

RESEARCH ARTICLE

The Shackles of Veto: On the American Parallel of Article 19 TFEU and Its Tension with Procedural Justice

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Abstract

Article 19 TFEU's unanimity requirement shares a striking similarity with a two-century old debate on voting and minority rights between the 'father' of the US Constitution, James Madison, and the 'rebellious son', John C. Calhoun. Madison made majority voting a necessary condition for impartial lawmaking and minority protection in multistate unions. Conversely, Calhoun sought to maintain the racial status quo through advocating for a competing unanimity-based structure. Minority protection in Article 19 TFEU aligns with Calhoun's model. This Article reassesses Article 19 TFEU through the foundational principles of constitutionalism underlying the US debate and shows their continued relevance for contemporary case law and minority protection in the EU. Particularly, it demonstrates, first, that Article 19 offends the impartiality principle of *nemo iudex in causa sua*—no person should judge their own cause—which has long been a leitmotiv in Western constitutional theory. Second, it illustrates that unanimity causes *de jure* and *de facto* ramifications for ethnic and religious minorities in the EU. Last, the Article provides a theoretically grounded and comparatively informed argument to aid ongoing attempts for treaty amendment.

Keywords: non-discrimination; minority rights; Article 19 TFEU; James Madison; impartiality; unanimity; treaty amendment

'For the end of civil Society, being to avoid, and remedy those inconveniences ... which necessarily follow from every Man's being Judge in his own Case'
John Locke¹

I. Introduction

Article 19 Treaty on the Functioning of the European Union ('TFEU') requires unanimity of Member States in Council to 'combat discrimination based on sex, racial or ethnic origin' among other grounds.² This requirement has been blamed for rendering the EU 'minority agnostic', with 'skin deep' commitment and incapable of 'rectify[ing] historical inequalities'.³ This is

*I am grateful to Mark Tushnet, and Alison Young for their constructive feedback on an earlier draft. The usual disclaimer applies.

¹J Locke, *Second Treatise of Government and A Letter Concerning Toleration* (Mark Goldie ed, OUP 2016), Ch VII, p 90 (emphasis added).

²Art 19 TFEU.

³M Goodwin, 'Romani Marginalisation after the Race Equality Directive' in U Belavusau and K Hernald (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing, 2019); M Bell, *Racism and Equality in the European Union* (OUP, 2008), pp 49–50; D Kochenov, 'European Union's Troublesome Minority Protection: A Bird's-Eye View' in J Boulden and W Kymlicka (eds) *International Approaches to Governing Ethnic Diversity* (OUP, 2015).

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manifested exemplarily in the sheer paucity of cases tackling the widespread anti-Roma,⁴ anti-Black racism, or anti-Semitism and Islamophobia.⁵ It is also evident in the inability to pass the Commission's 2008 Equal Treatment Directive Proposal to extend protection beyond employment, which has been entrapped by unanimity for fifteen years.⁶

What is overlooked in analysing Article 19 TFEU is a two-century old pedigree of constitutional thought. Far from being an orphan idea, Article 19 TFEU's unanimity requirement largely echoes a memorable intellectual debate between the 'father of the American Constitution', James Madison, and the 'rebellious son', John C. Calhoun, on voting, minority rights, and the conceptualisation of a 'Union' of states.⁷ Madison extended John Locke's use of the impartiality principle of *nemo iudex in causa sua*—no person ought to judge their own cause—as a bedrock of constitutional governance. Yet, Madison was first to argue that only a 'well-constructed Union' which integrates a variety of states based on majority voting can ensure respect to the *nemo iudex in causa sua* maxim and prevent local majorities from adjusting laws to their own causes.⁸

More than four decades after the ratification of the Constitution, the last surviving founder, Madison, was challenged by the twice US Vice President, Calhoun. Fearing African American emancipation, Calhoun articulated a competing comprehensive theory on unanimity voting. Contra Madison, he contended that only unanimity of the union's constituent states or what he terms 'concurrent majority' or 'unanimous concurrence'⁹ can pass laws for 'the good of the whole'¹⁰ and provide a 'check' on unwarranted competence creep.¹¹ To reach this conclusion, Calhoun developed many premises that resemble certain ongoing EU debates, which I shall return to later.

Revisiting this debate is of timely importance that extends beyond identifying historical parallels. Understanding the interlinkages between the constitutional principle of *nemo iudex in causa sua*, the unanimity requirement, and their combined impact on minorities is necessary to fully comprehend contemporary aspects of EU law. Going back to first constitutional principles helps to decipher the Court of Justice of the European Union's ('CJEU') passivity on the issue, the dearth of case law on discrimination on ethnic and religious grounds, as well as the lamentable conditions of such minorities, according to the Commission's own reckoning.¹² This also coincides with the European Parliament ('EP') initiating the process of treaty amendment and thus opens a glimpse of hope for possible change, or at least bestowing a formal endorsement for discussing the inherent malaise in the treaties.¹³ Additionally, and notwithstanding the fate of the treaty amendment,

⁴Originally from India, the Roma migrated to Europe between 500 and 1000 AD 'reaching Europe around the thirteenth century'. Many Roma 'were enslaved in what is today's Romania beginning in the thirteenth or fourteenth century and some remained enslaved until the mid-nineteenth century'. A Eliason, 'With No Deliberate Speed: The Segregation of Roma Children in Europe' (2016) 27 *Duke Journal of Comparative & International Law* 191, 194.

⁵M Möschel, 'Eighteen Years of Race Equality Directive: A Mitigated Balance' in Belavusau and Henard, note 3 above.

⁶COM(2008) 426 final, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [hereinafter the 2008 Proposal for an Equal Treatment Directive] M Bell, 'Advancing EU Anti-Discrimination Law: The European Commission's 2008 Proposal for a New Directive' (2009) 3 *Equal Rights Review* 7, pp 11–13.

⁷W K Bolt, 'Founding Father and Rebellious Son: James Madison, John C. Calhoun, and the Use of Precedents' (2004) 5(3) *American Nineteenth Century History* 1.

⁸J Madison, 'Federalist No 10' in A Hamilton, J Madison, and J Jay, *The Federalist Papers* (I Shapiro ed, Yale University Press 2009) [hereinafter 'Federalist No 10'].

⁹JC Calhoun, 'A Disquisition on Government' in RM Lence (ed), *JC Calhoun 'Union and Liberty': The Political Philosophy of John C Calhoun* (Liberty Fund, 1992).

¹⁰*Ibid*, p 46.

¹¹*Ibid*.

¹²COM(2014) 2 final, Joint Report on the application of Council Directive 2000/43/EC and of Council Directive 2000/78/EC, p 13.

¹³Eg A Duff, 'Parliament Must Press Its Case for Treaty Reform', *Politico* (18 September 2022), <https://www.politico.eu/article/european-parliament-lisbon-treaty-reform/#>.

tracing the underpinning divergence and convergence in other constitutional systems holds significant analytical value in its own right. Comparisons are often regarded as means to revisit unexamined ‘assumptions’,¹⁴ caution against historical mistakes and thus promote ‘self-reflection’ and ‘betterment’ through ‘distinction and contrast’.¹⁵

Accordingly, this Article makes two interrelated arguments. Firstly, that the maxim of *nemo iudex in causa sua* is a normative standard that should be followed, or at least considered, in allocating the suitable voting procedure for minority rights in ‘integrative’ unions. By integrative unions, I rely on Lenaerts’s definition, which refers to constitutional systems formed through sovereign states voluntarily ‘coming together’ to form a larger legal order, such as the EU and the US.¹⁶ Within such unions, the principle of *nemo iudex in causa sua* necessitates majority voting in the central authority when legislating on minority rights, serving as a safeguard against local majorities assuming the role of exclusive judge of their own interests. Secondly, this Article argues that Article 19 TFEU’s unanimity requirement encroaches on *nemo iudex in causa sua* and aligns with Calhoun’s consensus model, which has contributed to the lamentable conditions for many ethnic and religious minorities in the EU.

It is important to stress that the purpose of this Article is not to prescribe a certain transplant from US history, nor to suggest that drafting Article 19 TFEU was borrowed from the US. Instead, it is to highlight how the normative principle of *nemo iudex in causa sua*, which has been consistently used in European legal tradition long before the existence of the US itself, has played rule in US constitutionalism, yet strikingly ignored and overlooked in EU allocation of decision-making voting procedure. It is surprising given how Madison drew on European and English sources in formulating his use of the doctrine which now seemed overlooked by EU constitutionalism. One of this Article’s purpose is to reinstate the importance of the *nemo iudex in causa sua* rule as an axiom to be seriously considered in allocation of decision-making procedure. Another purpose of this Article is to utilise US constitutional history to show how unanimity can function as a tool to perpetuate the unjust status quo to the detriment of minority rights.

Prior to explaining this Article’s analysis, it is important to provide a prefatory note regarding the comparability of the US and the EU. Despite many divergences in details, the two systems share a ‘normative’ denominator¹⁷ and a ‘family’ resemblance¹⁸ that have long generated *functional comparisons* not only in literature¹⁹ but also in judicial opinions.²⁰ This stems from the fact that the US federal structure, like the EU, came into being through a constitutional process of ‘coming together’²¹ or what Lenaerts terms ‘integrative federalism’.²² As many have remarked, in both experiences, pre-existing states voluntarily agreed to integrate into a continent-sized polity.²³ With varying degrees, they both experienced debates regarding the divisibility of sovereignty and

¹⁴EA Young, ‘The European Union: A Comparative Perspective’ in R Schütze & T Tridimas (eds), *Oxford Principles of EU Law* (OUP, 2017).

¹⁵R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP, 2014), p 194.

¹⁶K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 *American Journal of Comparative Law* 236.

¹⁷F Fabbrini, *Fundamental Rights in Europe* (OUP, 2014), p 33.

¹⁸On comparing constitutional ‘families’, see V Jackson, ‘Comparative Constitutional Law: Methodologies’, in M Rosenfeld and A Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2012).

¹⁹See eg T Sandalow and T Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (OUP, 1982); M Cappellletti, M Seccombe, and J Weiler, *Integration Through Law: Europe and the American Federal Experience* (de Gruyter, 1986); EA Young, ‘Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism’, 77 *NYU Law Review* 1612 (2002); V Jackson, ‘Narrative of Federalism: Of Continuities and Comparative Constitutional Experience’, 51 *Duke Law Journal* 223 (2001).

²⁰See eg *Printz v US*, 521 US 898, pp 976–977 (Breyer, J, dissenting); *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01AG, ECLI:EU:C:2002:476, para 108

²¹A Stepan, ‘Federalism and Democracy: Beyond the US Model’ in D Karmis and W Norman (eds), *Theories of Federalism: A Reader* (Palgrave-Macmillan, 2005).

²²Writing extrajudicially, Lenaerts, note 16 above, p 236.

²³*Ibid.*

the contested extent of central authority, particularly concerning minority rights among other things.²⁴ This commonality is what makes a comparison of the two systems ‘obvious and fruitful’.²⁵ The two systems remain thematically ‘the least different’ if not ‘the most similar’ among other possible comparator constitutional polities.²⁶

This Article is composed of three parts. Part II provides the theoretical background by exploring the principle of *nemo iudex in causa sua* and its relationship to the genesis of the concept of an integrative union. It demonstrates this point using two examples on the effective application of *nemo iudex in causa sua* in the EU and the US. It then shows, by contrast, how unanimity in Article 19 TFEU shares certain similarities to Calhoun’s model and that both violate the *nemo iudex in causa sua* maxim by allowing majorities to judge their own interests. Part III showcases the practical drawbacks of unanimity on EU racial and religious minorities, focusing on the fifteen-year legislative deadlock surrounding the Commission’s 2008 Equal Treatment Directive proposal. This Article concludes by outlining the limited scope of the proposed reform and addresses evident national concerns.

II. *Nemo Iudex in Causa Sua* and the Genesis of Constitutional Union

The legal maxim *nemo iudex in causa sua*—no person ought to judge their own cause—bars a judge from deciding a case in which s/he has a more or less direct financial interest.²⁷ The maxim is considered a cornerstone of natural and procedural justice to most, if not all, legal traditions. This includes its use in the UK’s seventeenth century leading *Bonham* case,²⁸ as well as by the US Supreme Court²⁹ where the doctrine was labelled a ‘*first principle*’.³⁰ In the EU, not only has the maxim been invoked before the CJEU³¹ but it also lays the foundation of the right to an impartial tribunal enshrined in Article 47 of the EU’s Charter of Fundamental Rights.

Albeit valuable, the individual, litigation-related application of the maxim is not the concern of this Article. Rather, it focuses on the maxim’s application to the decision-making process of public institutions in their collective, corporate capacity. This collective, macro application of the maxim has long played a crucial role in Western constitutional theory.³² Suffice it to say that John Locke, like earlier writers,³³ saw the legislative as exercising a *judicial task in a broader sense* by acting as an ‘umpire’ who ‘dispense justices’ through respecting the corporate application of *nemo iudex in causa sua*.³⁴ For Locke, the main justification of the state was to provide ‘an indifferent judge’ which was lacking in the state of nature³⁵ and thus remedy injustices which ‘necessarily follow from every *Man being Judge in his own Case*’.³⁶

²⁴J Resnik, ‘Federalism(s) Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations’, 55 *Federalism and Subsidiarity* 363 (2014).

²⁵D Halberstam, ‘The Issue of Commandeering’ in R Howse & K Nicolaidis (eds), *The Federal Vision: Legitimacy And Levels of Governance in the United States and the European Union* (OUP, 2001).

²⁶Fabbrini, note 17 above, p 29; on comparing similar cases, see R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP, 2014).

²⁷G F Wharton, *Legal Maxims, with Observations and Cases* (Alpha 1865), pp 101–102.

²⁸*Dr Bonham’s Case*, (1610) 77 Eng. Rep. 638 (CP) 652; 8 Co. Rep. 107a, 118a (Coke, CJ).

²⁹*Eg Gutierrez de Martinez v Lamagno*, 515 US 417 (1995).

³⁰*Arnett v Kennedy*, 416 US 134, 197 (1974) (White, J, concurring in part and dissenting in part).

³¹See eg *AB et al v Krajowa Rada Sądownictwa*, C-824/18 [2020] Opinion of AG Tanchev, para 134; *Europese Gemeenschap v Otis and Others*, C-199/11, ECLI:EU:C:2012:684, para 39.

³²*Eg T Hobbes, Leviathan* (Richard Tuck ed, 1996), Pt I, p 104.

³³Natural law theories perceived law as ‘divinely-inspired’ and ‘unchanging’, thus legislators were clarifying what the law ‘really was’. MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2012), pp 27–28. Kelsen remarked that the word ‘parlement’ originally meant ‘Court’, H Kelsen, *Peace through Law* (Lawbook Exchange, 2000), p 21.

³⁴Vile, note 33 above, p 28

³⁵Locke, note 1 above, Ch XIX, p 227.

³⁶*Ibid*, Ch II.13 (emphasis added).

The maxim's macro application has a particular affinity with the US's move towards a federalized union. Madison, who drew on Locke's work, extended the logic of the principle a step further. In his most celebrated contribution, Federalist No 10, he used the maxim to offer a convincing argument against unitary small republics and to propose instead an integrative federal union. Whilst he explicitly concurs with Locke that legislative acts are often nothing but a '*judicial determination*', he diverges on seeing majority rule in unitary states not as respectful of *nemo iudex in causa sua* but rather as a *flagrant violation* thereof.³⁷

Troubled by the 'disease' of faction and the 'vices' of the US states prior to the federal union,³⁸ Madison lamented the absence in the confederation structure of a '*disinterested and dispassionate umpire*'.³⁹ While Madison had used this argument in earlier writings,⁴⁰ it found its most memorable expression in the Federalist No 10:

No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, *a body of men, are unfit to be both judges and parties,* at the same time; yet, what are many of the *most important acts of legislation, but so many judicial determinations,* not indeed concerning the rights of single persons, but *concerning the rights of large bodies of citizens;* and what are the **different classes of legislators,** but advocates and **parties to the causes which they determine?**⁴¹

Madison used three examples to further illustrate the point. A vivid one is debtor-relief laws. Reacting to the depressed economic conditions following the Revolutionary War, state legislators—captured by majorities who were debtors—enacted a variety of debt-relief laws to the detriment of creditors. These included laws staying the collection of debts, allowing payment on instalment or in commodities.⁴² Through these legislative acts, debtors directly controlled the outcome of pending cases between them and creditors, thus making themselves both a party and a judge of their own controversy.

Pondering on how then to reconcile republican constitutionalism with the rule of *nemo iudex in causa sua*, Madison found the remedy in what Lenaerts terms 'integrative federalism'.⁴³ By integrating many states into a larger political orbit 'the Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other'.⁴⁴ By qualitatively increasing the diversity of interests, they 'naturalize the evil of each other'⁴⁵ and modify '*the sovereignty* as that it may be *sufficiently neutral* between different parts of the Society'.⁴⁶

The Madisonian remedy and its relation to the *nemo iudex in causa sua* rule rests on a major premise which I unpack below along with brief examples that test its workability in the US and EU. This is essential to contrast the Madisonian understanding with Calhoun's unanimity model and to show why unanimity in Article 19 TFEU and in Calhoun's model violates the *nemo iudex in causa sua* rule.

³⁷Eg J Madison, 'The Proposed Principles for the Federal Convention to George Washington, April 16, 1787' in R R Rutland and W M E Rachal (eds), *The Papers of James Madison* (1977), Ch IX, pp 382–387 [hereinafter, 'PJM'].

³⁸J Madison, 'Vices of the Political System of the United States' in *PJM*, note 37 above.

³⁹Madison, note 37 above.

⁴⁰Madison to Jefferson, October 24, 1787 (*PJM*, X, 209–14) (emphasis added).

⁴¹Madison, 'Federalist No 10', note 8 above, p 22 (emphasis added).

⁴²See eg J Ely, 'The Contract Clause: Origins and Early Development' (2015) 4 *Brigham-Kanner Property Rights Journal* 199.

⁴³On the distinction between *integrative* and *devolutionary* union/federalism, see Lenaerts, note 16 above.

⁴⁴Madison, 'Federalist No 10', note 8 above, p 46.

⁴⁵D W Howe, 'The Political Psychology of the Federalist' (1987) 44(3) *The William and Mary Quarterly* 485, p 504.

⁴⁶Madison, 'Vices', note 38 above.

A. Diversity of Interests as Constitutional Blessing and a Built-In Check

In his earlier work, Madison was puzzled by the stark gulf of religious tolerance in eighteenth century America compared to Europe. He realized that America, unlike Europe, was religiously diverse, and its multiplicity of sects had restrained larger sects from dominating others. This way, America simply secured a level of tolerance that ‘no appeal to revolutionary principles or public good could have accomplished’.⁴⁷ From that he realised that in the same way that ‘multiplicity of sects’ protects religious rights, the increased ‘multiplicity of interest’ attained through integrating many states together can provide a ‘built-in check’⁴⁸ for civil rights against oppressive local majorities. In Federalist No 51, Madison compared religious and political faction. In politics as in religion, diversity of interest—understood to be *multiplicity of sects*—was the safest guarantee against the risk of one faction ‘capturing the reins of government and turning it to its own interests’.⁴⁹

Madison concluded then that as a pre-condition to ‘carry into effect schemes of oppression’, groups sharing ‘malevolent’ impulses must ‘concert’ their interests and ‘act in unison’.⁵⁰ To prevent this concert, an integrative multilayered constitutional order provides a remedy. Since it *diversifies* the interests, actors, and factions significantly well beyond the narrower scope of the state level, the ‘opportunity of communication and concert’ between nefarious factions becomes restrained and render them less ‘politically [e]ffective’.⁵¹ The component of the Madisonian insight can be broken down into the following syllogism:

Partial decision-making in collective settings requires *concert* among common interests
An integrative union diversifies interest which makes *concert* more difficult
An integrative union thus makes partial decision-making more difficult. Q.E.D

The middle premise ‘*interest diversification makes concert more difficult*’ is the linchpin of the Madisonian claim to secure impartiality. The chart below helps visualize the argument. Assume there are five equally populated states, each dominated by a racial majority with other dispersed racial minorities. The states then come together into an integrative federation. For simplicity, let us assume the ethnic ratios follow and correspond to representing interests at the legislature as indicated in the chart below (Figure 1).

For ‘simple arithmetical reasons’, strong state majorities get diluted at the union level, and the dangers of unrestrained majority are higher in states.⁵² The smaller and less complex the polity, the easier for the wrong kinds of unrestrained majorities to form.⁵³ Local majorities must form a coalition across states to act on the federal/union level. Such an inter-state coalition must inescapably involve a high assortment of interests and actors. The durability of such a coalition is challenged by the shifting, transitory nature of the interests of its constituent parts. Under certain conditions, cracks appear, and it becomes more difficult for a coalition either to ‘act in unison’ or dominate the course of federal action.⁵⁴ The ensuing uncertainty and the fear of being dominated by countervailing groups make it more prudent for factions to move to their second-best option, which is a common modicum of objectives and more egalitarian principles.⁵⁵ To wit, the check

⁴⁷L. Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Cornell University Press, 1998), p 207.

⁴⁸C R Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 *Stanford Law Review* 29, 40.

⁴⁹N Feldman, *Divided by God: America’s Church-State Problem-and What We Should Do About It* (Straus and Giroux, 2006), p 27.

⁵⁰Madison, ‘Federalist No 10’, note 8 above, p 45.

⁵¹R A Dahl, *A Preface to Democratic Theory* (University of Chicago Press, 2006), p 30.

⁵²J N Rakove, *A Politician Thinking: The Creative Mind of James Madison* (Oklahoma University Press, 2017), p 118.

⁵³Ibid.

⁵⁴Madison, ‘Federalist No 10’, note 8 above, p 45.

⁵⁵B Barry, *Political Argument: A Reissue* (University of California Press, 1990), p 255; see exemplarily, how UK employers shifted their preference after EU intervention in Marshall II and so did non-radical opponents to school segregation explained below.

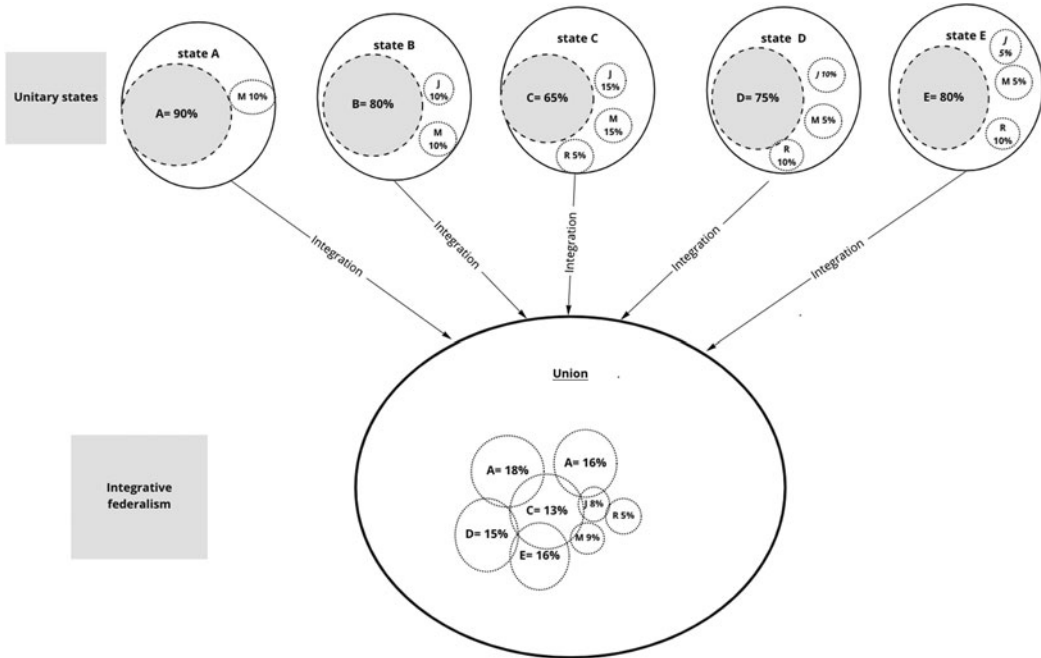


Figure 1. Diversification in Integrative Union

underlying Madison's Federalist No 10 is to *minimize* the ability of strong factions to impose their unbridled interest at the federal level compared to their ability to do so at the state level.⁵⁶

Numerous practical examples attest to the workability of the Madisonian argument where an increase in impartiality is traceable in the union compared to the state level. The well-known battle over US civil rights reflects how centralization and its concomitant diversification helps break '*concert*' and provide a more impartial protection of minority rights compared to state majorities. Despite the existence of the strongly worded Equal Protection Clause of the US constitution's Fourteenth Amendment, when minority rights were left to states (as a non-neutral umpire) the result was segregation and disenfranchisement. When centralised, things took a different course.

The New Deal's centralising structure, along with 'incorporation' (ie extension) of the Bill of Rights to apply to states, equipped the federal umpire with the jurisdiction and factual tools to intervene. Then, lawyerly activism, coupled with conducive external factors, pushed the indifferent federal umpire away from inertia which was best epitomized judicially by the *Brown* decision.⁵⁷ As the Congress contemplated engagement,⁵⁸ the anti-right coalition led by Richard Russel pushed back.⁵⁹ The sequence of events, multiplicity of actors with different incentives, and the joint impact of global and domestic factors significantly eroded the Southern coalition. Russel bitterly complained that their alliance no longer 'fought civil rights in *concert*'.⁶⁰ Restraining this coalition's capacity

⁵⁶Dahl remarks that Madison meant to protect elite minorities 'of wealth, status, and power' from their 'bitter enemies—the artisans and farmers of inferior wealth, status, and power, who ... constituted "popular majority"'. However, as the examples discussed in the Section show, Madison's argument can be easily extended to protect minorities in the contemporary sense. R A Dahl, *A Preface to Democratic Theory* (University of Chicago Press, 2006), p 30.

⁵⁷*Brown v Board of Education*, 347 US 483 (1954).

⁵⁸On why the Congress lagged far behind, see MJ Klarman, *Brown v. Board of Education and the Civil Rights Movement: The Supreme Court and the Struggle for Racial Equality* (OUP 2007), p 45.

⁵⁹See generally, R Mann, *When Freedom Would Triumph: The Civil Rights Struggle in Congress, 1954–1968* (Louisiana State University Press, 2007), p 181.

⁶⁰*Ibid*, pp 164–65, 238.

facilitated the adoption of the Civil Rights Acts of 1964 and 1968 as well as the Voting Rights Act 1965, which have led ‘overt’ discrimination to go ‘underground’.⁶¹

In the EU, centralization of sex discrimination and equal pay affirms the Madisonian logic. Upon integration, competing interests started to collide pitting the neo-liberal British policies against the egalitarian French industries.⁶² The expansion of the political orbit beyond the state allowed euro-law associations and the CJEU,⁶³ to break the ‘control’ of Thatcher and her allies compared to their ability to control legislative outcomes at the national level. This is evident through contrasting how the EU law clashed and prevailed over the less egalitarian Westminster Acts.⁶⁴ Eventually the recalcitrant states conceded and their interests shifted to ensure that others would adhere to equal pay to prevent the comparative market advantage of cheaper production costs by paying women less.⁶⁵ Overall, many scholars concur that centralizing this issue opened avenues for sex equality that were not possible within individual Member States.⁶⁶

The takeaway is to show that according to the maxim of *nemo iudex in causa sua*, placing minority rights within the central authority of the union coupled with majority voting diversifies interest and makes concert among malevolent coalitions more difficult. This in turn, helps increase impartiality and relatively shield minority interests from local prejudices. Surely having the suitable constitutional allocation of powers is not a ‘Newtonian’⁶⁷ machine that ‘flawlessly’ produce justice without popular ‘vigilance’.⁶⁸ Rather it is a conducive factor, in the sense that it harnesses inter-state social and judicial vigilance to nudge and empower the union legislature to act impartially. These harmonious interactions and the added value of a union is largely restrained by Article 19 TFEU’s unanimity requirement as shown next.

B. Why Unanimity and Article 19 Violate the *Nemo Iudex in Causa Sua* Rule?

Unanimity simply frustrates the logic of the *nemo iudex in causa sua* maxim. It will be recalled that the main premise of the Madison’s Federalist No 10 is to break the ‘ability to concert’ among local majority factions. However, here concert is not needed because unanimity allows any local majority singlehandedly to block any purported measure at the EU level. As is well-known, the Council members are ministers appointed by their states and are not directly elected. Thus, whenever unanimity is required, one state’s local majority has the power to *be the judge of its own case* and veto a proposal notwithstanding the position of the elected European Parliament (Figure 2).

Contrary to Madison’s reliance on diversity as a constitutional check, here the more veto players you have, the more the risk of inaction increases. Thus, in the EU the unanimity hurdle has become more difficult since the 2004 enlargement and the growth of EU states, given that the higher the number of veto players the less likely a measure may pass. Differently put, unanimity is almost tantamount to decentralisation. When acting unanimously, the Council ‘simply is the Member State

⁶¹L M Friedman, *A History of American Law*, 4th ed (OUP, 2019), p 685.

⁶²C Barnard, ‘The Economic Objectives of Article 119’ in T Hervey and D O’Keeffe (eds), *Sex Equality Law in the European Union* (Wiley, 1996).

⁶³Eg Sweet refers to ‘the relationship between the development of sex equality law after *Defrenne II* and the construction of networks of lobby groups, union officials, law professors, and litigators’. AS Sweet, *The Judicial Construction of Europe* (OUP, 2005), p 191; A Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (CUP, 2015).

⁶⁴*Eg Marshall v Southampton and South-West Hants Area Health Authority*, C-271/91, (No 2) [1993] ECR I-4367.

⁶⁵Private employers too were gradually induced to alter their approach. Employers preferred paying damages for potential plaintiffs rather than restructuring their business on equal pay basis. However, employers’ preference significantly changed following the CJEU’s *Marshall* (No 2) ruling, which led to a four-fold increase of damages. K Alter, *The European Court’s Political Power: Selected Essays* (OUP, 2010), pp 169–170; *Marshall* (No 2) *ibid*

⁶⁶J Pillinger, *Feminising the Market: Women’s Pay and Employment in the European Community* (Springer, 2016), p 81.

⁶⁷M Loughlin, *Foundations of Public Law* (OUP, 2010), p 392.

⁶⁸Reformulating, B Ackerman, *We the People, Vol III* (Harvard University Press, 2014), p 61. The CJEU famously noted that ‘the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted’. *Van Gend en Loos*, 26/62 [1963] ECR 1.

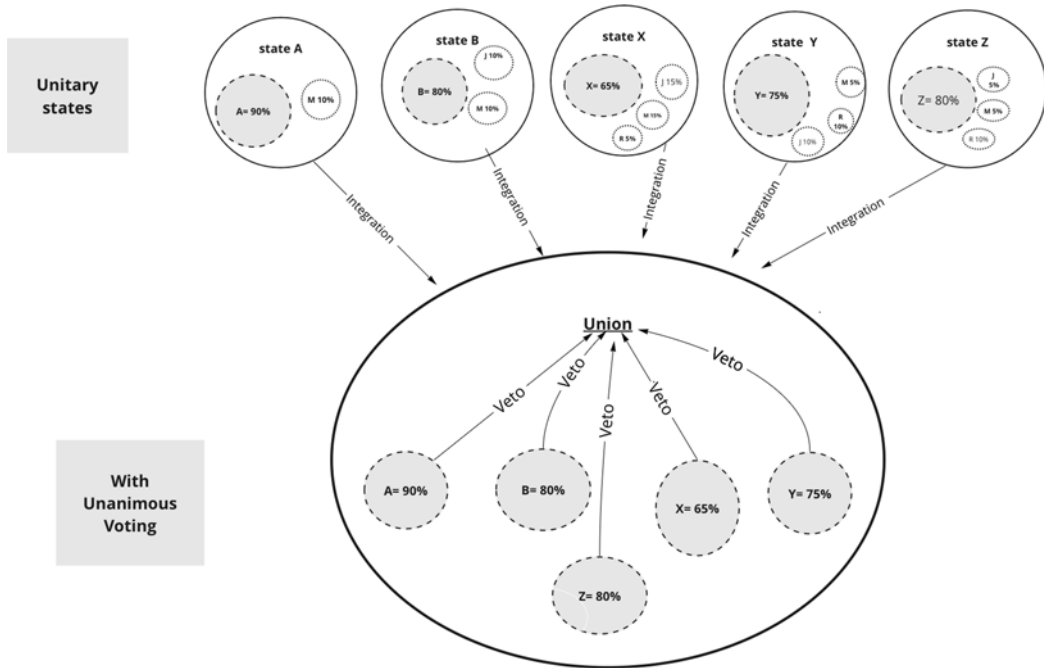


Figure 2. Integration with Unanimous Voting

governments'.⁶⁹ To harken back to US history, in spite of its Constitution's strongly worded Equal Protection Clause, when minority rights were left to states (as non-neutral umpires), the result was segregation and disenfranchisement. In contrast, when centralised desegregation was undermined, overt discrimination went underground. Unanimity repeats the pattern of decentralising rights to the state majorities as partial umpires judging their own cases.

Prior to illustrating how unanimity shapes and restrains the development of EU law on minority rights, I explain Calhoun's ideas as unanimity's most ardent defender. I then identify conceptual similarity between Calhoun's model and Article 19 TFEU. This is important because there is no such thing as an orphan idea without a conceptual genealogy or a historical parallel.⁷⁰ And 'the desire to reform' a legal concept goes 'hand in hand with the desire to know its [historical parallels]'.⁷¹ Particularly since there remains a gap—as Miller and Nicola have noted—in 'the dominant European constitutional law paradigm' in analysing 'the role of US states' rights movements' and its connection to 'racial subordination'.⁷²

C. Calhoun and Article 19 TFEU's Disturbing Similarity

Unanimity and state veto in Article 19 TFEU resemble the work of John C Calhoun. The former US secretary of state, and twice vice-president, is regarded as the antebellum's evil 'genius'.⁷³ One of his notorious intellectual contributions was to shift the debate on slavery from being conceived as

⁶⁹RD Kelemen, 'Built to Last? The Durability of EU Federalism' in S Meunier and K R McNamara (eds), *Making History: European Integration and Institutional Change at Fifty* (OUP, 2007).

⁷⁰A Peterson, *History of Philosophy Without Gaps, Vol 1* (OUP, 2014).

⁷¹Reformulating, H A L Fisher (ed), *The Collected Papers of Frederic William Maitland, Vol 2* (CUP, 1911), p 10.

⁷²J Miller and F Nicola, *The Failure to Grapple with Racial Capitalism in European Constitutionalism* (iCourts Working Paper Series, 2020), No 201, p 6.

⁷³G Kateb 'The Majority Principle: Calhoun and His Antecedents' (1969) 84(4) *Political Science Quarterly* 583.

‘necessary evil’ to a ‘positive good’.⁷⁴ Apprehensive of ‘abolition’ and ‘free soil’,⁷⁵ he sought to preserve the status quo by developing a constitutional theory that turned ‘the Madisonian legacy on its head’.⁷⁶ To do so, Calhoun offered a competing analysis of the idea of sovereignty, demos, the nature of a union, and, most relevantly, the voting requirement within such a union. All, with some necessary caveats, are relevant to the contemporary EU’s constitutional analysis.

In EU scholarship, Schütze was the amongst the first to draw attention to the parallels of Calhoun’s ideas to the ongoing supremacy debates in the EU. In ‘A Letter from America’, Schütze offered an informative account on the question of supremacy and Calhoun’s idea of ‘nullification’ or vetoing the execution of federal laws.⁷⁷ But Calhoun has twin ideas regarding veto: one on preventing the ‘execution’ of federal laws, which Schütze took to task, the other is on the voting procedure for ‘enacting’ laws, which is intimately linked to his views on race and slavery. This latter aspect is what this Article focuses on to pick up the comparison from where Schütze left off.⁷⁸

It is true that Calhoun’s idea came to the foreground in the 1828 ‘Tariff of Abomination’ economic crisis where the agricultural South ‘protested against’ a federal tariff that was seen as protective of the ‘industrial North’.⁷⁹ However, consensus exists that it was Calhoun’s view on race and uncompromising ‘commitment to slavery’ that dictated the ‘contours of his political theory’.⁸⁰ Calhoun started with questioning the principle of ‘all men are born free and equal’ as ‘unfounded and false’.⁸¹ To him, any laws on the emancipation of African Americans are unconstitutional not only because they disturb what he perceives as ‘racial hierarchy’⁸² but also because they encroached upon ‘reciprocity between states’.⁸³

With this view in mind, how could Calhoun secure the status quo and prevent, what he perceives as, unconstitutional federal abolition that would disrupt racial supremacy? Calhoun’s ‘extended’ answer boils down to the doctrine of ‘concurrent majority’,⁸⁴ which is that ‘States still retain their sovereignty ... unimpaired’,⁸⁵ and that states always have conflicting interests, thus, the decision principle within the union should be ‘unanimity not majority rule’.⁸⁶ Rather than what he terms ‘numerical majority’, he offers his competing model of ‘concurrent majority’, by which he meant the ‘unanimous agreement’ of ‘the majorities within’ all states.⁸⁷ This way, states can defend their own interests by vetoing any unfavourable change to their local majority. The veto can be overridden only by a constitutional amendment.

⁷⁴J Read, *Majority Rule versus Consensus: The Political Thought of John C. Calhoun* (University Press of Kansas, 2009), p 121.

⁷⁵Ibid.

⁷⁶Ibid, pp 118–159.

⁷⁷R Schütze, ‘Federalism as Constitutional Pluralism: A Letter from America’ in M Avbelj et al (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012).

⁷⁸The Disquisition expounds his doctrine of the ‘concurrent majority—the right of significant interests to have a veto over either the enactment or the implementation of a public law’—and discusses historical instances in which it had worked. Calhoun, note 9 above, Foreword, p xviii.

⁷⁹Schütze, note 77 above, 192.

⁸⁰B Steele, ‘Majority Rule versus Consensus Book Review’ (2010) 76(3) *Journal of Southern History* 714; Read, note 74 above, Ch 5.

⁸¹Calhoun, note 9 above, p 44.

⁸²For Calhoun slavery is not ‘an evil—far otherwise’. He anchored his argument on a skewed historical analysis: ‘Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually’. JC Calhoun, ‘Speech on The Reception of Abolition Petitions’ in Calhoun, note 9 above, p 473.

⁸³Read, note 74 above, p 21.

⁸⁴Calhoun, ‘Disquisition’, note 9 above, p 61

⁸⁵Ibid.

⁸⁶Read, note 74 above, p 5.

⁸⁷Calhoun’s frequently used term may seem vague but there is mainstream reading that he meant the majorities within states. Kateb for instance notes that ‘the same letter in which Calhoun first mentioned concurrent (or concur-ring) majority, he said that he viewed ‘a confederated com-munity as composed of as many distinct political interests as there are States ...’. Kateb, note 73 above, p 597.

To Calhoun, ‘unanimous agreement’ is constitutionally far superior to numerical majority. His argument rests on several premises. First, to Calhoun, ‘[s]overeignty is an entire thing to;—to divide, is,—to destroy it’ and sovereignty resided in ‘the people of the several States’. Thus, he insisted that ‘politically speaking ... there are no other people’, no sovereignty nor demos at the federal level to justify majority voting.⁸⁸ Secondly, he argued that state veto is a political safeguard and a ‘check’ on the Union’s unwarranted competence creep into state sovereignty and interests.⁸⁹ Thirdly, to show that unanimity is far from a constitutional anomaly, he drew an analogy between states’ legislative vetoes and the separation of powers’ reciprocal checks whereby certain branches of government veto each other.

One problem with Calhoun’s reasoning, not uncommon today, is that he missed the ‘constitutional forest’ for the trees.⁹⁰ Focusing on particulars, he failed to account for the first principles in classical constitutional theory. Unlike Madison, Calhoun’s work is ‘in no sense founded upon the funded wisdom of the ages’ but rather ‘represents the exact opposite’.⁹¹ Unsurprisingly then, Calhoun overlooked the foundational role of the *nemo iudex in causa sua* rule in constitutional theory and the Federalist Papers. The incompatibility of Calhoun’s model with the latter came from no less authority than Madison himself as the last surviving Founding Father.⁹² Exigencies of space preclude full discussion of Madison’s reply (which is well-discussed elsewhere),⁹³ I only highlight one point stressed by Madison on the analogy between state veto and executive veto in the separation of powers and its concomitant impact on perpetuating injustice.

Madison dismissed any ‘valid analogy’ between ‘reciprocal checks’ among the three branches of government and ‘a single state’s’ capacity to veto.⁹⁴ ‘Disputes between independent parts of the same [government]’ lead to a deadlock.⁹⁵ This is fundamentally different from ‘disputes between a state Govt. and the Govt. of the [United] States’. Here ‘each party possessing ... an organized Govt ... and having each a physical force to support its pretensions’.⁹⁶ In other words, while a reciprocal check seeks to prevent legislation in *tutu*, unanimity restrains only the central government while allowing a free hand of the state legislature to adopt laws as they please, to the detriment of minorities. State veto, then, inverts the logic of *nemo iudex in causa sua* rule by expanding, rather than restraining, state majorities’ capacities to judge their own causes.

The Civil War settled the Madison–Calhoun debate and consigned the latter to ‘the American dustbin odium’.⁹⁷ However, Calhoun’s model witnessed a partial resurrection (albeit unconsciously) in the EU’s sole article on minority-related legislative power. It is true that the similarity between the EU’s approach and Calhoun’s is only partial because of the divergent socio-political circumstances that he laboured in compared to today. Nonetheless, the partiality does not exclude the disturbing similarity in essence and consequence.

⁸⁸Calhoun to Hamilton, August 28, 1832’ in Meriwether et al (eds), *Papers of John C. Calhoun*, XI, pp 615 (first quotation), 618 (second quotation).

⁸⁹[W]ithout this there can be no constitution ..., it called by what check, or balance of power which, in fact, forms the constitution’. Calhoun, ‘Disquisition’, note 9 above, p 28.

⁹⁰For a contemporary critique on conflating constitutional woods with trees, see M Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (2017) 76 *Cambridge Law Journal* 257.

⁹¹H V Jaffa, *Calhoun versus Madison: The Transformation of the Thought of the Founding a Bicentennial Celebration*, *Library of Congress Speech*, <https://www.loc.gov/loc/madison/jaffa-bio.html>.

⁹²In his last work, Madison alluded to the dangers of Calhoun: ‘Let the open enemy to it be regarded as a ... Serpent creeping with his deadly wiles into Paradise’. *Advice to My Country*, 1834; and to George Tucker, June 27, 1836 (note in Madison’s hand, Madison Papers, Library of Congress; *Letters of Madison*, IV, pp 435–436).

⁹³Eg Read, note 74 above, pp 42–45.

⁹⁴Madison to Edward Everett, August 28, 1830’ (Hunt, *Writings of Madison*, IX, pp 383–403).

⁹⁵If states were to act opportunistically in cases of a federal deadlock, this would prompt federal institution to sort out their deadlock and pre-empt state law. Conversely, state veto will ensure that this federal reconciliation would not happen, and state majorities would pursue their interests unbridled. See generally, HK Gerken and A Holtzblatt, ‘The Political Safeguards of Horizontal Federalism’ (2014) 113 *Michigan Law Review* 57.

⁹⁶Madison to Edward Everett, note 4 above. For a commentary, see Read, note 74, pp 42–45.

⁹⁷J Kincaid, ‘Majority Rule versus Consensus, Review’ (2010) 40(3) *Publius* 560, p 561.

In essence, his mechanism aimed to ensure that the union would act only through consensus. This is the case with Article 19 TFEU, where consensus is needed to ‘combat discrimination’.⁹⁸ Another way to look at the similarity between the two models is from the prism of the status quo. At the heart of Calhoun’s theory is the desire to insulate the status quo from change as much as possible. Yet, the status quo, as Sunstein notes, is often ‘neither neutral nor just’.⁹⁹ To insulate the status quo from change is to perpetuate the injustices befalling many of the underrepresented parts of the society. Likewise, Article 19 TFEU insulates the status quo of EU minorities and its concomitant injustice. While Calhoun’s model was not fully tested, Article 19 TFEU has been. The consequence of Article 19 TFEU has rendered the EU ‘minority agnostic’ and its contribution ‘limited’¹⁰⁰ to ‘all but the most anodyne of actions’,¹⁰¹ leaving minorities at the mercy of the ‘tyranny of veto’¹⁰² as explained in the next section.

III. The Repercussions of Article 19 TFEU and the Way Forward

A. Article 19 TFEU’s Drafting and Its Current Use

Despite Europe’s heavy legacy of racism which almost brought the continent to the brink of destruction, the European project, up until the end of second millennium, had almost no role in protecting racial and religious minorities.¹⁰³ Things changed with the Amsterdam Treaty (1997),¹⁰⁴ which introduced Article 13 EC (now Article 19 TFEU) conferring power on the EU to adopt legislation to combat discrimination on a range of grounds within the existing Union competences.¹⁰⁵ Adding such a competence came as a product of many factors. Chief among them was the collapse of communism and the impending eastward expansion of European integration to many post-communist countries with ‘a messy record’ of treating ethnic and national minorities.¹⁰⁶ An additional factor was the growing pressure from civil society and the European Parliament for involvement on ‘a wider range of discrimination grounds’.¹⁰⁷

While the original proposal of Article 13 EC endorsed qualified majority voting (‘QMV’), pressure from a few Member States spearheaded by the UK managed to weaken the Article by requiring unanimity for its use.¹⁰⁸ The UK Parliament’s archives demonstrates that the British view, which concurring Member States hid behind, saw ‘the defence of sovereignty is bound up with the concept of *veto*’.¹⁰⁹

⁹⁸Article 1 TFEU.

⁹⁹C R Sunstein, *The Partial Constitution* (Harvard University Press, 1993), p 1.

¹⁰⁰Kochenov, note 3 above.

¹⁰¹L Flynn, ‘The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others?’ (1999) 36 *Common Market Law Review* 1127, p 1138.

¹⁰²M Bell, *Anti-Discrimination Law and the European Union* (OUP, 2002), p 126.

¹⁰³There was some soft measures and declaration regarding xenophobia and racism, see T Harvey ‘Putting Europe’s House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam’ in D O’Keeffe and P Twomey (eds) *Legal Issues of the Amsterdam Treaty* (Hart, 1999), pp 346–348.

¹⁰⁴Later, the Charter of Fundamental Rights took this a step further, enshrining both a prohibition of race-based discrimination (Article 21) and a right to education (Article 14).

¹⁰⁵Harvey, note 103 above.

¹⁰⁶W Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider’ (2009) 16(3) *Columbia Journal of European Law* 385, p 416.

¹⁰⁷M Bell, ‘The Principle of Equal Treatment: Widening and Deepening’ in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd ed (OUP, 2011), p 618. On the role of ‘Starting Line Group’ and others who campaigned for the Article, see TE Givens and R E Case, *Legislating Equality: The Politics of Antidiscrimination Policy in Europe* (OUP, 2014), pp 57–58.

¹⁰⁸Bell, note 107 above. For a summary of the different views of different Member States, see L Flynn, ‘The Implication of Article 13 EC: After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others?’ (1999) 36(6) *Common Market Law Review* 36. (Noting that ‘[a]ccording to the European Parliament’s summary ... all Member States approved the introduction of a non-discrimination clause, apart from Denmark, which expressed no view, and the UK which was opposed. However, it was noted that there were divisions as to the scope of the clause and, in general, opposition to any direct effect of such a provision’.).

¹⁰⁹IGC Issues: Summary and Bibliography Research Paper 96/73’ (17 June 1996), p 14.

While certain parallels can be drawn between Calhoun and the UK's position, it is essential to underscore an important distinction between the position of Member States endorsing majority voting and that of Madison. Whilst Madison made a clear recourse to first constitutional principles, representative of states supporting majority voting offered mainly pragmatic arguments that were described as lacking a clear 'direction'.¹¹⁰ Commentators noted that the Irish presidency 'failed to push the negotiations along'¹¹¹ and to articulate a compelling criteria to determine which matters should be subject to qualified majority voting.¹¹² Therefore, it was left to the Dutch presidency 'to make some attempt' though 'with little success'.¹¹³ Ultimately, the unanimity requirement prevailed on pragmatic grounds without the kind of a constitutionally enriching debate as the one we saw in the US.¹¹⁴

Since its adoption, the legislative reliance on Article 19 TFEU has been exceedingly rare. The only two measures enacted using the Article date back to 2000 and were induced by an 'unusual twist of political fate',¹¹⁵ or what others term an 'external factor' well beyond the control of constitutional actors.¹¹⁶ In February 2000, Jörg Haider's radical right-wing party was elected to the Austrian government, which evoked a call for a reaction from the EU and prompted 'the fast-tracking' of the Commission's proposal for a directive on discrimination on grounds of racial or ethnic origin.¹¹⁷ In June 2000, Member States adopted the Racial Equality Directive ('RED').¹¹⁸ Shortly afterwards, the EU 'moved swiftly to complement'¹¹⁹ this with the Framework for Employment Equality Directive ('FED'),¹²⁰ which extended the prohibition of discrimination to the grounds of 'religion or belief, disability, age, and sexual orientation'. Arguably, Haider's affair had an important impact in securing an exceptional agreement. The then-new Austrian government 'would not dare oppose the Race Directive out of fear that this would legitimize the reproach by the government to the other fourteen member states ... that includes a racist party' and if other Member States sought to oppose the proposal, 'they would be blamed and shamed for not putting their political power where their mouth is'.¹²¹

Nonetheless, after more than two decades and despite certain 'symbolic'¹²² or 'mitigated' improvements,¹²³ the EU's contribution has been described as 'skin deep' and 'troublesome'.¹²⁴ If one considers religious minorities, it was not until 2017 that the first case on religious discrimination was decided, which was, to say the least, disappointing.¹²⁵ The Commission's proposal to

¹¹⁰B Patrick and G Smith, 'Politics and Policy Making at the 1996–1997 European Union Intergovernmental Conference' (unpublished manuscript, 1999), p 142, <http://etheses.lse.ac.uk/1562/>.

¹¹¹Ibid.

¹¹²Qualified majority voting and unanimity. Note No 15 (CONF 3815/96), 18 April 1996, EC/IGC/CONF.3815/96.

¹¹³Smith, note 110 above; see also summary of arguments for and against unanimity in *Human Rights and the 1996–97 Intergovernmental Conference: The Union Divided: Race Discrimination and Third Country Nationals in the European Union* (Justice, 1997).

¹¹⁴Ibid; Flynn, note 107 above; see also Presidency's progress report on the IGC (21 and 22 June 1996), Bulletin of the European Union, No 6 (1996).

¹¹⁵Bell, 'Widening and Deepening', note 107 above, p 618.

¹¹⁶External events as a term of Article denote events well beyond the control of constitutional actors that significantly influence constitutional rules or even the structure. See Z Elkins et al, *The Endurance of National Constitutions* (CUP, 2009).

¹¹⁷Bell, 'Widening and Deepening', note 107 above, p 618.

¹¹⁸Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

¹¹⁹Bell, 'Widening and Deepening', note 107 above.

¹²⁰Council Directive (EC) 2000/78.

¹²¹Givens and Case, note 107 above, p 85.

¹²²Goodwin, note 3 above, p 179.

¹²³Möschel, note 5 above.

¹²⁴Goodwin, note 3 above, p 179.

¹²⁵*Samira Achbita*, C-157/15, EU:C:2017:203; *Asma Bougnaoui*, C-188/15, EU:C:2017:204. For a critical analysis, see JHH Weiler, 'Je Suis Achbita' (2017) 28(4) *European Journal of International Law* 989. On the sheer paucity of cases relevant to both the FED and RED Directives, see U Belavusau and K Henrard, 'Achievements and Pitfalls' in Belavusau and Henrard, note 3 above, p 22.

extend protection against discrimination on grounds covered by FED beyond work has failed to pass since 2008. As EU law currently stands, it would be 'lawful' to deny services for someone manifesting a religious symbol be it a Sikh turban, a Jewish yarmulke, or a Muslim headscarf.¹²⁶

In the absence of a strong EU role, Vouchez has comprehensively illustrated the 'exclusionary' consequences resulting from the invocation of neutrality by many Member States to conceal hostility towards religious minorities, particularly a 'strong dimension of islamophobia'.¹²⁷ Further, through the examination of various national case law, she highlights how accommodating religious minorities is often perceived by national courts to 'cause trouble' and 'threaten the public order'.¹²⁸ As many have noted, the minority policies of several Member States which are frequently phrased in the language of integration serve *de facto* as a majoritarian tool to control 'groups of non-Western descent'.¹²⁹

Equally troubling is the EU's six million Roma minorities who are still facing *de facto* segregation in education, housing and other spheres of life.¹³⁰ They underwent a *fait accompli* of inhuman expulsion by French authorities in 2010.¹³¹ Statistics still reveal a high level of anti-Roma sentiments across Europe¹³² and 'unscrupulous politicians' often successfully use Roma as 'a scapegoat' to 'refocus discontent'.¹³³ Yet very few cases tackle the widespread anti-Roma, anti-Black racism or anti-Semitism and Islamophobia.¹³⁴ The scholarship concerning the multifaceted challenges faced by racial and religious minorities within the EU is too extensive to warrant further exploration here. Suffice it to refer to the diagram used in the Commission's latest anti-racism action plan.¹³⁵

The question then is to what extent the unanimity requirement of Article 19 TFEU contributes to these problematic figures. Obviously, various factors, such as the colonial legacy of certain Member States¹³⁶ and differing philosophies regarding anti-discrimination laws¹³⁷ contribute to the dynamics at the national level. However, the primary consequence of unanimity is that it leads to EU *inaction* and perpetuates the (unjust) national status quo. By allowing any national majority to judge their own interest and block any purported EU measure, it frustrates the *nemo iudex in causa sua* rule and thus inhibits the EU from utilizing its potential as a supranational check on national majoritarian biases. This can be demonstrated through the following four aspects.

First, unanimity's negative impact can be best illustrated by the failure to adopt the Commission's 2008 proposal for the 'Horizontal Directive' despite being a 'cautious proposal'

¹²⁶However, if these symbols were classified as an issue of race or ethnicity, the EU law would provide protection. National law would apply and may provide protection against these discriminatory practices; A Śledzińska-Simon, 'Unveiling the Culture of Justification in the European Union: Religious Clothing and the Proportionality Review' in U Belavusau and K Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart, 2019).

¹²⁷S Hennette-Vauchez, 'Religious Neutrality, Laïcité and Colorblindness: A Comparative Analysis' (2020) 42(2) *Cardozo Law Review* 539.

¹²⁸*Ibid.*, referring to the judgment of Cour d'appel [CA] [regional court of appeal] Paris, 6e ch, No 14PA00582(Fr) (12 October 2015).

¹²⁹T Loenen, 'The Headscarf Debate: Approaching the Intersection of Sex, Religion, and Race under the European Convention on Human Rights and EC Equality Law' in D Schiek and V Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge, 2009), p 314.

¹³⁰Eliason, note 4 above, p 194.

¹³¹M Dawson and E Muir, 'Individual, Collective Vigilance in Protection Fundamental Rights in the EU: Lesson from the Roma' (2011) 48(3) *Common Market Law Review* 766.

¹³²A 2014 Pew Research study found that majorities across almost all Member States hold deeply unfavourable views of the Roma (Italy: 85%; France: 66%; Greece: 53%; UK: 50%). Pew Research Centre, 'A Fragile Rebound for EU Image on Eve of European Parliament Elections' (2014), pp 30–33, www.pewglobal.org/2014/05/12/chapter-4-views-of-roma-muslims-jews/ cited in European Commission Report.

¹³³Goodwin, note 3 above, p 172 (referring to politicians from France and Hungary).

¹³⁴Möschel, note 5 above, p 155.

¹³⁵COM(2020) 565 final, A Union of Equality: EU Anti-Racism Action Plan 2020–2025.

¹³⁶P Hansen and S Jonsson, *Euroafrica: The Untold History of European Integration and Colonialism* (Bloomsbury, 2014).

¹³⁷See eg B Havelková and M Möschel (eds), *Anti-Discrimination Law in Civil Law Jurisdictions* (OUP, 2019), p 4.

seeking to equate the scope of discrimination of religion and other grounds to that of RED.¹³⁸ Whilst it was approved by the EP in 2009,¹³⁹ the proposal ‘remained stuck’ in the Council facing intense German objections on its costs for business and other Member States’ concerns regarding social security.¹⁴⁰ If the three month blocking of the passage of the 1964 US Civil Rights Act earned the title of ‘longest debate in history’,¹⁴¹ how should the Commission proposal be described, having been blocked for more than 14 years.

Secondly, the impact of unanimity can also be demonstrated by comparing it to other areas or institutions where unanimity is not required. Most obviously, sex equality, generally unshackled by unanimity remains the most protected ground where nine directives have been successfully enacted and transposed.¹⁴² But even within the field of racial and religious minorities, a more subtle comparison is the attitude of EU institutions with more federal/supranational composition and thus unrestrained by unanimity. The European Parliament in 1995, while contemplating different options of the then proposed Article 19, sought a very expansive solution by extending the EU’s market engine competence enshrined in Article 18 TFEU (discrimination on grounds on Member States nationality) to all possible grounds of discrimination.¹⁴³ Additionally, the European Parliament approved the Commission’s proposal on equal treatment twelve years ago and proposed important amendments regarding the introduction of ‘multiple discrimination’.¹⁴⁴ However the Council ‘retained none’ of these suggestions and failed to pass the proposal.¹⁴⁵ Unanimity at the Council remains *a solid rock* on which the efforts of other EU institutions are crushed.

The Commission too, unrestrained by the shackles of unanimity, took numerous steps on this front.¹⁴⁶ This includes chasing defiant EU states through ‘ardent transposition battles’ of the RED and FED directives.¹⁴⁷ Between 2005–2007, the Commission initiated infringement proceedings for non-conformity with both directives against 25 Member States mainly.¹⁴⁸ In fact, the Commission was a strong advocate of the introduction of qualified majority to Article 19 TFEU’s predecessor and expressed its disappointment for falling short of ‘the initial objective (which envisaged that the qualified majority should become the general rule)’.¹⁴⁹ More recently, the Commission blamed Article 19 TFEU’s unanimity requirement for leading to ‘an inconsistent legal framework and an incoherent impact of Union law on people’s lives’.¹⁵⁰

Third, the danger of unanimity on minorities can even extend beyond perpetuating inertia and the ‘unjust’ status quo. It could establish a ‘double hurdle’ to minority protection measures at the national level.¹⁵¹ As Kochenov remarked, ‘virtually any right reserved for a special group of citizens

¹³⁸Bell, ‘Proposal for a New Directive’, note 6, pp 11–13.

¹³⁹The Parliament legislative resolution of 2 Apr 2009, T6-0211/2009.

¹⁴⁰P Craig and G De Búrca, *EU Law*, 7th ed (OUP, 2020), p 914.

¹⁴¹B Whalen and C W Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (Seven Locks Press, 1989).

¹⁴²For a list of the directives, see U Belavusau and K Henrard, ‘A Bird’s Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives’ (2019) 20 *German Law Journal* 614, n 34.

¹⁴³M Klamert et al, *Commentary on the EU: Treaties and the Charter of Fundamental Rights* (OUP, 2019), p 426.

¹⁴⁴See European Parliament Legislative Resolution of 2 April 2009 on the Proposal COM(2008)0426, Amendment 37 of the EP, 2009, Art 1; Amendments 1, 23.

¹⁴⁵Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation (consolidated text) ST 14500/16, 14 December 2016.

¹⁴⁶On the Commission’s supranational pedigree compared to the Council’s intergovernmental composition see R Schütze, *European Constitutional Law*, 2nd ed (CUP, 2016), pp 13–19.

¹⁴⁷U Belavusau and K Henrard, ‘The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law: Achievements and Pitfalls’ in Belavusau et al, note 3 above, p 33.

¹⁴⁸Belavusau and Henrard, note 147 above.

¹⁴⁹Note d’analyse sur le traité d’Amsterdam (Bruxelles, le 7 juillet 1997) (translation by the author).

¹⁵⁰COM(2019) 186 final, The European Economic and Social Committee and the Committee of the Regions, Strasbourg (16 April 2019).

¹⁵¹Kochenov, ‘A Bird’s-Eye’, note 3 above, 86.

of a particular Member State who belong to a minority must be opened up to any EU citizen from other Member States'.¹⁵² The 'inherent market bias' of the EU and the stringent CJEU test for excluding other EU citizens from minority-tailored protective provisions undermines and disincentivizes vanguard Member States' ability to protect minorities.¹⁵³ Had the EU legislator not been restrained by unanimity it would have been easier to negotiate and enact a measure harmonizing and accommodating the diverse protective measures needed to accommodate minorities across different Member State levels.

Fourth, the inability to utilise Article 19 TFEU to pass further legislative measure contributes to hindering jurisprudential development. As Advocate General Mazák noted, 'Article 19 TFEU is simply an empowering provision' and as such 'it cannot have direct effect'.¹⁵⁴ He cautioned that any judicial activism in this area '[n]ot only would ... raise serious concerns in relation to legal certainty, it would also call into question the distribution of competence between the Community and the Member States, and the attribution of powers under the Treaty in general'.¹⁵⁵ Circularity and the 'constitutional catch 22' is obvious here.¹⁵⁶ Unanimity cannot be interpreted away,¹⁵⁷ and the Council with its current 27 Member States cannot easily agree to expand legislations beyond the existing measures.¹⁵⁸

Before proceeding to the next Section, one remark must be highlighted on the Racial Equality Directive and how it may give deceptive optimism at first impression. Given the politically conducive circumstances of its adoptions, it has the broadest material scope among all discrimination grounds.¹⁵⁹ The RED forbids discrimination not only in employment-related fields, but also in social protection, healthcare, education, and the supply of goods and services, including housing.¹⁶⁰ However, as de Búrca remarked, the directive is a 'more genuine framework in nature, in so far as it contains a general prescription ... to which States must commit themselves, but without prescribing in detail how this is to be achieved'.¹⁶¹

Relatedly, the directive almost exclusively relies on the 'passive' protection through 'complaints-based' enforcement, which is particularly insufficient to rectify historical inequalities of racism.¹⁶² According to the Commission's own reckoning, the directive 'is not enough to resolve the deep-rooted social exclusion *Legislation needs to be combined with policy and financial measures*'.¹⁶³ Race, taken alone and keeping multiple discrimination aside, is 'vastly complex'.¹⁶⁴

¹⁵²Ibid.

¹⁵³Ibid, p 96, referring to cases such as *Bickel and Franz*, C-274/96, [1998] ECR I-7637, para 25. He further explains that pursuant to the Court's formulation, Member States are required to demonstrate beyond any reasonable doubt that the policies introduced are: (1) necessary; (2) achieve a rational objective in the least intrusive way; and (3) are not aimed at establishing direct or indirect discrimination or undermining the internal market.

¹⁵⁴Opinion of AG Mazák in *Palacios de la Villa*, C-411/05, [2007] ECR I-8531, paras 133, 138, 95.

¹⁵⁵Ibid.

¹⁵⁶D Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 *Common Market Law Review* 1795.

¹⁵⁷See K Lenaerts and JA Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629.

¹⁵⁸The success of judicial activism depends partially on the prospect of getting the legislator effectively involved. As Alter remarked, the CJEU has some area of 'acceptable latitude, beyond which [it] cannot stray'. K Alter, *The European Court's Political Power: Selected Essays* (OUP, 2010), p 126; Klarman, note 58 above, p 453.

¹⁵⁹Bell, 'Widening and Deepening', note 108 above, p 619.

¹⁶⁰RED Art 3.

¹⁶¹While RED applies to 'social protection, including social security and "healthcare", no attempt is made by that instrument to define the consequent detailed rules. It is unclear what the impact of this provision will be'. E Ellis and P Watson, *EU Anti-Discrimination Law* (OUP, 2012), p 438.

¹⁶²Bell, 'Proposal for a New Directive', note 6, p 18.

¹⁶³COM(2014) 2 final. Joint Report on the application of Council Directive 2000/43/EC and of Council Directive 2000/78/EC, 13 (emphasis added).

¹⁶⁴Goodwin, note 3 above, p 175.

'Proactive' legislator intervention,¹⁶⁵ incentive measures, and redistributive measures are needed to rectify historical ethnic inequality.¹⁶⁶ However, RED leaves positive action to the discretion of Member States, and so far there has been no single case before CJEU tackling positive action on race. As is well-known, incentives and proactive measures played a large role in facilitating compliance and promoting interracial contact in the US.¹⁶⁷ This further attests to the fact that given the vulnerability of racial and ethnic groups, they are affected the hardest by legislative inaction resulting from the unanimity hurdle.¹⁶⁸

B. Outlining the Scope of Reform and Its Objections

With these contemporary repercussions in mind and given the previously discussed historical background, the EU might want to distance itself from Calhoun's model with its negative connotation and racist motivation. It should be stressed that this Article and the logic of *nemo iudex in causa sua* advocates a move away from unanimity only with regards to Article 19 TFEU where violation of the *nemo iudex in causa sua* rule is explicit and the cost for minorities is the most disproportionate. Differently put, as the EP has long advocated, the same voting arrangement akin to that of Article 19 TFEU's immediately preceding Article 18 TFEU should be adopted for Article 19, as well as Article 157 TFEU.

This does not mean removing unanimity in other areas, such as security-related aspects, the Flexibility Clause of Article 352 TFEU, or technical areas, such as increasing the number of Advocate Generals for example.¹⁶⁹ These aspects do not pit the majorities against the minorities in such a way where the *nemo iudex in causa sua* rule is engaged, and thus are not prone to the same critique offered in this Article. However, even with such a relatively narrow proposal, a few counterarguments are bound to arise and should be clarified before concluding.

First, it could be argued that Article 19 TFEU's unanimity is a 'political safeguard' to ensure respect of national interests.¹⁷⁰ This rehashes Calhoun's rationale, which called unanimity a 'check, or balance of power'.¹⁷¹ This argument conflates a safeguard with a roadblock. Safeguards are meant to accommodate dynamism and change, yet in the case of unanimity, it becomes an insurmountable and almost perpetual obstacle, as evidenced by the entrapment of the 'cautious' equality directive proposal for a span of 15 years. Therefore, this objection reverses the Madisonian reply to Calhoun that veto perpetuates the unfair status quo and leaves state majorities free to oppress minorities.

This objection would have been persuasive had unanimity been the norm for all EU competences. But since the treaties alternate between different voting requirements, in choosing between unanimity and majority voting for different legal bases, one may inquire why Article 19 TFEU falls within the ambit of unanimity. The crux of constitutional allocation of powers is to be guided by 'reflection' and 'choice' rather than randomness and 'accident'.¹⁷² Treaty drafters should be able to justify their choices in terms of EU values and 'squarely confront' the moral 'cost' of such choices.¹⁷³ Opting for

¹⁶⁵On the distinction between passive and proactive protection, see E Muir, 'Fundamental Rights: An Unsettling EU Competence' (2014) 15(1) *Human Rights Review* 25.

¹⁶⁶Eliason, note 4 above, p 238. For a critique on the EU's focus on individual rights at the expense of redistributive justice, see A Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' in D Kochenov et al (eds), *Europe's Justice Deficit?* (Hart, 2015).

¹⁶⁷S Fredman, *Discrimination Law* (OUP, 2011), pp 334–335.

¹⁶⁸This is not to mention that ethnic minorities are at a comparative disadvantage because their conditions do not always overlap with the EU's market apparatus.

¹⁶⁹Eg Arts 242, 352 TFEU.

¹⁷⁰For an analysis of political and other sorts of EU safeguards, see Kelemen, note 69 above.

¹⁷¹Calhoun's described unanimity as a 'check, or balance of power which, in fact, forms the constitution'. Calhoun, 'Disquisition', note 9 above, p 28.

¹⁷²A Hamilton, 'Federalist No 1', note 8 above, p 1.

¹⁷³*R v Home Secretary*, ex parte Simms [1999] UKHL 33, [2000] 2 AC 115.

unanimity for non-discrimination speaks volumes about the priority of this domain. The *nemo iudex in causa sua* argument and its history shows unanimity's particularly *disproportionate cost for minorities*. This shows either a complete discarding of foundational constitutional theory or an intentional discarding of minorities. Whilst Article 2 TEU upgrades minority rights to an EU value, the unanimity choice relegates its protection to the lowest level for the reasons discussed earlier.¹⁷⁴ It is the duty of academics to lay bare the costs of such a choice, as well as the contradiction at the heart of the treaties, by showing that the reference in Article 2 may be 'half-hearted' when operationalised through Article 19 TFEU.¹⁷⁵

Secondly, moving Article 19 TFEU to majority voting does not mean encroaching on national traditional values in areas such as family law.¹⁷⁶ As 'a *lex generalis* legal base', Article 19 TFEU can be used only 'where the Treaty does not already contain another more specific *lex specialis* legal base'. That is why despite Article 19's mentioning of sex, equal pay measures are grounded in Article 157(3) as the *lex specialis*.¹⁷⁷ Likewise, matters of cross-border family law, for instance, will continue to be subject to the special legislative procedure in Article 81(3). This nuanced understanding is already underscored in the entrapped 2008 Commission Equal Treatment Proposal, which notes that it would apply '*without prejudice to national laws on marital or family status and reproductive rights*'.¹⁷⁸ This further reflects that moving Article 19 TFEU to majority voting will not jeopardise the fine balance between the Union's role in protecting minorities and the imperative of respecting the commendable diversity of Member States' cultural values.

IV. Conclusion

'A government', says Machiavelli, 'must often be brought back to its original principles'.¹⁷⁹ That is what this Article has attempted to do through tracing the roots of constitutional governance to the universal principle of *nemo iudex in causa sua*. The best formulation thereof came in Madison's Federalist No 10, which extended Locke's use of the principle to ingeniously argue for integrative federalism. Through the discussed syllogism, it was shown that integrating into a larger union increases the *diversification of interested factions*, which bestows more *impartiality* on the central government.

However, the unanimity requirement underlying Article 19 TFEU has been shown to frustrate the *nemo iudex in causa sua* principle, perpetuate the unjust status quo, and to resemble Calhoun's model. Worse still, unanimity further reverses the logic of the *nemo iudex in causa sua* rule in two more respects. First, it makes increasing diversity of actors a *constitutional curse rather than a blessing* because it increases the likelihood of a veto, which hinders favourable intervention. Second, it may adversely affect efforts of vanguard states in protecting their own minorities. This is because any single local majority can easily block the change across the whole of the EU on the one hand, while on the other, the free movement would make extending minority-tailored measures to all EU citizens costly for the vanguard state.

For this, this Article offers a historically informed, theoretically grounded argument to support the European Parliament's earlier advocacy of moving Article 19 to majority voting akin to Articles 18 and 157 TFEU. This would enable the EU to uphold the values outlined in Article 2 TEU, which explicitly include minority rights, and to respect the centuries-long history of the *nemo iudex in causa sua* principle in Western constitutional theory. The principle has been surprisingly overlooked in the allocation of decision-making procedure within the EU as the drafting history of

¹⁷⁴Kochenov, 'Bird's Eye', note 3 above, p 81.

¹⁷⁵Ibid, p 93.

¹⁷⁶Art 81(3) TFEU.

¹⁷⁷Klamert et al, note 143 above, p 427.

¹⁷⁸The 2008 Proposal for an Equal Treatment Directive, note 6 above (emphasis added).

¹⁷⁹N Machiavelli, *Discourses on Livy*, Bk 3 (HC Mansfield and N Tarcov trans, University of Chicago Press, 2009), ch 1.

Article 19 TFEU indicates. This oversight is striking considering how Madison drew upon European and English sources when incorporating the doctrine, which now appears to be disregarded in EU constitutionalism. Consequently, the purpose of this Article is to re-establish the importance of the *nemo iudex in causa sua* maxim as a fundamental principle that should be seriously considered in revisiting the allocation of decision-making voting procedures.

Admittedly, treaty amendment is complex and difficult to secure, but history may counsel against despair. It was years of activism from social networks, intellectual output of the Kahn Commission Report, and the political efforts of the European Parliament that in a time-honoured fashion helped expand the EU's jurisdiction in the first place into non-discrimination beyond sex.¹⁸⁰ Moreover, and irrespective of the fate of any treaty amendment, comparative analysis, as offered in this Article, should be seen as an end in itself. Rather than seeking to provide 'off -the-shelf' solutions, contrasting divergence and convergence in other constitutional systems¹⁸¹ promotes 'self-reflection and often self-lamentation'.¹⁸²

¹⁸⁰Eg Givens and Case, note 107 above.

¹⁸¹Young, note 14 above.

¹⁸²Hirschl, note above 15, p 194.