the ECHR. Thus, the text does not conclusively determine whether the case law of the ECHR is strictly binding on the ECJ. We must, therefore, look to the other sources of evidence to illuminate its meaning.

The Explanations of the CFR provide some clarification on this point. They state that ‘[t]he meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union.’ This sentence indicates that the case law of the ECHR is included in Article 52(3)’s reference to the ECHR. However, the Explanations also state that that provision does not adversely affect the autonomy of EU law, thus implying

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that though the jurisprudence of the ECtHR carries great weight it is not binding in all circumstances.\footnote{Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02.}

11.2.3 Pre-Ratification Practice

Murray notes that ‘[p]rior to the entry into force of the Lisbon Treaty, the Court of Justice...enjoyed a considerable degree of autonomy as to the meaning and scope of rights falling within the ambit of Community law, even though it has demonstrated considerable deference to the Strasbourg Court.'\footnote{Murray (n26) 1402.} The case law of the ECtHR did not strictly bind the ECJ. Nonetheless, the ECJ drew heavily on that case law in developing its own distinctive human rights jurisprudence, as described in Chapter 1 of this thesis.\footnote{For a full, if somewhat dated account, see Elspeth Guild and Guillaume Lesieur The European Court of Justice on the European Convention on Human Rights: Who Said What, When? (Kluwer Law International, 1998).}

11.2.4 Drafting History

The case-law of the ECtHR was repeatedly referred to as a source of inspiration during the drafting of the CFR. For instance, during the first meeting of the Convention, then known as ‘the Body,’ its President, Roman Herzog, referred to ‘the extensive case-law of the European Court of Human Rights in Strasbourg, which will...inspire and enlighten us.’\footnote{‘Record of the first meeting of the Body to draw up a draft Charter of Fundamental Rights of the European Union’ CHARTE 4105/00 BODY 1, 17 December 1999, p. 8. See also, Opinion from the Social and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe, CHARTE 4116/00, CONTRIB 12, 28 January 2000, p. 5, ‘Contribution of the Association of Women of Southern Europe (AFEM) on the proposed Charter provisions’ CHARTE 4157/00, CONTRIB 42, 13 March 2000, p.6, ‘Comments on document Charte 4149/00 Convent 13 submitted by Mr. Paavo Nikula, Personal Representative of the Finnish Government, and Mrs Tuija Brax, Representative of the Finnish Parliament’ CHARTE 4185/00, CONTRIB 68, 28 March 2000, p. 3, ‘Comments on document Charte 4149/00 Convent 13 submitted by Mr. Gunnar Jansson, Representative of the Finnish Parliament’ CHARTE 4184/00, CONTRIB 67, 28 March 2000, p. 2, ‘Contribution from Mr. Erling Olsen, Personal Representative of the Government of Denmark on document Charte 4149/00 Convent 13’ CHARTE 4181/00, CONTRIB 64, 28 March 2000, p. 4. See also numerous proposed amendments contained in ‘Amendments submitted by the members of the Convention regarding civil and political rights and citizens’ rights’ CHARTE 4332/00, CONVENT 35, 25 May 2000.}

Moreover, the risk of divergence between the ECJ’s jurisprudence on the CFR and the jurisprudence of the ECtHR was highlighted from the beginning of the Convention’s work. For example, in ‘The Council of Europe’s contribution to a European Union Charter of
Fundamental Rights,’ co-authored by Marc Fischbach and Hans Christian Kruger the
danger of ‘discrepancies arising between the two European Courts’ bodies of case-law’ was
highlighted. The authors recommended EU accession to the ECHR as a means of avoiding
such divergent interpretations.⁵⁹

The Convention specifically contemplated including an obligation to follow the ECtHR’s
jurisprudence in the operative text of the CFR. Several proposals to this effect were made.
Lord Goldsmith, for example, recommended including a provision which would ensure that
‘[e]ach reference in this Charter to an Article of the ECHR or its Protocols should be
interpreted in accordance with the jurisprudence of the Strasbourg organs.’ The Praesidium
adopted such suggestions in its draft of 18³ of April 2000, which contained a provision,
Article H.4, stating that ‘[n]o provision of this Charter may be interpreted as restricting the
scope of the rights guaranteed by...the European Convention on Human Rights as

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⁵⁹ ‘The Council of Europe’s contribution to a European Union Charter of Fundamental Rights’
CHARTE 4105/00 BODY 1, 17 December 1999, 26-27. The importance of EU accession to the ECHR, as
a means of preventing the emergence of diverging standards of human rights protection, was
emphasized repeatedly during the Convention. See, for example, the Report of the Parliamentary
Assembly of the Council of Europe CHARTE 4106/00 CONTRIB 5, 18 January 2000, p.2-9,
‘INFORMATION NOTE Subject: Draft Charter of Fundamental Rights of the European Union’
CHARTE 4111/00 BODY 3, p. 5, ‘Property rights within european law,’ European Landowners
Organisation (ELO) CHARTE 4110/00 CONTRIB 8, p. 3, ‘Texts adopted by the Parliamentary
Assembly of the Council of Europe on 25 January 2000’ CHARTE 4115/00, CONTRIB 11, 28 January
2000, p. 2-5, ‘Political Affairs Committee of the Parliamentary Assembly of the Council of Europe’
CHARTE 4114/00, CONTRIB 10, p.5-7, ‘Contribution by Mr Fischbach and Mr Krüger, Council of
Europe observers’ CHARTE 4136/00, CONTRIB 29, 21 February 2000, p. 2-4; ‘Submission by the
Confederation of British Industry (CBI)’ Brussels, 12 April 2000, CHARTE 4226/00, CONTRIB 101, p.
6, ‘Contribution by the Conference of European Churches with a view to the hearing on the 27 April
2000’ CHARTE 4233/00 CONTRIB 107, 18 April 2000, p. 2, ‘Contribution by the Association of
German Public Service Broadcasting Corporations (ARD) and German Television (ZDF) with a view
for the hearing on the 27 April 2000’ CHARTE 4229/00, CONTRIB 103, 18 April 2000, p. 5; ‘Amnesty
International presented at the hearing on 27 April 2000’ CHARTE 4290/00, CONTRIB 162, 10 May
2000, p. 9, ‘Contribution by the International Federation of Human Rights (FIDH) with a view to the
hearing on 27 April 2000’ CHARTE 4232/00, ADD 1, CONTRIB 106, 7 June 2000, p. 4, ‘Common
statement by the International Federation of Human Rights (FIDH)’ CHARTE 4129/00, ADD 1,
CONTRIB 24, 7 June 2000, p. 5, ‘Report from the Committee on Legal Affairs and Human Rights
Council in the Parliamentary (sic) Assembly of the Council of Europe’ CHARTE 4465/00, CONTRIB
319, 14 September 2000, p. 4, 7, ‘Contribution by the Social, Health and Family Affairs Committee of
the Council of Europe, with a letter to Mr. Roman HERZOG, the President of the Convention, and the
Resolution 1210’ CHARTE 4483/00, CONTRIB 334, 26 September 2000, p. 3-4.
⁶⁰ ‘Contribution of Lord GOLDSMITH, Personal Representative of the Government of the United
Kingdom’ CHARTE 4146/00, CONTRIB 36, 6 March 2000, p. 3-4. See also, ‘Contribution by Mr Frits
KORTHALS ALTES, Personal Representative of the Netherlands Government’ CHARTE 4145/00,
CONTRIB 35, 8 March 2000, p. 7, ‘Observations by Mr Fischbach and Mr. Krüger to the document
Charte 4149/00 Convent 13’ CHARTE 4178/00, CONTRIB 61, p. 3, ‘Submission by the Church and
Society Commission of the Conference of European Churches with a letter to Mr. Roman Herzog, the
President of the Convention, and a report from the Plenary Meeting of the Commission in Moscow on
5-9 May 2000’ CHARTE 4360/00, CONTRIB 37, 14 June 2000.
interpreted by the case law of the European Court of Human Rights." On the 16\textsuperscript{th} of June Dr Ingo Friedrich, MEP, and Dr Peter Mombaur, MEP submitted that 'a de facto link to the case law of the European Court of Human Rights would...hamper the development of an autonomous doctrine of fundamental rights under EU law, in which case the Charter could fail to achieve one if (sic) its essential objectives.'

The proposed text evolved somewhat over the next few months and by July 3\textsuperscript{rd} the working draft of what became Article 52(3) contained no reference to the case law of the ECtHR. A reference to the case law of the ECtHR had also been included in what became Article 53 of the CFR. However, this reference was also removed, such that the final version of Article 53 now reads in relevant part as follows:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised...by ...the European Convention for the Protection of Human Rights and Fundamental Freedoms

However, it is unclear whether these amendments were intended to remove the obligation to follow the jurisprudence of the ECtHR. Bare references to the ECHR may have been understood by Convention members to implicitly include the jurisprudence of the ECtHR. For example, Frits Korthals Altes, Representative of the Government of the Netherlands, expressed the view than an analogous proposal, which he had put forward and which also contained no reference to the case law of the ECtHR, implicitly imposed an obligation to follow that case law.

The Council of Europe observers in the Convention were not so sanguine. In a contribution on July 13 2000, Marc Fischbach stated that '[i]t will not be at all obvious - unless an express provision to that effect is included - that the minimum level of protection to be respected...will also be applicable to those rights contained in the Charter whose equivalents are to be found not in the ECHR but in the case law of the European Court of

\textsuperscript{61} 'NOTE FROM THE PRAESIDIUM Subject: Draft Charter of Fundamental Rights in the European Union – Horizontal clauses' CHARTE 4235/00, CONVENT 27, 18 April 2000, p. 3.

\textsuperscript{62} 'Amendments submitted by the members of the Convention regarding social rights and the horizontal clauses,' Brussels, 16 June 2000, CHARTE 4372/00, CONVENT 39, p. 431.

\textsuperscript{63} 'Summary of amendments received and of Praesidium compromise amendments on economic and social rights and on the horizontal clauses' CHARTE 4383/00, CONVENT 41, 3 July 2000, p.

\textsuperscript{64} For a comprehensive account of the drafting history of Article 53 CFR, see Jonas Bering Liisberg 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 C M L Rev 1171.

\textsuperscript{65} 'Letter to the Convention by Mr. Frits Korthals Altes, Representative of the Government of the Netherlands, relating to horizontal articles,' CHARTE 4406/00, CONTRIB 262, 6 July 2000, p. 2.
Human Rights.' He gave the right to data protection as an example of such a right. He also dismissed suggestions that a reference to the case law of the ECtHR would undermine the autonomy of EU law, noting that Article 53 of the ECHR already allowed other human rights instruments to provide greater protection.

After this intervention Mr Erling Olsen, the Representative of the Danish Government, proposed amending the draft Charter so as once again to include a reference to the case law of the ECtHR. The Praesidium’s Draft Preamble of the 14th of July stated that '[t]his charter confirms the rights that arise out of...the jurisprudence of the Court of Justice of the European Communities and of the European Court of Human Rights.' In the draft of the 28th of July 2000, this reference was modified slightly. The draft Preamble now referred to 'the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.' This is also the form of words contained in the final version of the CFR.

In a report issued on the 14th of September 2000, the ‘Legal Affairs and Human Rights Council in the Parliamentary (sic) Assembly of the Council of Europe’ proclaimed itself satisfied that the reference to the ECtHR’s case law in the Preamble to the CFR ‘makes it clear that the ECHR rights also include rights recognised by the case-law.’ The authors stated that the Preamble ensured ‘that future developments regarding the ECHR and the Charter will be consistent and harmonious and...thus avoided destroying the common dynamic of these two instruments.' This reference to the case law of the ECtHR was retained in the final version of the Preamble to the CFR. Certain scholars have suggested that this reference has the effect of obliging the ECJ to follow the jurisprudence of the ECtHR in its interpretation of CFR provisions with analogues in the ECHR.

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"CHARTE 4411/00, CONTRIB 268, 13 July 2000, p. 4.
"Article 53 ECHR provides as follows:
'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'
"CHARTE 4427/00, CONTRIB 281, 14 July 2000, p. 2.
"70, 'Report from the Committee on Legal Affairs and Human Rights Council in the Parliamentary (sic) Assembly of the Council of Europe' CHARTE 4465/00, CONTRIB 319, 14 September 2000.
"Ibid, 2.
"Peers (n53) 156-157.
However, the form in which the case law of the ECtHR was incorporated into the CFR was weaker, for several reasons, than the Council of Europe might have desired. First, the language of the preamble does not impose an obligation to follow the ECtHR's case law. Contrary to the views expressed by the Legal Affairs and Human Rights Council in their report, it simply recognises the ECtHR's case law as a source of inspiration for the CFR. Second, the preamble accords equal importance to the human rights case law of the ECJ and of the ECtHR. Thus, it is unclear how the ECJ should act in the event of a contradiction between the case law of the two courts.

Perhaps mindful of the ambiguous status of the ECtHR's case law in the CFR, the Legal Affairs and Human Rights Council Report repeated the Council of Europe observers' earlier refrain that the only sure means of guarding against divergences between the CFR and ECHR was for the EU to accede to the latter. In a further contribution, the Council of Europe observers themselves once more recommended including a reference to the case law of the ECtHR in the operative part of the CFR text. However, this latter proposal fell on deaf ears, and the reference to the case law of the ECtHR was not restored to the operative part of the text of the CFR. Thus, the drafting history of the CFR does not support a strict bindingness of the ECtHR's case law.

What is to be made of this omission? In a submission to the Convention, the European Commission interpreted Article 52(3) as meaning that the rights set forth in the Charter correspond in their meaning and scope to rights already secured by the European Convention, without prejudice to the principle of the autonomy of Union law. The risk of the

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73 Lock (n2) 387.
74 Lock (n2) 386, Peers (n53) 157.
76 'Contribution by the Council of Europe's observers, on the draft appendix to the explanatory notes regarding the Article 51 § 3 of the Charter' CHARTE 4479/00, CONTRIB 330, 25 September 2000, p. 2.
case-law of the European Court of Human Rights diverging from that of the Court of Justice of the European Communities should thereby be removed.™

This Janus-like quotation neatly encapsulates the ambivalent relationship between the ECHR and the CFR, which is characterized by a perpetual tension between the competing imperatives of homogeneity, on the one hand, and institutional autonomy on the other.

In the Convention on the Future of Europe, Judge Skouris of the ECJ stated that Article 52(3) 'would confirm the current Court of Justice practice of following the interpretation given to the ECHR by the European Court of Human Rights, and should not lead to a change in that satisfactory practice of the Court of Justice.'" On this view Article 52(3) represented a codification of the ECJ's jurisprudence under which, as we have seen, the case law of the ECtHR had been accorded significant weight, but was not regarded as binding in all circumstances.

It is submitted that these latter interpretations, for several reasons, offer the most convincing account of Article 52(3). First, the text of that article is ambiguous because it could be read as referring either to the ECHR as interpreted by the ECtHR or to the text of the ECHR alone. Second, this interpretation would ensure continuity with the pre-Lisbon jurisprudence of the ECJ. Third, the removal of what would have been a binding obligation to follow the jurisprudence of the ECtHR, from the operative text of the CFR, strongly suggests that the framers of the latter distinguished between the ECHR itself and the ECtHR's interpretation thereof. This is also the interpretation supported by most post-Lisbon discussions of Article 52(3).

11.2.5 Post-Ratification Interpretations


™ Summary of the meeting held on 17.09.02 chaired by Commissioner António Vitorino' Brussels, 26 September 2002 (02.10), CONV 295/02, WG II 10, p. 10.
(a) Scholarly Commentary

Like Judge Skouris, de Búrca interprets Article 52(3) CFR as maintaining the pre-Lisbon position, whereby the ECJ drew 'sporadically and inconsistently on...international human rights sources' but under which the ECJ was 'the final and authoritative arbiter of their meaning and impact within the EU.' Lenaerts adopts a similar view: 'the approach encapsulated in Article 52(3) of the Charter is no less than the codification of the case-law of the ECJ, according to which the ECHR, as interpreted by the ECtHR, has 'special significance' in the protection of fundamental rights within the EU legal order.'

However, scholars have put forward a number of arguments in favour of interpreting Article 52(3) as imposing an obligation on the ECJ to adhere to the case law of the ECtHR in its interpretation of the CFR. First, many have argued that the ECJ must follow the jurisprudence of the ECtHR because, pursuant to Article 45 ECHR, the latter is the authoritative interpreter of the ECHR. This is certainly true under the legal system established by the Council of Europe. However, EU law must determine for itself the modalities of its interaction with other legal orders. Thus, it is for EU law to determine the status of the jurisprudence of the ECtHR under the CFR. In other words, the fact that Article 45 ECHR designates the ECtHR as its authoritative interpreter can have no consequences in EU law.

Second, given that the object and purpose of Article 52(3) was to prevent divergences between the ECHR and CFR, that Article 52(3) should be interpreted as requiring adherence to the ECtHR's case law. Similarly, Weil argues that the 'generally rather loose, to some extent even inconsistent, approach of the ECJ towards the ECHR is no longer acceptable in

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80 de Búrca (n77) 680.
83 ibid 385.
view of the formal legal force of the rules of the ECHR by virtue of Article 52(3) CFR. In previous chapters of this thesis I have already sought to explain why the law’s object and purpose should not take priority over the text of the law. I noted above that Article 52(3) could refer to either the text of the ECHR alone, or to the ECHR as interpreted by the ECtHR, and thus that it was ambiguous as to the status of the jurisprudence of the ECtHR. I also noted that the drafting history supports the former interpretation, and that it is tolerably clear that the framers of the CFR did not intend to impose a binding obligation on the ECJ to follow the jurisprudence of the ECtHR in all circumstances. Rather, they meant to codify the pre-existing jurisprudence of the ECJ, which accorded a high degree of respect to the jurisprudence of the ECtHR but nonetheless recognized that EU law might depart from it in certain circumstances. Thus, the ‘object and purpose’ of Article 52(3) was not to render the jurisprudence of the ECtHR strictly binding.

(b) Case Law

In the case of Orlando Arango Jaramillo & Ors, the court stated that ‘reference must be made’ to the jurisprudence of the ECtHR ‘in accordance with Article 52(3) of the Charter.’ Similarly, in 5 v Maahanmuuttovirasto, AG Bot stated that ‘[i]t should be recalled that the right to the respect for private and family life is guaranteed in Article 7 of the Charter, in the same terms as Article 8(1) of the ECHR, which means, under Article 52(3) of the Charter, that the meaning and the scope of that right must be determined by taking account of the case-law of the European Court of Human Rights in that regard.’ In M. E. & Ors v Refugee Applications Commissioner, AG Trstenjak stated that ‘[i]n so far as the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice.’

These formulations plainly accord high value to the jurisprudence of the ECtHR, and yet they do not recognize any mandatory obligation to follow it. There is a clear difference between being obliged to refer to the jurisprudence of the ECtHR or accord 'high

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84 Weiβ (n 45) 226.
85 Case C-334/12 (ECJ, 28 February 2013).
86 ibid para. 43.
87 Maahanmuuttovirasto (n 33).
88 ibid, para. 77.
89 C-493/10, Opinion of AG Trstenjak of 22 September 2011.
90 ibid, para. 56.
importance’ to it on the one hand, and being obliged to follow it on the other. The judgments issued by the ECJ since the CFR came into force certainly do not evince any sense of obligation to merely genuflect before Strasbourg’s achievement; to the contrary, there has been a decided tendency towards original creation. Thus, although the court has routinely referred to, and frequently followed, the case law of the ECtHR in the interpretation of CFR provisions, it has not uniformly or unthinkingly endorsed that jurisprudence.\footnote{Although it is important to note that certain statements by the ECJ and its Advocates General do suggest that Article 52(3) CFR renders adherence to the case law of the ECHR mandatory. See, for example, the Opinion of AG Kokott in C-489/10 Prokurator Generalny v Lukasz Marcin Bonda of 15 December 2011, para. 43.}

Beginning with those cases in which the ECtHR jurisprudence has been accepted without modification, in \textit{Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen},\footnote{C-92 and 93/09 (ECJ, 9 November 2010).} for example, the court stated that legal persons could invoke the rights protected under Article 7 and 8 of the Charter only insofar as the official title of the legal person contained the names of one or more natural persons, in accordance with ECtHR case law.\footnote{ibid para. 43.} The court also cited ECtHR jurisprudence in support of the proposition that the right to private life should be understood to extend to one’s business and professional activities.\footnote{ibid para. 59.} The court has referred to the jurisprudence of the ECtHR with approval in its interpretation of the CFR in many other cases since the CFR came into force.\footnote{See, for example, C-254/11 Bereg Megyei Rendőrkapitányoság Zsákony Határrétegesi Kirendeltsége v Shimodi, Opinion of AG Cruz Villalón of 6 December 2012, para. 74.} However, such adherence is by no means uniform. Indeed, as discussed above, the second sentence of Article 52(3) expressly contemplates the CFR affording ‘more extensive protection’ and, thus, departing from the jurisprudence of ECHR.

### 11.3 'More Extensive Protection' Under the CFR

#### 11.3.1 Textual Analysis

The second sentence of Article 52(3) states that ‘[t]his provision shall not prevent Union law providing more extensive protection.’ It is noteworthy that the second sentence begins by directly referring to the first – ‘this provision’ – and is concerned with explaining its implications more fully. Recall that the first sentence deals exclusively with rights which correspond to rights protected by the ECHR. It provides that ‘[i]n so far as this Charter...
contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' Thus, the second sentence of Article 52(3), like the first which it is designed to explicate, should be understood as applying exclusively to CFR rights which correspond to rights protected by the ECHR.

It would be awkward to interpret it as meaning that EU law could provide 'more extensive protection' by protecting rights not found in the ECHR. The phrase 'in so far as' in the first sentence already unmistakeably implies that not every right in the CFR corresponds to an ECHR right. In fact, the number of rights protected by the CFR, which includes novel socio-economic rights and cultural rights, greatly exceeds that of the ECHR. Thus, to interpret the phrase 'more extensive protection' as referring to CFR rights which have no analogue in the ECHR would render it a pointless monstrosity; it is obvious that the CFR, and even more so 'Union law,' protect a vastly greater number of rights than are protected under the ECHR. The only sensible reading of the second sentence of Article 52(3) is, therefore, that the CFR rights which correspond to ECHR rights may be afforded 'more extensive protection' than that provided by the ECHR.

This reading is supported by the Explanations to the CFR. In the list it provides of CFR rights which correspond to ECHR rights, it also indicates which rights afford greater protection than the ECHR, but does not deal with CFR rights in addition to those protected by the ECHR.*

Thus, Article 52(3) is a strangely ambivalent, if not self-contradictory, provision. Its first sentence provides that the 'meaning and scope' of CFR rights with analogues in the ECHR 'shall be the same,' which seemingly requires homogeneity, whereas its second sentence admits that the CFR may afford 'more extensive protection' to these rights. However, in spite of this maladroit drafting, its import is tolerably clear. It means that, in so far as CFR rights correspond to ECHR rights, the ECHR provides a minimum standard beneath which the CFR may not fall. However, the language of the text gives no guidance whatever which might enable an interpreter to determine when and to what extent EU law affords greater protection.

11.3.2 Drafting History

The drafting history of the CFR makes it plain that the aim was not merely to reproduce the rights protected by the ECHR. To the contrary, the drafters of the CFR sought, in the words of Mr Inigo Mendez de Vigo MEP, to 'provide added value.'

When ECHR rights were adopted by the drafters of the CFR, their scope was frequently widened. Mr Frits Korthals Altes, the Personal Representative of the Dutch Government, summarized the position as follows:

> Deviating from the wording of a fundamental right also contained in the ECHR risks producing a difference in interpretation between the ECHR and the EU Charter. There is no objection if such deviation aims to expand that fundamental right: in my opinion, the European Union has every entitlement to expand a fundamental right in such a way as to make protection within the European Union stronger than that guaranteed by the ECHR. On the other hand, the EU Charter must never restrict a fundamental right already guaranteed by the ECHR or word it in more limited terms than the ECHR does.*

The Explanations to the CFR provide a full list of the rights which correspond to, but nonetheless provide greater protection than, the ECHR.** The ECHR, therefore, in the view of the drafters of the CFR, constituted a 'minimum standard,' which EU law could exceed but never fall short of.***

11.3.3 Post-Ratification Interpretations

(a) Scholarly Commentary

Scholars have not failed to note the tension discussed above between the first and second sentences of Article 52(3) and many have arrived at the same conclusion as I have, namely

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* See, Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).
** See, Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).
that the ECHR provides a 'floor' beneath which the CFR may not fall. This interpretation is also supported by the Explanations to the CFR, which state that 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.'

Scholars have also pointed out the difficulty in comparing the protection afforded by human rights instruments quantitatively. Maduro has noted, for example, that 'it is often difficult to determine what constitutes the highest level of fundamental rights protection.' In other words, it will not always be clear whether a given standard of protection is more or less extensive than another. The Byankov case, which I shall discuss presently, shows that it can be extremely difficult to decide which of two instruments provides 'more extensive protection,' especially in circumstances in which two or more rights are in tension with one another.

(b) Case Law

Whatever the original meaning of Article 52(3), it would be a considerable oversimplification to suggest that, in its interpretation of the CFR, the ECJ and its Advocates General will only depart from the case law of the ECtHR in order to offer 'more extensive protection' than the latter. In reality, deviations from ECtHR case law have thus far been condoned by the ECJ or its Advocates General in four distinct sets of circumstances: first, where the text of the CFR or the Explanations relating thereto suggest that the CFR affords greater protection than the ECHR; second, where the case law of the ECtHR relates to an ECHR Protocol which has not been ratified by all the Member States; third, where the case law of the ECtHR cannot be transplanted wholesale into EU law because of the requirements

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103 Explanations Relating to the Charter of Fundamental Rights, 2007/C 303/02.

of the internal market; and, fourth, where the protection afforded by the case law of the ECtHR is deemed inadequate as a normative matter. I now propose to give examples of cases falling into each of these categories and to evaluate whether each category of exception may be justified on an originalist view of the CFR.

The decision of the ECJ in *Diouf* is an example of a case falling into the first category, *ie* where the text of the CFR, or the Explanations relating thereto, afford greater protection to a right than ECtHR jurisprudence. The case concerned the meaning of Article 47 CFR, which protects the right to an effective remedy. Article 47 CFR corresponded to Article 13 ECHR, which also guarantees the right to an effective remedy. However, whereas Article 13 ECHR guaranteed this right only in relation to violations of rights protected by ‘this Convention,’ Article 47 CFR guaranteed an effective remedy in relation to ‘rights and freedoms guaranteed by the law of the Union.’ Due to this divergence in the wording of the two instruments, the court refused to confine Article 47 to violations of the CFR itself.

The approach in *Diouf*, which gives ‘more extensive protection’ to a right under the CFR if its wording is broader than that of its counterpart in the ECHR, is thoroughly justified according to originalist theory. Originalism accords priority to the text being interpreted and requires that the text be given the meaning reasonable interpreters would have ascribed to it at the time of its enactment. Where it is plain from its text that a particular guarantee in the CFR is broader than that contained in the ECHR the ECJ must interpret the CFR as providing greater protection. This is entirely consistent with Article 52(3), under which the ECHR constitutes a floor which may be exceeded by EU law.

*Åkerberg Fransson* is an example of a case falling into the second category, *ie* where the ECHR provision concerned has not been ratified by a number of Member States. The *ne bis in idem* or ‘double jeopardy’ principle is enshrined in both Article 4 of Protocol No 7 to the ECHR and in Article 50 CFR. The ECtHR has ruled that the imposition of both criminal and administrative penalties in respect of the same offence violates Article 4 of Protocol 7 ECHR. However, in *Åkerberg Fransson*, AG Cruz Villalón stated that the ECJ should not adhere to the case law of the ECtHR. He reasoned that, because many Member States had

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107 ibid, paras. 38-42
108 *C-617/10 Åklagaren v Hans Åkerberg Fransson*, Opinion of AG Cruz Villalón, of 12 June 2012.
109 ibid paras. 75-87.
not ratified the ECHR Protocol and others had lodged reservations in respect of it,\textsuperscript{109} the
Convention did not actually guarantee the \textit{ne bis in idem} principle.\textsuperscript{110} Moreover, many
Member States continued to impose administrative and criminal penalties simultaneously.\textsuperscript{111}
For these reasons AG Cruz Villalón suggested that the ECJ should give a ‘partially
autonomous interpretation’ to Article 50 CFR.\textsuperscript{112} He concluded that ‘regard must be had to
the current state of the case-law of the European Court of Human Rights but the protective
threshold which the Court of Justice is required to respect must be the result of an
independent interpretation which is based exclusively on the wording and scope of Article
50 of the Charter.’\textsuperscript{113} The ECJ implicitly agreed with AG Cruz-Villalón in its judgment in
Åkerberg Fransson. It held that Article 50 CFR permitted the simultaneous imposition of
criminal and administrative penalties for the same offence.\textsuperscript{114}
The Opinion of AG Cruz Villalón suggests that those aspects of the ECHR which have not
been unanimously ratified by the Member States of the EU cannot be said to be ‘guaranteed’
by it. The exception he suggests is supported by the text of the CFR. Article 53 thereof
describes the European Convention as an ‘international agreement... to which the Union or
all the Member States are party.’ Because Article 53 conceives of the ECHR as an agreement
unanimously supported by the Member States, it must follow that any aspect of the ECHR
not supported by all Member States is not included in Article 53’s reference to the ECHR. It
is reasonable to suppose, as discussed in Chapter 6, and unless the context indicates
otherwise, that a word used in one part of a text has the same meaning throughout. Thus,
since Article 53 indicates that references to the ECHR are to be understood as referring to
those aspects of the ECHR ratified by all Member States, all references to the ECHR in the
CFR should be so construed. Therefore, AG Cruz Villalón’s conclusion, that Article 52(3)
CFR does not oblige the ECJ to follow the jurisprudence of the ECtHR on Protocols which
have not been unanimously ratified by the Member States, appears justified by the text of
the CFR.
However, the Explanations to the CFR provide that ‘[t]he reference to the ECHR covers both
the Convention and the Protocols to it.’ This reference to ‘the Protocols’ suggests that it
refers to all of the Protocols. However, as discussed in Chapter 10 of this thesis, the
\textsuperscript{109} ibid para. 82.
\textsuperscript{110} ibid para. 84.
\textsuperscript{111} ibid para. 86.
\textsuperscript{112} ibid para. 87.
\textsuperscript{113} ibid.
\textsuperscript{114} In C-617/10 Åklagaren v Hans Åkerberg Fransson (ECJ, 26 February 2013) paras. 33-37.
Explanations to the CFR cannot be invoked to contradict its operative text. Article 53 plainly conceives of the ECHR as something to which all Member States have signed up. Therefore, if all Member States have not signed up to an ECHR Protocol, the rights contained therein should not be considered to be ’guaranteed’ by the ECHR for the purposes of Article 52(3). Thus, the reference in the Explanations to the ‘the Protocols’ should be considered to refer only to Protocols ratified by all Member States.

The Byankov case falls into the third category, ie the case-law of the ECtHR was rejected because it had the potential to interfere with the operation of the internal market. The case concerned the validity of a national law which imposed limitations on the freedom of movement of Union citizens with unsecured debt in excess of a specified statutory amount. Article 27(1) of Directive 2004/38 provided an exhaustive list of grounds upon which EU citizens’ freedom of movement within the Union could be restricted, and expressly excluded economic grounds. The referring court had noted that the ECtHR permitted the imposition of limitations on the free movement of debtors in order to secure the interests of creditors, subject to certain limitations. The referring court had suggested that the unavailability of such a remedy would mean that EU law provided a lesser standard of protection to creditors than the ECHR, in violation of Article 52(3) CFR.

AG Mengozzi stated that the EU legal system protected freedom of movement to a considerably greater degree than the ECHR. He then added that ‘[t]here exists within European Union law a legal arsenal capable of guaranteeing the rights of creditors without requiring any infringement of a debtor’s freedom of movement. I do not therefore share the referring court’s concern about the existence of a level of protection that differs between the ECHR system and the European Union legal order.’ Thus, the Opinion of AG Mengozzi in Byankov suggests, first, that the requirement in Article 52(3) CFR that the level of protection afforded by the ECHR and CFR be ‘the same’ does not require that identical remedies be available in both systems; functional equivalence will suffice. Second, AG Mengozzi’s Opinion also suggests that the requirements of the internal market may justify a refusal to accept the validity, in EU law, of remedies which are recognized as legitimate by the

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115 C-249/11, Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti, Opinion of AG Mengozzi, of 21 June 2012.
117 ibid para. 27.
118 ibid.
The ECJ arrived at the same conclusion but did not engage with this point in the same level of detail as AG Mengozzi. The Opinion of AG Mengozzi in *Byankov* suggests that there may still be some truth in de Vries’s statement that:

> in Strasbourg the proponents of economic rights might have to justify a restriction on human rights, in Luxembourg the fundamental, human rights proponents will have to ... establish that the restriction on free movement is justified on the basis of protecting fundamental rights.

In any event, cases such as *Byankov* certainly demonstrate that the CFR does not create a strict hierarchy between fundamental rights and fundamental freedoms; the court will instead endeavour to strike a balance between the two, as it did prior to the ratification of the Treaty of Lisbon.

The approach of AG Mengozzi in *Byankov* is thoroughly justified on originalist grounds. Article 6.1 TEU states that ‘[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union...which shall have the same legal value as the Treaties.’ It is plain, therefore, that the rights protected by the CFR are not superior to any of the internal market rules set out in the Treaties. Rather, the fundamental rights protected by the CFR and the market freedoms contained in the Treaties must be reconciled. In seeking to strike that balance, the court should keep the injunction in Article 52(3) in mind, however, and like AG Mengozzi in *Byankov*, should strive for functional equivalence in the standard of protection afforded by the CFR and the ECHR.

The *Radu* case falls into the fourth category, ie in that case the protection afforded by the jurisprudence of the ECtHR was deemed to be inadequate as a normative matter. AG Sharpston refused to apply the ECtHR’s jurisprudence on extradition to cases concerning the European Arrest Warrant. That ECtHR jurisprudence required contracting states to refuse an extradition request where there was likely to be a ‘flagrant disregard’ of the rights of the

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19 For the view that the exercise of rights under the CFR must be reconciled with the requirements of the internal market, see C-271/08 *European Commission v Federal Republic of Germany* (ECJ, 15 July 2010) paras. 41-50. For a case in which national standards of fundamental rights were rejected as benchmarks for the CFR on the basis *inter alia* that they conflicted with the requirements of the internal market, see C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk*, Opinion of AG Bot 12 June 2012, paras. 52-62.

20 C-249/11, *Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti*, (ECJ, 4 October 2012), para. 47.


22 C-396/11 *Parchetul de pe lângă Curtea de Apel Constanţa v Ciprian Vasile Radu*, Opinion of AG Sharpston, 18 October 2012.
accused in the event of his extradition.\textsuperscript{123} It also required an applicant to prove the risk of flagrant disregard beyond a reasonable doubt.\textsuperscript{124} AG Sharpston considered this standard deficient for a number of reasons, including its vagueness and stringency.\textsuperscript{125} Instead, she recommended applying a standard under which a European Arrest Warrant would be refused where 'the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness.'\textsuperscript{126} She also recommended applying a lower standard of proof, whereby an applicant would merely have to prove 'that his objections to the transfer are substantially well founded.'\textsuperscript{127} The ECJ did not address this issue in its judgment.

It is plain that a refusal to apply ECTHR standards on normative grounds alone is not consistent with an originalist view of the CFR. Originalist theory requires an interpreter to adhere to the text of the law being interpreted. Article 52(3) plainly indicates that CFR rights with analogues in the ECHR should be interpreted consistently with the latter. Although the case law of the ECTHR is not strictly binding, on an originalist view of Article 52(3), it has heavy presumptive weight and, thus, more than mere disapproval is required to justify departing from it. In \textit{Radu} AG Sharpston identified no textual or originalist basis for her disapproval of the ECTHR standards of review and of proof. Nor did she demonstrate that that standard was widely disapproved of by the Member States of the EU, still less that they favoured imposing a more lax standard. Thus, it must be concluded that the Opinion of AG Sharpston cannot be justified on an originalist interpretation of the CFR.

In addition to the grounds identified above, the court should also consider itself free to depart from the jurisprudence of the ECTHR when the latter violates the tenets of consociational democracy. Specifically, the court should refuse to follow decisions of the ECTHR which offend against the fundamental values of any of the Member States of the EU. As discussed in Chapter 5 of this thesis, recognising the consociational nature of the EU involves accepting that each Member State ought to have the right to veto any decision it regards as being fundamentally inimical to its values or interests.

\textbf{Conclusion}

\textsuperscript{123} \textit{Soering v United Kingdom} (1989) 11 EHRR 439.
\textsuperscript{124} \textit{Garabeyev v Russia} (2009) 49 EHRR 12.
\textsuperscript{125} \textit{Radu} (n122), Opinion of AG Sharpston, para. 82-83.
\textsuperscript{126} ibid 83.
\textsuperscript{127} ibid 85.
In the first section of this chapter I sought to demonstrate that the ECtHR had interpreted the ECHR dynamically, and in a manner which was inconsistent with its original meaning.

In the second section of the chapter I sought to show that Article 52(3) CFR, on an originalist interpretation thereof, does not impose a strict obligation on the ECJ to follow the case law of the ECtHR, though the court must afford such case law considerable weight.

In the third section of the chapter I sought to discern in what circumstances the ECJ might legitimately, and consistently with originalist theory, depart from the jurisprudence of the ECtHR, whether to provide 'more extensive protection' or for some other reason. First, I concluded that this should be permitted where the text of the CFR, interpreted according to its meaning at the time of its adoption, justified a 'more extensive' interpretation of a CFR right. Second, I concluded that the ECJ should depart from the jurisprudence of the ECtHR where that jurisprudence concerned an ECHR Protocol which had not been ratified by all Member States. Third, I concluded that, due to the equal status of the Treaties and the CFR in the EU legal order, CFR rights had to be interpreted in a manner consistent with the requirements of the internal market, as set out in the Treaties. Fourth, I argued that normative disagreement with the case law of the ECtHR did not, on an originalist analysis of Article 52(3), justify departing therefrom in the interpretation of corresponding provisions of the CFR.
CONCLUSION

The argument of this thesis was structured as follows. Part II consisted of chapters 1 to 3. In it the methods of interpretation currently employed by the court were discussed. The court's method has been variously described as purposive, teleological, and systematic in nature. In Chapter 1 of the thesis the court's method of interpretation was described in detail. It was concluded that the decisions of the court have often either exceeded the text of the law being interpreted or have directly contradicted it. In Chapter 2 of the thesis some of the arguments which have been put forward by scholars in attempting to justify the court's teleological approach were examined. These included traditional justifications, practical justifications, and moral-political justifications for the court's approach. It was argued that none of the arguments that have been put forward to justify the court's approach succeed in doing so. In Chapter 3 of the thesis a number of arguments were put forward against teleological interpretation. It was argued inter alia: that the court's approach violates the intentions of the law-maker, the Member States in the context of the CFR; that the court's approach is undemocratic; and that the court's approach ignores the fact that the purposes served by the law are more often multifarious rather than unitary. Thus, at the conclusion of Part II the conclusion was arrived at that the teleological approach of the ECJ was a fundamentally undesirable method of interpretation.

Part III consisted of chapters 4 and 5 of the thesis, in which a competing theory of Charter interpretation was put forward. Specifically, in Chapter 4 it was argued that the EU is best understood as a consociational democracy, which is to say that it is best understood as an attempt to establish structures to mediate conflicts between the different groups which constitute European society. It was submitted that it was accurate as a descriptive matter to characterize the EU as a consociational democracy, for the following reasons: first, because it is governed by coalitions of elites from all sections of EU society; second, because each Member State has a veto over important decisions affecting it; third, because proportionality is the principal standard of political representation in the EU; and, fourth, because each Member State enjoys a significant degree of autonomy, which allows it to govern its own internal affairs without external interference. In Chapter 4 it was argued that the consociational conception of the EU was also desirable from a normative point of view. The
principal arguments put forward in this regard were that recognizing the consociational nature of the EU implies an acceptance of the legitimacy of cultural pluralism as between states, which is important *inter alia* because it facilitates experimentation and peaceful co-existence between states.

In Chapter 5 the argument moved from the recognition of the legitimacy and desirability of cultural plurality in general to a discussion of the implications of that conclusion for the methods of interpretation employed by the ECJ. It was argued that the normative desirability of cultural pluralism as between states implied that the ECJ should defer to the authority of the Member States in its interpretation of the CFR which was, after all, adopted on the basis of their unanimous consent. Specifically, it was argued that recognising the normative desirability of cultural plurality between states implied recognizing the influential authority of the Member States, which should be respected by the ECJ in its interpretation of the CFR.

In Chapter 5 it was further argued, by reference to the theory of 'self-government over time,' that the authority of the Member States to direct Charter interpretation should be deemed to date from the time of the ratification of the Lisbon Treaty in 2009, the date upon which the CFR was given legal force for the first time.

Part IV contained chapters 6 to 10 of the thesis. It was devoted to a consideration of the implications of recognising the influential authority of the Member States for Charter interpretation, the overall conclusion being that the influential authority of the Member States to direct Charter interpretation implies that an originalist approach ought to be adopted in its interpretation. The first and primary indicator of the original meaning of any document is provided by its text. Therefore, in Chapter 6 some of the more important maxims of textualist interpretation were discussed, by reference to the jurisprudence of Justice Antonin Scalia and Justice Clarence Thomas of the U.S Supreme Court.

Chapter 7 discussed a difficulty which has not featured in the U.S discourse on originalism, and which the originalist justices have not had occasion to address, that of multilingualism. In Chapter 7 alternatives to multilingual interpretation were canvassed in detail. It was concluded that, rather than resorting to teleological interpretation in the face of the difficulties posed by multilingualism, the court should adopt a mixed classical and purposive approach to the resolution of divergences between the different language versions of the CFR.
Though both Chapters 6 and 7 set out certain maxims to be adopted in the interpretation of legal texts, both general and multilingual, such maxims cannot provide a complete account of interpretation, especially when applied to a human rights instrument such as the CFR, the language of which is frequently vague or abstract. Thus, it is necessary in cases where the text is obscure to have resort to supplementary sources of textual meaning.

In Chapter 8 one of these supplementary sources, namely drafting and ratification history, was considered. It was argued that the drafting and ratification history of the CFR ought to be considered in its interpretation because it is capable of casting light on the intention of the Member States with respect to the CFR at the time it was given legal effect in 2009. However, it was argued that ‘intention,’ in this context should not be understood to refer to the subjective wishes of identifiable flesh and blood authors of the CFR but, rather, to the intention which a reasonable reader would glean from a consideration of the discussions which took place at the time of the drafting and ratification of the CFR. This has been described in the literature as the ‘institutional intention’ of the lawmaker. It was also submitted in Chapter 8 that interpreters of the CFR should also give effect to the expectations reasonable people had in respect of the application of the text of the CFR at the time of its adoption. Thus, it was submitted that the ECJ should follow an ‘original text and institutional understanding’ approach in interpreting the CFR. It was further submitted that this mirrors both the public original meaning approach adopted by Justice Scalia in his interpretation of the U.S Constitution and also the slightly distinct general original meaning theory of Justice Thomas. In this chapter some of the criticisms which have been made of originalist methodology were also considered.

In Chapter 9 the last remaining indicia of textual meaning under an originalist approach was considered, namely legal tradition. It was argued that legal tradition, in both its pre- and post-ratification varieties, ought to be considered by the court in its interpretation of the CFR, where neither its text nor its drafting and ratification history dictate a particular resolution to the case at hand.

Part V contains Chapters 11 and 12 of the thesis. In Chapter 10 an originalist analysis of Article 51 of the CFR is undertaken. That provision states that the CFR shall apply to the Member States only when they are ‘implementing Union law.’ It was concluded that Article 51 of the CFR ought to be interpreted much more narrowly than the ECJ has thus far done.
Specifically, it is argued that the phrase ‘implementing Union law’ should be understood to apply to the Member States exclusively in circumstances where they are acting as agents of the EU.

In Chapter 11 an originalist analysis of Article 52(3) CFR is undertaken. That article provides as follows:

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

The key issue posed by this provision is whether it renders adherence by the ECJ to the jurisprudence of the ECHR mandatory. That jurisprudence is highly dynamic in nature and under it the ECHR is recognized as a living instrument. Thus, if on an originalist view Article 52(3) renders adherence by the ECJ to the jurisprudence of the ECHR mandatory, then the viability of an originalist approach to the interpretation of the remaining provisions of the CFR would be called into question. However, after carrying out an originalist analysis of this provision it was concluded that Article 52(3) was not originally understood to impose a binding obligation on the ECJ to adhere to the jurisprudence of the ECHR in its interpretation of the CFR. Rather, on an originalist view the jurisprudence of the ECHR is entitled to be accorded considerable respect but may be departed from for sufficient reason. In the course of Chapter 11 some of the reasons which might justify the court in departing from the decisions of the ECHR.

Much depends on the methods employed by the ECJ in its interpretation of the CFR. If the court persists in interpreting its provisions in a manner which contradicts its original meaning, as it has done thus far, certain deleterious consequences will follow. If the court continues along the path marked by such decisions as Zambrano, Dereci, and Åkerberg Fransson, under which the scope of application of EU law and of the CFR is constantly expanded, Member States will be afforded less and less space in which to develop an autonomous cultural life of their own. This would be a fundamentally undesirable outcome, since cultural values are indelibly plural, often conflicting, and are not susceptible of rational reconciliation or final determination. In such circumstances the best that can be done is to allow each Member State to offer its citizens and residents the public goods it deems most
desirable, and to allow citizens of the EU to move to the Member State which offers them the public policies they find most congenial. This is far from a perfect solution, but it has the distinct virtue of acknowledging that final solutions to the eternal questions of human rights and individual dignity do not exist, and that they must remain the subject of debate and contestation among citizens, however unsatisfying that may be to those who seek immediate gratification in rule by judicial *pronunciamento*.

By contrast, if an originalist approach were to be adopted by the ECJ in its interpretation of the CFR, and as discussed in Chapter 10, its scope of application would be narrowed and the autonomy of the individual Member States of the EU would accordingly be enhanced. Moreover, the adoption of an originalist approach to the interpretation of the substantive provisions of the CFR would ensure that the rights contained therein would be defined in a manner which would not interfere with the fundamental values and moral commitments of any of the Member States. In this way the cultural autonomy of each of the Member States could be preserved, so as to facilitate further experimentation and discussion in relation to fundamental matters of human rights which, as was submitted in Chapter 4 of this thesis, holds out the best prospect of arriving at mutually agreeable compromises between states and cultures with often implacably opposing views on some of the most fundamental questions of philosophy and morality.
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