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THE COURT, THE CHARTER, AND THE VERTICAL DIVISION OF POWERS IN THE EUROPEAN UNION

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1. Introduction

By construing an unwritten human rights catalogue for the European Union, with a broad scope *ratione materiae* and *ratione personae*, the European Court of Justice has played an important role in the vertical division of powers in the European Union. This judge-made Bill of Rights will now, however, be replaced by the incorporation of the – legally binding – Charter of Fundamental Rights in the recently signed EU Constitution. There were several concerns during the European Convention that a legally binding Charter could particularly lead to a significant – and hence undesired – shift in the vertical division of powers in the European Union. Similar fears had already led the Convention which drafted the Charter to construct a narrow scope of application. The two Conventions therefore decided to delimit both the scope *ratione materiae* and *ratione personae* of the Union's fundamental rights *acquis* and hence to curtail the role of the Court.

This article will examine the question of whether and how the incorporation of the Charter could change the role of the Court of Justice in the vertical division of powers in the European Union. It analyses the possible effects of this incorporation from a comparative perspective, since, remarkably, similar arguments were used when it was decided to add a legally binding Bill of Rights, with only a limited scope, to the United States Constitution. The Bill of Rights has nevertheless had an important centralizing effect, a process in which the Supreme Court has played a pivotal role.

This article will consist of two sections. Section 2 will examine how Article II-111 of the Constitutional Treaty (hereafter: "CT"), by limiting the scope *ratione personae* of the Union's fundamental rights *acquis,* will affect the role of the Court of Justice. It is important to point out that the term

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"scope *ratione personae*" is used here to describe what Curtin and Van Ooik have called the "passive personal scope of application", which concerns the question *against whose acts* the Charter offers protection.[1] Section 3 will discuss what effects the Charter in general will have on the use of the Union's powers, and how this can subsequently also, indirectly, widen the scope of the Court's fundamental rights review.

2. The Conventions, the Charter, and the role of the Court

2.1. *The current role of the Court of Justice*

As is well known, the European Court of Justice in its case law regards fundamental rights as part of the general principles of Community law.[2] It is generally acknowledged that the Court developed this case law in order to choke the inchoate revolt by the Italian and German Constitutional Courts against the articulation and the constitutional consequences of the supremacy doctrine.[3] The Court thus added to the constitutional framework of the Community a judge-made, unwritten Bill of Rights.

Why no such catalogue was part of either the EEC or ECSC Treaty will remain unclear, since, as is well known, the *travaux préparatoires* have never been disclosed. It could have been a "deliberate silence",[4] for instance because the framers of the Treaties feared that it "might have become an invitation to extend [the] enumerated powers".[5] On the other hand, the framers of

1. As opposed to the question who is actually protected by the Charter, or "active personal scope of application". Curtin and Van Ooik, "The sting is always in the tail. The personal scope of application of the EU Charter of Fundamental Rights", 8 MJ (2001), 102, at 103.

2. Case 29/69, *Stauder* v. *City of Ulm*, [1969] ECR 419, para 7.

3. See e.g. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (OUP, 2000), at pp. 170–172; Weatherill, *Law and Integration in the European Union* (OUP, 1995), at pp. 215–216; Mancini, "The Making of a Constitution for Europe", 26 CML Rev. (1989), 595, at 608–610; Besselink, "From Heteronomous to Autonomous Protection of Fundamental Rights – The EU protection of Fundamental Rights as an Evolving Constitutional Concern" in Prechal et al. (Eds.), *The Emerging Constitution of Europe* (OUP, 2005), forthcoming; Rodríguez Iglesias, "The Protection of Fundamental Rights in the case law of the Court of Justice of the European Communities", 1 *Columbia Journal of European Law* (1995), 169, at 181.

4. Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Lawmaking* (Nijhoff, 1986), at p. 390.

5. Weiler, "Eurocracy and Distrust: Some Questions concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities", 61 *Washington Law Review* (1986), 1103, at 1112.

the Treaties probably intended Community law to include more than written law only, considering that Article 230 EC provides that "the Court of Justice shall review the legality of acts ... on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty *or of any rule of law relating to its application*".[6] Be that as it may, it is clear that the Court's fundamental rights case law served not merely to provide a form of human rights protection in the European Union, but also to promote European integration, *inter alia* by securing the supremacy principle. As in the United States context discussed below, legitimacy concerns were the primary reason for introducing fundamental rights in the Community's constitutional order.

The Court used as sources for its unwritten Bill of Rights the common constitutional traditions of the Member States,[7] international human rights treaties,[8] and the European Convention on Human Rights.[9] Besides acts of Community institutions, the Court has found that it has jurisdiction to review acts of Member States in the following situations:[10]

a) Agency type situations – Member States implementing EC legislation.[11]

6. De Witte, "The Past and the future role of the European Court of Justice in the Protection of Human Rights" in Alston and Weiler (Eds.), *The EU and Human Rights* (OUP, 1999), at p. 864. Emphasis added.

7. Case 11/70, *Internationale Handelsgesellschaft (I)*, [1970] ECR 1125, para 4. See also Case 44/79, *Hauer*, [1979] ECR 3727, para 15.

8. Case 4/73, *Nold*, [1974] ECR 491, para 13.

9. Case 36/75, *Rutili*, [1975] ECR 1219, para 32. This case law was codified in Art. 6(2) TEU.

10. This distinction is derived from Weiler and Lockhart, "'Taking rights Seriously' seriously: The European Court and its fundamental rights jurisprudence – Part I", 32 CML Rev. (1995), 51, at 73. See also Tridimas, *General Principles of EC Law* (OUP, 1999), at pp. 23–27 and 225–231 and the Opinion of A.G. Jacobs in Case C-168/91, *Konstantinidis*, [1993] ECR I-1191, para 44.

11. Eeckhout has demonstrated that within this category three different categories of case law can be discerned. First, those cases – involving customs legislation – in which the Court held that, in the absence of harmonization, Member States may adopt any penalty which seems appropriate, but they must exercise that power in accordance with Community law and its general principles. See e.g. Case C-36/94, *Siesse*, [1997] ECR I-3573, para 21. Second, those cases in which the Court held that fundamental rights are binding on Member States when they are implementing Community legislation, so that these rights can then be used to review Member State measures. See e.g. Joined Cases 201 & 202/85, *Klensch*, [1986] ECR 3477, paras. 8–9; Joined Cases 196–198/88, *Wachauf*, [1989] ECR 2609, paras. 14 and 19; Case C-2/92, *Bostock*, [1994] ECR I-955, para 16. Third, those cases in which fundamental rights are used to determine the scope of liability arising under national legislation adopted for the specific purpose of implementing a directive. See Joined Cases C-74 & 129/95, *X*, [1996] ECR, I-6609, paras. 25–26. "The EU Charter of Fundamental Rights and the Federal Question" 39 CML Rev. (2002), 945, at 962–967.

b) Derogations from Community law requirements, in particular from the fundamental market freedoms:
i) explicit Treaty exceptions – a Member States invokes a Treaty provision derogating from the principle of free movement, to justify a restriction on free movement;[12]
ii) *Cassis de Dijon* exceptions;[13] although the Court initially held that these were not subject to review,[14] it changed this position in *Familiapress*;[15]
iii) *Schmidberger* exceptions;[16] a Member State invokes respect for and protection of fundamental rights as a *direct* justification for its derogation.[17]

By construing and employing an unwritten human rights catalogue, perhaps even against the intent of the framers of the Treaty of Rome, the Court played a significant lawmaking role. Weiler even stated that the "situation conjures up the classic risk of a *gouvernement de juges*".[18] Many commentators have used similar qualifications to describe the Supreme Court's judicial activism in *Griswold* v. *Connecticut*[19] and *Roe* v. *Wade,*[20] in which it applied to state legislation a fundamental right not expressly enumerated in the Bill of Rights.[21] The European Convention was well aware of the political power of the Court of Justice in this area. According to the minutes of its second Working Group,[22]

> "The idea was also put forward that since common constitutional traditions had served as a third major source for the Charter (besides the rights in the ECHR and the EC Treaty), the desire to establish harmony between these three sources argued in favour either of the addition of a horizontal provision on constitutional traditions similar to those relating to the other

12. See Case C-260/89, *ERT*, [1991] ECR 2925, para 43.
13. Case 120/78, *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.
14. Joined Cases 60 & 61/84, *Cinetheque*, [1985] ECR 2605, para 26; Case 12/86, *Demirel*, [1987] ECR 3719, para 28.
15. Case C-368/95, *Familiapress* v. *Bauer Verlag*, [1997] ECR I-3689. See also Case C-36/02, *Omega Spielhallen*, judgment of 14 Oct. 2004, nyr, para 35.
16. Case C-112/00, *Schmidberger*, [2003] ECR I-5659.
17. Hence without reference to one of the explicit or *Cassis de Dijon* exceptions, see the annotation by Brown in 40 CML Rev. 1499 (2003), at 1503–1504.
18. Weiler, op. cit. *supra* note 5, at 1115; see also De Witte in Alston and Weiler, op. cit. *supra* note 6, at pp. 865–867.
19. 381 U.S. 479 (1965).
20. 410 U.S. 113 (1973).
21. See e.g. Funston, *Constitutional Counterrevolution. The Warren Court and the Burger Court: Judicial Policy Making in Modern America* (Schenkman, 1977), at pp. 307–320; Schwartz, *A History of the Supreme Court* (OUP, 1993), at pp. 357–361.
22. This working group was responsible for examining the possibilities of incorporating the Charter into the Treaties and of the accession of the Community/Union to the ECHR.

> two sources, or of the addition in Article 6(2) of the Treaty of an element which met this concern. If such an addition were not made, there would be a risk that the incorporation of the Charter would give too much political power to the Community court. However, others remarked that the Court of Justice's margin of discretion was greater nowadays, in the context of a definition of Community fundamental rights purely through case law."[23]

2.2. *The limitation of Article II-111 CT*

The two Conventions – and especially the second – attempted to delimit both the scope *ratione materiae* and *ratione personae* of the Union's fundamental rights *acquis*. They attempted to rule out the possibility of fundamental rights protection turning into a "federalizing device".[24] Since the first Convention granted the Charter a wide material scope, and the second provided it with legally binding force, it now seems that the scope *ratione materiae* of the Union's fundamental rights *acquis* is clearly curtailed. The Charter has a scope *ratione materiae* which is wider than the fundamental rights case law of the Court, but it nonetheless contains fewer rights "than the Court could guarantee on the basis of Article 6(2) *juncto* Article 46(d) TEU."[25] The Charter also does not contain a provision similar to, for instance, the United States Ninth Amendment, which provides that "the enumeration ... of certain rights, shall not be construed to deny or disparage others". However, what is especially important is the limitation of the scope *ratione personae* of the Union's human rights *acquis* in Article II-111 CT. This provision was clearly intended to avert the use of the Charter by the Court of Justice in order to further influence the vertical division of powers in the European Union.

Giscard d'Estaing could rightfully be proud when, in his Rome Declaration, he highlighted the importance of the fact that the Treaty establishing a Constitution for Europe "enshrines citizens' rights by incorporating the European Charter of Fundamental Rights".[26] The Constitutional Convention he had just presided over had opted for something not even James Madison, generally regarded as the father of the United States Bill of Rights, had been able to achieve: to incorporate fully in the Constitution a legally binding Charter of Fundamental Rights. The second Working Group of the Conven-

23. CONV 203/02, at 4 (emphasis added).

24. Lenaerts, "Fundamental Rights to be included in a Community Catalogue", 16 EL Rev. (1991), 367, at 389.

25. Lenaerts and De Smijter, "A 'Bill of Rights' for the European Union", 38 CML Rev. (2000), 273, at 289.

26. Speech of 18 July 2003.

tion in its final report recommended either inserting a direct or "indirect" reference to the Charter, or to incorporate its full text. Both the Working Group and the Plenary favoured the latter. There was a consensus for giving the Charter a legally binding status,[27] even though initially, according to the minutes of one of the Working Group's first meetings, some Members had argued in favour of merely attaching the Charter in the form of a "Solemn Declaration", or inserting an indirect reference to it, in order to preserve the position of the Member States.[28] As is well known, before the Convention, the status of the Charter had been the subject of considerable political and academic debate.[29] Several Member States, especially the United Kingdom, were strongly opposed to incorporating the full text of the Charter or providing it with a legally binding status. Of all the modalities discussed, this was clearly the most significant.

However, together with the emerging growing consensus on the technique of incorporation, during the Convention there were increasing concerns about the possible impact of this modality on the vertical division of powers in the European Union. These concerns were not new. In fact, already at the first meeting of the 1999–2000 Convention responsible for drafting the Charter, it was stressed that the Charter should in no way "alter the responsibilities of the Union".[30]

This first Convention decided to enunciate this notion in a special provision, which was later to become Article 51 of the Charter and is now Article II-111 CT.[31] The Convention wanted to make sure the Charter did not in any way affect the vertical division of powers in the European Union. First of all, it construed a narrower personal scope of application than that of the fundamental rights case law as articulated by the Court. It decided to limit the Charter's scope *ratione personae* to agency type situations, excluding explicit and *Cassis de Dijon* exceptions.[32] This decision by the Convention dis-

27. CONV 354/02, at 2.

28. CONV 203/02, at 2. See also CONV 116/02, at 7–9.

29. See e.g. CONV 164/02, at 2; Dutheil de la Rochere, "Droits de l'homme: La Charte des droits fondamentaux et au delà", Jean Monnet Working Paper No. 10/01, www.jeanmonnetprogram.org/papers/papers01.html; De Witte, "The legal status of the Charter: Vital question or non-issue?", 8 MJ (2001), 81; Miller, "Human Rights in the EU: the Charter of Fundamental Rights", House of Commons Research Paper 00/32, at 18–21; MacCormick, "Problems of Democracy and Subsidiarity", 6 EPL (2000), 531; McGlynn, "Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?", 26 EL Rev. (2001), 582, at 583–585.

30. CHARTE 4105/00, at 2.

31. CHARTE 4235/00, at 1–2, CHARTE 3340/00, at 9. See also CHARTE 4316/00, at 9–10; and CHARTE 4111/00, at 2.

32. See also Lord Goldsmith, "A Charter of Rights, Freedoms and Principles", 38 CML

played "an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy".[33] By placing only minimal restraints on the Member States' powers, the Convention wanted to minimize the effect of the Charter on the vertical division of powers. Secondly, the Convention decided to enunciate, in the second paragraph of Article II-111 CT, that the Charter did not "extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Community, or modify powers and tasks defined by the Treaties", which "excludes any effect of the Charter on the division of competences between the Community or the Union on the one hand and the Member States on the other"[34] and confirms the principle of attribution of powers as articulated in Article 5(1) EC and 5 TEU.[35] Finally, the Convention at one point even proposed explicitly stating in the Preamble of the Charter that it "neither increases nor amends the powers and tasks of the Community and of the European Union as laid down in the Treaties",[36] which eventually resulted in the formula that the Charter paid "due regard [to] the powers and tasks of the Union and the principle of subsidiarity."

The second Convention clearly wanted to underscore the importance of this *rationale* of Article II-111. Although the second Working Group decided right from the start "by general agreement ... that the Charter's content had been drafted by the previous Convention and that it would not now be appropriate to rewrite it", it nevertheless decided to make some important amendments to Article II-111 to ensure that the Charter would not affect the vertical division of powers.[37] According to the minutes: "All speakers stressed the importance, already highlighted by the previous Convention, of

Rev. (2001), 1201, at 1205; Weiler "Human Rights, Constitutionalism and Integration, Iconography and Fetishism", 3 *International Law FORUM du droit international* (2001), 227, at 234; Jacobs, "Human Rights in the European Union: the Role of the Court of Justice", 26 EL Rev. (2001), 331, at 338–339.

33. De Burca, "The Drafting of the European Union Charter of Fundamental Rights", 26 EL Rev. (2001), 126, at 137.

34. Lenaerts and De Smijter, op. cit. *supra* note 25, at 288–289.

35. Pernice, "Integrating the Charter of Fundamental Rights into the Constitution of the European Union: practical and theoretical propositions", 10 *Columbia Journal of European Law* (2004), 5, at 25.

36. CHARTE 4400/00, at 2.

37. CONV 164/02, at 3. See also CONV 351/02, at 2. De Burca, in De Witte (Ed.), *Ten Reflections on the Constitutional Treaty for Europe* (EUI, 2003), at p. 21, has referred to this as a "belt and braces" approach.

the principle that the incorporation of the Charter should not affect the distribution of competences between the Union and the Member States".[38] The Working Group argued that this was especially important if the Charter were to have legally binding force, which is remarkable considering that the first Convention drafted the Charter "as if" it had or would be granted legally binding status.[39] Amendments were suggested to both the first and second paragraph of Article II-111, "in order to render ... clear beyond the slightest doubt" that an incorporated Charter would "in no way" alter the vertical division of powers.[40] The Working Group furthermore again emphasized "that the Charter was drafted with due regard to the principle of subsidiarity", which also resulted in the inclusion of Article II-112(6) CT.[41] It underscored in its Final Report that it was "in line with the principle of subsidiarity that the scope of application of the Charter is limited ... to Member States *only* when they are implementing Union law".[42]

Overall, it is clear that the aim of both Conventions was to prevent the Charter from having *any* kind of effect on the vertical division of powers in the broadest sense possible. It is for this reason that Article II-111 explicitly stipulates that the Charter (1) does not create any new powers at the Union level nor (2) modify existing powers and tasks, (3) applies to the Union with due regard for the principle of subsidiarity, (4) respects the limits of the Union's powers, and – to prevent it from imposing undesired limitations on Member State powers – (5) applies to the Member States only when they are implementing Union law.[43]

2.3. *The United States example*

What effect will these limitations have on the role of the Court of Justice in the vertical division of powers? A comparison with the United States Su-

38. CONV 203/02, at 4.

39. See the speech of Roman Herzog of 13 Jan. 2000, CHARTE 4105/00, at 9.

40. CONV 354/02, at 5; see also CONV 295/02, at 7.

41. CONV 354/02, at 5.

42. Ibid. Original emphasis. These proposals were adopted by the Plenary without considerable debate. See CONV 783/03 at 9, CONV 726/03 at 2, and CONV 378/02, at 9–12.

43. The final text of Art. II-111 CT reads (words in italic added by the second Convention): "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers *and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution*. 2. This Charter does not *extend the field of application of Union law beyond the powers of the Union or* establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution."

preme Court can give some important indications on how the role of the Court of Justice will change. It is quite remarkable how the *travaux préparatoires* of the Charter resemble those of the American Bill of Rights well over two centuries ago. As is well known, the Bill of Rights consists of the first ten *amendments* to the United States Constitution. The 1787 Constitutional Convention in Philadelphia had deliberately omitted a Bill of Rights in the proposed Constitution; a motion to insert one was unanimously defeated. The main reason for not including a Bill of Rights was the fear of the framers of the Constitution that a Bill of Rights would affect the vertical division of powers.

First of all, there were concerns that a Bill of Rights could lead to an increase or widening of the federal legislative powers as enumerated in the United States Constitution. Alexander Hamilton argued that a Bill of Rights would impose limits on powers that were not granted to Congress, which "would afford a colorable pretext to claim more than were granted." Why state that the liberty of the press should not be restrained, when the federal level lacks the power to impose such restrictions?, he argued. "I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish ... a plausible pretense for claiming that power."[44] When, during the Convention, it was proposed in another motion "that the liberty of the Press should be inviolably observed", a Connecticut representative laconically replied, "it is unnecessary. The power of Congress does not extend to the press",[45] and the motion was defeated. However, after the Convention there were strong concerns by Anti-Federalists about a possible abuse of the powers of the new government as enumerated in the Constitution. An influential Anti-Federalist argued that adding a Bill of Rights was of the "highest importance ... and will appear the more necessary when it is considered, that ... the constitution and laws made in pursuance thereof, ... are the supreme law of the land, and supersede the constitutions of all the states."[46] Federalists replied that an abuse of personal rights could never occur, as the government could only exercise the powers delegated to it. Although this line of argument was "technically correct",[47] in several of the states the Federalists only won the ratification contest after they had promised that they would, after ratification, as soon as possible call for the adop-

44. Federalist Paper no. 84, in Ball (Ed.), *Hamilton, Madison, and Jay. The Federalist with Letters of "Brutus"* (CUP, 2003), at p. 420.

45. Levy, *Constitutional Opinions, Aspects of the Bill of Rights* (OUP, 1986), at p. 106.

46. Brutus (probably Robert Yates, a recognized leader of the Anti-federalists), Letter no II, in Ball, op. cit. *supra* note 44, at 452. See Art. VI of the US Constitution.

47. McLaughlin, *A Constitutional History of the United States* (Appleton, 1935), at p. 211.

tion of "a Bill of Rights that would be legally enforceable in the courts".[48] In the first Congress, James Madison fulfilled this promise, but only because he thought that this would "kill the opposition [against the Constitution] everywhere."[49] Madison proposed to incorporate a Bill of Rights in the Constitution, but Congress favoured a separate Bill of Rights as a supplement to the Constitution.

Secondly, the framers of the Bill of Rights wanted to ensure that it would not place any constraints on the legislative powers of the states. Madison's draft Bill of Rights – as in fact approved by the House of Representatives – had a scope *ratione personae* which extended to both the federal and state governments, but the Senate rejected this broad scope. The Bill of Rights would eventually only apply to the federal government. This deliberate rejection of the scope *ratione personae* advocated by Madison signified "a momentous change which showed that federalism ... was the chief concern of Congress in approving the Bill of Rights".[50] By opting for a Bill of Rights that only applied to the federal governments, it

> "remained true to the original concept of federalism: 'Congress shall make no laws' are the opening words of the First Amendment. The limits to be observed by state authorities were to be found in the state constitutions."[51]

Congress made a clear choice that the Bill of Rights would not apply to the states.

In sum, the United States Bill of Rights should neither affect the powers at the central level, nor place any restraints whatsoever on the legislative powers of the states. Despite its intended limited scope *ratione personae*, the Bill of Rights however now also applies to – and thus limits – the legislative competence of the states, albeit only indirectly through the due process clause of the Fourteenth Amendment. The Supreme Court has played a pivotal role in this process, although it initially *confirmed* that the personal

48. Vile, *A Companion to the United States Constitution and its Amendments* (Greenwood, 2001), at p. 125.

49. James Madison, letter to Richard Peters, 19 Aug. 1789, in *The Papers of James Madison* (Vol. 12) (University of Virginia Press 1979), at p. 347. See also Chase and Ducat, *Edward S. Corwin's The Constitution and what it means today* (Princeton University Press 1974), at p. 285.

50. Kelly et al., *The American Constitution, its origins and development* (Norton 1983), at pp. 121–122. See also Corwin (Ed.), *The Constitution of the United States of America, analysis and interpretation* (Government Printing Office 1953), at p. 899.

51. Koopmans, *Courts and Political Institutions, a Comparative View* (CUP, 2003), at p. 45.

scope of the Bill of Rights was limited to the federal level. In *Barron* v. *Baltimore*, the question was whether the Fifth Amendment's takings clause[52] applied to the city of Baltimore. Chief Justice Marshall argued that this question was "of great importance, but not of much difficulty ... [The Fifth Amendment] is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states".[53]

According to the fourteenth Amendment, adopted in 1868 after the Civil War, the states may not "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or "deprive any person of life, liberty, or property, without due process of law".[54] Generally referred to as the privileges and immunities clause and due process clause, respectively, it is far from clear whether these clauses imply that the Bill of Rights (indirectly) also applies to the states.

The question whether the Fourteenth Amendment "incorporates" the Bill of Rights is in fact a rather controversial one: one can discern no less than five schools of judicial thought. According to "the no-incorporationist" school, the Bill of Rights is irrelevant to the interpretation of the Fourteenth Amendment; whether states infringe the due process clause must be determined by natural law-like tests, such as whether they violate "civilized standards of law"[55] or "whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples".[56] Secondly, according to the "selective incorporationist" school, some of the first eight amendments should apply to the states, though not all of them.[57] Thirdly, according to the "total incorporationist" school, the entire Bill of Rights is incorporated in the Fourteenth Amendment and applies *in toto* to the states.[58] Fourthly, according to the "selective incorporation plus" theory, some provisions of the Bill of Rights apply to the states, as well as other non-explicit fundamental rights, whereas, lastly, the "total incorporation plus" theory claims that the entire Bill of Rights plus other fundamental

52. Which prevents government from depriving private persons of vested property rights without payment of just compensation.

53. 32 U.S. 243 (1833), at 247 and 250–251.

54. Amendment XIV, Section 1 United States Constitution.

55. Frankfurter J in *Malinski* v. *New York*, 324 U.S. 401 (1945), at 414.

56. Frankfurter J in *Adamson* v. *California*, 332 U.S. 46 (1947), 67. See also *Palko* v. *Connecticut* 302 U.S. 319 (1937); and *Twining* v. *New Jersey*, 211 U.S. 78 (1908).

57. See e.g. the opinion of the Court (delivered by White J) in *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

58. See e.g. the opinion of Black J in *Adamson*.

rights apply.[59] There does not seem to be any conclusive historical evidence for any of these theories regarding the intention of the framers of the Fourteenth Amendment.[60]

More than half a century after the ratification of the Fourteenth Amendment, the Court in *Gitlow* v. *New York*[61] for the first time held that through its incorporation into the due process clause the First Amendment's protection of freedom of speech applied to states. Two years later, in *Fiske* v. *Kansas,*[62] the Court for the first time declared a state law infringing the freedom of speech to be unconstitutional. Over the years, the Court has found the due process clause to incorporate the First Amendment's right of establishment and the right to exercise one's religion, freedom of the press, the right of assembly and the right of petition, as well as several of the rights enumerated in the Fourth, Fifth, Sixth and Eighth Amendments. There are only five provisions of the Bill of Rights that have still never been applied to state laws.[63]

Since the Supreme Court has until recently held that incorporation into the privileges and immunities clause was not possible, the incorporation debate always centred on whether or how to use the due process clause instead. However, in the recent already seminal case of *Saenz* v. *Roe,*[64] the Court – for the first time in its history[65] – used the privileges and immunities clause to invalidate a state law for infringing the fundamental right to travel. This had been deemed impossible ever since the Court, in the famous *Slaughter-House cases*, held that the privileges and immunities clause could not be used by the federal courts as a basis to invalidate state laws.[66]

59. See e.g. the opinion of Douglas J in *Poe* v. *Ullman,* 367 U.S. 497 (1961), and the opinion of Murphy J in *Adamson*.

60. Chemerinsky, *Constitutional Law, Principles and Policies* (Aspen, 2002), at p. 481.

61. 268 U.S. 652 (1925).

62. 274 U.S. 380 (1927).

63. The Second Amendment's right to bear arms, the Third Amendment's right to not have soldiers quartered in a person's home, the Fifth Amendment's right to a grand jury indictment in criminal cases, the Seventh Amendment's right to jury trial in civil cases, and the Eighth Amendment's prohibition of excessive fines. These provisions have not been incorporated either because the Supreme Court held that incorporation was impossible, or simply because it has never ruled on the provision concerned.

64. 526 U.S. 489 (1999).

65. The Supreme Court in *Colgate* v. *Harvey* (296 U.S. 404 (1935)) held that a state law was void *inter alia* because it infringed a "privilege of citizenship of the United States", but it overruled this case four years later in *Madden* v. *Kentucky*, 309 U.S. 83 (1940).

66. 83 U.S. 36 (1872). The first section of the Fourteenth Amendment furthermore provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". This so called equal protection clause has, since the 1960s, been applied to the state level as well, even though, again, the historical sources as regards the original intent of its Framers "at

It will be clear from the above that the incorporation doctrine contradicts the intention of the framers of the United States Constitution and the Bill of Rights, which, like those of the European Constitution and the Charter, intended to rule out the possibility that the Bill of Rights would have any effect on the vertical division of powers. The United States incorporation doctrine is generally regarded as a remarkable act of judicial activism on the part of the Supreme Court.[67] More than half a century after the adoption of the Fourteenth Amendment, the Supreme Court still stressed that "neither the Fourteenth Amendment, nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech'".[68] When some years later *Gitlow* revealed the first signs of the incorporation doctrine, who would have thought that today, almost the entire Bill of Rights would have been incorporated into the Fourteenth Amendment?

2.4. *Towards a European equivalent of this doctrine?*

Turning now to the question what effect the limitations of Article II-111 CT will have on the role of the Court of Justice in the vertical division of powers, the question which emerges is whether similar developments to those described above could occur within the European Union constitutional order.

The Conventions provided the Charter with a scope *ratione personae* very similar to the Bill of Rights, the only difference being the constitutional *mise-en-scène* at the time the two documents were adopted, since the Union in general depends on its Member States for the implementation of most of its legislation. In order to prevent the two human rights documents from having any effect on the vertical division of powers, their framers decided that they only apply to the central level, which, in the European Union context, also includes the Member States when they act as agents of the European Union by implementing its legislation. This would of course be different if the Charter were to apply also to explicit or *Cassis de Dijon* derogations – which the Conventions clearly excluded – or to *Schmidberger* derogations.

best, are inconclusive". Warren CJ in *Brown* v. *Board of Education*, 347 U.S. 483, (1954), at 489.

67. See e.g. Powe, *The Warren Court and American Politics* (Harvard University Press, 2001); Lewis, *The Context of Judicial Activism: The Endurance of the Warren Court Legacy in a Conservative Age* (Rowman & Littlefield, 1999), at pp. 412 et seq.; Kamisar, "The Warren Court and Criminal Justice" in Schwartz (Ed.), *The Warren Court. A Retrospective* (OUP, 1996), at pp. 116 et seq.

68. *Prudential Ins. Co. of America* v. *Cheek*, 259 U.S. 530 (1922), at 543.

For, in these situations, the question is whether Member States in exercising their *own* legislative powers are acting in contravention of negative Community prohibitions.

Considering the extension of the Bill of Rights' scope *ratione personae* by the Supreme Court, the question is whether a doctrine similar to the United States incorporation doctrine could emerge within the European Union context. It follows from the general case law of the Court of Justice that Member State legislation is beyond the scope of its fundamental rights review if it lies "outside the scope of Community law",[69] which is the case when:

a) the situation concerned does not establish a sufficient connection with primary Community law – especially the fundamental market freedoms – and is therefore a "wholly internal" situation;[70] and[71]

b) there is no secondary Community law on the (specific) topic,[72] or there is, but the Member State measure concerned is not "intended to implement"[73] the Community legislation. This is *inter alia* the case when the measure is not designed to ensure compliance with Community legislation,[74] or regulates a topic which is still reserved to the Member States' authority because the Community legislation is part of a gradual harmonization process which has only partially been realized.[75]

69. Case 12/86, *Demirel*, [1987] ECR 3719, para 28; Case C-144/95, *Maurin*, [1996] ECR I-2909, para 12; Case C-159/90, *Grogan*, [1991] ECR I-4685, para 31; C-309/96, *Annibaldi*, [1997] ECR I-7493, para 13. Sometimes "the field of application of Community law" or the "ambit of Community law" is used instead by Advocates General or the Court of Justice (e.g. in Case C-299/95, *Kremzow*, [1997] ECR I-2629, para 15), but the terminology is used interchangeably (see e.g. the decisions of the Court in *Annibaldi* and *Kremzow* and the Opinion of A.G. Mischo in *Booker Aquaculture*, Joined Cases C-20 & 64/00, [2003] ECR I-7411). There is no indication that any of these terms is more comprehensive than another.

70. *Kremzow*, para 16 in conjunction with Case 180/83, *Moser*, [1984] ECR 2539, paras. 15, 17 and 18; and *Grogan,* para 31 and 32; see also Case 147/87, *Zaoui,* [1987] ECR 5511, para 15; Case C-153/91, *Office National des Pensions*, [1992] ECR I-4973, para 8; Case C-206/91, *Koua Poirrez*, [1992] ECR I-6685, para 11.

71. Although the Court in *Kremzow* suggests that these two criteria are cumulative (para 17: "Moreover."), it generally examines only one of them.

72. *Demirel*, para 28, *Maurin*, paras. 8–13. For instance, in *Maurin*, Mr Maurin had been charged with selling food products after the expiry date. The Directive concerned *inter alia* required the labelling of expiry dates and also required Member States to prohibit trade in unlabelled products, but did not "impose any obligation on Member States where, as in the present case, there is a sale of products which comply with the directive but whose use-by date has expired." (para 11). Thus, there was no Community legislation on the *specific* topic.

73. *Annibaldi*, para 21.

74. *Kremzow*, para 17.

75. Case C-36/99, *Idéal Tourisme*, [2000] ECR I-6049, para 41; *Maurin*, paras. 8–12.

The Court has, over the years, rejected several feelers to widen its scope of review, put out mostly by Advocates General. Advocate General Trabucchi already in 1976, in *Watson and Belmann*, argued that unjustified intrusions by Member States "*even if they arise through the exercise of powers retained by them*, into the privacy of individuals in their capacity as aliens" could be contrary to Community law, because they breached "a principle governing respect for privacy" and therefore the right of free movement.[76] Advocate General Jacobs in *Konstantinidis* argued that Member State measures which contravened the fundamental rights of a Community national exercising his or her free movement rights might on that ground alone be subject to human rights review. The case concerned a Greek citizen in Germany, who appealed against the misspelling of his name in the German marriage register. The Advocate General argued that the Member State measure concerned was within the scope of Community law, since it was capable of having a discriminatory effect in the sense of Article 43 EC. But even if it was non-discriminatory, it should be able to be subject to human rights review. The Advocate General argued that a "moving citizen", when exercising the rights of free movement "should be treated in accordance with a common code of fundamental values".[77]

On the other hand, the general case law of the Court of Justice over the years does reveal a gradual but remarkable extension towards an already quite significantly broad scope of fundamental rights review. Like the Supreme Court, the Court of Justice has gradually extended its jurisdiction to review (Member) State legislation. First it extended its scope of review to agency type situations. Then to explicit derogations. Subsequently, in *Familiapress,* it extended its scope of review to *Cassis de Dijon* exceptions. This was already quite a remarkable move, because when the Court holds that Member State legislation is justified under the rule of reason, this legislation is essentially no longer within the remit of the fundamental freedom concerned. It would be more logical to presume, as the court initially in fact also emphasized in *Cinéthèque* and *Demirel*, that since the Member State legislation is justified, it is "no longer within the scope of Community law [and] no further EC/EU fundamental rights can apply".[78] *Schmidberger* signified an even further extension, to those situations in which a Member State invokes respect for and protection of fundamental rights as a direct justifica-

76. Opinion of A.G. Trabucchi in Case 118/75, *Watson and Belmann*, [1976] ECR 1185, at 1211. Emphasis added.

77. Opinion of A.G. Jacobs in *Konstantinidis*, *supra* note 10 para 46.

78. Besselink, "The Member States, the National Constitution and the Scope of the Charter", 8 MJ (2001), 68 at 78.

tion for its derogation. The Court quite recently took another, albeit less controversial step, when in *Booker Aquaculture* it extended the *Wachauf* case law to the implementation of Directives. Since 1998, the Court even applies the non-discrimination principle of Article 12 EC to the autonomous powers of the Member States, as long as the case involves a national of a Member State legally residing in another Member State.[79]

These developments reveal a remarkable dichotomy between the Court's scope *ratione personae* of its fundamental rights case law and that envisaged by the two Conventions. Article II-111 CT aims exactly to avoid a European equivalent of the American incorporation doctrine. The fundamental rights case law of the Court of Justice is moving in a direction in which the framers of both the Charter and the Constitution clearly did not wish it to go. With Article II-111, the Conventions gave a clear signal that the Court should employ a more limited scope *ratione personae* of fundamental rights review.[80] One should not forget that Article 46(d) TEU already stated that the Court has jurisdiction with respect to Article 6(2) TEU only with regard to "action of the institutions". According to Lenaerts, even if this provision was not intended to call into question the scope *ratione personae* of the established case law on fundamental rights, "there is no denying that the signal from the constituent power of the Union is that the Court of Justice should proceed with caution in this respect."[81]

As mentioned, Weiler has referred to the current role of the Court as a form of *gouvernement de juges.* According to Weiler, writing in 1986, the only thing that was lacking which would make it even more contentious was an equivalent of the incorporation doctrine. Indeed, Raoul Berger had in his famous book nine years earlier used a similar description to describe the Supreme Court's activist use of the Fourteenth Amendment.[82] This judicial activism of the Supreme Court has had three major effects on the vertical division of powers in the United States. The incorporation of the Bill of Rights first of all imposed restrictions on the states' legislative powers. Selective incorporationists for instance argue that applying the Bill of Rights to

79. Case C-85/96, *Martínez Sala*, [1998] ECR I-2691, paras. 61–65; Case C-274/96, *Horst Otto Bickel and Ulrich Franz*, [1998] ECR I-7637, para 16. See O'Leary, "Putting Flesh on the Bones of European Union Citizenship", 24 EL Rev. (1999) 68, at 77–79; Eeckhout, op. cit. *supra* note 11, at 959–962; Pernice op. cit. *supra* note 35, at 34.

80. See also Besselink, op. cit. *supra* note 78, at 79.

81. Lenaerts, "Fundamental Rights in the European Union", 25 EL Rev. (2000), 575, at 591.

82. Berger, *Government by Judiciary: the Transformation of the Fourteenth Amendment* (Harvard University Press, 1977).

the state level unduly restricts the authority of the states.[83] Secondly, it led to a significant extension of the federal judicial power at the expense of the states.[84] Thirdly, it significantly increased the *legislative* jurisdiction at the central level; one of the "major consequences" of the Supreme Court's incorporation case law was that "Congress [now] has the power to pass whatever laws are necessary and proper to implement constitutional guarantees in the states."[85] It is virtually certain that, inevitably, similar effects will occur within the European Union.

3. The Charter, the EU powers, and the Court's jurisdiction

3.1. *How the Charter will affect the Union's powers*

The effect of the Charter on the role of the European Court of Justice in the vertical division of powers will also depend on how the Charter will affect the Union's powers. As mentioned, the Charter clearly stipulates that it does not "establish any new power or task for the Union, or modify powers and tasks defined in other parts of the Constitution". Its framers stressed – as did those of the Bill of Rights – that the Charter should not in any way affect the vertical division of powers. It follows from Opinion 2/94 that "no Treaty provision confers on the Community institutions any general power to enact rules on human rights",[86] a doctrine which the Conventions have left unchanged. Furthermore, the EU Constitution provides for an enumeration and hence delimitation[87] of the Union's exclusive, shared and complementary competences.[88] However, will the Charter indeed leave the Union's powers untouched? It is submitted, that the Charter will still, in the words of Hamilton, "afford a colorable pretext to claim more [powers] than were granted." This is illustrated by the way in which the Bill of Rights has affected the use of federal powers. The First Amendment for instance provides

83. Total incorporationists reply that preventing violations of human rights is more important than concerns about the vertical division of powers.

84. See e.g. Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (Harvard University Press, 1973), at pp. 13–15.

85. Peltason, *Understanding the Constitution* (Harcourt Brace, 1994), at p. 182. A fourth effect, of course, is that the Bill of Rights also limited the legislative powers at the central level.

86. Opinion 2/94 [1996] ECR I-1759, para 27.

87. See Laeken Declaration on the Future of Europe, December 2001; CONV 375/1/02 REV 1 at 1–3.

88. Arts. I-13, 14 and 17 CT, respectively. See also Arts. I-11(2) and 12 CT.

that "*Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press ...".[89] As mentioned, it is already clear from the wording of this provision that the intention of the Bill of Rights' framers was that the provision should not affect the powers at the federal level. This is indeed confirmed by the Amendment's *travaux préparatoires*.[90] Nevertheless, as Amar points out,

> "Of course the idea that Congress simply lacked Article I enumerated power over various First Amendment domains may seem wholly fanciful today, given the widespread acceptance of expansive twentieth-century commerce clause cases ... reading the Constitution through twentieth century eyes, we must squint quite hard to see the first Amendment as any different from the seven amendments that follow it, so far as enumerated powers are concerned."[91]

The commerce clause is the American equivalent of Article 95 EC and states that Congress has the power "to regulate Commerce ... among ... the states".[92] Congress has employed the use of the Commerce Power as a legal basis for several non-internal-market-related statutes, including the 1964 Civil Rights Act,[93] one of the "most important laws ever adopted in American history".[94] Recent Article 95 case law on Tobacco products,[95] Biotechnological developments,[96] and in fact also on human rights[97] reveals that a similar development is already occurring within the European Union.[98] Some commentators argue for instance that the reason why the Court of Justice had developed its fundamental rights case law was precisely because of

89. Emphasis added.

90. See Levy, *The origins of the First Amendment establishment clause: Religion and the First Amendment* (MacMillan, 1986), at p. 84.

91. Amar, *The Bill of Rights, Creation and Reconstruction* (Yale University Press, 1998), at p. 37. The legislative powers of the United States Congress are enumerated in Art. I of the Constitution.

92. Art. I, Section 8, Clause 3 of the United States Constitution.

93. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

94. Chemerinsky, op. cit. *supra* note 60, at p. 257.

95. Case C-376/98, *Germany* v. *Parliament and Council*, [2000] ECR I-8419 (*Tobacco Advertising*); Case C-491/01, *Imperial Tobacco*, [2002] ECR I-11453.

96. Case C-377/98, *Netherlands* v. *Parliament and Council*, [2000] ECR I-7079.

97. See *infra*, section 3.2.

98. See Knook, "Guns and Tobacco. The effect of interstate trade case law on the vertical division of powers", 11 MJ (2004), 347.

the Community's fast-growing capacity to affect fundamental rights, already in the 1960s.[99] De Burca has pointed out that powers such as Article 95 EC "are likely to be re-oriented and infused with a range of different values and considerations by the enactment of the Charter", especially a legally binding one.[100] But one could also think, for instance, of Articles 12 and 13,[101] 44, 94, 137,[102] 141,[103] 149,[104] 151[105] and 153 EC,[106] to name but a few.[107] Just as the Bill of Rights affected the traits of the federal powers in the United States, so will a legally binding Charter of Fundamental Rights, incorporated in the Constitution, and with a wide material scope, most likely alter the *ethos* of the European Union – and with it, its powers.

The first Convention rather cryptically admitted that some of "[t]he right to be guaranteed ... require action by the European Union for them to be implemented, and the legislator has broad discretionary powers as regards such action."[108] On several of the Charter's rights, however, the Union has no legislative competence. This is especially remarkable when one can infer from these rights a positive duty to protect them,[109] which, as is well known, the European Court of Human Rights often has done as regards ECHR rights. Alston and Weiler have pointed out that human rights protection within the European Union cannot be realized merely by "negative integration". A form of – corresponding – "positive integration" is also required.[110] A clear example of this is the *Port I* case, in which the Court held that the Union has a duty to protect human rights "when the transition to the common organization of the market infringes certain traders' fundamental rights protected by Community law".[111] Theoretically, the Court could condemn

99. De Witte, "The past and the future role of the European Court of Justice in the protection of Human Rights" in Alston and Weiler, op. cit. *supra* note 6, at p. 866; Weatherill, op. cit. *supra* note 3, at pp. 105–106.

100. De Burca, "Human Rights: The Charter and Beyond", Jean Monnet Working Paper No. 10/01, www.jeanmonnetprogram.org/papers/papers01.html

101. See *infra*, section 3.3.

102. See the Charter's solidarity Chapter, especially Arts. II-88, 90, 91 and 94 CT.

103. See Art. II-83 CT.

104. See Art. II-74 CT.

105. See Art. II-82 CT.

106. See Art. II-98 CT.

107. Which correspond to Arts. III-123, 124, 138, 173, 210, 214, 282, 280, and 235 CT, respectively.

108. CHARTE 4111/00, at 5.

109. E.g. the rights to marriage, conscientious objection, education, business, workers' rights, and rights concerning social welfare.

110. Alston and Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights" in Alston and Weiler, op. cit. *supra* note 6, at p. 10.

111. Case C-68/95, *T. Port*, [1996] ECR I-6065, para 40.

legislation for infringing a Charter right, without the existence of a corresponding Union power. Should the EU then not use one of its existing powers "creatively" in order to remedy this deficit in human rights protection? If it were not to do so, this would certainly be in sharp contrast to the duty of the Union articulated in Article II-111(1), "to respect the rights, observe the principles and promote the application" of the Charter. Eeckhout has even implied that this phraseology could itself be read as altering the powers of the Union,[112] but, as demonstrated in the previous section, the *travaux préparatoires* of Article II-111(1) CT clearly aim to forestall any effect on the vertical division of powers.

Weiler has been sceptical about the added value of the Charter and has stressed the need for a human rights policy instead.[113] He has argued that such a human rights policy would already be possible using existing Union powers, *inter alia* by employing a wider use of Article 95 EC.[114] A report of a high profile export group has pointed out that the Union may already regulate fundamental rights within the areas of its existing competences.[115] In other words, when the Charter affects existing Union powers, this will not be contrary to Opinion 2/94, nor will it conflict with the formula in Article II-111(2) that "the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union." Nor does this conflict with the principle of attribution of powers, which, as mentioned, this first part of Article II-111(2) confirms. It *will* of course be difficult to reconcile with the final words of Article II-111(2): that the Charter does not "modify powers and tasks defined in the other Parts of the Constitution." But it is questionable whether these words will have such a tempering effect on the development whereby powers such as Article 95 EC are used extensively by the Union to influence all kinds of policy areas. Quite the opposite, the Charter will most likely infuse and further this development. The Union could sometimes even, especially after *Port I,* have a duty to use its powers in this way in order to uphold the level of human rights protection in the European Union. Perhaps the Charter will not extend

112. Eeckhout, op. cit. *supra* note 11, at 980 and 984.

113. Weiler, "Editorial: Does the European Union Truly Need a Charter of Rights?", 6 ELJ (2000), 95. For a completely different position, see Von Bogdandy, "The European Union as a human rights organization? Human rights and the core of the European Union", 37 CML Rev. (2000), 1307.

114. Weiler and Fries in Alston and Weiler, op. cit. *supra* note 6, at 147.

115. *Affirming fundamental rights in the European Union. Time to Act.* Report of the Expert Group on Fundamental Rights, European Commission, Brussels 1999, at 12.

the enumerated powers of the Union, but it will inevitably reshape and widen them.

3.2. *How extensive use of the Union's powers will widen the scope of review*

Two recent cases illustrate the fact that using the powers of the Union extensively to legislate on fundamental rights will simultaneously widen the Court's scope of fundamental rights review of Member State measures.

In *Österreichischer Rundfunk*,[116] a number of organizations – including the public broadcasting organization Österreichischer Rundfunk – had challenged the power of the Austrian Court of Auditors to collect and make public the salary data of their employees. They argued that this power was incompatible with Directive 95/46/EC, which obliged Member States to "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data".[117] According to Article 3(2) of the Directive, the Directive did not apply to the processing of personal data (1) by a natural person in the course of a purely personal or household activity, and (2) in the course of an activity which falls outside the scope of Community law, such as operations concerning public security, defence or State security and the activities of the State in areas of criminal law.

Advocate General Tizzano argued that the regulated activity fell outside "the scope of Community law" and the Directive could not therefore apply. Since the purpose of the statute was to make transparent the salaries received in the public sector and to "encourage proper management of public resources", this activity was

> "a public-audit activity prescribed and regulated by the Austrian authorities (and in fact in a constitutional law) on the basis of a choice of a policy and institutional nature made by them autonomously and not intended to give effect to a Community obligation. Since it is not the subject of any specific Community legislation, that activity can only fall within the competence of the Member States".[118]

116. Joined Cases C-465/00, 138/01 & 139/01, *Österreichischer Rundfunk*, [2003] ECR I-4989.

117. Art. 1(1) of Directive 95/46/EC.

118. Opinion of A.G. Tizzano, para 43.

This is a rather convincing argument, considering that there is no secondary Community law on the *specific* topic, or, if one argues there was because of the existence of Directive 95/46/EC, considering that the Austrian law was not intended to implement this Directive. The Advocate General went on to consider the arguments put forward by those parties that claimed the activity was within the scope of Community law. Some parties had argued that there was a relationship with Community law – especially Articles 39, 136, 137 or 141 EC – but given that the audit activity did not affect access by workers from other Member States to Austria or vice versa,[119] had little or nothing to do with social policy, nor made a distinction between workers of either sex, this seemed – as the Advocate General noted – rather strained. Finally, the Advocate General pointed out that the obligation under Austrian law to disclose the salary data to the Court of Auditors was not – as the ÖRF had argued – a provision implementing Union law, as it only required specific forms of processing which were necessary for the carrying out of the audit activity of the Court of Auditors. It would be a circular argument to first presume that every national provision which requires the processing of personal data is a provision implementing the Directive, to then argue that every form of processing prescribed by a national provision is covered by the provisions of the Directive because it is carried out in the course of an activity which falls within the scope of Community law.[120]

Remarkably, the Court did not refute any of the Advocate General's arguments discussed so far. The Advocate General also argued however – and this is perhaps the most intriguing part of his argumentation – that the Directive could not be applied even though its purpose was to oblige Member States "to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data". This was an important, but not an independent objective of the Directive, because

> "If it were, it would have to be accepted that the Directive is intended to protect individuals with respect to the processing of personal data even quite apart from the objective of encouraging the free movement of such data, with the incongruous result that even forms of processing carried out in the course of activities entirely unrelated to the establishment and functioning of the internal market would also be brought within its scope."[121]

119. The Advocate General also referred to *Moser,* in which the Court held (at para. 18) that a "purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with Community law to justify the application of Article [39]". See also *Kremzow*, para 16.

120. Opinion of A.G. Tizzano, para 48.

121. Id., para 53.

Such a situation would not only be incompatible with Opinion 2/94, but also with *Tobacco Advertising,* in which the Court held that to use Article 95 EC as "a general power to regulate the internal market"[122] would be contrary to its express wording and the principle of attribution of powers.

On this point, the Court seemed to disagree with the Advocate General. It pointed out that, according to *Tobacco Advertising* and *Imperial Tobacco*, a measure based on Article 95 "must actually be intended to improve the conditions for the establishment and functioning of the internal market", but in the present case "*that fundamental attribute was never in dispute before the Court*".[123] *Therefore*,[124] the applicability of the Directive could not depend on whether the situation concerned had "a sufficient link with the exercise of the fundamental freedoms as guaranteed by the Treaty."[125] The Court argued that since the legal basis was not disputed, the Court was therefore left no choice but to apply the Directive to the Austrian legislation, even though there was no "actual connection"[126] or "direct link"[127] with the common market freedoms.

This outcome reveals a remarkable situation. Despite the fact that the adoption of the Directive was probably incompatible with the Court's recent case law on the legal basis of Article 95 EC, the principle of attribution of powers, and Opinion 2/94, the Court apparently had to apply it, simply because its legal basis was not contested. As mentioned, a Member State measure is beyond the scope of Community law if there is no sufficient connection with primary Community law, and no secondary Community law on the specific issue exists, or if it does, the national law is not intended to implement the Community legislation. In the present case there was neither a sufficient connection, nor was the Austrian legislation intended to implement the Directive.[128] Remarkably, even though all this had been put forward by Advocate General Tizzano, the Court did not address any of these points. Because of its aim and wording, the Court applies the Directive to situations which essentially are "wholly internal", or at least have nothing more than a mere indirect connection with Community law.

122. *Tobacco Advertising*, para 83.
123. *Österreichischer Rundfunk*, para 41. Emphasis added.
124. See para 42: "In those circumstances .".
125. Ibid.
126. Id., para 43.
127. Ibid.
128. And it is even questionable whether Directive 95/46/EC dealt with the same specific topic as the Austrian constitutional law.

In *Lindqvist*,[129] which concerned the same Directive, the question was whether prosecuting somebody under a national measure which *was* intended to implement the Directive, can be in breach of Community measures when the activity for which this person was prosecuted has no connection with Community law. Mrs Lindqvist, who carried out voluntary work as a catechist, published on her website personal information relating to her colleagues in the parish – such as family circumstances – without informing them or obtaining their consent. She argued that she had published the data in the course of a non-profit activity, whereas the Directive only applies to economic activities; otherwise, it could not have been based on Article 95 EC and hence would have been invalid. Nor could Article 95 be used to regulate freedom of expression on the Internet. She argued this activity therefore fell outside the scope of Community law in the sense of Article 3(2) of the Directive. Advocate General Tizzano agreed. He argued that this provision "would be completely meaningless" if even non-economic activities without any cross-border element were to be regarded as falling within the scope of Community law.[130] As in his Opinion in *Österreichischer Rundfunk*, he argued that Article 95 could not be used to legislate on the protection of human rights, as this would be contrary to *Tobacco Advertising*, the principle of attribution of powers, and Opinion 2/94.

However, the Court again did not go into any of these arguments. It admitted the activity was non-economic and that it therefore had to consider whether it fell within the scope of Community law as meant in Article 3(2) of the Directive. It argued that against the background of *Österreichischer Rundfunk* "it would not be appropriate to interpret the expression 'activity which falls outside the scope of Community law' as having a scope which would require it to be determined in each individual case whether the specific activity at issue directly affected the freedom of movement".[131] The exceptions enumerated in Article 3(2) provided for two exceptions to the Directive's scope of application; these exceptions were restricted to those enumerated and *ejusdem generis*, and since they did not cover non-economic activities, the Directive applied.

Like *Österreichischer Rundfunk*, *Lindqvist* reveals that when the legality of the Directive is not disputed – even though both Mrs Lindqvist and the Advocate General in this case questioned its legal basis – the Court has no choice but to apply it, thereby extending its fundamental rights review of

129. Case C-101/01, *Bodil Lindqvist*, judgment of 6 Nov. 2003, nyr.
130. Opinion of A.G. Tizzano in *Lindqvist*, para 37.
131. *Lindqvist*, cited *supra* note 129, para 42.

Member State measures. The two cases illustrate that the Court will sometimes have to allow legislation on human rights when its legal basis is not in dispute, but also that this is only possible when the Union uses a specific legal basis. Even at a time when the Court adheres in general to a narrower scope of Article 95 EC,[132] it will be difficult for the Court to stop any creative use of legal bases such as Article 95 to legislate on human rights.

Furthermore, these two cases, together with *Familiapress*, *Schmidberger* and *Booker Aquaculture* demonstrate the augmentational development by means of which the scope of the Union is moving towards an equivalent of the United States incorporation doctrine – towards a scope *ratione personae* extended even to the Member States' autonomous legislative powers. Perhaps more importantly, these cases signify the symbiotic relationship between the expansion of the Union's powers in order to legislate on human rights and the expansion of the Court's human rights review. The extensive use of EU powers will also widen the scope *ratione personae* of the Court's case law on fundamental rights.

3.3. *Another example: Discrimination*

A similar development will most likely occur in the field of discrimination, or is perhaps already occurring. The Union has in its "Article 13 package" adopted the Race Directive and Employment Directive, as well as a policy programme promoting transnational cooperation to combat discrimination. The Race Directive, in particular, has an unprecedented wide scope, also dealing with issues concerning which the Union has no (real) legislative competence, which according to Eeckhout, is difficult to reconcile with the wording of Article 13 EC.[133] Just as Article II-111(1) CT stipulates that the Charter applies to its addressees "within the limits of the powers of the Union", so can Article 13 EC only be employed "within the powers conferred by [the Treaty] upon the Community". However, this latter phrase should not be read as making Article 13 subordinate to or only able to be used in conjunction with other Treaty provisions, in which case the surplus value of introducing this provision with the Treaty of Amsterdam would have been nothing more than a will-o'-the-wisp.[134] The function of this phrase is that it limits the specific competence of Article 13 EC – elucidating that it is

132. Knook, op. cit. *supra* note 98, at 358–360.

133. Eeckhout, op. cit. *supra* note 11, at 986.

134. See Flynn, "The Implications of Article 13 EC – After Amsterdam, will some forms of discrimination be more equal than others?" 36 CML Rev. (1999), 1127, at 1134.

of an accessory nature – and possibly even "merely refers to the principles of subsidiarity and proportionality".[135] Therefore, this provision can also be used when the Union only has weak legislative competence, such as on education and health.[136]

Eeckhout has wondered whether, because of its wide ambit, the Race Directive risks "sharing the fate of the Tobacco Advertising Directive. This would be the truly hard case for the ECJ, in which the principle of limited powers would be pitted against the noblest of legislative acts ever to have been produced by the EU".[137] But will it truly be such a difficult case for the Court? Eeckhout does argue that there are some grounds to believe "that the Race Directive does not transgress the conferred powers boundary. [T]he principle of effective Treaty interpretation supports the case for a broader rather than narrower scope of the EC's legislative power in this field."[138] More importantly, however, *Lindqvist* and *Österreichischer Rundfunk* suggest that when in a similar type of case the Court is asked to rule on whether the Race Directive is outside the scope of Union law, but its legal basis is not disputed[139] the Court of Justice will have no choice but to apply it.

Precisely because of the accessory nature of Article 13 EC, the Article 13 package will probably have an important effect on the Union's other legislative powers. Even though Article 13 itself does not have direct effect, its broad scope could inspire the Court to provide broad protection under Article II-81 CT, which prohibits "*any* discrimination based on *any* ground *such as* sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation".[140] Even before the adoption of the Charter, Lenaerts had already argued that it would be difficult to believe that in the absence of Article 13 legislation, the Court would have no power to prohibit discrimination on the grounds mentioned in that provision, or even on other grounds.[141] Conversely, Article II-81 CT

135. Id., at 1135.

136. Ibid.

137. Eeckhout, op. cit. *supra* note 11, at 987.

138. Id., at 987–988.

139. Which is unlikely, considering that the record seven months time in which it was negotiated and adopted suggests "that the Member States had little difficulty with the Commission's original proposal". Tyson, "The Negotiation of the European Community Directive on Racial Discrimination" 3 *European Journal of Migration and Law*, (2001), 199, at 201.

140. Emphasis added.

141. Even despite the Court's judgment in Case C-249/96, *Grant*, [1998] ECR I-621. Lenaerts, op. cit. *supra* note 81, at 579.

could, as demonstrated, lead to a more extensive use of existing EU powers (including Art. 13 EC),[142] be it directly or via Article 13.[143] This could be reinforced by the broad personal scope of Article 12 EC as construed by the Court,[144] which could perhaps be viewed as a forerunner to a European incorporation doctrine.

4. Conclusion

Overall, it is clear that there are already – and with the coming into force of the legally binding Charter there will be even more – significant counteracting forces against the Conventions' desire to prevent the Charter from having any effect on the vertical division of powers.

First of all, the overall case law of the Court seems to be moving towards an equivalent of the United States incorporation doctrine. Two and a half years after the Charter was proclaimed at Nice in December 2000, at a time when several Advocates General,[145] as well as the Court of First Instan-

142. Which has a narrower scope, allowing Community legislation to combat discrimination "based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" only.

143. Which corresponds to Art. III-124 CT, although, again, clearly much effort has been made to prevent any effect on the vertical division of powers, especially when compared to the proposed Art. II-56 of the Commission's Penelope Draft, which, for instance, even made a direct reference to Art. II-81 (Feasibility Study, Contribution to a Preliminary Draft Constitution of the European Union, Working Document, 4 Dec. 2002).

144. This wide scope *ratione personae* of course already broadens the scope of legislative jurisdiction under Art. 12 itself.

145. A.G. Alber in Case C-340/99, *TNT Traco*, [2001] ECR I-4109, para 94, and in Case C-63/01, *Evans*, judgment of 4 Dec. 2003, nyr, paras. 80, 84–86 and 97–98; A.G. Tizzano in Case C-173/99, *BECTU*, [2001] ECR I-4881, paras. 26–28; in *Österreichischer Rundfunk,* cited *supra* note 116, para 60, and in Case C-200/02, *Chen and Zhu*, judgment of 19 Oct. 2004, nyr, para 119; A.G. Mischo in Joined Cases C-122 & 125/99, *D* v. *Sweden*, [2001] ECR I-4319, para 97; A.G. Jacobs in Case C-270/99 P, *Z* v. *Parliament*, [2001] ECR I-9197, para 40, in Case C-377/98, *Netherlands* v. *Parliament*, [2001] ECR I-7079, paras. 197 and 210, in Case C-50/00 P, *Unión de Pequeños Agricultores*, [2002] ECR I-6677, para 39, in Case C-126/01, *GEMO,* judgment of 20 Nov. 2003, nyr, para 124, and in *Schmidberger,* para 101; A.G. Geelhoed in C-413/99, *Baumbast* [2002] ECR I-7091, paras. 59 and 110, in Case C-256/01, *Allonby*, judgment of 13 Jan. 2004, nyr*,* para 53, in Case C-165/01, *Betriebsrat der Vertretung der Europäischen Kommission in Österreich,* [2003] ECR I-7683, footnote 15, in Case C-313/99, *Mulligan* [2002] ECR I-5719, para 28, in Case C-111/02 P, *Reynolds*, judgment of 29 April 2004, nyr*,* para 62, in Case C-58/02, *Commission* v. *Spain*, judgment of 7 Jan. 2004, nyr*,* para 39, and in Case C-456/02, *Trojani*, judgment of 7 Sept. 2004, nyr, footnote 6; A.G. Léger Case in Case C-309/99, *Wouters* [2002] ECR I-1577 footnote 176, in Case C-353/99 P, *Hautala*, [2001] ECR I-9565, paras. 51, 73 and 78–89, and in Case C-224/01, *Köbler*, judgment of 30 Sept. 2003, nyr,

ce,[146] were already referring to the Charter in quite a number of cases, the Court of Justice in *Schmidberger* extended the scope *ratione personae* of "its" unwritten Bill of Rights even further, despite the "signalling effect" of then Article 51 of the Charter (and that of Art. 46(d) TEU after Amsterdam).

Secondly, Directive 95/46/EC, as well as the "Article 13 package" in general and the *Race Directive* specifically, illustrate that the Council is already using its (enumerated) powers extensively for human rights purposes. This trend will be reinforced by the broad scope *ratione materiae* of the Charter, especially when it has legally binding force.

Furthermore, these trends are likely to have a cross-fertilizing effect: the scope (and powers) *ratione personae* of the European Union's fundamental rights *acquis* will not be determined by either the Union (the Council) or the Court of Justice, but rather by an interdependent interplay between the two. *Lindqvist* and *Österreichischer Rundfunk* illustrate that when the Union's powers are used extensively to legislate on human rights, this could lead to

para 98; A.G. Mischo in *Booker Aquaculture,* paras. 125–126; A.G. Stix-Hackl in Case C-131/00, *Nilsson* [2001] ECR I-10165, footnote 26, in Case C-459/99, *MRAX*, [2002] ECR I-6591, footnote 9, in Case C-60/00, *Carpenter*, [2001] ECR I-6279, in Case C-210/00, *Käserei Champignon Hofmeister*, [2002] ECR I-06453, footnote 30, in Case C-224/00, *Commission* v. *Italy*, [2002] I-2965, para 58; A.G. Ruiz-Jarabo in Case C-208/00, *Überseering,* [2002] ECR I-9919, para 59; A.G. Stix-Hackl in Joined Cases C-34 & 38/01, *Enirisorse*, judgment of 27 Nov. 2003, nyr, para 100 and in *Omega* (*supra* note 15) para 5, 55 and 91. A.G. Ruiz-Jarabo Colomer in Joined Cases C-187 & 385/01 *Gözütok and Brügge*, judgment of 11 Feb. 2003, nyr, footnotes 21 and 46, in Case C-338/00 P, *Volkswagen A.G.*, judgment of 18 Sept. 2003, nyr, para 94, in Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, *Aalborg Portland*, judgment of 7 Jan. 2004, nyr, para 27, in Case C-87/02, *Commission* v. *Italy*, judgment of 10 June 2004, nyr, para 36, and in Case C-117/01, *K.B.*, judgment of 7 Jan. 2004, nyr, para 73; A.G. Kokott in Joined Cases C-361 & 362/02, *Dimosio*, judgment of 1 July 2004, nyr, footnote 23; A.G. Poiares Maduro in Case C-384/02, *Grøngaard and Bang*, pending, para 56.

146. In chronological order: Case T-112/98, *Mannesmannröhren-Werke*, [2001] ECR II-729, para 76; Case T-77/01, *Diputación Foral de Álava et al* v. *Commission* [2002] ECR II-81, para 35; Case T-54/99, *max.mobil*, [2002] ECR II-313, paras. 48 and 57; Case T-198/01 R, *Technische Glaswerke Illmenau GmbH* v. *Commission*, [2002] II-2153, paras. 85, 110 and 115; Case T-177/01, *Jégo-Quéré et Cie* v. *Commission*, [2002] ECR II-2365, para 42 and 47 ; Case T-211/02, *Tideland Signal* v. *Commission*, [2002] ECR II-3781, para 37; Joined Cases T-377, 379 & 380/00, and T-260 & 272/01, *Philip Morris International* v. *Commission*, [2003] ECR II-1, para 122; Case T-224/00, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v. *Commission*, judgment of 9 July 2003, nyr, para 50; Case T-223/00, *Kyowa Hakko Kogyoand Kyowa Hakko Europe* v. *Commission*, judgment of 9 July 2003, nyr, para 104 ; Joined Cases T-116 & 118/01, *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v. *Comisión*, judgment of 5 Aug. 2003, nyr, para 209; Case T-67/01, *JCB Service* v. *Commission*, judgment of 13 Jan. 2004, nyr, para 36; Joined Cases T-236, 239, 244 to 246, 251 & 252/01, *Tokai Carbon et al.* v. *Commission*, judgment of 29 April 2004, nyr, para 137 ; Joined Cases T-67, 68, 71 & 78/00, *JFE Engineering Corp. et al.* v. *Commission*, judgment of 8 July 2004, nyr, para 178.

an extension of the human rights review of the Court of Justice. Conversely, a legally binding Charter could lead to the Union's powers being used more extensively, *inter alia* because of the Charter's broad scope *ratione materiae*.[147] It is quite improbable that the final words of Article II-111 CT will temper these developments, or halt their effects on the vertical division of powers.

The rights articulated in the Charter are to a certain extent derived from sources which the Court of Justice in one way or another already applies. This also seems to be one of the main points of criticism of the Charter by Weiler, who has argued that the Charter has done nothing more than to encapsulate a constitutional consensus on the status quo.[148] One could argue that this factor might hence mitigate the effects on the vertical division of powers, as these rights already limit the Member States' legislative powers. It is indeed an important difference with the United States Bill of Rights, which was adopted at a time when "the states had very imperfect bills of rights".[149]

It is true that several of the rights stated in the Charter of Fundamental Rights are based on the ECHR,[150] some of the Charter's rights have their origins in the common constitutional traditions of the Member States or are at least inspired by national constitutional law,[151] others have been inspired by judgments of the Court of Justice,[152] some are based on the European Social Charter of 1961 and the Revised Social Charter of 1996,[153] and some are based on existing EC or TEU provisions.[154] Indeed, the whole idea of the

147. When, in the European Union context, a Member State human rights measure constitutes an obstacle to free movement, this can already activate the use of Art. 95 EC. See Weiler and Fries in Alston and Weiler, op. cit. *supra* note 6, at p. 165.

148. Weiler, op. cit. *supra* note 113, at 95.

149. Levy, op. cit. *supra* note 45, at 111.

150. For an enumeration of these provisions, see the Explanatory Memorandum on Art. II-112 CT. The Explanatory Memorandum was added to the Constitution as "Declaration concerning the explanations relating to the Charter of Fundamental Rights", O.J. 2004, C 310/324.

151. Compare the Explanatory Memorandum on Arts. II-70, 74, 77, 80, 97 and 109 CT for different forms of derivation. Art. II-97 on environmental protection, for instance, "also draws on the provisions of some national constitutions", whereas the right to conscientious objection (Art. II-70(2)) "corresponds to national constitutional traditions and to the development of national legislation on this issue".

152. See the Explanatory Memorandum on Arts. II-63, 71, 75–77, 80, 101, 105, 107, and 110 CT.

153. See the Explanatory Memorandum on Arts. II-75, 86–91, and 93–95 CT.

154. See the Explanatory Memorandum on Arts. II-68, 72, 75, 76, 78, 81–83, 94–97, and 99-106 CT.

Charter was merely to pull together existing rights.[155] If the Court of Justice were thus, for instance, to use rights distilled from the Member States' common constitutional traditions, against Member States' legislation implementing Union law, this would mean using rights which "are to a greater or lesser extent already part of the national law of Member States: that is where they come from."[156]

On the other hand, one should not forget that "the wide sweep of the EU Charter is such that it includes measures which were previously unknown as fundamental rights",[157] and it is not unlikely that these will be among the first to be invoked. Several of the rights have a much wider scope than those on which they are inspired. Besselink has pointed out that in the few cases that the Charter in its Explanatory Memorandum claims that a right is "common to all national constitutions", it is questionable whether this is truly the case.[158] Also, Article II-112 CT implies that the Charter does not prevent the provision of more extensive protection.[159]

Nevertheless, the present wording of Article II-113 CT can also be read as providing a lower standard of protection than, for instance, that provided by treaties to which only some Member States are a party,[160] which would make an equivalent of the United States incorporation doctrine rather controversial. The Supreme Court case law has been somewhat ambiguous on this issue, in some cases applying the provisions of the Bill of Rights differently,[161] whereas in others rejecting "the notion that the Fourteenth Amendment applies to the states only a watered-down, subjective version of the individual guarantees of the Bill of Rights."[162] Taken altogether, however, almost all provisions of the Bill of Rights that have been incorporated apply to the states exactly as they apply to the federal level.[163]

155. See the Presidency Conclusions of the Cologne European Council, 3 and 4 June 1999.

156. Temple Lang, "The sphere in which Member States are obliged to comply with the general principles of law and community fundamental rights principles", 18 LIEI (1991), 23, at 29.

157. Ewing in Cane and Tushnet (Eds.), *The Oxford Handbook of Legal Studies* (OUP, 2003), at p. 322.

158. Besselink, op. cit. *supra* note 78, at 69–71.

159. See also the Explanatory Memorandum on Art. II-112(3) and 112(4) CT.

160. Besselink in Prechal et al. (Eds.), op. cit. *supra* note 3.

161. E.g. in *Williams* v. *Florida,* 399 U.S. 78 (1970), the Supreme Court held that Florida legislation allowing 6-person juries was not in contravention of the Sixth Amendment, even though this Amendment requires 12-person juries at the federal level.

162. *Malloy* v. *Hogan*, 378 U.S. 1 (1964), at 10–11 (citations omitted).

163. Chemerinsky, op. cit. *supra* note 60, at p. 486. He argues that "[t]his might be criticized on federalism grounds as unduly limiting the states. But rights such as freedom of speech

All in all, there are three possible scenarios imaginable as to how the incorporation of the Charter could change the role of the Court of Justice in the vertical division of powers.

i) *Scenario I: A legalistic approach*

Will the Court of Justice act as the guardian of the Constitution or as a countervailing power? If it chooses the former, it will probably adhere strictly to the letter of the Charter, including Article II-111. The Court will have to narrow the scope of its fundamental rights *acquis* to agency-type situations. This type of role will however not imply that the Court can choose judicial laissez-faireism instead of activism. If Union legislation is "inspired" by the Charter, the Court is left no choice but to invalidate it, as the Charter, according to the concluding words of Article II-111(2), cannot modify the Union's powers and tasks.

ii) *Scenario II: A status quo (ante) approach*

Even though, when ratified, the European Constitution obliges the Court to use a narrower scope of fundamental rights review, the Court could also choose to stick to its current scope of review. This approach also means that it will have to allow fundamental rights legislation by the Union inspired by the Charter, as is illustrated by *Österreichischer Rundfunk* and *Lindqvist*. Of course, Article II-111 CT will be significantly eroded if the Court chooses to follow this approach. Since it was legitimacy concerns which led the Court to develop its case law on fundamental rights in the first place, similar concerns could now lead the Court to act with caution. As Engel points out, even if the Charter does indeed give the European Court "new opportunities for legal activism, [this] does not necessarily imply that the Court will actually use them. Cultural factors, such as the current subsidiarity debate, might counsel it to act with prudence."[164] The history of the Court's fundamental rights case law demonstrates that it must take into account its legitimacy *vis-à-vis* national courts.

are fundamental liberties, and there is no reason why their content should vary depending on the level of government".

164. Engel, "The European Charter of Fundamental Rights. A Changed Political Opportunity Structure and its Normative Consequences", 7 ELJ (2001), 151, at 153.

iii) *Scenario III: An activist approach*

When legitimately feasible, the Court could of course also use the "new opportunities for legal activism". Whether or not obliged by the cross-fertilizing effect of an extensive use of Union powers to legislate on human rights, or simply following the line it has set out in earlier case law, it is clear that this scenario leads towards a full equivalent of the incorporation doctrine, applying the Charter to all Member States' legislation, even if there is only a weak connection with Union law, or no connection at all. There are already some voices within the European Union advocating such an extension.[165] The Court of Justice could take a piecemeal approach, something which the Court perhaps already started, with its case law on Article 12 EC. Considering the gradual extension of the scope of fundamental rights review so far, as well as the fact that the fundamental rights case law of the Court of Justice has already shown some remarkable demonstrations of judicial activism – even neglecting the signalling effect of Article II-111 CT at a time several Advocates General and the Court of First Instance were referring to the Charter – this scenario is anything but inconceivable.

165. See Clapham, "On Complementarity: Human Rights in the European Legal Orders", 21 *Human Rights Law Journal* (2000), 313, at 320; and contribution 162 by Amnesty International to the first Convention: CHARTE 4290/00, at 5–6. See also the report of the Expert Group mentioned *supra,* note 115, at para 6.