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Perfectionism in European Law

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PERFECTIONISM IN EUROPEAN LAW

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Abstract: European law manifests powerful perfection-seeking internal dynamics, nudging – even compelling – legal actors to strive to make the European legal order ‘the best it can be’. This article uses a comparative approach to show that this perfectionism is contingent (i.e. not necessarily shared by all legal orders), and that it is a highly distinctive characteristic of European legalism specifically. Uncovering the hidden dynamics of this juridical perfectionism is an important step towards rethinking European law’s agency and its correlate: our own ability to shape European integration through law.

I. INTRODUCTION

A. On the character of European law as legal knowledge

This article advances a claim pertaining to the character, or the style, of European law as legal knowledge. The argument will be that this body of knowledge manifests powerful ‘perfection-seeking’ dynamics that compel and constrain legal actors in ways not always sufficiently acknowledged. The ‘perfectionist’ label is an effort to capture a broad range of familiar habits and trends in European law, such as the instability of doctrinal strictures in the face of the relentless pursuit of ‘*effet utile*’

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and the legal protection of individuals,¹ the extension of principles and ideals to their logical extremes, insistence on ‘completeness’ and ‘coherence’ for different areas of European law,² or the compulsion to consider ‘all the relevant circumstances’ of each individual case in the context of proportionality assessments. What these traits have in common, the article argues, is that they are all, in different but related ways, manifestations of an underlying drive to make the European legal order ‘the best it can be’.³ Making European law’s distinctive perfectionism explicit, by way of comparison with the character of legal knowledge elsewhere, allows us to view these and other seemingly disparate phenomena as related, and offers the prospect, if not of liberation, then at least of raising consciousness about how the internal dynamics of legal thought may affect our ability to shape the future of European integration through law.

Reflection on the full extent of law’s significance to the project of European integration still has the power to surprise, perhaps even readers of a Yearbook of European *Legal Studies*. Its reach cannot be captured merely through the scope and force of individual doctrines (supremacy, proportionality review), or the power of individual institutions (Court of Justice, Legal Service of the Commission), awesome though some of these are. Law’s hegemonic status rather emerges most fully from the way in which *legal knowledge* has become established as a “generalist or transversal knowledge of European government, whose mastery is deemed indispensable for those who want to authoritatively participate in debates over its functioning or dis-functioning”.⁴ More than being simply asymmetrically important relative to domains such as politics,⁵ the European legal domain in fact *frames* these other realms, and dictates the terms on which they can be understood.⁶

And yet, despite this ubiquity of law in Europe, we actually know relatively little about the character of ‘the legal’ as it relates to European integration. At the

¹ Familiar, examples include the ‘purely internal situation’ rule in Citizenship law (Case C-34/09 *Ruiz-Zambrano* [nyr]); the ‘no horizontal direct effect’ rule for Directives (e.g. Case C-144/04 *Mangold* [2005] ECR I 9981); and the instability of the ‘selling arrangements’ category in the post-*Keck* case law on the free movement of goods.

² Famously: Case C-50/00 *Unión de Pequeños Agricultores* [2002] ECR I 6677 (Opinion of Advocate General Jacobs, para. 28: ‘complete system of remedies’).

³ A more detailed overview of varieties of perfectionist legal thought, and a discussion of the obvious objection that participants in *any* legal order can surely be expected to want to make theirs the best it can be, are presented below, in Part II.

⁴ Vauchez, A, ‘The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)’ (2008) 2 *International Political Sociology* 128, 134.

⁵ Cf. Scharpf, *The Double Asymmetry of European Integration* (MPfIG Working Paper 09/12); Everson, M, & Eisner, J, *The Making of a European Constitution* (Routledge 2007) 2 ff.

⁶ Cf. Vauchez (2008), 129; Everson & Eisner (2007), 3.

heart of this relative ignorance lies a pervasive tendency in European studies to accord law the status of a mere 'dependent variable' - an instrument wielded by, or on behalf of, actors whose *extra*-legal powers and interests are the real object of concern.⁷ In these approaches, what gets lost is attention to the character of legal knowledge itself, and to how the internal dynamics of what could be called 'the strictly juridical' constrains and enables those who invoke the law, and those whom it addresses.⁸ Despite its paramount status, European law as legal knowledge is, as the American legal anthropologist Annelise Riles has recently put it for another field, not studied "as a cultural phenomenon in its own right", but merely "as a function of social, political, and economic forces".⁹

Over the past few years, however, there have been signs of a shift in focus. In 2006, for example, Mauricio García-Villegas, building on the work of the sociologist Pierre Bourdieu, called for greater attention to the "*internal logic of legal thought*" as part of an attempt "to gain a better understanding of the sociology(ies) of law in a comparative perspective".¹⁰ Michelle Everson and Julia Eisner, in their 2007 book '*The Making of a European Constitution*', proposed to try "*seeing into the mind of European law*", by turning away from "traditional doctrinal legal analysis to instead embrace and deploy socio-legal methodologies that seek to pry behind the façade of formal law".¹¹ And a recent high-profile addition to this literature, finally, is Daniel Kelemen's '*Eurolegalism*', which identifies a distinct, European "legal and regulatory style" that can be compared and contrasted with the style of 'adversarial legalism' said to be prevalent in the United States.¹² These projects differ considerably in their

⁷ Cf. Vauchez (2008), 129 ff. This 'dependent variable' approach can be seen as an aspect of more general, pervasive, instrumentalist understandings of law. See e.g. Joerges, C, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' (1996) 2 *European Law Journal* 105, 105 ("... political science analyses, ..., tend to rely upon an instrumentalist view of the legal system which fails to acknowledge the Law's normative logic and discursive power").

⁸ Cf. Bourdieu, P, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings. Law Journal* 814, 816.

⁹ Cf. Riles, A, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011), 18.

¹⁰ García-Villegas, M, 'Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States' (2006) 31 *Law & Social Inquiry* 343, 344 (emphasis added). This call was taken up explicitly in Gessner, V, & Nelken, D, *European Ways of Law: Towards a European Sociology of Law* (Hart Publishing, 2007), 7.

¹¹ Everson & Eisner (2007), 5-9. The authors call for "re-locating the primary focus on the role of law in constitutional progress" (at 6), and for attention to the "fundamental, but nitty-gritty question, of how law maintains its own impartiality, or autonomous character, but, likewise, responds appropriately to a real-world and its very immediate social and political demands", the question, in short of "law's *proprium*" (at 9, emphasis in original).

¹² Kelemen, D, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011).

methods and their interests.¹³ But they do share an interest in the nature and agency of conceptions of law prevalent among European legal actors – a concern to understand not only what actors *do with* European law, but also the internal dynamics of legal knowledge and what that knowledge *does to* understandings of, and capacities for intervention in, the processes of European integration.

B. Perfectionism as a dominant working image of European legalism: Genealogy and comparison

This article aims to contribute to these efforts to take the juridical element in European law seriously. It will do so by analyzing what will be claimed is an important unacknowledged strand in European legalism – the idea of legal perfectionism. Perfectionism, the article will argue, is a useful way of capturing part of the distinctive quality of (ideal typical representations of) dominant working images of ‘what good law should look like’, as they are operative within the relevant European legal epistemic communities.¹⁴

There are two principal ways of elaborating an argument as to the distinctive quality of contemporary European legalism - perfectionist or otherwise. The first of these looks inwards, tracing genealogies of ideas and practices originating in the legal systems of one or more EU Member States. For the idea of perfectionism specifically, a strong thesis along these lines could arguably be construed on the basis of dominant tendencies in early post-War German constitutional legal thought. The judicial and the academic constitutional legal discourse of the late 1950s and early 1960s – the period when the Federal Constitutional Court handed down many of its foundational decisions - are striking for their incessant references to ideals of

¹³ Notably in their selection of the relevant materials (legal doctrine, social processes, institutional organization, *etc.*) and the conceptual level at which observations are framed (law’s ‘*proprium*’, the nature of a ‘juridical field’, a ‘style’ of law and regulation, *etc.*). See also Loughlin, M, ‘The Functionalist Style in Public Law’ (2005) 55 *University of Toronto Law Journal* 361 (including elements of political and constitutional theory alongside ideas within – and on – law proper).

¹⁴ Cf. Joerges, C, ‘Law, Economics and Politics in the Constitutionalisation of Europe’ (2002-2003) 5 *Cambridge Yearbook of European Legal Studies*, 128. ‘European legalism’ will be defined here as dominant, if often implicit, views of what ‘good law’ should look like, operative among legal elites, in the broad area of ‘European constitutional law’, comprised of EU law and European human rights law. These views can be characterized as “working legal thought”, active at the level of “the higher reaches of the law where the learned tradition is propounded” and judicially implemented. See for these terms Galanter, M, ‘Why the Haves Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95, 147; Grey, TC, ‘Judicial Review and Legal Pragmatism’ (2003) 38 *Wake Forest Law Review* 473, 478.

expansion, intensification, and other forms of what could, at least intuitively, be called the *betterment* of the – then new – constitutional legal order. The Basic Law, for example, was thought to embody an “*absolut vollständige Oberrechtsordnung*” – a fully comprehensive overarching legal order,¹⁵ with a “*zusammenordnende und einheitsbildende Wirkung*” – a harmonizing and unifying role.¹⁶ The judicial task in this comprehensive constitutional legal arrangement was to ensure a ‘perfect fit’ between its normative ideals and their realization in social life.¹⁷ Courts, in other influential formulations, were to strive for ‘*optimization*’,¹⁸ and, in cases of conflict, for a “*nach beide Seiten hin schonendsten Ausgleich*” – an accommodation that would render all competing values in play optimally effective.¹⁹

A genealogical argument as to the character of European legalism could trace the influence on current European understandings of these and other similar German themes and tropes, perhaps alongside comparable ones from other juridically influential Member States. There are, however, significant limitations to what such a line of inquiry can accomplish.²⁰ The most important of these stems from the following. Familiar central elements of a locally dominant legal style are unlikely to be identified and discussed as such within their ‘home’ legal order. They are, in Bourdieu’s words, simply ‘*doxa*’ – ‘that which appears self-evident’ – and are

¹⁵ Roellecke, G, ‘Prinzipien der Verfassungsinterpretation in der Rechtsprechung des Bundesverfassungsgerichts’, in Starck, C, (ed.), *Bundesverfassungsgericht und Grundgesetz II* (Mohr, 1976), 33. As the FCC put it in a 1965 decision, the Basic Law was understood to stand for “*eine einheitliche Ordnung des politischen und gesellschaftlichen Lebens der staatlichen Gemeinschaft*” – “a unified ordering of the political and social life of State and society”. See BVerfGE 19, 206; 220 (*Kirchenbausteuer*) [1965]. Others spoke of the “*Allgegenwart des Verfassungsrechts*” – “the omnipresence of constitutional law”. See Ehmke, H, ‘Prinzipien der Verfassungsinterpretation’ (1963) 20 VVDStRL 70-71.

¹⁶ Cf. Häberle, P, *Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz* (C.H. Beck, 1962), 6 (citing Rudolf Smend). See also Hesse, K, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (C.F. Müller, 1975), 5 (relying heavily on Smend’s integration theory).

¹⁷ Häberle (1962), 44 (“The Constitution intends, through its guarantees of constitutional rights, *to make sure that normativity and normality run ‘parallel’*”) (emphasis added; quotation marks in original). The anthropomorphism is typical for the relevant discussions. A leading critic of the tendencies described here, Ernst Forsthoff, argued that the FCC’s case law showed how deeply the Court’s members were “conscious of its *comprehensive responsibility for the constitution-conformity of legal life*”. See Forsthoff, E, ‘Die Umbildung des Verfassungsgesetzes’ (1959), in *Rechtstaat im Wandel* (W. Kohlhammer, 1964), 151 (emphasis added in translation).

¹⁸ Hesse (1975), 28. Hesse’s famous labels for this process were ‘*optimierung*’ and ‘*das Prinzip der praktischen Konkordanz*’, or ‘the principle of practical concordance’, both said to be required by the underlying principle of the unity of the Constitution.

¹⁹ Müller, F, *Normstruktur und Normativität* (Duncker & Humblot, 1966), 213.

²⁰ An additional complication is that the analysis required – of post-War German constitutional legal thought itself, in this case, and of its imprint on ideas on a European level – easily exceeds what is possible in the space of this contribution. I explore these ‘perfectionist’ themes in early post-War German constitutional legal thought, and their reverberations in contemporary global constitutionalism, at length in forthcoming work.

therefore generally not thought of as requiring any distinctive label.²¹ And indeed: the range of themes and tropes highlighted above as possibly in a meaningful sense ‘perfectionist’, were - and are - not discussed in this way, or in fact under any other comprehensive heading, in German constitutional law itself.²² As a result, an internal, genealogical, approach, by itself, cannot easily provide the necessary argument for treating these various modes of reasoning together, as manifestations of a distinctive, common underlying category.

It is precisely this type of argument for which an outward looking, comparative approach is especially well suited, both in general and, it is submitted, for the idea of perfection specifically. ‘Perfectionism’, it so happens, figures as an explicit label in debates in US American constitutional legal theory, most notably in the work of Cass Sunstein and James Fleming.²³ Interestingly, as will be discussed below, they, and other writers like Ronald Dworkin, who similarly invoke the imagery of perfection, do so to describe ideas very closely related to the German ones outlined in their briefest form above. Interestingly also, these writers tend to portray dominant American constitutional legal practice as in some ways *not* ‘perfectionist’ in the sense they understand the label.²⁴ Study of this ‘perfectionism’ debate in American constitutional legal thought, therefore, is likely to bring two immediate benefits. First, it can support an initial suggestion that many of the elements outlined above (*‘effet utile’*, proportionality, *etc.*) – which may in some cases appear radically contradictory – could indeed be connected on a deeper level. And second, if ‘perfectionism’, defined at its most basic as an ambition to make a legal order the best it can be, can only realistically have a distinctive meaning if there are legal actors who, in some way, *do not* share that ambition, then the American experience suggests that this precondition could indeed be met.

This article, then, offers a preliminary exploration of the character of European legalism by way of a study of the ‘perfectionism’ debate in American constitutional legal theory. It compares elements of ‘perfection’ explicitly identified in the US to more implicit phenomena familiar in European law, in order to answer three

²¹ Bourdieu, P, *Outline of a Theory of Practice* (Cambridge University Press, 1977), 164.

²² The most significant candidate for a category encompassing much – though not all – of these ‘perfectionist’ themes would be Rudolf Smend’s idea of ‘material constitutionalism’.

²³ See e.g. Sunstein, CR, *Radicals in Robes: Why Extreme Right-Wing Courts are Bad for America* (Basic Books, 2005); Fleming, JE, *Securing Constitutional Democracy: The Case of Autonomy* (University of Chicago Press, 2006); Dworkin, R, *Law’s Empire* (Hart Publishing, 1998), 229 ff (interpreting law so as to make it the “best it can be”), 243 (“best light possible”). Dworkin’s seminal notion of ‘integrity’ is often treated as synonymous with ‘perfection’.

²⁴ Sunstein, for example, observes that “[p]erfectionism can easily be found in the major law schools, but ... is rare on the federal courts”, in contrast to the ‘fundamentalism’ (originalism) and ‘minimalism’ which he sees as “the principal antagonists in contemporary constitutional law”. Sunstein (2005), 31-33.

basic questions.²⁵ First, are ‘perfectionism’ and ‘non-’ or ‘anti-perfectionism’ useful lenses for distinguishing between different legalisms? Second, if so, can these categories validly describe pertinent differences between working images of ‘good law’ in the US American and European constitutional spheres? And third, if underlying working images of ‘good law’ in Europe are indeed in some relevant sense ‘perfectionist’, what, if anything, is the broader significance of this characteristic?

C. Parameters and assumptions

The search for distinctive characteristics of European legalism under a ‘perfectionist’ heading is informed and circumscribed by the following parameters and assumptions.

First, although the search is for perfectionism as a legalism, that is: relating to understandings and beliefs concerning the internal dynamics of juridical functioning, in particular in the area of constitutional law, there may be difficult questions of overlap with perfectionist thought in other domains. Some of the ideas discussed below as manifestations of *legal* perfectionism may in fact have to be located at least in part, or even primarily, in the field of constitutional theory.²⁶ Other perfectionist ideas may be very closely related to the specificities of the European integration project, in terms of its driving ideals and practical implementation.

Of particular importance is the demarcation with regard to moral and political philosophy. These latter fields are in fact those where the term ‘perfectionism’ is most often encountered. There, it is used to refer to teleological accounts of ethics or political morality that depend on an objective theory of the human good.²⁷ There are indications that ‘perfectionism’ as political philosophy may have special relevance to the European integration project. Damian Chalmers, in particular, has recently invoked the Aristotelian, archetypically perfectionist, concept of ‘*Eudaimonia*’ to advance an argument as to why European law might be unusually demanding and

²⁵ Of course this comparative approach also comes with an important limitation: one cannot assume that perfectionism *itself* will mean exactly the same thing in different settings. There are likely to be different strands of perfectionist legal thought, receiving varying degrees of emphasis, as between, say, the German, European, or US settings. The article builds on – and, it is argued, confirms – the hypothesis that there are sufficient family resemblances between these different versions to justify studying them together as part of the same basic category. See also fn. 107, below.

²⁶ It should be noted that the comparison with US legal materials, conducted below, refers exclusively to *constitutional* legal thought.

²⁷ Cf. Hurka, T, *Perfectionism* (Oxford University Press, 1993).

“cumbersome”.²⁸ As he writes, *Eudaimonia* “is about *combining a politics of virtue with a politics of success* in which demands of government, society and the citizen are made *to be ever better*”.²⁹ This ‘perfectionism’,³⁰ Chalmers argues, “underpins the justification for any EU legal norm; the sense of what any EU legal norm is about”.³¹ While a general openness to ‘the substantive’ – values, philosophies, ideals – will be identified as a hallmark of perfectionist legalisms below, the fascinating question as to whether a European perfectionist legalism might be undergirded by a specific European perfectionist political morality, will have to remain outside the scope of this article.³²

Second, it is important to address two questions relating to reasonable expectations for a concept of legal perfectionism: How do we know whether any arrived-at ‘perfectionist’ image is in any way accurate in the context of European law; and how do we judge whether ‘perfectionism’, as yet another label, has any added value? In terms of the standards for validity, it seems reasonable to demand at least a certain degree of fit with what we already think we know about European law. Especially strong supporting arguments would be required, for example, if ‘perfectionism’ were to reveal itself entirely at odds with such widely noted characteristics of European law as the Court of Justice’s (meta)-teleological style of interpretation, or the relative formality of its reasoning. Such a basic degree of fit is significant in another way as well. One important potential source of added value for perfectionism as a lens for looking at European legalism, it is claimed, lies in its capacity for making sense of apparent legal paradoxes; for reconciling widely noted, but otherwise not easily mutually compatible characteristics of European law. In fact, it will be argued below that perfectionism as a label can do precisely this with regard to the clash between two common observations on the Court of Justice’s case law: its relative *formality* – in terms of the terseness of its reasoning and its predilection for conceptual system-building – on the one hand, and the often extreme *informality*

²⁸ Chalmers, D, ‘Gauging the Cumbersomeness of EU Law’ (2009) 62 *Current Legal Problems* 405. For another discussion of perfectionist themes and their relation to the scope and authority of EU law, see Somek, A, *Individualism: An Essay on the Authority of the European Union* (Oxford University Press, 2008).

²⁹ Chalmers (2009), 412 (emphasis added).

³⁰ Chalmers uses the term at 412.

³¹ *Ibid.*, 406. EU law’s unusually ‘demanding’ character, as compared to domestic law, is thought to stem from the need to justify its transnational existence.

³² It may be noted that the idea of ‘perfect’ individual freedom in a libertarian sense is very unlikely to be part of such a European political morality, and does in fact prove a much better fit with important strands in American constitutional legal thought. See e.g. Fried, C, ‘Perfect Freedom, Perfect Justice’ (1998) 78 *Boston University Law Review*, 721 (calling this “the *Lochnerian* vision of perfect freedom”, after the famous early twentieth century Supreme Court decision).

of its 'all-circumstances-considered' assessments in the context of proportionality and other tests, on the other. Both these argumentative strategies, it is suggested, emanate from the same sense of compulsion that lies at the heart of a perfection-seeking legalism.³³

Finally, and building on this last point, it should be emphasized that there is no reason to expect that any prevalent working image of law - whether European or American, 'perfectionist' or otherwise - will be fully internally coherent or uncontested. The ideal of perfecting a particular legal order is in fact highly likely to require the fulfillment of irreconcilable criteria that are all integral to locally cherished notions of what 'good law' should look like. The attempt to elaborate meanings for perfectionism on the basis of debates in constitutional legal theory will have to be guided by this realization. The search will not be for a formal definition, but for a list of typical characteristics, best understood, in turn, as extremes on a series of antinomies, on which the 'perfectionist' end of each scale bears some family resemblance to one or more of the 'perfectionist' extremes on the others. The meaning of each individual characteristics will be informed by both these family resemblances, and by the nature of the conceptual opposite on the relevant scale. And above all, this search should build on the conviction that the way people *talk about* their ideal images of law *matters*, even if these ideal images are impossible to capture with any finality.

II. VARIETIES OF LEGAL PERFECTIONISM

A. Introduction

The claim that the European legal order might be, in an intuitive sense, perfection-seeking has a certain appeal. The Union's foundational documents call for an '*ever closer Union*'. Its legislature has often pursued, and has been permitted to pursue, a maximizing approach to its remit – think in particular of the powers under the current Articles 114 and 352 TFEU - leading to familiar accusations of 'competence creep'.³⁴ And its main judicial body has long been, if not an activist court, then certainly an *active* agent in expanding the scope, depth and authority of

³³ The link between formality and compulsion (more commonly called constraint) is well known. See e.g. Schauer, F, 'Formalism' (1988) 97 *Yale Law Journal* 509. The argument underlying the present article is that an ideal of 'perfect justice on the circumstances of every case', and other perfectionist legal ideals, might engender a similar kind of compulsion.

³⁴ E.g. Weatherill, S, 'Competence creep and competence control' (2004) 23 *Yearbook of European Law* 1.

EU law. All these characteristics – teleology, maximization and judicial activism or activity – are easily relatable to ideas on the pursuit of some form of perfection in law.

If, however, the search is for ‘perfectionism’ as a *distinctive* characteristic of European legalism, then these initial impressions cannot suffice. A basic comparison with US materials shows why. The American Constitution famously calls for a ‘*more perfect Union*’. Its federal authorities have pursued, and have constitutionally largely been allowed to pursue, an expansive reading of their powers under such broadly worded provisions as the Commerce Clause. And the juridification and judicialization of political and other domains through law and powerful courts is at least as pertinent to the American situation as it is to other Western democracies.

While basic ideas such as teleology, maximization, juridification and judicialization are likely to form part of a ‘perfectionist’ account of law, they will have to be refined and complemented if they are to be useful for a comparative project of distinguishing typical US American and European legalisms. This Part aims to carry out this conceptual refinement in two ways. A first Section analyzes explicit debates on ‘perfectionism’ in US constitutional legal theory, looking in particular at various definitions proposed in academic writing. A second Section builds on these partial definitions to present a range of anti-perfectionist ideas and practices in US constitutional law. These ideas and practices will then be contrasted with their suggested prevalent European counterparts in Part III.

B. Perfectionism as a cultural theme in US constitutional legal theory

As a cultural theme in American constitutional legal thought, the perfectionist style is most easily accessible by way of a search for instances in which the language of perfection (or its opposites) is invoked explicitly in framing theoretical disagreements in constitutional law. A useful starting point from this perspective is the best known of these invocations: Henry Monaghan's 1981 article '*Our Perfect Constitution*'.³⁵ Monaghan uses the label 'perfectionism' to describe a range of approaches to constitutional interpretation united in their "looking outward to current or emerging conceptions of political morality".³⁶ These approaches are contrasted with those that instead – and appropriately, in Monaghan's view – look 'backwards', to original intent and precedent.³⁷ In Monaghan's depiction, perfectionist writers see the constitution as "perfect with a small 'p'" in that "a necessary link is asserted between the constitution and currently 'valid' notions of rights, equality and distributive justice".³⁸

This principal contrast, between 'perfectionism' and interpretive approaches based on original meaning figures prominently also in the work of other writers who invoke similar language. This is the case in particular for the most prominent 'perfectionist' listed by Monaghan and also later identified as such by others: Ronald Dworkin. Dworkin, as Cass Sunstein has noted more recently, does not himself use terms like 'perfection' or 'perfectionism' directly, but he does famously write of the need to read legal materials "in their best constructive light" so as to make them "the best they can be".³⁹ In '*Law's Empire*', Dworkin draws a basic distinction between his own (perfectionist) position, which he calls 'law as integrity',⁴⁰ and an approach labeled 'conventionalism' – judicial decision making based on respect for "past explicit decisions of political institutions".⁴¹ Dworkin's account gives further flavour to

³⁵ Monaghan, HP, 'Our Perfect Constitution' (1981) 56 *New York University Law Review* 353 (referring to perfectionism as a "culture theme", at 374). For a recent reinterpretation of Monaghan's thesis, see Tushnet, MV, "Our Perfect Constitution" Revisited', in Berkowitz, P, *Terrorism, The Laws of War, and the Constitution* (Hoover Press, 2005). See also Marc Graber, 'Our (Im)Perfect Constitution', 51 *Review of Politics* 1989 (describing an "attitude of perfect constitutionalism").

³⁶ *Ibid.*, 360-361.

³⁷ *Ibid.* (Monaghan summarizes a typical 'perfectionist' position as the idea that "constitutional adjudication should enforce those ... values which are fundamental to our society", referring to Paul Brest).

³⁸ *Ibid.*, 358.

³⁹ Sunstein (2005), 32.

⁴⁰ *E.g.* Dworkin (1998), 225.

⁴¹ *Ibid.*, 147.

possible meanings of perfectionism where he deals explicitly with a Monaghan-type objection: the critique that his arguments “always seem to have *happy endings* [, or] at any rate, liberal endings”.⁴² In response, Dworkin readily concedes that “constitutional opinion is sensitive to political conviction” - which in his case would indeed be a broadly liberal conviction - but emphasizes that such influence is common to all interpretive approaches, with the exception of “an unbelievably crude form of legal positivism”.⁴³ Dworkin elaborates: “It is in the nature of legal interpretation – not just but particularly constitutional interpretation – to aim at happy endings. There is no alternative, except aiming at unhappy ones, because once the pure form of originalism is rejected there is no such thing as neutral accuracy. Telling it how it is means, up to a point, telling it how it should be”.⁴⁴

Apart from this dimension of perfectionism as aiming for ‘happy endings’, or liberal outcomes, Dworkin’s work is helpful in outlining not just one – ‘conventionalism’ – but also a second conceptual opposite to perfectionism: ‘pragmatism’. The contours of this third category, and its influence on the meaning of perfectionism itself, play a major role in the two main recent analyses of perfectionism in American constitutional law: Cass Sunstein’s *Radicals in Robes* (2005) and James Fleming’s *Securing Constitutional Democracy* (2006).

One of Sunstein’s abiding concerns has been to promote ‘judicial minimalism’ as an appropriate conception of the judicial task.⁴⁵ In his early work on this topic, Sunstein contrasted ‘minimalism’ – “saying no more than necessary to justify an outcome, and leaving as much as possible undecided” -, with what he then called ‘maximalism’: the effort to “decide cases in a way that establishes broad rules for the future and that also gives deep theoretical justifications for outcomes”.⁴⁶ In *Radicals in Robes*, this binary opposition of minimalism and maximalism evolves into a quadriptych of fundamentalism, minimalism, majoritarianism and perfectionism.⁴⁷ For fundamentalists, constitutional interpretation “requires an act of *rediscovery*. Their goal is to return to what they see as the essential source of constitutional meaning:

⁴² Dworkin, R, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996), 36 (emphasis added).

⁴³ *Ibid.*, 37.

⁴⁴ *Ibid.*, 38.

⁴⁵ See in particular Sunstein, CR, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999).

⁴⁶ Sunstein, CR, ‘Foreword: Leaving Things Undecided’ (1996) 110 *Harvard Law Review*, 6-7, 15. See also Sunstein (1999), 62 (writing that Justices Hugo Black and Antonin Scalia are “substantive maximalists in the sense that [they have] an elaborate understanding of the nature of the Constitution’s substantive commitments”).

⁴⁷ In his earlier work, Sunstein only uses the term ‘perfectionism’ in its traditional moral and political philosophy sense.

the views of those who ratified the document”.⁴⁸ Fundamentalists, as Sunstein portrays them, have a “broad and ambitious theory of constitutional interpretation”, and often seek “large-scale changes in constitutional law”, even though they tend to believe that their theory reflects “the right kind of judicial modesty”.⁴⁹ On the Supreme Court, Justice Scalia’s originalism is the archetypical example of fundamentalism. Fundamentalists are opposed by minimalists, who “dislike ambitious theories” and who prefer “shallow rulings over deep ones”, notably in the form of “*incompletely theorized agreements* in which the most fundamental questions are left undecided”.⁵⁰ Majoritarians, or advocates of ‘*nonpartisan restraint*’, believe judges “should give the benefit of the doubt to the elected branches”, and should generally “uphold legislation unless it is clearly beyond constitutional boundaries”.⁵¹ John Hart Ely’s famous democratic-process-enforcing theory is a classical example of what Sunstein calls majoritarianism. This leaves ‘perfectionists’. Their belief is that “the continuing judicial task is to make the [Constitution] as good as it can be by interpreting its broad terms in a way that casts its ideals in the best possible light”.⁵² Sunstein lists the Warren Court and Ronald Dworkin’s work as key examples of perfectionism.⁵³

How do Sunstein’s dichotomy and his division-in-four fit with each other, and what do these different categories tell us about the intended meaning of perfectionism? Majoritarianism, or process-thinking, for Sunstein has crucial elements in common with minimalism.⁵⁴ This suggests that fundamentalism and perfectionism are both variants of ‘maximalism’, united by a preference for ‘*breadth*’, ‘*depth*’, and ‘*ambition*’ in (constitutional) legal reasoning.

A final set of relationships between these various categories emerges in the work of James Fleming. Fleming’s overall project can be understood as a critique of what he sees as pervasive ‘*flights from substance*’ in American constitutional law and legal theory.⁵⁵ His two main targets as substance-avoiding strategies are flights to ‘process’, as in John Hart Ely’s theory, and flights to ‘original understanding’, as in Justice Scalia’s and others’ originalism.⁵⁶ Interpreting constitutional provisions in solely terms of their contribution to the safeguarding of democratic deliberation

⁴⁸ Sunstein (2005), 26 (emphasis in original).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 27-28 (emphasis in original).

⁵¹ *Ibid.*, 44, 50 (emphasis in original).

⁵² *Ibid.*, 31-32.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 50 ff. In Sunstein’s depiction, ‘minimalism’ has a dimension of incrementalism that ‘majoritarianism’ lacks.

⁵⁵ See e.g. Fleming, JE, ‘*Constructing the Substantive Constitution*’ (1993) 72 *Texas Law Review* 211.

⁵⁶ *Ibid.*, 213. Fleming sees Sunstein’s minimalism as a sophisticated form of process-thinking (at 216-217 ff).

(process) or in light of their meaning at the time of their adoption (originalism), in Fleming’s view, means failing to do justice to the substantive ideals that constitutional law embodies.⁵⁷ Given that Fleming sees Sunstein’s minimalism as a sophisticated form of process-thinking – *à la* Ely – and that, like Sunstein, he takes Dworkin to be a principal proponent of ‘substantivism’ in (constitutional) law,⁵⁸ there is a well nigh complete congruence between Sunstein’s and Fleming’s categories. Fleming’s ‘constitution perfecting’ theory, then, is presented first and foremost as a ‘substantive’ alternative in a constitutional legal climate dominated by anti- or non-substantive theories.⁵⁹ Fleming’s perfectionism is also an ambitious – Sunstein would say ‘maximalist’ – alternative to more cautious, minimalist, understandings of the appropriate role for constitutional law and courts.

Figure 1. Conceptual Grid: Approximate comparisons

Sunstein	Fleming	Dworkin
(I) Maximalism	(I) Substance	(I) Integrity
(I.1) Perfectionism	(I.1) Perfectionism	
	(II) Flights from substance	
(I.2) Fundamentalism/originalism	(II.1) Originalism	(II) Conventionalism
(II) Minimalism		
(II.1) Decisional minimalism		(III) Pragmatism
(II.2) Majoritarianism	(II.2) Process-thinking	

⁵⁷ *Ibid.*, 213 (“The substance that [process thinking and originalism] are said to flee is not only substantive liberties ..., but also substantive political theory in interpreting the Constitution”).

⁵⁸ *Ibid.*, 213. Fleming notes that Dworkin’s famous article the ‘Forum of Principle’ was originally entitled ‘The Flight from Substance’.

⁵⁹ See also Tribe, LH, ‘The Puzzling Persistence of Process-Based Constitutional Theories’ (1980) 89 *Yale Law Journal* 1063.

C. Possible meanings for ‘perfection’ in law

Starting from these basic conceptual schemes, what meanings can be attributed to the perfectionist label, and to ‘perfection’-oriented legal rhetoric more generally, as it figures in American constitutional legal discourse? The following elements seem to be among those most commonly invoked.

(1) Aspiration. Perfectionism in the sense of trying to make a Constitution, or legal materials generally, “the best they can be”, could mean, and for Fleming and Dworkin does mean, aiming for “happy endings”, in terms of concrete outcomes.⁶⁰ Perfectionism, in this sense, exhorts legal actors to honour their legal order’s “aspirational principles” rather than merely follow “historical practices and concrete original understanding”.⁶¹ This approach implies a certain level of optimism or faith in the capacities of public institutions generally, and courts in particular, to achieve these desired outcomes, and a willingness to look forward, to results to be achieved, rather than merely backward, to historical agreement. It also ties in with expansive understandings of law discussed below under the headings of ‘intensity’ (4) and ‘comprehensive’ (5), two other prominent dimensions of liberal approaches to constitutional law.

(2) Substance. In all depictions outlined above, perfectionism refers to an understanding of the role of constitutional law and courts as not limited to merely securing the procedural framework for effective self-government. This is particularly explicit in the case of James Fleming, who sets out as his principal ambition “to do for ‘substance’ what [John Hart] Ely has done for ‘process’”.⁶² References to ‘the substantive’ in law are notoriously ambiguous, and the basic contrast with ‘process’ only goes some way in clarifying matters. On one view, ‘substance’ can mean the substantive principles thought to inhere in the constitutional framework – the aspirational principles mentioned under (1), above. But ‘substance’ could also mean ‘substantive justice’, on some extra-constitutional criterion. Fleming, for one, makes it clear that an idea of a “perfectly just” Constitution, “unmoored by the constraints of our constitutional text, history, and structure”, is not what he has in mind.⁶³ But the precise role of extra-constitutional values in perfectionist accounts – especially where

⁶⁰ Fleming (2006), 211.

⁶¹ *Ibid.*, 227.

⁶² Fleming, JE, ‘The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution’ (2007) 75 *Fordham Law Review*, 2888. For other references to Ely’s work as “process-perfecting” and for a contrast with “judgments about substantive issues”, see Tribe, ‘The Puzzling Persistence of Process-Based Constitutional Theories’ (1980), 1063-1064.

⁶³ Fleming (2006), 6.

interpreters disagree over what principles are to be found in a constitutional legal text in the first place – remains somewhat unsettled.

(3) Coherence / constructivism. Perfectionism may refer to theories of interpretation that emphasize the virtues of coherence over more localized forms of reasoning and interpretation. Coherence-seeking perfectionism can come in at least two versions. In the thinner of these, perfectionism is simply synonymous with ‘systematic’ and ‘meta-teleological’ interpretation.⁶⁴ Perfection, on this view, is related to maximization in terms of typical juridical virtues - equal treatment and legal certainty, notably –, but also to the importance of formal, scientific, reasoning in the sense pursued by the nineteenth century builders of *Begriffspyramiden*, and even to a more general Western aesthetic of system and symmetry. In a thicker sense, however, perfection-as-coherence moves away from these more classical, formal, virtues, and adopts the more substantive, constructivist, hue favoured by Dworkin. On that view, trying to make legal materials ‘the best they can be’ would involve interpreting them constructively, in light of the “best justification of ... legal practices as a whole”, through recourse to moral theory.⁶⁵

(4) Maximal intensity. Related to both the aspirational and substantive dimensions listed above is an understanding of perfectionism in terms of the intensity, or stringency, of rights protection.⁶⁶ This form of perfectionism finds its primary expression in the rhetoric of ‘higher’ and ‘lower’, or ‘stronger’ and ‘weaker’, levels of rights protection. Intensity differs from ‘aspiration’ in that it refers to outcomes rather than to an underlying style of reasoning. A backward-looking, originalist interpretation of a particular rights clause, the First or Second Amendments to the US Constitution for example, may not easily be called perfectionist in any aspirational sense, but could well, in some cases, produce more intense rights protection than alternatives. Intensity is also different from ‘substance’ in that the latter refers rather to *the range* of principles that are allowed to inform constitutional adjudication, while the former refers to *the strength* of the protection afforded to particular rights claims in specific situations.

⁶⁴ *Ibid.*, 230. On ‘meta-teleology’, see Lasser, M, ‘Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy (Oxford University Press, 2004), 288.

⁶⁵ Dworkin (1998), vii, 230 ff; Fleming, ‘The Incredible Shrinking Constitutional Theory’ (2007), 2889 (calling this “interpretive perfectionism”); Greene, AS, ‘The Fit Dimension’ (2007) 75 *Fordham Law Review*, 2922 (calling this “splitting the difference’ between ‘fit’ and ‘justification’”). Dworkin’s work is, of course, heavily reliant on perfectionist imagery, from his fictional omniscient judge Hercules, to the - often maligned - idea of a ‘single right answer’.

⁶⁶ Fleming, ‘The Incredible Shrinking Constitutional Theory’ (2007), 2890 (calling this “‘taking rights seriously’ liberalism”).

(5) Maximally comprehensive. Not discussed by Dworkin and Fleming, but clearly implicit in much of Sunstein's work, is an idea of perfectionism as a drive towards maximal coverage of societal domains through law and legal processes.⁶⁷ In this sense, a perfect (constitutional) legal order is one in which all aspects of social, political and economic life, are governed by (constitutional) legal norms.⁶⁸

(6) Maximally effective. Closely associated to 'intensity' (4) and 'comprehensiveness' (5) is the idea of a maximally effective (constitutional) legal system, in which high-level protection for a broad range of claims is realized through a 'perfect' system of remedies. Most commonly, calls for 'perfect remedies' tend to focus on judicial remedies, which, paradoxically, could make this brand of perfectionism rather narrow. In a broader sense, maximally effective constitutional legal perfectionism could also refer to the understanding that an as-complete-as-possible range of relevant actors – not just courts, but also executives, parliaments, private organizations -, are seen to have a role to play in the enforcement of constitutional legal norms.⁶⁹

(7) Maximally particular. Finally, the rhetoric of 'perfection' tends to surface in relation to the idea of 'perfect' justice on the circumstances of each individual case. It is this idea of perfectionism as maximal particularity that Justice Scalia of the US Supreme Court famously mocked when he wrote that "the value of perfection in judicial decisions should not be overrated".⁷⁰ Maximal particularity can be seen as perfection-driven in its search for full congruence between underlying ideals of justice (however derived) and their realization in concrete cases.

⁶⁷ E.g. Sunstein, CR, 'Beyond Judicial Minimalism' (2008) 43 *Tulsa Law Review*, 825 (referring to minimalism as protective of "space for self-governance").

⁶⁸ This dimension appears to be particularly important in the German version of perfectionist legal thought outlined earlier.

⁶⁹ It is clear that tensions could easily arise between these two versions of 'comprehensive-judicial-remedies' perfectionism and 'comprehensive-constitutional-obligations perfectionism'. This is just one example of the tensions inherent in the perfectionist style.

⁷⁰ Scalia, A, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1178.

III. EUROPEAN AND US CONSTITUTIONAL LEGALISMS: PERFECTIONISM AND ITS OPPOSITES?

A. Introduction

Building on the, unavoidably still ambiguous, meanings of perfectionism outlined above, this Part explores differences between US and European legalisms in more detail. The aim will be to make at least a preliminary case that European and US constitutional legal thought can be mapped rather neatly onto the perfectionist and non- or anti-perfectionist extremes of the different conceptual spectra outlined in the previous Part. This demonstration is based principally on an assessment of interpretative styles at the two main 'pan-European courts' – the Court of Justice of the European Union and the European Court of Human Rights – and of modes of argument in doctrinal writing relating to EU law, and can only be provisional in the context of this article.

The following Sections describe a range of anti-perfectionist elements in American (constitutional) doctrine and scholarship, and a suggested corresponding set of perfectionist elements for the European setting. A final Section looks at arguments that could nuance this initially rather black and white opposition.

B. Aspiration, substance and their opposites

In the scheme outlined above perfectionist legal thought is aspirational and substantive. In more colloquial terms, one could say perfectionism is *forward* and – somewhat more ambiguously – *outward* looking. It is also *ambitious* and '*maximalizing*' in ways that non-perfectionist legal thought is not. Perfectionism's opposites, on these criteria, are conventionalism/originalism and different forms of proceduralism, pragmatism, and 'judicial restraint'-thinking.

Each of these non- or anti-perfectionist labels is much more easily associated with American than with European constitutional legal thought. To begin with, originalism, proceduralism, pragmatism and 'judicial restraint'-thinking are all rarely discussed *at all* in the European setting.⁷¹ But beyond this lack of explicit attention, in each case, an accurate characterization of EU law would rely on terms diametrically

⁷¹ There are, of course, notable exceptions. See recently e.g. Gerards, JH, 'Pluralism, Deference, and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal*, 118 ff, and Barnard, C, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) *European Law Review* 117.

opposed to these labels. Instead of looking back to original intent or original meaning, European Union law is dominated by various forms of *forward-looking* reasoning, such as reasoning based on the need to complete the internal market, purposive interpretation, and the '*effet utile*' argument.⁷² The use of '*effet utile*', in particular, has been described as the heart of a "methodological expansionism", "which constantly extends the reach and effectiveness of European law".⁷³

The European Court of Human Rights in its case law is similarly forward-looking, notably in its reliance on "evolutive interpretation", and the insistence that the Convention is a "living instrument which must be interpreted in the light of present-day conditions".⁷⁴ Convention case law can also often be said to be 'aspirational', notably in the Court's regular assertions that Convention rights do not merely constitute negative restrictions on state power but also impose 'positive obligations' to further the 'effective' protection of rights, even where such extension seems contrary to the original intentions of the Convention's drafters.⁷⁵

It is interesting to note that the dearth of 'originalist'-style reasoning in European law and legal thought, is accompanied by a similar absence of the kind of 'proceduralist' argument made by John H. Ely and others in the US. Janneke Gerards' recent twin observations that a clear doctrine of deference is lacking at the CJEU *and* that one solution to this gap could be found in neglected "classical theories of procedural democracy", such as the one formulated by Ely, is illustrative on this point.⁷⁶

⁷² *E.g.* on horizontal effect: Case C-36/74 Walrave & Koch [1976] ECR 1405, par. 17: "The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community ... *would be compromised if ...*" (emphasis added). Schepel (Schepel, H, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 *European Law Journal*, 183) notes: "The Court repeats ... these paragraphs so often that it must be assumed to amount to more than a whim". See also Everson & Eisner (2007), 53 (describing, in addition to the '*effet utile*' argument, "*effet nécessaire*" reasoning as "the extension of teleological reasoning beyond the securing of the legislative intent that lurks behind individual provisions of positive law").

⁷³ Schmid, CU, 'From Effet Utile to Effect Neoliberal', in Nickel, R, *Conflict of Laws and Laws of Conflict in Europe and Beyond* (Intersentia, 2010), 296. The German Federal Constitutional Court was famously critical of precisely this dimension of Court of Justice reasoning, in its Maastricht decision: "Whereas a dynamic expansion of the existing Treaties has so far been supported on the basis of [...] Treaty interpretation as allowing maximum exploitation of Community powers ('*effet utile*') [...], in future it will have to be noted ...". See [1994] 69(2) *Common Market Law Reports* 105.

⁷⁴ See initially ECHR *Tyler v United Kingdom*, Series A No. 26 [1978], par. 31.

⁷⁵ See initially ECHR *Marckx v Belgium*, Series A No. 31 [1979], par. 31, and the dissenting opinion of Judge Sir Gerald Fitzmaurice, par. 7 ff.

⁷⁶ Gerards, 'Pluralism, Deference, and the Margin of Appreciation Doctrine' (2011), 118 ff.

C. Coherence and its opposites

Coherence-related modes of legal reasoning are ubiquitous in European law. It is common practice for the Court of Justice or Advocates General to refer to ‘the scheme of the Treaties’, or ‘the Treaty as a whole’ in support of a ‘systematic’ approach to interpretation.⁷⁷ It has even been argued that the best way to characterize the reasoning of the Court is by way of the label of ‘meta-teleology’, which indicates a form of purposive interpretation informed by the goals of the European legal system as a whole.⁷⁸ Systematic interpretation is also common in European law scholarship, and in the case law of other influential courts, such as the ECHR.

The dominance of these modes of reasoning is such that it is difficult, in the European context, to even imagine the possibility of alternatives. This is where comparative analysis can be especially useful. And indeed: American constitutional legal theory and practice show how judges and commentators can in fact be committed to an approach to constitutional legal reasoning that is radically different from European coherence-thinking. A running theme in American constitutional legal writing is how Supreme Court interpretations of the Constitution and the Bill of Rights are, in a word not even used in European scholarship – ‘*clausebound*’.⁷⁹ Akhil Amar, a leading critic of this practice, notes: “Textual argument as typically practiced today is blinkered ..., focusing intently on the words of a given constitutional provision in splendid isolation”.⁸⁰ Amar calls his own preferred approach ‘intratextualism’, which he describes as the effort to “read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word of phrase”.⁸¹ Two features of this alternative proposal are especially noteworthy from the perspective of this paper. First, to many European lawyers, Amar’s suggestion will look obvious and non-controversial; ‘intratextualism’

⁷⁷ See e.g. Hesselink, MW, ‘A Toolbox for European Judges’ (2010) 17 *European Law Journal*, 452.

⁷⁸ Lasser (2004).

⁷⁹ Amar, AR, *The Bill of Rights: Creation and Reconstruction* (Yale University Press, 2000); Ely, JH, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 12. Ely also uses the wonderful Jazz metaphor of “‘vertical’ approaches that insist only on compatibility with the particular chord being played at the time”, as opposed to ‘horizontal’ approaches, that look to melody. He writes: “the Constitution quite often – and quite intentionally, I think ... - gives us nothing but chords”). Ely, JH, ‘Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures’ (1991) 77 *Virginia Law Review*, 837.

⁸⁰ Amar, AR, ‘Intratextualism’ (1999) 112 *Harvard Law Review*, 788.

⁸¹ *Ibid.*, 748.

looks like a rather careful and modest version of the more ambitious forms of systematic interpretation practiced daily by European courts, or advocated in European legal textbooks. Secondly, the line of attack chosen by Amar's critics is particularly interesting, as it makes explicit some of the links to the theme of perfectionism. "Do the provisions of the Constitution fit together in a coherent scheme? Should judges interpret the Constitution as if they do?", Adrian Vermeule and Ernest Young ask, responding to Amar.⁸² They observe that Amar answers "yes" to both these questions, and that in doing so, he follows in the footsteps of Ronald Dworkin, who "articulated a general theory of legal interpretation that shared Amar's central idea that the relevant legal materials fit together, or at least should be read to fit together, into a coherent pattern".⁸³ Vermeule and Young then object to Amar's intratextualism on the same grounds many American constitutional commentators have objected to Dworkin's work, for example for the reason that it ignores basic institutional and cognitive limitations to the judicial function.⁸⁴ This objection makes starkly clear the connections between 'intratextualism', 'systematic interpretation', 'coherence' and perfection.

**D. Comprehensiveness, effectiveness, particularity, and their opposites:
The 'second best' and the 'perfect' constitutional legal order**

This Section groups together a range of American constitutional legal doctrines and practices that are all, in related ways, expressly limited – and thereby *limiting* - in their ambition for the judicial enforcement of constitutional legal norms. It also shows how, for each of these elements, European practices follow an almost exactly opposite approach. The perfection sought by these European practices can provisionally be described as an ideal of perfect congruence between abstract underlying constitutional meaning and the judicial effectuation of that constitutional meaning in concrete cases. American constitutional legal thought, by contrast and on this same measure, often deliberately aims for 'second-best'.⁸⁵

⁸² Vermeule, A, & Young, E, 'Hercules, Herbert, and Amar: The Trouble with Intratextualism' (2000) 113 *Harvard Law Review* 730.

⁸³ *Ibid.*, 730.

⁸⁴ *Ibid.*, 732 ("Intratextualism contains a pervasive, if only partially articulated, assumption that the Constitution is a fully coherent document"). For an explicit invocation of Dworkin in support of an approach to constitutional legal reasoning in the European context, see Kumm, M, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal*, 286.

⁸⁵ Cf. Schauer, F, 'The Second-Best First Amendment' (1989) 31 *William & Mary Law Review*, 1

(1) Constitutional law outside the courts. One example of this difference can be found in ideas of *'extra-judicial' constitutionalism*. There is an influential intellectual tradition in American constitutional law that maintains that enforcement of the constitution by the judiciary does not - and should not - exhaust the full scope and depth of constitutional meaning. Important examples are the ideas of "Popular Constitutionalism" (Kramer), and of "Doing Constitutional Law Outside The Courts" (Tushnet).⁸⁶ "The idea that the judicially enforced scope of a constitutional norm may be narrower than its scope as legal authority", Lawrence Sager writes in a book with the evocative title *'Justice in Plainclothes'*, "enjoys a venerable provenance [in American constitutional legal thought]".⁸⁷

This conception of a domain of constitutional law beyond judicial enforcement, and the idea that there might be some light between the abstract meaning of constitutional legal texts and the extent of their enforcement by the judiciary, do not, it is submitted, allow for an easy fit with European law. European judicial practice, rather, is to enforce legal norms to their fullest extent.⁸⁸ The *'effet utile'* doctrine, for example, is a prominent expression of "the notion that no rights must be without a remedy"; the precise opposite of the American intellectual tradition referred to by Sager.⁸⁹ There is then, in EU law at least, very little scope for the idea of a constitutional legal order that is not comprehensively supervised, to maximal effectiveness, by the Court of Justice and its national court partners.

(2) The interpretation/implementation distinction. American constitutional legal thought contains prominent references to the idea that "a gap frequently, often necessarily, exists between the meaning of constitutional norms and the test by which those norms are implemented".⁹⁰ Courts, on this view, not only interpret constitutional norms, they also *implement* them, by way of doctrine that is "driven by

⁸⁶ Kramer, LD, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004); Tushnet, MV, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999).

⁸⁷ Sager, LG, *Justice in Plainclothes: A Theory of American Constitutional Practice* (Yale University Press, 2006), 89, 102 (emphasis added); Fleming, JE, 'Fidelity to Our Imperfect Constitution' (1997) 65 *Fordham Law Review*, 1343; Sager, LG, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 *Harvard Law Review*, 1213 (1978) ("It is part of the intellectual fabric of constitutional law ... that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an idea into a workable standard for decision of concrete issues").

⁸⁸ See e.g. Solanke, I, 'Stop the ECJ? An Empirical Analysis of Activism at the Court' (2011) 17 *European Law Journal*, 766 ("the CJ as a whole continues to be described as an inherently 'constructionist court that wants to advance the frontiers of European competence' on all occasions").

⁸⁹ Everson & Eisner (2007) 52, 137 ff.

⁹⁰ Fallon, RH, 'Implementing the Constitution' (1997) 111 *Harvard Law Review*, 60.

the Constitution, but does not reflect the Constitution's meaning precisely".⁹¹ The Supreme Court's many 'multi-part' tests that operate in different areas of constitutional law are a key example. There is no serious suggestion, for example, that the Court's *Central Hudson* four-step test for the protection of commercial speech under the first amendment is in any way an elaboration of that amendment's 'true meaning'.⁹² The motivation for such an elaborate four-step analysis is rather that it could be helpful in *implementing* – making 'judicially workable' – an otherwise excessively abstract constitutional provision.⁹³

Such a clear separation between interpretation and implementation seems absent from European law. The Court of Justice always portrays its activity as *interpreting* the Treaties and secondary legislation.⁹⁴ There are various strands to this difference. For one, the absence of a clear practice and theory of precedent at the European level means that the Court is perhaps both less inclined and less free than, say, the US Supreme Court, to craft freestanding legal doctrine on the basis of previous case law, without constant reference to the text of Treaties and legislation.⁹⁵ In addition, the more expansive European approach to the range of acceptable sources of constitutional meaning discussed above – the 'substantive' dimension of recourse to 'general principles', for example, or the 'coherentist' reliance on the system of the Treaties – suggests that European courts can plausibly claim to be 'interpreting' constitutional legal materials even when they move away from the strictures of constitutional text.

The absence of the interpretation/implementation distinction becomes especially visible on those – rare – occasions that the Court of Justice seeks to explicitly change course in its case law. Famous instances of 'overturning', such as *Keck* in the free movement of goods, have to be exactly that: overturning. Because the meaning of the relevant Treaty provision and the judicial 'test' giving effect to the

⁹¹ *Ibid.*, 57.

⁹² *USSC Central Hudson Gas & Electric Corp. v. Public Service Commission* [1980] 447 U.S. 557, 566.

⁹³ Another (in)famous example is the well known '*Miranda*' warning arresting officers are constitutionally obliged to give criminal suspects. Here again, it is not seriously maintained that the phrases to be read out – "You have the right to remain silent", *etc.* – follow from the wording of the relevant constitutional provision by way of a process of interpretation. But it is thought, at least by the ruling's advocates, that this type of *prophylactic* statement is a useful way of implementing an important constitutional safeguard. For an extended critique of the way in which the Supreme Court's '*formulae*' diverge from constitutional text, see Nagel, RF, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (University of California Press, 1989).

⁹⁴ See e.g. Maduro, M, *We The Court* (Hart Publishing, 1998), 20 ff.

⁹⁵ American multi-part tests are typically elaborated under extensive reference to earlier case law, to such an extent that observers sometimes complain that any link back to constitutional text is lost. Broader differences between the civil and common law traditions (e.g. the judge as mere 'mouthpiece' vs. the judge as maker of law) are likely to be relevant here as well.

provision are considered to be identical, the Court cannot easily modify the details of its approach without simultaneously going back on what it has said about the general meaning of the provision.⁹⁶

(3) Comprehensive vs. 'patchwork' legal doctrine. No doubt in part because of its common law background, large areas of American constitutional legal doctrine have a patchwork-like structure. A particular area of constitutional law, say that related to the first amendment's protection of freedom of expression, will be governed by a range of different tests, rules and exceptions.⁹⁷ What is characteristic for American constitutional legal doctrine, then, is not just the existence of 'multi-part' tests, as just discussed, but the simultaneous existence of numerous such tests.⁹⁸ Among the most widely used 'tests' are 'forbidden-content' tests, 'suspect-content' tests, 'balancing' tests, 'effects' tests, 'purpose' tests, and 'aims' tests.⁹⁹ The content of many of these factors cannot come as a surprise to European lawyers – they are, at least in part, exactly the kinds of elements European courts look at in the framework of the proportionality principle. But this is where the key difference lies. Whereas European courts rely on *one overarching principle* to adjudicate virtually all areas of European law, in American case law and scholarship these different elements are often kept purposefully separate. While the precise reasons for this divergence have to remain outside the scope of this paper,¹⁰⁰ the difference between a patchwork- and a comprehensive approach to constitutional legal doctrine fits

⁹⁶ Case C-267/91 *Keck* [1993] ECR I 6097. It is noteworthy that in this instance, where the Court is in some sense *creating implementing doctrine* rather than simply interpreting, it has swiftly come under (perfectionist!) pressure to move back towards an approach that is thought to reflect more directly and precisely *the meaning* of the Treaty provision and to enhance its effectiveness. See notably the Opinion of Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I 179.

⁹⁷ E.g. Tribe, LH, *Constitutional Choices* (Harvard University Press, 1985), 220 (calling American first amendment doctrine a "patchwork quilt of exceptions").

⁹⁸ See generally Fallon, RH, 'Implementing the Constitution' (1997); Fried, C, 'Types' (1997) 14 *Constitutional Commentary* 55. There are many examples, especially in the first amendment context (e.g. Stone, GR, 'Content-Neutral Restrictions' (1987) 54 *University of Chicago Law Review* 46) and the constitutional protection of property (e.g. Sullivan, KM, 'The Justices of Rules and Standards' (1992) 106 *Harvard Law Review*, 51: "Recent regulatory takings law is an amalgam of per se rules and multi-factored balancing tests").

⁹⁹ Fallon, *ibid.*

¹⁰⁰ Again: differences between common law ('problem solving') and civil law ('system building') traditions are certainly relevant here. But there seems to be more involved. For example: European-style adjudication often appears to strive for congruence with the dictates of practical reason, for example in its proportionality assessments, as this is seen to enhance the legitimacy of judicial reasoning. US-style adjudication, by contrast, often appears to go out of its way to emphasize the difference between 'mere' practical reason and the more specifically 'legal' reasoning that is appropriately the province of the judiciary. Maintaining a dense, technical, web of partial and overlapping 'tests' is one way of emphasizing this distinctiveness of legal reasoning.

neatly with a general positioning of the American and European legalisms along a 'perfectionism' axis.

(4) Extreme particularity and 'rule-formalism'. American constitutional law offers many examples of manifestations of 'rule-formalism'; the reliance on doctrinal rules even when they do not perfectly match their background justifications, that is, in spite of their acknowledged status as "imperfect generalizations".¹⁰¹ The various doctrinal (multi-part) 'tests' discussed above, in which courts are meant to fit infinite variation in factual circumstances into a rather rigid progression of binary – left/right – choices, are an important illustration of this phenomenon. Some of these limiting doctrinal devices are, in fact, explicitly seen as helpful in constraining what otherwise would be a perfection-seeking "generalized balancing".¹⁰² Another example is the idea of '*per se* rules' – absolute, categorical prohibitions – in some parts of American constitutional law, notably in the area of restrictions on 'takings' of private property under the fifth amendment.

'Black or white' categorical approaches, and the idea of '*per se*' rules and absolute prohibitions, it is submitted, exceedingly rare in European law. There is no distinction between, say, looking either at effects or at intentions; all factors are rather integrated within the proportionality framework mentioned earlier. There are no clearly demarcated different 'levels of scrutiny' and deference; the proportionality test rather is thought to be flexible enough to permit a continuum of different levels of intensity of review. And there are no, or certainly very few, 'absolute' rules in European law, which is characterized rather by a constant pressure for courts to look at 'all the circumstances of the case', and, importantly, to force public administrations to do the same. Even in those rare instances where the Court of Justice *does* seek to impose some kind of categorical boundary – the *Keck* distinction between product requirements and selling arrangements; the rule that 'purely financial considerations' cannot support legitimate restrictions on free movement –, these categories seem to come under a lot of pressure rather quickly. All in all, it seems reasonable to argue that the burden of arriving at 'the right' answer – the burden of 'perfect justice' – is more keenly felt and acknowledged in European legalism than in its US equivalent.¹⁰³

¹⁰¹ Cf. Scalia, A, 'The Rule of Law as a Law of Rules' (1989), 1177.

¹⁰² Examples are discussed in Fried, C, 'Types' (1997), 60 ff.

¹⁰³ This question, of the relative tolerance for rule following even in the face of 'wrong' answers, could be an exceptionally fruitful area for comparative empirical research, not just among legal elites, but also among the wider population.

E. *Anti-perfectionism in Europe? Some counter-examples*

It is not difficult to think of examples where European law appears to go in a direction rather opposite to the ‘perfectionist’ trends outlined so far. Yes, the Court of Justice may practise intensive and expansionist modes of review, but surely the *principle of ‘subsidiarity’* is an example of an opposing trend? Well, yes and no. For one, subsidiarity review by the Court of Justice is widely acknowledged to be very ‘light touch’ in nature, providing no real boundary to European Union competence.¹⁰⁴ And secondly, it is important to note that in the case of subsidiarity, where there is at least an attempt to limit the scope of European law, that attempt is carried out in the typically perfectionist form of a case-specific, overarching principle, rather than through any kind of categorical delimitation. There are also a number of *famous ‘gaps’* in the Court’s normally expansionist approach, notably its refusal to extend the doctrine of horizontal direct effect to Directives, and its limited conception of standing for individual claimants.¹⁰⁵ But then again, there is a reason for why these gaps are so famous: there is only a handful of them. And also: they are generally perceived as true ‘gaps’, *i.e.* lacunae in an otherwise coherent and comprehensive construction. It is also true that the Court does, occasionally, attempt to impose a binary, categorical framework, most famously of course in *Keck*. But here too, *Keck* is noteworthy as much for what the case itself aimed to do, as it is for the idea of a ‘*post-Keck*’ case law, in which this categorical distinction has come under intense pressure.¹⁰⁶ Many more counter-examples could surely be found. But at least none of these most famous candidates seems strong enough to challenge the basic claim that European law is, in a distinctive sense, perfection-seeking.

¹⁰⁴ *E.g.* Conway, G, ‘Levels of Generality in the Legal Reasoning of the European Court of Justice’ (2008) 14 *European Law Journal*, 800 (with references).

¹⁰⁵ Deirdre Curtin, in the early 1990s did observe a trend towards “minimalism” in the Court’s case law, “... in sharp contrast with the activism of the Court during the previous decades” (Curtin, D, ‘The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context’ (1990) 15 *European Law Review*, 195, citing former Advocate General Koopmans). This paper, however, suggests that (a) more recent case law - in the free movement areas, on citizenship, *etc.* – does not fit with this observation, even if it were accurate at the time, and (b) that it is telling that this characterization was formulated in the context of the ‘horizontal effect for Directives’ discussion; one of the famous, but relatively rare, areas of reticence in the Court’s case law.

¹⁰⁶ *E.g.* Case C-110/05 *Commission v. Italy (motorcycle trailers)* [2009] ECR I 519.

IV. CONCLUDING OBSERVATIONS: THE POINT OF PERFECTION

The European Union legal order is a *demanding* legal order. There is very little tolerance, among the relevant courts and their surrounding epistemic communities, for ‘gaps’ and ‘blind spots’. Ever more domains of social and economic life are brought within reach of norms of European Union law, policed by European Courts and by national courts with a European Union mandate. Within the European legal order, there are to be no ‘rights without (judicial) remedies’. Expansive ‘general principles’ on a high level of abstraction should, and do, inform all actions by legal actors. Legal demands are interpreted purposefully and with aspiration. And courts aim to do justice on the individual circumstances of each case, while simultaneously trying to build coherent overarching conceptual pyramids.

This article has suggested that these and other characteristics can be seen as manifestations of powerful perfection-seeking internal dynamics of juridical functioning. It has also been argued that this drive for perfection distinguishes European legalism from prevalent ideals for law in the US.

This uncovering of European legalism’s perfectionism may be helpful in a number of ways.¹⁰⁷ On a very general level, the idea of perfectionism reinforces the case for the re-imagination of law as a powerful agent, and, consequently, the case for more detailed attention to law’s internal dynamics in the studies of European integration. Second, perfectionism can suggest new answers to some persistent riddles of European law, such as the side-by-side existence of extreme formality and radical case-by-case informality in many areas of European adjudication, or the extraordinary difficulties involved in solving problems of judicial architecture, in Strasbourg as well as in Luxembourg. Both these puzzles assume a different hue in light of an overarching category of a perfectionist legalism, which nudges actors towards the pursuit of conflicting, but equally expansive, ideals for the scope and depth of the legal order and its judicial oversight.

¹⁰⁷ It should be recalled that strictly speaking, all this article has done is make the argument that European legalism is ‘perfectionist’ on *American* definitions of ‘perfectionism’. For reasons explained in Section I.B, above, a detailed analysis of European *indigenous* perfectionism has not been carried out. Further study of this indigenous perfectionism – either on a European level, or at its origins in the legal orders of one or more Member States – may reveal important differences with the ‘American’ understanding. To give one preliminary example: It seems clear that a ‘German’ form of perfectionism would place much more emphasis on ideas of law as a ‘system’ than does the ‘American’ version. For an overview of the importance of the concept of ‘the system’ in German legal thought, see Canaris, CW, *Systemdenken und Systembegriff in der Jurisprudenz* (Duncker & Humblot, 1969).

Third, and most importantly, awareness of the pulls and nudges exercised *on us* by a perfectionist European legalism may help put into question some of our standard juridical responses and stock solutions, and suggest alternatives that currently often lie out of sight. Criticizing the Court of Justice's expansive use of '*effet utile*' and arguing for a 'better balancing' of the competing stakes, say in the context of the *Viking* and *Laval* decisions,¹⁰⁸ is a typical example of countering the search for one kind of legal perfection with the search for an equally perfectionist alternative.¹⁰⁹ This article has not made any claim as to the value of such suggestions. But analyzing the distinctive nature of the 'typically European' legal dynamics that envelop both the Court and many of its critics in cases such as these, as this article has sought to do, can reveal a range of options that our common perfectionism would otherwise not even admit as possible.

¹⁰⁸ Cases C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* [2007] ECR I 10779 (Grand Chamber) and C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I 11 767 (Grand Chamber).

¹⁰⁹ See e.g. Schmid, CU, 'From Effet Utile to Effect Neoliberal' (2010) (even arguing for the application of German-style '*praktische Konkordanz*', on the perfectionist nature of which see above, at fn. 17); Barnard, C, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012).