EUROPE'S CONSTITUTIONAL COURT

The Role of the European Court of Justice in the Intertwined Separation of Powers and Division of Powers in the European Union

Allard D.L. Knook

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Europa's Constitutionele Hof

De Rol van het Europese Hof van Justitie in de vervlochten horizontale en verticale machtenscheiding in de Europese Unie

(met een samenvatting in het Nederlands)

Proefschrift

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Allard Diederik Leonard Knook

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Promotoren: Prof.mr. H.R.B.M. Kummeling
Prof.dr. T. Zwart

For F.

PREFACE

It is clear that the European Union has been on a constitutional rollercoaster for the last four years. When I started writing this book, the European Constitution had just been signed. Four years later, Ireland has rejected the Lisbon Treaty and the future of the European Union is uncertain. Four years in which a lot has happened in the European Union, but luckily, I had two supervisors who greatly supported me along the way and whom I cannot therefore thank enough. At every meeting we had, Henk Kummeling and Tom Zwart always nicely demonstrated the concept of synergy: having these two supervisors meant always having triple the support. I would also like to thank Professor Koopmans for his valuable comments on Chapter II, as well as Ronald van Ooik and Leonard Besselink for all their help and advice on Chapters IV and VI, respectively. I would like to especially thank Peter Morris and Paulien de Morree for their tremendous work. I would also like to especially thank Jason, a Cambridge educated genius, for all his lost evenings and weekends. However, the most important person supporting me the last four years has of course been Erieke. This book would not have been written without her as my Calliope.

OUTLINE

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ABBREVIATIONS

AA	Ars Aequi
CAP	Common Agricultural Policy
CDE	Cahiers de Droit Européen
CFSP	Common Foreign and Security Policy
CML Rev.	Common Market Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. L. Rev.	Columbia Law Review
Cornell L. Rev	Cornell Law Review
CT	Constitutional Treaty
EAEC	European Atomic Energy Community Treaty
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
ELJ	European Law Journal
EL Rev.	European Law Review
EPL	European Public Law
EU Const.	European Constitutional Law Review
FDA	Food and Drug Administration
Harv. L. Rev.	Harvard Law Review
ICLQ	International and Comparative Law Quarterly
IGC	Intergovernmental Conference
JCMS	Journal of Common Market Studies
JHA	Justice and Home Affairs
LIEI	Legal Issue of European Integration
LQR	Law Quarterly Review
MEQR	Measure having an equivalent effect to a quantitative restriction
MJ	Maastricht Journal of European and Comparative Law
Mod. L. Rev.	Modern Law Review
OJLS	Oxford Journal of Legal Studies
QMV	Qualified majority voting
RMC	Revue du Marché Commun
RTDE	Revue Trimestrielle de Droit Européen
SEA	Single European Act
Stan. L. Rev.	Stanford Law Review
Sup. Ct. Rev.	Supreme Court Review

TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization
Yale L. J.	Yale Law Journal
YEL	Yearbook of European Law

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INTRODUCTION

1. The Main Question

One of the most often used citations describing the European Court of Justice comes from Eric Stein, who wrote, in 1981:

> "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe".

Remarkably, only rarely is the following sentence quoted. Eric Stein continues by writing that

> "From its inception a mere quarter of a century ago, the Court has construed the European Community Treaties in *a constitutional mode rather than employing the traditional international law methodology*."[1]

Stein is generally seen as one of the first to describe the constitutionalisation of the European Union, as it is now generally referred to by many.[2] A well known definition of this process comes from Timmermans:

> "This process is one by which the legal system of the organisation acquires some fundamental characteristics and is going to respect a number of basic values, and in doing so, is making that system at the

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[1] Stein, Lawyers, Judges, and the Making of a Transnational Constitution, 75 *American Journal of International Law,* 1, 1 (1981). Emphasis added.

[2] Other influential articles have been Mancini, "The making of a Constitution for Europe", 26 CML Rev. 595 (1989); Craig, "Constitutions, Constitutionalism and the European Union.", 7:2 ELJ 126 (2001); and Birkinshaw, "Constitutions, Constitutionalism, and the State", 11 EPL 31 (2005).

same time more independent from the contracting parties who brought it into being."[3]

The rejection of the Constitutional Treaty does not, of course, set aside the fact that the European Union has been transformed into an organization with important constitutional traits. However, over the years, less emphasis has been placed on the question of what has been the constitutional role of the Court of Justice.

This book will examine the constitutional role of the Court of Justice in the intertwined Separation of Powers and Division of Powers in the European Union. That the Separation of Powers and the Division of Powers are essentially intertwined is one of the most important characteristics of the European Union. For instance, because the Council consists of representatives of the Member States,[4] all changes to the Separation of Powers between the institutions will simultaneously affect the Division of Powers between the European Union and the Member States. When the Court decides to extend the scope *ratione personae* of its human rights review to include, for instance, Member State legislation which only indirectly affects EU law, such an extension will not only limit the legislative powers of the Member States but will also mark a shift in the balance of power between the European Union's legislature and judiciary. When the European Court of Justice decides that Community legislation should have been adopted on a provision requiring unanimity rather than Qualified Majority Voting, its judgment will not only have important implications for the Division of Powers between the European Union and its Member States, but will also lead to a redistribution of power between the European Union's political institutions – and, moreover, will have important implications for the role of the Court *vis-à-vis* these political institutions.

2. A Constitutional Court?

Related to this question regarding the constitutional role of the European Court of Justice in the intertwined Separation of Powers and Division of Powers is the question whether the European Court of Justice can be characterized as a Constitutional Court. In order to answer this question, a preliminary question must first be raised, i.e. the question of how to define, in abstract terms, the concept of "Constitutional Court". This is

[3] Timmermans, "The Constitutionalization of the European Union", 21 YEL 1 (2002), at 2.

[4] As well as the *European* Council of course.

certainly not an easy question to answer.[5] First of all, classifying the Court of Justice – or any court for that matter – as a Constitutional Court requires that there is prior agreement that the jurisdiction concerned has a constitution or, put differently, a document which essentially lays down the Separation of Powers, Division of Powers and the relationship between the government and its citizens. If such an agreement exists, a constitutional court can be defined as a court established by this constitution with supreme authority to interpret the constitution.[6] Although it has ultimate authority to interpret constitutional law issues, it does not necessarily have exclusive authority in that regard.[7] For instance, it follows from the United States Political Question – and similar doctrines in other constitutional orders – that certain constitutional issues are to be resolved by the political institutions, especially when the Constitution so prescribes.[8] Furthermore, its judgments are subject only to regularized procedures for revising the constitution if the constitutional court's interpretations are regarded as erroneous or otherwise unacceptable.

In a more "continental sense", a Constitutional Court is a court which is separate from civil law courts and public law courts and which decides exclusively over constitutional issues. Such Constitutional Courts will normally have exclusive jurisdiction over matters of constitutional interpretation or at the very least have final authority over such matters.

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[5] The reason why I eventually decided to consult a small selection of the most cited authors in this book on this exact question, namely Mark Tushnet, Erwin Chemerinsky, Anthony Arnull, Paul Craig and Alec Stone Sweet. The remainder of this section is based on their very valuable response, all seem agreeing that the answer to this question is not only a difficult, but also to a certain extent a subjective one or at least depending on the constitutional system involved.

[6] See also: Arnull, "From Bit Part to Starring Role? The Court of Justice and Europe's Constitutional Treaty", 24 YEL 1 (2005).

[7] Most forcefully demonstrated in the United States context by Whittington, *Political Foundations of Judicial Supremacy. The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press, 2007).

[8] Such doctrines can serve as counterbalancing power to the risk of a Constitutional Court becoming too powerful when allowed to review the constitutionality of the decisions of the political institutions. See e.g. Koopmans, *Courts and Political Institutions* (Cambridge, 2003), at 91. For a description of why - precisely because of this risk - the Dutch Constitution prohibits the constitutional review of legislation, see: Dölle and Engels, *Constitutionele Rechtspraak* (Wolters Noordhoff, 1989). And see Blondel, *Comparative Government. An Introduction* (Prentice Hall, 1995), at 352.

The European Court of Justice has often been referred to as a Constitutional Court, in that it is the judicial body that has final responsibility for the interpretation of EU law, but also because it has been responsible for the articulation and development of principles of a constitutional nature. It will be demonstrated in this book that the Court of Justice has greatly contributed to the process of constitutionalisation by developing fundamental norms both with regard to the Separation of Powers and the Division of Powers in the European Union.

3. The Supreme Court as a comparative prism

As is well known, the European Court of Justice is one of the most criticized courts in the world. Commentators paint a picture of the Court of Justice essentially resembling Zeus in the famous myth; a sovereign god moving Europa into a direction it does not want. The Court of Justice has often been accused of bias, judicial activism and usurping the role of the Legislature, receiving classifications ranging from "running wild"[9] to "a judicial giant"[10] or adhering to "radical conservatism".[11] One commentator has remarked that "criticizing the Court has become all the trend".[12]

One purpose of this book is to reassess this criticism of the role of the European Court of Justice by looking at its constitutional role from a comparative perspective, using the role of the Supreme Court in the Separation of Powers and Division of Powers in the United States as a comparative prism. Without entering into a discussion as to whether the European Union should be regarded as a federal system – which is essentially irrelevant for this question – as will be demonstrated in this book, constitutional developments of the European Union in general and in the case law of the Court of Justice more particularly have been strikingly similar to those in the United States. When, for instance, it was debated whether a Charter of Fundamental Rights should be added to the *acquis communautaire*, the exact same arguments were used as those used by the Federalists and Anti-Federalists when it was discussed

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[9] Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Lawmaking* (Nijhoff, 1986).

[10] Burca and Weiler, *The Court of Justice* (Oxford University Press, 2001), at 217.

[11] Arnull, *The European Union and its Court of Justice* (Oxford University Press, 2006).

[12] Schepel, "Reconstructing Constitutionalisation, Law and Politics, in the European Court of Justice", 20 OJLS 457 (2000), at 458.

whether a Bill of Rights should be added to the United States Constitution.

4. Outline

This book will examine the constitutional role of the European Court of Justice by looking at the case law of the Court of Justice on several of the most important principles of EU Law. Precisely because of the important parallels with the Supreme Court and the United States constitutional context in general, the constitutional role of the Supreme Court provides a perfect prism to detangle this case law of the European Court of Justice. This constitutional role of the Court of Justice in the intertwined Separation of Powers and Division of Powers will be examined from five different angles. Chapters II will examine the role of the Court of Justice in the Separation of Powers in the European Union. Chapter III will examine whether the Court of Justice has set limits to its review, thus defining its own role vis-à-vis the political institutions. Subsequently, Chapter IV will examine the role of the Court of Justice in the Division of Powers in the European Union. Chapter V will examine the constitutional effects of the case law on subsidiarity. Finally, Chapter VI will analyse what the effects of the fundamental rights case law of the Court of Justice have been with regard to the Separation of Powers and Division of Powers in the European Union.

One final word on terminology. Like the European Constitution, the Treaty of Lisbon proposes to rename the Court of Justice of the European Communities as simply the "Court of Justice". The Court of First Instance will be renamed "General Court', as was also proposed by the Constitutional Treaty. The two levels of jurisdiction taken together will be referred to as "the Court of Justice of the European Union".[13] This book will, however, use the current terminology. Furthermore, throughout this book the term Constitutional Legislature will be used to describe the Member States acting collectively, not to be confused with the term "Community Legislature" as is generally used by *inter alia* the Court of Justice. In order to avoid confusion, throughout the book the term Separation of Powers is used, in the context of the European Union, to describe the horizontal relations between the institutions, whereas the term Division of Powers is used to describe the relationship between the European Union and its Member States. The book reflects the state of the law on July 16, 2008.

[13] Article 19 EU as proposed by the Lisbon Treaty.

- II -

SEPARATION OF POWERS

1. Introduction

As is well known, the *Trias Politica* model as expounded by Montesquieu divided the power of a government into a Legislative, Executive and Judicial Branch, each with separate and independent powers and areas of responsibility. The premise behind this model was that, by dividing power, the rights and liberties of individual citizens would be protected.[1] According to Montesquieu, if a single branch shared legislative, executive and judicial powers, there was a definite risk that this branch, having unlimited power, would violate the rights and liberties of the citizens. Separating these powers among a Legislative, Executive and Judicial Branch ensured that only through the combined use of all three could the government use force. Of course, these ideas of Montesquieu have had a major impact on the system of Separation of Powers as envisaged by the Framers of the United States Constitution.[2]

Conversely, hardly any attention was paid to a Separation of Powers between the institutions in the Founding Document of the European Union. However, it is important to first define how the concept of Separation of Powers is used here. As Koopmans has pointed out, the notion of "Separation of Powers" in the United States differs substantially from the French concept of "séparation des pouvoirs", the former embodying "not only the independence of the judiciary, but also the mutual autonomy of the legislative and executive branches of government, each of them having its separate tasks, powers and responsibilities," whereas the latter "refers only to the obligation of the Courts to refrain from interfering in government and administration."[3] According to Douglas-Scott, the doctrine of Separation of Powers:

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[1] Montesquieu, *De l'esprit des lois*, Vol. I, Bk. XI, ch. 6.

[2] See Federalist Papers Nos. 9, 43, 47 and 78, in (Ball (Ed.), *Hamilton, Madison and Jay. The Federalist with Letters of "Brutus"*. (Cambridge University Press, 2003). See also: Flaherty, "The Most Dangerous Branch", 105 Yale L.J. 1725 (1996).

[3] Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge University Press, 2003), at 7.

> "is not easily translatable into the EU context. ... Nevertheless, it has become common to speak of an "institutional balance" within Community institutions, and the way this is evoked draws on a system of checks and balances not dissimilar to these we find in more traditional governmental systems. The EU institutions have come to operate a system of checks on each other, sometimes referred to in the context of an institutional balance."[4]

This principle of institutional balance, as defined by the Court in *Meroni*[5] and *Chernobyl I*,[6] consists of a "system for distributing powers among the different Community institutions, assigning to each its own role in the institutional structure of the Community."[7] The Court has held that observance of the institutional balance "means that each of the institutions must exercise its powers with due regard for the powers of the other institutions."[8] The Court has repeatedly stressed that it regards it as its duty to ensure that this principle is respected in inter-institutional relations.

The principle of institutional balance, is, as Jacqué has pointed out:

> "for the Court ... a substitute for the principle of the separation of powers which, in Montesquieu's original exposition of his philosophy, aimed to protect individuals against the abuse of power."[9]

Similarly, Von Bogdandy has argued that "in [*Meroni*], the Court used the principle of the Separation of Powers to protect the citizen and to rationalise the exercise of Community Power by the Community institutions".[10] There are other similarities with both the doctrine of Separation of Powers and the doctrine of checks and balances. As Vibert has argued, "in Member States there is typically a fusion of powers

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[4] Douglas-Scott, *Constitutional Law of the European Union* (Pearson, 2002), at 49.

[5] Joined Cases 9/56 and 10/56, *Meroni v. High Authority* [1957 and 1958] ECR 133, at 152.

[6] Case C-70/88, *Parliament v. Council* [1990] ECR I-2041 (*Chernobyl I* refers to the Judgment of the Court of May 22, 1990, *Chernobyl II*, discussed in Chapter III, refers to the Judgment of October 4, 1991 (ECR I-4529)).

[7] *Chernobyl I*, at para. 21.

[8] Case 70/88, op. cit. *supra* note 6, at para. 21.

[9] Jacqué, "The Principle of Institutional Balance", 41 CML Rev. 383 (2004), at 383.

[10] Von Bogdandy, "Constitutional Principles for Europe", in Riedel and Wolfrum (eds.), *Recent Trends in German and European Constitutional Law* (Springer, 2006), at 15.

between parliament and government while the European Union has evolved a system of separation of powers".[11] Or, in the words of Verhoeven,

> "the concept of institutional balance underscores once again how far EU constitutional law and practice is removed from the concept of unitary parliamentary representation of a hypothetical common will. Rather, the picture of EU governance matches the system of government which Montesquieu had in mind when he wrote his *De l'esprit des lois*".[12]

Furthermore, just as the doctrine of checks and balances has been described by the United States Supreme Court as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other",[13] so has, as pointed out by Jacqué, the doctrine of institutional balance been interpreted by the European Court of Justice as meaning that "any encroachment by one institution on the powers allotted to another institution is consequently prohibited".[14] Moreover, as de Witte has demonstrated:

> "Maintaining the "horizontal" balance of powers between the federal institutions has been a major function of the U.S. Supreme Court; it has been much less prominent in European constitutional systems which do not establish a clear Separation of Powers (...). By contrast, it *is* a major feature of the European Court of Justice's constitutional tasks."[15]

It is well known that the institutional balance between the Commission, the Council and the European Parliament has significantly changed over the years. For instance, "within the institutional triangle, the history of the Community is marked by the progressive growth of the powers of the

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[11] Vibert, "Developing a Constitution for Europe", in Arnull and Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002) 167, at 173.

[12] Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International, 2002), at 208.

[13] *Buckley v. Valeo*, 424 U.S. 1 (1976), at 30.

[14] Jacqué, op. cit. *supra* note 9, referring *inter alia* to Case 149/85, *Wybot v. Edgar Faure* [1986] ECR 2391.

[15] De Witte, "Interpreting the EC Treaty like a Constitution: the role of the European Court of Justice in comparative perspective", in Bakker et al. (eds.), *Judicial Control. Comparative Essays on Judicial Review* (Maklu, 1995) 133, at 143. Original emphasis.

Parliament to the detriment of those of the two other institutions".[16] This Chapter will examine the role of the Court of Justice with regard to the main developments in inter-institutional relations ever since the European Union was founded.

However, because of the *sui generis* construct of the Separation of Powers in the European Union,[17] this Chapter follows – what Douglas-Scott has referred to as – a "traditional political theory" approach, examining the institutional organisation of the European Union "in terms of the separation of powers, which stated [that] those who formulate the laws should be distinct from those who are entrusted with their interpretation, application and enforcement".[18] It is not attempted to apply either the United States' or the French notion of Separation of Powers, but rather to approach the concept on a more abstract level: examining what the effects of the case law of the European Court of Justice have been with regard to a possible distinction between those formulating the laws and those interpreting, applying and enforcing them. The main question in this Chapter is not whether the Court of Justice has contributed to a United States' construct of Separation of Powers, but rather, in a more Kelsenian sense, whether it has contributed to a distinction between "creation and application (execution) of law."[19] Furthermore, in will be examined how the Court of Justice has contributed to the fact that in the present-day institutional system of the European Union "various checks and balances operate within a series of institutions."[20]

However, in order to better understand the *sui generis* construct of the Separation of Powers in the European Union, first, the main foundational differences between the United States and the European Union will be described (§2). After that, the distinction between Formalism and Functionalism will be discussed, a dichotomy used in the United States to describe the role of the Supreme Court in the Separation of Powers (§3). Then, the case law of the Court of Justice with regard to the relations between the European Union's political institutions will be examined (§4). Finally, the Formalism and Functionalism dichotomy will be transposed to the European Union to describe what role the

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[16] Jacqué, op. cit. *supra* note 14, at 387.

[17] Lenaerts and Verhoeven, "Institutional Balance as a Guarantee for Democracy in EU Governance", in Joerges and Dehousse (eds.), *Good Governance in Europe* (Oxford University Press, 2002), at 35.

[18] Op. cit. *supra* note 4, at 48.

[19] Kelsen, *General Theory of Law and State* (Harvard University Press, 1945), at 269.

[20] Douglas-Scott, op. cit. *supra* note 4, at 49.

European Court of Justice has played in the European Union's Separation of Powers (§5).

2. Foundational differences

2.1. Introduction

One of the most important aims of the Framers of the United States Constitution was to construct a clear Separation of Powers "among the three co-equal branches of Government".[21] In their desire to create a system differing from that of parliamentary sovereignty, the Founding Fathers – influenced by Montesquieu – introduced a system of government under which no branch would be more important than another.[22] The doctrine of Separation of Powers was not absolute, but was limited by the doctrine of checks and balances, since, in the words of Madison, these three branches of government should "not be so far separated as to have no constitutional control over each other".[23] In fact, this doctrine, too, was an illustration of how the Framers wanted to create a system which was wholly different from that of parliamentary sovereignty; "the great security against a gradual concentration of the several powers in the same department", Madison wrote, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others".[24]

The importance given by the Founding Fathers to the two doctrines of Separation of Powers and checks and balances is reflected, *inter alia*, in the distinct discussion of the Federal Legislative, Executive and Judicial Power in Articles I, II, and III of the United States Constitution, respectively. With regard to checks and balances, however, it is important to note that Article III does not expressly grant the Federal Judicial Power the authority to review the constitutionality of the actions of the other two branches as are defined in Articles I and II. There were proposals at the Constitutional Convention to create a Council of Revision consisting of the President and some or all of his Cabinet –

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[21] One of the most often used formulae in American Constitutional law, *inter alia* by the Supreme Court, e.g. in *Clinton* v. *Jones*, 520 U.S. 681 (1997), at 699. The origin of this formula is unclear, but it can probably be derived from Madison's Federalist Paper No. 63 (Ball, op. cit. note 2, at 240).

[22] Similar reactions to the British notion of parliamentary sovereignty could be witnessed in the other former colonies of the United Kingdom. See e.g. Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971), at 40.

[23] Madison, Federalist Paper No. 48, in Ball, op. cit. *supra* note 2, at 240.

[24] Federalist Paper No. 51, in Ball, op. cit. *supra* note 2, at 252.

which would review and could veto all bills before they came into effect – but these proposals were rejected on the ground that it was undesirable to involve the Judicial Branch in the lawmaking process. It is unclear whether this implied that the Constitutional Convention also implicitly rejected a judicial review of federal legislation.[25]

Already in 1803, however, the Supreme Court asserted its authority to review the constitutionality of acts of Congress, and by implication acts of the President, if they exceeded the powers as laid down in the Constitution. In *Marbury v. Madison,*[26] the Court held void Section 13 of the Judiciary Act of 1789, which gave the Supreme Court the power to issue writs of mandamus. The Court held that the provision exceeded the Court's authority as laid down in Article III of the Constitution. When the Republican Party under Jefferson won the Presidential elections of 1800, President Adams attempted to nominate several members of the ruling Federalist Party to the bench before the end of his term. Some of the commissions however were never delivered, including that of Marbury. Marbury sued Jefferson's Secretary of State Madison to force him to deliver his commission. Chief Justice Marshall was now confronted with a difficult choice. If he issued the writ of mandamus to deliver the commission, Jefferson would surely refuse to comply, which would significantly weaken the authority of the Supreme Court. If the writ was denied, it might well appear that the Court had acted under political pressure. Either way would be a denial of the supremacy of the law, but Marshall escaped this Morton's Fork by declaring unconstitutional a minor statutory provision and ruling in favour of the Jefferson Administration, while at the same time asserting the most important of the Supreme Court's powers until this day.

Marshall offered two main arguments for this power to declare federal legislation unconstitutional. First of all, he argued that it is inherent in the role of the judiciary that it reviews the constitutionality of the laws it applies. Marshall famously wrote: "it is emphatically the province and duty of the judicial department to say what the law is".[27] Article III, section 2 of the US Constitution defines the jurisdiction of the federal judiciary in terms of nine cases and controversies, and Marhall argued that the authority to decide "cases" implied the Court's power to review the constitutionality of federal legislation. Marshall even argued that judges would violate their oath of office if they enforced unconstitutional legislation.

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[25] See: Monaghan, "The Constitution goes to Harvard", 13 *Harvard Civil Rights-Civil Liberties Law Review* 117 (1978), at 125.
[26] 5 U.S. (1 Cranch) 137 (1803).
[27] Id., at 176.

Marshall's second argument concerned the supremacy of the – written – constitution. Marshall argued that limits on the powers of the legislature as are imposed by the Constitution are meaningless unless subject to judicial review. Marshall wrote: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void".[28]

Contrary to the United States, the European Union began life as an international organisation, not as a state, whether unitary, federal or confederal. From an *institutional* point of view, the EEC Treaty was drafted as a treaty between sovereign States, with neither a clear form of Separation of Powers nor a clear system of checks and balances.[29] That the European Union started as an international rather than a constitutional system leads to three main foundational differences to the position of the United States (§2.2-4). A fourth difference relates to the role of the Supreme Court of Justice and the European Court of Justice as set up by the two founding documents (§2.5).

2.2. First difference: an international organization

Whereas the body of the United States Constitution was "devoted almost entirely to structure, explaining who among the various actors – federal government, state government; Congress, executive, judiciary – has authority to do what",[30] the Drafters of the EEC Treaty had no intention whatsoever of creating a classic form of Separation of Powers between the three political institutions of the EEC. As Schütze points out, "the European Union – born in 1958 with the genetic code of an international organization – could hardly be viewed to reproduce the *Trias Politica* of a nation state."[31] Proposals to create a European Political Community had failed after the debacle of the Draft Treaty defining the Statute of the European Community, which would have set up an institutional framework comprising a "Council of Ministers", a "European Executive Council", and a bicameral "Parliament" consisting of a House of the

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[28] Id., at 177.

[29] Pescatore, "L'Exécutif Communautaire: justification du Quadripartisme Institués par les Traités de Paris et de Rome", 4 CDE 387 (1978); Van Gerven, *The European Union. A Polity of States and Peoples* (Hart, 2005), at 14.

[30] Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press, 1980), at 90.

[31] Schütze, "Changed inter-institutional Relations through a new Hierarchy of Norms? Reinforcing the Separation of Powers Principle in the EU", EIPA Working Paper 01/2005.

Peoples and a Senate. Essentially, from an *institutional* point of view, the EEC Treaty did not greatly differ from its contemporaries. The Treaty constituting the Statute of the Council of Europe of 1949 and the Treaty establishing the Benelux Economic Union of 1960, for instance, also afforded a strong role to a central council of ministers, and a minimal, advisory one to a parliamentary assembly. The composition and powers of the political institutions of these three organizations, as well as the relations between them, were to a large extent identical.[32]

Nevertheless, one important aspect of the EEC Treaty in which it could be distinguished from other Treaties of its time was that it introduced a political institution which was comprised of Members "whose independence is beyond doubt" and who therefore "shall neither seek nor take instructions from any Government or from any other body".[33] It is difficult to make any general remarks on the intention of the Founding Fathers of the EEC Treaty – simply because the *travaux préparatoires* have never been disclosed – but looking merely at the wording of these provisions of the EEC Treaty, it seems that the Commission was given a "very important position as the initiator of all legislation … as well as having certain decision making powers of its own".[34]

Temple Lang has demonstrated that precisely because the EEC was set up as an international organisation, the role of the Commission was meant to be one of an autonomous, independent institution:

> "The original safeguard was institutional. It provided the safeguard which is needed, not because it is composed of infallible philosopher-

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[32] Compare e.g. Articles 10, 13, 14, 15, 22 and 25 of the Statute of the Council of Europe of May 5, 1949 with Articles 4, 145, 146, 192, 137 and 138 of the EEC Treaty of March 25, 1957 and with Articles 15, 16, 17 and 19 of the 1958 Benelux Treaty as well as Articles 1 and 3 of the Convention establishing the Interparliamentary Consultative Council of the Benelux countries (November 5, 1955). The new Benelux Treaty, signed on June 17, 2008, does not impose any significant differences in this respect, although, overall, it does limit the number of Benelux institutions.

[33] Article 157(1) and 157(2) of the original EEC Treaty. This can be contrasted, for instance, with the Convention establishing the Organization for European Economic Co-operation, which also set up an Executive Committee and an intergovernmental Council, but which stipulated that the Committee "shall carry on its work in accordance with the general and specific instructions of the Council" (Article 16 of the Convention for European Economic Co-operation (Paris, April 16, 1948)).

[34] Craig and de Burca, *EU Law. Text, Cases and Materials* (Oxford University Press, 2003), at 12.

kings, but because it is independent of all the national governments, and as independent as possible of the authorities of Member States. Under this "Community method", [m]easures proposed by the independent Commission may be adopted by majority voting, but they can be amended only by unanimity. So the interests of minorities, and of small Member States, are protected against the risks otherwise inherent in majority voting by the role of the Commission. To perform this initiating and mediating function, the Commission *must* be equally independent of all the Member States. Its members could *not* be democratically elected, because if they were, they would inevitably be seen as representing the States which elected them."[35]

2.3. Second difference: no institutional balance

Secondly, there was not a genuine balance between the political institutions of the EEC, especially when compared to the draft proposals for the European Political Community. In the EEC Treaty system, the Council, for instance, generally only acted on a proposal from the Commission, in only a few instances having an obligation to consult the Assembly as well. The draft proposals for the European Political Community entrusted a *Parliament* with parliamentary supervision of the Executive Council, as well as with the power to enact legislation and to make recommendations and proposals. In contrast, the EEC's *Assembly* had only very little consultative power. That the European Union started as an international organization to which only controllable portions of sovereign power were to be transferred, was precisely the reason why its Founders did not make it more democratic.[36]

2.4. Third difference: no Separation of Powers

Besides this lopsided balance between the three political institutions, the drafters of the EEC Treaty essentially created a system in which the legislative and the executive were *de jure* and *de facto* distributed between the Council, Commission and Parliament. Instead of, in the words of Madison, "the three great departments of power [being] separate and distinct",[37] there was no clear distinction between the successive roles of the Community institutions. In *France, Italy, and*

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[35] Temple Lang, "Checks and Balances in the European Union: The Institutional Structure and the "Community Method"", 12(1) EPL 127 (2006), at 134. Original emphasis. See also: Devuyst, "The Community-Method after Amsterdam", 37 JCMS 109 (1999), at 134-135.

[36] Mancini and Keeling, "Democracy and the European Court of Justice", 57 Mod. L. Rev. 175 (1994), at 176-177.

[37] Federalist Paper No. 47, in Ball, op. cit. *supra* note 2, at 235.

United Kingdom v. Commission, the Court dismissed the argument of the United Kingdom that it followed from the Treaty that all original lawmaking power was vested in the Council, whilst the Commission had only powers of surveillance and implementation. The Court held that there was simply "no basis for that argument in the Treaty provisions governing the institutions".[38]

2.5. Fourth difference: the role of the Court

It is generally acknowledged that *Marbury* represented a remarkable volte face, and a clear break with the system of Separation of Powers as envisaged by the drafters of the US Constitution.[39] Before 1803, the legislative and executive branches of government took the lead in the original interpretation of the Constitution.[40] When, in 1837, the Supreme Court for the second time invalidated a federal statute, the power of the Court to review the constitutionality of federal legislation was already generally accepted. [41]

Conversely, the European Court of Justice was given important powers to review acts of the other institutions, hence including the power to review Community legislation. When compared to its contemporaries, which were mainly set up to review the lawfulness of the legislation of the Member States of the Treaty concerned, the Court of Justice was given a remarkably broad jurisdiction. Article 164 of the original EEC Treaty (now Article 220 EC) stipulated that the Court of Justice should ensure "that in the interpretation and application of this Treaty the law is observed". Under Article 173 of the EEC Treaty (now Article 230 EC), the Court of Justice had the power to "review the legality of acts of the Council and Commission other than recommendations or opinions". The Article furthermore provided that:

> "It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission 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, or misuse of power."

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[38] Joined Cases 188/80 to 190/80, *France, Italy and United Kingdom v. Commission* [1982] ECR 2545, para. 6.

[39] See e.g. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986), at 1.

[40] See e.g. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801.* (University of Chicago Press, 1997).

[41] *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

The Court of Justice was furthermore given an extensive scope of review under the preliminary questions procedure, as was laid down in Article 177 of the EEC Treaty (now Article 234 EC).

2.6. Conclusion

In the now more than half a century following the signing of the EEC Treaty the relations between the political institutions *inter se* have changed significantly. The European Parliament is increasingly regarded as the co-legislature enacting legislation together with the Council. Every treaty reform so far has significantly enhanced the position of Parliament,[42] *inter alia* by extending the areas in which co-decision is to be used.[43] The Lisbon Treaty will make the co-decision procedure the "ordinary legislative procedure",[44] which was also proposed by the Constitutional Treaty.[45] In contrast, the development of the role of the Commission has shown an opposite direction. Its initial important role has been severely limited over the years in favour of the other political institutions.[46] As mentioned, this chapter examines the role of the Court of Justice with regard to the main developments in inter-institutional relations, applying a dichotomy used to describe the role which the Supreme Court has played in the Separation of Powers in the United States.[47]

3. Formalism of the Supreme Court

3.1. Introduction

The fact that the powers of the three branches of the United States government are distinctly discussed in Articles I, II, and III of the Constitution does not mean that the boundaries between the powers of these branches are neatly defined. James Madison, for instance, recognized that there should be a certain degree of overlapping responsibility; "a duty of interdependence as well as independence".[48] This is exemplified by the participation of the United States' President in

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[42] See Editorial Comments, "Back to Basics. Why a European Parliament?", 36 CML Rev. 515 (1999), at 517.

[43] In the Constitutional Treaty e.g. on asylum and immigration (Article III-113) and agriculture and fisheries (Article II-231(2)).

[44] Articles 289 and 294 TFEU as proposed by the Lisbon Treaty (ex Article 288 EC). The procedure is defined in Article 251 TFEU.

[45] Article I-34 CT. Also see Articles I-20 and I-22 CT.

[46] See e.g. Temple Lang, op. cit. *supra* note 35.

[47] This chapter will focus primarily on the institutional structure of the first pillar.

[48] *Mistretta v. United States*, 488 U.S. 361 (1989), at 381.

the legislative process through the veto power, and by the Senate's authority to refuse to confirm persons nominated to office by the President.[49]

It is from this "interdependency and independency" that the debate between formalists and functionalists has sprung. According to the formalist view, the text of the Constitution and the Framers' intent provide clear guidance for Separation of Powers questions. By emphasizing the tripartite structure of constitutional government, formalists argue that it is the Supreme Court's task to prevent departures that are not expressly found in the Constitution.[50] This approach can be contrasted with the so-called functionalist approach, which focuses more on the core functions of the three respective branches.[51] Functionalism does allow for the sharing of power and a certain amount of encroachment by one branch upon another, as long as this does not impair the basic principles of separated powers; it stresses "the efficiency of their interdependency rather than their independency".[52] This section will give some important examples of both formalist and functionalist cases of the Supreme Court (§3.2 and §3.3, respectively), as well as of a third approach, generally referred to as Holmesianism (§3.4)). It is shown that the three approaches can essentially be put on a scale of judicial activism, on the one hand, and judicial passivism on the other, the first implying an active role of the Supreme Court in the United

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[49] This "interdependency and independency" can of course quite easily lead to conflicts between the three branches of government. Of course, as Chief Justice Taft once wrote, such conflicts are preferably "fixed according to common sense and the inherent necessities of the governmental co-ordination" (*Hampton & Co.* v. *United States*, 276 U.S. 394 (1928), at 406). Indeed, common sense has apparently often prevailed in the United States, since, remarkably, disputes about boundary lines have relatively rarely been resolved by the Courts. In fact, "in the area of Separation of Powers, far more so than with problems of federalism and individual rights, judicial resolutions have been relatively sparse and political accommodations have predominated" (Gunther, *Constitutional Law* (Foundation Press, 1985) at 336). Also see: Justice Jackson in his concurring opinion in *Youngstown co. v. Sawyer*, 343 US 579 (1952).

[50] Stone *et al., Constitutional Law* (Little, Brown & Co., 1991), at 415.

[51] Strauss, "Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?", 72 Cornell L. Rev. (1987), at 765.

[52] Brown, "Separated Powers and Ordered Liberty", 139 *University of Pennsylvania Law Review* 1513 (1991), at 1527-1528. The debate between formalism and functionalism is closely related to the debates between advocates and opponents of originalism, constructionism, or textualism, but they must be differentiated as there are important differences between them. To discuss these debates or the differences between them would clearly be outside the scope of this chapter.

States Separation of Powers, the latter implying full restraint by the Supreme Court, leaving Separation of Powers questions to the other branches of government – and functionalism taking a middle position.

3.2. Formalism

A clear example of the Supreme Court using a formal approach is *Youngstown v. Sawyer.* The question here was whether President Truman had the constitutional power to order his Secretary of State Sawyer to take possession of and operate the steel mills of the United States, an order he gave just a couple of hours before a strike by the United Steelworkers Union was to begin. Truman argued that the strike would endanger national defence and the war effort in Korea, but the mill owners argued that this order amounted to lawmaking and hence must come from Congress. The Supreme Court agreed; the order should have either stemmed from an Act of Congress or from the Constitution itself, and neither any statute nor any Article of the Constitution – either expressly or implicitly – provided such authority. It is striking how much importance is given by the Supreme Court in *Youngstown* to the text of the Constitution, as well as to the Framers' original intent. Despite perhaps the urgency of President Truman to seize control of the steel mills, the Court more generally emphasised the importance of the formal limits between the Executive and the Legislative Branch. It held that "in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker … and the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute".[53]

Another example of a clear formalist reasoning is *INS v. Chadha.* In this case, the Court declared unconstitutional the one-House legislative veto: an important legislative instrument which could be used by Congress or – as in the present case – one of its Houses to repeal a decision by a federal agency. The Court stressed the importance given by the Constitution and its Framers to the constitutional system of checks and balances in general and the requirements of bicameralism and presentment more specifically.[54] The formalists' approach used by the Court is illustrated by a much-quoted passage from the majority opinion by Chief Justice Burger, who wrote that:

> "[t]he choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often

[53] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952), at 588.

[54] In its majority opinion, Chief Justice Burger for instance made (numerous) references to Federalist Papers Nos. 22, 51, 62, 64, 66, 73 and 75.

> seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. … With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution".[55]

In a strong dissenting opinion, Justice White – clearly adhering to a more functionalist view – admitted that the legislative veto was not contemplated by the Founding Fathers, but became vital in "our contemporary political system [to secure] the accountability of executive and independent agencies".[56]

A third "highly formalist"[57] example is the reasoning in *Clinton v. City of New York*. This case concerned a federal act which increased presidential powers beyond what are found in the Constitution; it authorized the President to cancel parts of appropriation bills while allowing the rest to enter into effect, the so-called line-item veto. The Court held that the statute was void for violating the Presentment Clause,[58] which stipulates that after a bill has passed both Houses, it must, in order for it to become "a Law", be presented to the President, who then either signs or returns (i.e. vetoes) it. Again emphasizing the formal limits between the Executive and the Legislature, the Court held that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes".[59]

3.3. Functionalism

Contrary to Formalism, Functionalism does accept certain power sharing among the branches of government – as well as certain infringements by one branch of the prerogatives of another – as long as the basic principles of separated powers and the core functions of each of the three respective branches are respected. This is illustrated by the dissenting opinion of Justice Breyer in *Clinton* v. *New York*. Breyer, stressing the practical need of the line-item, pointed out that, unlike when the United

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[55] 462 U.S. 919 (1983), at 959. See also Elliott: "INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto", Sup. Ct. Rev. (1983) 125.
[56] *Chadha,* at 967.
[57] Chemerinsky, *Constitutional Law, Principles and Policies* (Aspen, 2002), at 336.
[58] Article 1, Section 7, Clause 2 of the United States Constitution.
[59] 524 US 417 (1998), at 438.

States was founded, a typical budget appropriations bill nowadays contained "a dozen titles, hundreds of sections" which Congress could not simply divide "into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately".[60]

Another often quoted example of functionalism is Justice Jackson's concurring opinion in *Youngstown*. Jackson argued that "while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government".[61] This "workable government" formula has been used in two cases since then by the majority of the Court. First of all, in *United States* v. *Nixon,* the Court recognized the existence of the so-called executive privilege,[62] but then used the "workable government" formula to reject the argument of President Nixon that this executive privilege provided him with absolute immunity to deny a subpoena.[63] Secondly, in *Mistretta* v. *United States,* the Court upheld a federal law which delegated legislative power to a commission composed of seven members appointed by the President – at least three of whom must be federal judges – and which placed this commission in the Judicial Branch. The Court argued that the Constitution did not prohibit Congress from assigning to courts or auxiliary bodies within the Judicial Branch certain administrative or rulemaking duties. Nor did the principle of checks and balances prohibit Congress "from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges".[64] This functional approach can be contrasted with Justice Scalia's dissenting opinion in this case, who argued that "the power to make law cannot be exercised

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[60] Id., at 471.

[61] Op. cit. *supra* note 53, at 635

[62] Executive privilege is a claim asserted by U.S. Presidents to justify the withholding of information from other branches of government. It is not mentioned in the Constitution, but Presidents have claimed it throughout history. For example, in 1796, President Washington invoked executive privilege when asked by the House of Representatives to hand over documents relating to the negotiation of the then-recently adopted Jay Treaty with England. The Senate – not the House – ratifies treaties, Washington argued, and therefore the House had no entitlement to the material. Eventually, President Washington did provide the documents to the Senate, not to the House of Representatives.

[63] *United States v. Nixon*, 418 U.S. 683 (1974), at 707. A similar line of functional reasoning was used in the other two Nixon cases: *Nixon v. Administrator General Services Administration*, 433 U.S. 425 (1977); and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

[64] *Mistretta v. United States*, 488 U.S. 361 (1989), at 412.

by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.[65]

3.4. Holmesianism

Next to formalism and functionalism, a third approach must also be mentioned, which was used only sporadically in the 1930s and is generally associated with Justice Holmes.[66] According to this approach, Separation of Powers questions are non-justiciable, mainly because the political institutions are capable of protecting themselves; courts must presume the constitutionality of what Congress does in the area of Separation of Powers.[67] "Holmesianism", as this approach has been referred to, has been criticized for having too much faith in a "self-calibrating institutional equilibrium".[68] It is argued that "there is good reason to suppose that without adequate controls one branch will sometimes exercise too much power over the others".[69]

3.5. Conclusion

One of the main differences between formalism and functionalism is that the methodology of the latter approach on the whole is more pragmatic and evolutionary. Functionalism essentially permits innovations to the Separation of Powers, as long as they are substantively consistent with the underlying rationales for this principle. For instance, in *Bowsher v. Synar,* Justice White – one of the most fervent proponents of the functionalist view – stressed that the role of the Court "should be limited to determining whether the Act alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law".[70] In other words, the functional view essentially implies a qualified form of judicial review; the political branches "can be trusted to look after their

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[65] Id., at 417. See also: Scalia, "The Rule of Law as a Law of Rules", 56 *University of Chicago Law Review* 1175 (1989).

[66] See e.g. *Humphrey's Executor v. United States,* 295 U.S. 602 (1935).

[67] See *Myers v. United States*, 272 U.S. 52 (1926), at 177. See Choper*, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court,* (University of Chicago Press, 1980), at 273 *et seq.*

[68] Sunstein, "Constitutionalism after the New Deal", 101 Harv. L. Rev. 421 (1987), at 495.

[69] Id.

[70] 478 U.S. 714 (1986), at 776 (White, dissenting). See also Justice White's dissenting opinions in *Chadha* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982), at 92-118.

own interests in mutual competition for power". [71] Checks and balances between the political branches are self-regulating; judicial intervention is required only in exceptional circumstances.

Despite perhaps the triviality of Holmesianism, this approach does illustrate that there is a powerful argument that the Supreme Court should weigh its own role with regard to Separation of Powers questions, precisely because it is itself also part of this Separation of Powers. In *Nixon,* for instance, the Supreme Court rejected the argument of the President that since the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch – the special prosecutor issuing the subpoena and the President – it was a non-justiciable political question. Some commentators questioned, however, whether the Court's decision on the substantive content of the executive privilege was "a constitutional issue the *courts* should resolve".[72] Even Archibald Cox, the first Watergate special prosecutor, would later submit, in the context of this case, that "not all disputes between the President and Congress are resolvable by the Supreme Court, even when they raise constitutional issues". Cox admitted that the lawyers of President Nixon also argued that should the President have to comply with the order of a court, this "would effectively destroy the status of the Executive Branch as an equal and coordinate element of government".[73] Consequently, only the President should have the power to determine the scope of its privilege. The Supreme Court however flatly rejected this argument by referring to Marshall's words that "it is emphatically the province and duty of the judicial department to say what the law is".[74]

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[71] Sullivan, "Dueling Sovereignties, US Term Limits, INC v. Thornton", 109 Harv. L. Rev. 78 (1995), at 93-94.

[72] Gunther, op. cit. *supra* note at 30, at 396. Original emphasis.

[73] Cox, The *Role of the Supreme Court in American Government*, (Clarendon Press, 1976), at 5 and 25.

[74] Some commentators have expressed serious doubts as to whether the Court could really infer from Marshall's words that the Supreme Court had the final say in all constitutional issues between the three branches, rather than merely deciding on constitutional issues arising in those cases which are within their jurisdiction (see e.g. Gunther, op. cit. *supra* note at 30, at 397; and Chemerinsky, op. cit. *supra* note 57, at 348). As mentioned, one of the main objectives of the United States Constitution was to create a system of government under which no branch of government would be more important than another, a rationale underlying both the doctrine of Separation of Powers and that of checks and balances.

Overall, the Court appears to adhere more to formalist solutions in resolving Separation of Powers questions.[75] With the exception of *Mistretta* and the *Nixon* cases, the Court has generally opted for formalist solutions to separation of powers questions, especially in recent case law.[76] This implies that, despite the scarcity of Separation of Powers cases, the Supreme Court has played an active role in the Separation of Powers in the United States.

4. The Separation of Powers in the European Union

4.1. Introduction

What role has the European Court of Justice played vis-à-vis the Community's political institutions? This section will examine the case law of the European Court of Justice on inter-institutional relations in the European Union. Much of this case law has been based on the principle of institutional balance and the principle of sincere cooperation. Remarkably, as de Witte has demonstrated:

> "both principles are unwritten; both were developed by the European Court of Justice; both have served for an interpretation of the Treaty departing from the ordinary grammatical meaning of the EC Treaty".[77]

After a short description of these developments (§4.2.1 and §4.2.2), it will be examined how the case law of the Court of Justice on these principles has affected the role of the Parliament, the Commission and the (European) Council (§4.3 to §4.6).

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[75] Other examples of formalism are *Hampton & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892); *Myers v. United States*, 272 U.S. 52 (1926); *Weiner v. United States* 375 US 349 (1963); *Buckley v. Valeo,* 424 U.S. 1 (1976); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Payne v. Tennessee*, 501 U.S. 808 (1991).

[76] Nourse, "Towards a New Constitutional Autonomy", 56 Stan. L. Rev. 835 (2004), at 843-844; Sunstein, op. cit. *supra* note 69, at 493. Some see *Morrison v. Olson* (487 U.S. 654 (1988)) as another example of functional reasoning (e.g. Strauss, "Common Law, Common Ground, and Jefferson's Principle", 112 Yale L. J. 1717 (2000), at 1742), but, as Chemerinsky points out, the majority in this case "largely avoided th[e] functionalist/formalist dispute" (op. cit. *supra* note 57, at 340).

[77] De Witte, op. cit. *supra* note 15, at 95.

4.2. Principles of Separation of Powers

4.2.1. The Unwritten Principle of Institutional Balance

The principle of institutional balance was articulated by the European Court of Justice in the famous 1958 *Meroni* case.[78] The Court of Justice would stress in later cases that it regarded it as its duty to ensure that the principle of institutional balance is observed.[79] As mentioned above, both Jacqué and Von Bogdandy have pointed out that the principle of institutional balance was articulated as a substitute for the principle of the Separation of Powers, aimed at protecting individuals against abuse of powers – like Montesquieu's original exposition of the concept. However, as a result of the Court's emerging case law on fundamental rights – as discussed in Chapter VI – this specific purpose of the principle has gradually lost its importance.[80] Although not laid down explicitly, the principle of institutional balance is reflected in the Lisbon Treaty and has played an important role at the European Convention for the Constitutional Treaty and in the run-up to the Lisbon Treaty.[81]

In *Meroni*, the Court held that the balance of powers between the institutions was "characteristic of the institutional structure of the Community" and "a fundamental guarantee granted by the [ECSC-] Treaty".[82] The *rationale* behind the principle of institutional balance can be found in a case decided a year before *Meroni*. In 1956, the Court had held in *Algera* that although "the institutions are autonomous within the limits of their powers … only the Community has legal personality, its institutions do not. *From that springs the need to harmonize the life of the four institutions*".[83] Similarly, the Court of Justice would argue in *Meroni* that the principle of institutional balance

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[78] Op. cit. *supra* note 5.

[79] For instance, in *Chernobyl I*, the Court argued, implicitly referring to Article 220, that "the Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must … be able to maintain the institutional balance" (op. cit. *supra*, note 6, para. 23).

[80] Jacqué, op. cit. *supra* note 9. Von Bogdandy, op. cit. *supra* note 10. In 2001, the Court held that the principle of institutional balance did not provide a remedy for a natural or legal person who considered that an act of a Community institution had been adopted in breach of this principle, regardless of whether that act was of direct and individual concern to that person (Case C-345/00 P, *FNAB et al.* v. *Council* [2001] ECR I-3811, para 41).

[81] See for instance the influential joint study of CEPS, EGMONT and EPS "The Treaty of Lisbon: Implementing the Institutional Innovations", November 2007.

[82] Op. cit. *supra* note 5, at 152.

[83] Joined Cases 7/56 and 3/57 to 7/57, *Algera et al. v. Common Assembly* [1957] ECR 81. Emphasis added.

could be derived from Article 3 of the ECSC Treaty, which enumerated eight objectives that were binding "not only on the High Authority, but on the institutions of the Community … within the limits of their respective powers".[84] For this reason, it is said that the – itself unwritten –principle of institutional balance is based on the principle of limited powers as enshrined in Article 4(1) of the original EEC Treaty.[85] Over the years the European Court of Justice has in its case law on the principle of institutional balance "both allowed, and defined the limits of, a significant development in the Community's institutional structure".[86]

4.2.2. The Unwritten Principle of Sincere Cooperation

The principle of sincere cooperation[87] is one of the main principles governing the Community's Division of Powers. Declaration No. 3 annexed to the Nice Treaty states that this principle also governs the relations between the Community institutions *inter se.* The principle – in the German constitutional system known as *Verfassungsorgantreue*[88] – essentially entails that the institutions have a mutual duty of sincere cooperation. The Lisbon Treaty will insert this principle in a new Article 13(2) EU, which will provide:

> "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures and conditions set out in them. The institutions shall practice mutual sincere cooperation". [89]

The Nice Declaration and the Lisbon Treaty codify the case law of the Court of Justice dating from 1988. In that year, the Court held in *Special Aid for Turkey* that the discretionary powers of the Community institutions "are limited by the Separation of Powers, as laid down in the Treaty, between the institutions". The Court continued that it was "therefore" its duty to ensure that "*in the context of interinstitutional*

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[84] Op. cit. *supra* note 5, at 153.
[85] Now Article 7(1) EC.
[86] Bradley, "Sense and Sensibility: Parliament v. Council Continued", 16 EL Rev. 245 (1991), at 251. Similarly, Bieber, "The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty", 21 CML Rev. 505 (1984), at 518.
[87] The principle has – just as its "vertical" counterpart – also been referred to as the "principle of cooperation in good faith between the institutions". See e.g. the Opinion of AG Léger, in Case C-417/93, *Parliament v. Council* [1995] ECR I-1185, paras 31 and 32.
[88] See Maurer, *Staatsrecht I* (Beck, 2005), at 393.
[89] Based *verbatim* on Article I-19(2) CT.

cooperation the institutions do not ignore the rules of law and do not exercise their discretionary power in a manifestly wrong or arbitrary way".[90]

This deduction of the Court, however, raises three important problems. First of all, it does not necessarily follow from the argument that the discretionary powers of the political institutions are limited that it is *therefore* "in the context of the principle of sincere cooperation" for the Court to ensure that the limits of the powers of the political institutions are observed. In fact, the Court had on numerous occasions previously held that it is its duty to ensure that the limits of powers are not used in a manifestly wrong or arbitrary way – without ever mentioning a principle of interinstitutional cooperation.[91]

This leads to a second problem: what exactly is the legal basis for applying this principle to the institutions *inter se*? Contrary to its case law on the principle of institutional balance, the Court in *Special Aid for Turkey* made no reference whatsoever to the original EEC Treaty to substantiate why the principle also applied horizontally. The Advocate General in this case had brought to the attention of the European Court of Justice an article by Bieber written as early as 1984, who had advocated that such horizontal application could be derived from Article 4 EC.[92] Yet, nowhere in the judgment is this Treaty provision – or any other provision for that matter – referred to so as to substantiate the Court's conclusion.

Moreover, there is no legal basis for the Court of Justice to act as a guardian of this unwritten principle. In *Special Aid for Turkey,* no reference was made to, for instance, Article 220 EC. By applying the doctrine of interinstitutional cooperation to the relations between the Community's political institutions, the Court essentially implied that it is its duty to ensure the proper functioning of this principle. This is a somewhat remarkable outcome for a case in which – as some members of the Court had even put forward during the hearing – it was not even

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[90] Case 204/86, *Greece v. Council* [1988] ECR 5337, paras 16 and 17, emphasis added. The present case concerned the powers of the classification of expenditure, but the Court extended this case law to the ordinary legislative process in C-65/93, *Parliament v. Council* [1995] ECR I-643.

[91] For early examples, see Case 34/62, *Germany v. Commission* [1963] ECR 49 (misuse of power when used in an arbitrary way) and Case 280/80, *Bakke-d'Aloya* [1981] ECR 2887 (misuse of power when used in a manifestly wrong way).

[92] Opinion of AG Mancini in *Special Aid for Turkey*, op. cit. *supra* note 90, para. 9 (and see Bieber, op. cit. *supra* note 86).

certain whether the Council's decision at issue was subject to a judicial review.[93]

Nevertheless, later case law confirms that the Court now regards it as its duty to guard the proper application of the principle of sincere cooperation. The Court has further fleshed out the principle and has applied it to the relationship between the Council and the Commission and to that between the Council and Parliament. In *Nuclear Safety Convention*, the Court held that the principle of sincere cooperation between the institutions entails that a Council decision approving accession to an international convention must enable the Commission to comply with international law.[94] In *Generalized Tariff Preferences*, the Court rejected the claim of the European Parliament that a Council Regulation should be annulled because it had not been consulted thereon, arguing that the European Parliament had not "cooperate[d] sincerely with the Council".[95] The Court in this case essentially used the unwritten principle of sincere cooperation to overrule the *verbatim* text of the Treaty that the European Parliament should be consulted on the subject at hand.[96]

4.3. The European Parliament

4.3.1. Introduction

The jurisprudence of the Court of Justice on the position of Parliament can be "characterised by considerable boldness and imagination in promoting a consistent conception of the European Parliament's role in the decision-making process".[97] Although, according to the original EEC Treaty, the European Parliament was, in the words of Mancini and Keeling, involved in the legislative process "solely as the addressee of information and as a consultative organ",[98] the Court of Justice already held in the 1985 *Transport* case that Parliament's role was "to exercise a political review of the activities of the Commission, and to a certain

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[93] Id., para. 4.
[94] Case C-29/99, *Commission v. Council* [2002] ECR I-11221, para. 69.
[95] *Inter alia* because it had not convened an extraordinary session – which was requested by the Council to comply with its consultative duty. Case C-65/93, op. cit. *supra* note 90, para. 27.
[96] De Witte, op. cit. *supra* note 77, at 146-147
[97] Bradley, "Maintaining the balance: the role of the Court of Justice in defining the institutional position of the European Parliament", CML Rev. 24 (1987), 41 at 63.
[98] Mancini and Keeling, op. cit. *supra* note 36, at 175.

extent those of the Council".[99] It seems to be generally accepted that "the status and influence of the Parliament has occurred through progressive recognition of its right to litigate initially through the judicial activism of the Court of Justice from 1980 to 1990, and subsequently by political agreement enshrined in a series of Treaty amendments".[100] These Treaty amendments hence to a large extent codified the existing case law of the European Court of Justice.

4.3.2. Role as part of the Community Legislature

Although currently the most minor of the European Parliament's legislative powers when compared with the cooperation and co-decision procedures, the consultation procedure was only a decade ago still, as de Burca has pointed out, "the operative procedure for many areas of Treaty lawmaking".[101] Over the years decisions of the Court – often resulting from disputes about its seat[102] or about the budget[103] – have significantly contributed to the European Parliament acquiring a prominent place in the European Union's institutional framework. Two important steps were of course taken by the Single European Act, which introduced the co-operation procedure,[104] and subsequently by the Maastricht Treaty introducing the co-decision procedure. However, both these steps were to a considerable degree the result of the importance given by the Court to the European Parliament's consultative position. On the basis of the principle of institutional balance,[105] the Court has on many occasions stressed the importance of this right of consultation. It has held that the due consultation of the European Parliament was an "essential factor in

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[99] Case 13/83, *Parliament* v. *Council* [1985] ECR 1513, para. 18.
[100] Craig and de Burca, op. cit. *supra* note 34, at 84.
[101] De Burca, 33 CML Rev. 1051 (1996), at 1063.
[102] See Case 230/81, *Luxembourg v. Parliament* [1983] ECR 255; Case 108/83, *Luxembourg v. Parliament* [1984] ECR 1945; Joined Cases 358/85 and 51/86, *France v. Parliament* [1988] ECR 4821; Joined Cases C-213/88 and C-39/89, *Luxembourg v. Parliament* [1991] ECR I-5643; Case C-345/95, *France v. Parliament* [1997] ECR I-5215.
[103] See e.g. the Order in Case 23/86 *R*, [1986] ECR 1085; Case 34/86, *Council* v. *European Parliament* [1986] ECR 2155; C-284/90, *Council v. Parliament* [1992] ECR I-2277; and C-41/95, *Council v. Parliament* [1995] ECR I-4411. See also: Editorial Comment, 18 CML Rev. 5 (1981).
[104] Article 252 EC. Like the Constitutional Treaty, the Lisbon Treaty proposes to abolish the cooperation procedure.
[105] In most, though not all cases referred to explicitly in the cases mentioned in the subsequent two footnotes. The Court stated that the consultation requirement was an (important) element of the principle of institutional balance.

the institutional balance intended by the Treaty".[106] The Court has also made clear that the European Parliament must be re-consulted each time the text of draft legislation is substantially amended, except when these amendments correspond to the wishes of the European Parliament itself.[107]

The rationale behind this importance given to the European Parliament's consultative role was explained by the Court in the first case law dealing with this issue. In the *Isoglucose* cases, remarkably decided little more than a year after the first direct parliamentary elections, the Court held that consultation of the European Parliament "reflects at the Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly".[108] Two years later, the Court added that consultation "enables the Parliament effectively to participate in the Community's legislative process".[109]

The result of not conforming to the requirement of consultation has also been clear from the outset: disregarding this essential formality renders the measure concerned void.[110] In the *Isoglucose* cases, the Court held the entire regulation for infringing the requirement of due consultation to be void, and in so doing probably ruled *ultra petita*, since both applicants had argued for a partial annulment, and Parliament, as the intervener, could not go beyond the pleas of the original parties.[111] The Court furthermore dismissed the argument of the Council that the European Parliament had no right to intervene on the ground that this right was associated with a right of action for annulment, even though

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[106] Case 138/79, *Roquette Frères v. Council* [1980] ECR 3333, para 33, Case 139/79, *Maizena* [1980] ECR 3393, para 34; Case C-70/88, op. cit. *supra*, note 6, para. 23; Case C-65/93, op. cit. *supra* note 90.

[107] Case 41/69, *Chemiefarma v. Commission* [1970] ECR 661; and Case 817/79, *Buyl v. Commission* [1982] ECR 245; Case C-65/90, *Parliament v. Council* [1992] ECR I-4593, and Joined Cases C-13/92 to C-16/92, *Driessen en Zonen et al* v. *Minister van Verkeer en Waterstaat* [1993] ECR I-4751, para. 23; Case C-388/92, *Parliament v. Council* [1994] ECR I-2067, para. 10; Case C-280/93 *Germany v. Council* [1994] ECR I-4973, para. 38; C-21/94, *Parliament v. Council* [1995] ECR I-1827, para 18; and Case C-392/95, *Parliament v. Council* [1997] ECR I-3213, paras 14-15; Case C-408/95, *Eurotunnel et al v. SeaFrance* [1997] ECR I-6315, paras 45-46.

[108] Case law cited *supra* note 106.

[109] Case 1253/79, *Battaglia v. Commission* [1982] ECR 297.

[110] Case C-156/93, *Parliament v. Commission* [1995] ECR I-2019. And see the case law cited *supra* note 106.

[111] Jacobs, "Isoglucose Resurgent: Two Powers of the European Parliament upheld by the Court", 18 CML Rev. 219 (1981), at 225.

this latter right would not be conferred on the European Parliament until the *Chernobyl I* judgment two years later.[112]

The emphasis given by the Court of Justice to the European Parliament's right of consultation should, on the other hand, not be overestimated. First of all, there was in fact "nothing revolutionary"[113] in the Court's judgment in the *Isoglucose* cases. As early as 1954, the Court had held – in another interinstitutional context – that due consultation formed an "essential procedural requirement", the disregarding of which constituted a ground for annulment.[114] Furthermore, the Court of Justice has offered only lukewarm support for the strategic litigation of the European Parliament to ensure that its consultative right should be taken seriously. The Court, for instance, carefully preserved the distinction between the consultation procedure and other legislative procedures, to prevent Parliament from effectively gaining "the right to a second reading of every Commission proposal which the Council has considered".[115] In terms of formalism/functionalism, the Court of Justice has overall adopted a rather functionalist approach towards the European Parliament's consultative power, on the one hand emphasizing the importance of this power, but on the other hand also imposing some important limitations. As mentioned, in *Generalized Tariff Preferences* the Court held that the principle of sincere cooperation entailed that the Council need not always consult the Parliament if it has already made sufficient efforts to comply with the consultative requirement. Also, in order for the legislative procedure not to become too cumbersome, the Court has held that Parliament need not be re-consulted if amendments made are "substantially identical" to the original provisions.[116] It is rather difficult, though, to infer from the Court's case law a general test to determine when a modification is so substantial as to require renewed consultation.[117] Essentially, and perhaps more importantly, it is ultimately the Court of Justice which decides on this.

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[112] Op. cit *supra* note 6.
[113] Bradley, op. cit. *supra* note 97, at 53.
[114] Case 2/54, *Italy v. High Authority* [1954] ECR 175.
[115] De Burca, op. cit. *supra* note 101, at 1063.
[116] Case 41/69, op. cit. *supra* note 107; Case 817/79, op. cit. *supra* note 107; Case 828/79, *Adam v. Commission* [1982] ECR 269; and Case 1253/79, op cit. *supra* note 109.
[117] Emiliou, "Protecting parliamentary Prerogatives", 18 EL Rev. 56 (1993), at 62.

4.3.3. Locus standi

Another important example of how the European Court of Justice has contributed significantly to the growth in importance of the European Parliament is the legislative history of Article 230(2) EC. The EEC Treaty was silent as to whether the European Parliament can sue (*légitimation active*) or be sued (*légitimation passive*), so both eventually needed to be resolved by the Court.[118] Article 230 originally gave standing to sue and be sued to the Council and Commission only. The EEC Treaty did not accord Parliament *locus standi* under Article 230, but the provision now provides that actions for annulment may also be brought by the European Parliament. This is because the Court held in 1990 that Parliament had standing to sue for the purpose of protecting its prerogatives; the Maastricht Treaty codified this decision by including Parliament in Article 230(3) EC; Nice moved the European Parliament up a paragraph and made it one of the privileged applicants in Article 230(2) EC – which do not need to demonstrate any special interest in bringing an action.[119]

The European Parliament's standing to be sued was addressed for the first time by the Court in *Les Verts*, in which the Court agreed with both parties that decisions of the Parliament were subject to judicial review under Article 230. The Court held that

> "the European Economic Community is a community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, [which] established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions". [120]

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[118] Also, actions for a failure to act against the Council or the Commission could, according to the original text of Article 232 EC (then Article 175 EEC Treaty), be brought by "Member States and the other institutions of the Community". Parliament first claimed such a right in the aforementioned *Transport* case in 1985, and, although "loosely drafted" (according to Bebr, "The Standing of the European Parliament in the Community System of Legal Remedies: A Thorny Jurisprudential Development", 10 YEL 171 (1982), at 173), the Court had no problem in reading this right into Article 232 EC (Case 13/83, op.cit. *supra* note 99, para. 17, which was codified in Article 232).

[119] See Case 45/86, *Commission v. Council* [1987] ECR 1493; and Case 131/86, *United Kingdom v. Council* [1988] ECR 905.

[120] Case 294/83, *Les Verts v. European Parliament* [1986] ECR 1339, para. 23. *Les Verts* was confirmed in Case 34/86, op. cit. *supra* note 103, paras 5-6. Standing to be sued under Article 38 ECST was then already recognised by the

The Court argued that the reason why the original text of Article 230 did not provide for the possibility of the European Parliament to be sued was that the Parliament had initially only been granted powers of consultation and political control rather than the power to adopt measures intended to have legal effects *vis-à-vis* third parties.

Five years later, the European Parliament's right to sue under Article 230 was accepted in *Chernobyl I,* although it was initially denied in 1988 in the – immediately much criticized[121] – *Comitology* case.[122] Article 155 of the EEC Treaty provided that the European Parliament's prerogatives were protected by the Commission, but in *Chernobyl I* the Parliament argued that this system had proven inadequate in practice, especially in the present case in which the Commission disagreed with the Parliament as regards the choice of the legal basis. The Court argued that the observance of the institutional balance meant that each of the institutions must in exercising their own powers respect those of the other institutions, but also "that it should be possible to penalize" any failure to do so. The Court held – implicitly referring to Article 220 – that it was its duty to ensure that "in the interpretation and application of the Treaties the law is observed", and – therefore – it was its task to maintain and observe the institutional balance. This duty prevailed over the "procedural gap" in the Treaties, which did not provide for any remedy for the Parliament to safeguard its prerogatives by way of *légitimation active*.[123] As mentioned, the Court acknowledged limited *locus standi*; any action brought by the Parliament was only admissible if the questions sought to safeguard Parliament's prerogatives.

4.3.4. Conclusion

Although the EEC Treaty required the consultation of Parliament in only a few instances, the Court of Justice has clearly played a crucial role in advancing this right. Even though the EEC Treaty endowed the European Parliament with only a minimal, advisory role, the Court of Justice has over the years gradually brought the European Parliament onto an institutional equal footing with the other institutions. To a great

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Court in Case 230/81, op. cit. *supra* note 102, and Case 108/83, op. cit. *supra* note 102.

[121] See e.g. Weiler, "Pride and Prejudice: Parliament v. Council", 14 EL Rev. 334 (1989); Bradley, "The Variable Evolution of the Standing of the European Parliament in Proceedings Before the Court of Justice", 8 YEL 40 (1988), at 51-55.

[122] Case 302/87, *Parliament v. Council* [1988] ECR 5615.

[123] Case C-70/88, op. cit. *supra*, note 6, paras 22, 23 and 24.

extent, this co-equal role of the European Parliament is codified in the Lisbon Treaty. Co-decision will be extended to (even) more policy areas, the co-decision procedure will become the ordinary legislative procedure, whereas the adoption of Community legislation other than by means of the co-decision procedure will be referred to as a "special legislative procedure".

Furthermore, although the Treaty provided no *locus standi* for the Parliament, the Court has accepted that it has both standing to sue and standing to be sued. The Treaty of Nice eventually included the European Parliament as one of the privileged applicants of Article 230(2) EC. No changes will be made in this regard by the Lisbon Treaty.

4.4. The Commission

4.4.1. Introduction

As mentioned, the original EEC Treaty granted the Commission an important position among the political institutions of the European Economic Community by endowing it with the right of legislative initiative as well as giving it decision-making powers of its own. Furthermore, Article 155 EEC, fourth indent (now Article 211(4) EC) created the possibility for the Council to delegate to the Commission important (legislative) authority. The EEC Treaty essentially provided for the sharing of both certain legislative and executive powers between the Council and the Commission. To a certain extent, the Court of Justice has tried to counterbalance this development.[124] This section will examine the case law of the Court of Justice with regard to the delegation of powers (§.4.4.2.), the Commission's role as part of the Legislature (§.4.4.3.) and the locus standi of the Commission (§.4.4.4.).

4.4.2. Delegation of Powers

Some of the most important powers of the Commission are delegated to it by the Council under Article 211(4) EC, which stipulates that the Commission, "to ensure the proper functioning and development of the common market … exercises the powers conferred on it by the Council for the implementation of the rules laid down by the latter".[125] When

[124] See Lenaerts, "Regulating the Regulatory Process: "Delegation of Powers" in the European Community", 18(1) EL Rev. 23 (1993).

[125] The Commission, of course, also has other important powers under the EC Treaty, especially in the areas of competition policy and safeguard measures. It is clearly outside the scope of this chapter to discuss all developments in the case law in these areas.

with the rapid advancement of European integration the volume of European legislation significantly increased, it quickly became apparent that not all Community legislation could be adopted by the ordinary legislative procedures. For this reason, the Council began to make intensive use of Article 211(4) and delegated important powers to the Commission, even legislative ones.[126] At the same time, the Council, anxious to maintain a degree of control over the way in which the Commission used its delegated powers, set up what became known as the Comitology system.[127]

In *Köster,* the Court held that this Comitology system was compatible with Article 211 EC and the principle of institutional balance.[128] The Court argued that the Comitology system did not distort "the institutional balance between Council and Commission", as it respected the division of powers between these two political institutions.[129] *Köster* thus confirmed that, in the words of Lenaerts and Verhoeven, "institutions may not, in the exercise of their powers, encroach upon the powers and prerogatives of other institutions".[130]

Essentially, the Court in *Köster* made a distinction between legislative rules and implementing rules, a distinction which, as the Court pointed out, could also be found in "the legal concepts recognized in all the Member States".[131] The Court differentiated between rules "based directly on the Treaty and derived law intended to ensure their implementation".[132] According to the Court, this distinction was reflected in "the legislative scheme of the Treaty, in particular by the last indent of [now Article 211]".[133] As summarized by Türk, the Court in *Köster* essentially established "a hierarchy of norms [which] shows similarities with that of [those] Member States which distinguish between legislative acts in the formal sense adopted in accordance with constitutional rules and derived acts adopted on the basis of such

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[126] See also: Usher, "The Commission and the Law", in Edwards and Spence (eds.), *The European Commission* (Longman, 1994), at 146-167.

[127] In short, this system entails that the exercise of delegated power requires the approval of a committee composed of Member State representatives.

[128] It is of course remarkable that the Court allowed the Comitology system in the first place, but, as Craig and de Burca point out (op. cit. *supra* note 34, at 150, fn. 47), the Court in *Köster* "may well have been influenced by the realisation that to find [this system] unconstitutional would have caused a major upset in the evolving pattern of Community decision-making".

[129] Case 25/70, *Köster* [1970] ECR 1161, para 9.

[130] Lenaerts and Verhoeven, op. cit. *supra* note 17, at 45.

[131] Id., para. 6.

[132] Op. cit *supra* note 129, para 6

[133] Id.

legislative acts".[134] Bieber and Salomé have argued that "such a hierarchy ... leads to a greater specialization and hence come[s] closer to a traditional system of separation of powers",[135] a process which Schütze has referred to as "sharpening the Separation of Powers through legal hierarchisation".[136]

As Douglas-Scott has argued, although the Court in *Köster* upheld the principle of delegation, it "limited the Council to the delegation of administrative, rather than discretionary powers".[137] As summarised by Lenaerts:

> "In [*Köster*], the Court ruled as follows: "both the legislative scheme of the Treaty, reflected in particular by the last indent of Article 155, and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognised in all the Member States, between the measures directly based on the Treaty itself [legislative acts] and derived law intended to ensure their implementation [executive acts].""[138]

Köster was codified by Article 202(3) EC, which was introduced by Article 10 of the SEA.[139] Already implicitly in *Köster*, but more clearly in subsequent case law on the Commission's delegated powers, the Court essentially used the principle of institutional balance[140] to make a distinction between a more "executive" role of the Commission, entrusted with either executive or with specific – individual – legislative authority, and a "legislative" role of the Council, endowed with general legislative authority, and only in exceptional circumstances acting as the Community's executive power. The Court would after *Köster* repeatedly stress that, following the amendments made to Article 202 EC by the

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[134] Türk, *The Concept of Legislation in European Community Law. A Comparative Perspective* (Kluwer Law International, 2004), at 75.

[135] Bieber and Salomé, "Hierarchy of Norms in European Law", 33 CML Rev. 907 (1996), at 915.

[136] Schütze, op. cit. *supra* note 31.

[137] Douglas-Scott, op. cit. *supra* note 4, at 65

[138] Lenaerts, op. cit. *supra* note 124, at 30.

[139] This provision provides that "to ensure that the objectives set out in this Treaty are attained, the Council … shall confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down". This is similar, of course, to Article 211(4), but Article 202 (3) adds that "the Council may also reserve the right, *in specific cases*, to exercise directly implementing powers itself".

[140] Explicitly referred to in *Köster,* op. cit *supra* note 129, paras 4 and 9; and in Case 30/70, *Scheer* [1970] ECR 1197, paras 13 and 18.

Single European Act, the Council may reserve the right to exercise implementing powers directly only in exceptional cases.[141] As Lenaerts points out:

> "The preference for the Commission over the Council as the institution responsible for the execution of Community legislation is simply the result of a concern to preserve the constitutional checks and balances inherent in the decision-making process set up by the Treaties. The risk that the Council might blur the lines between legislative and executive acts when it decides on both is far greater than when one institution (the Council) decides on legislative acts and another (the Commission) on executive acts. ... The Court of Justice has therefore enforced very strictly the boundary between legislation and execution (implementation)."[142]

In general, this case law seems to be reflected in the Lisbon Treaty. The new Article 290 TFEU will read:

> 1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.
>
> 2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:
> (a) the European Parliament or the Council may decide to revoke the delegation;
> (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.
>
> 3. The adjective "delegated" shall be inserted in the title of delegated acts.

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[141] See e.g. Case 16/88, *Commission v. Council* [1989] ECR 3457, paras 10-11 Case 22/88, *Vreugdenhil* [1989] ECR 2049, para. 16; Case C-357/88, *Hopermann* [1990] ECR I-1669, para. 7; Case C-257/01, *Commission* v. *Council* [2005] ECR I-345, paras 49-61. See also AG Jacobs in Case C-240/90, *Germany v. Commission* [1992] ECR I-5383, para 36.

[142] Op. cit. *supra* note 138, at 33.

This provision is quite similar to Article I-35 CT,[143] although the Lisbon Treaty adds a new paragraph 3 making it easier to identity delegated acts. The new Article 17 EU will furthermore provide that "the Commission … shall exercise coordinating, executive and management functions".[144] Lenaerts has pointed out – referring to *Köster* – that these provisions suggest "that the allotment between legislative and non-legislative acts has been realised in agreement with the jurisprudential acquis, in particular by saving the qualification of "legislative acts" for those laying down the basic elements of the matter to be dealt with". [145] The Constitutional Treaty – and subsequently the Lisbon Treaty – was

> "inspired by the crucial distinction between legislative and executive acts, which are common to all Member State legal systems. It clarifies the separation of powers at the European level and enables the establishment of a true hierarchy of norms."[146]

Craig has argued that this hierarchy of norms could have important implications for both the institutional balance in the European Union and the Division of Powers in the European Union.[147] He adds that

> "[this] hierarchy of norms, combined with those on competence restraints and the Charter … place the ECJ ever more squarely in the role of Constitutional Court, with the power to invalidate primary legislation for breach of these constraints on governmental power".[148]

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[143] The provision was slightly adjusted because the proposal of the Constitutional Treaty to rename the various types of Community Legislation (I-33(1) CT) - *inter alia* to rename Regulations and Directives as "European laws and European framework laws" - has been dropped

[144] Based *verbatim* on Article I-26 CT

[145] Lenaerts, "The Structure of the Union According to the Draft Constitution for Europe", in De Zwaan et al (eds.), *The European Union. An Ongoing Process of Integration. Liber Amicorum Alfred A. Kellermann* (Cambridge University Press, 2004) 3, at 12. Similarly, Lenaerts and Corthaut, "Judicial Review as a Contribution to the Development of European Constitutionalism", in Tridimas and Nebbia (eds.), *European Union Law for the Twenty-first Century. Rethinking The New Legal Order* (Hart, 2004) 17, at 40.

[146] Lenaerts, "A Unified Set of Instruments", 1:1 EU Const. 57 (2005), at 57. Similarly, Craig, "The Hierarchy of Norms", in Tridimas and Nebbia (eds.), id., at 85.

[147] Craig, id., at 85.

[148] Id., at 89.

4.4.3. Role as part of the Community Legislature

The fact that the Commission in the first years of its existence was able to play its "traditional role … as initiator of steps in the integration process"[149] was mostly the result of its right of initiative, the most important right of the Commission in the Community's legislative process.[150]

In general, the Commission has a monopoly on the use of this right. It cannot be forced to use it by either another institution or a Member State, for instance when so requested by the Council in the context of Article 208 EC.[151] Nor will a court action by an EU citizen to request the Commission to use its rights have a chance of succeeding, as it will probably be held inadmissible.[152] The Court has also held that the Commission cannot bind its exercise of the right of initiative, for instance by concluding international agreements which have binding effect.[153] The Court has stressed that the Commission can, when developing a proposal, consult and inform governments of non-Member States and conclude with them arrangements in order to steer these consultations,[154] but it is, when concluding such arrangements, "exercising, rather than restricting its right of initiative".[155]

Furthermore, according to Article 250 EC, the Council can amend proposals of the Commission only by unanimity. This is "an important instrument to protect [the Commission's] right of initiative".[156] The Court has emphasised that the Council can adopt such amendments only if the subject-matter and objective remain unchanged.[157] The Court has allowed only some flexibility on this point. When the Council for instance modifies or weakens conditions articulated in the original

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[149] Koopmans, "Rethinking the Institutional System", in de Zwaan et al. (eds.), op. cit. *supra* note 145, at 25.
[150] See also: Jacqué, op. cit. *supra* note 14, at 390.
[151] Lauwaars, *Lawfulness and Legal Force of Community Decisions*, (Sijthoff, 1973), at 109.
[152] This has already been held by the CFI in Case T-134/89, *Hettrich et al v. Commission* [1990] ECR II-565, and follows indirectly from Case 134/73, *Holzt & Willemsen v. Council* [1974] ECR 1. The applicant in this case had, by letter, even "begged the Commission to make use of its right of initiative and to submit an appropriate proposal to the Council" (para. 2), but, unfortunately, in vain.
[153] This follows *a contario* from Case C-233/02, *France v. Commission* [2004] ECR I-2759, para. 50.
[154] Id..
[155] Id., Opinion of Advocate General Alber, para. 62.
[156] De Zwaan, "The Role of the European Commission over the years: Changes and Challenges", in de Zwaan et al. (eds.), op. cit. *supra* note 145, at 60.
[157] Case C-408/95, *Eurotunnel v. SeaFrance* [1997] ECR I-6315, paras 37-39.

proposal of the Commission, this will not automatically alter the proposal's objective or subject-matter.[158]

Although, generally, the right of initiative requires the Commission to make a formal proposal, under some Treaty provisions a recommendation or other initiative suffices. In the *Stability and Growth Pact* case, the Court stressed the importance of the Commission's right of initiative when it gives a recommendation in the context of the excessive deficit procedure. In this case, the Court seemed to imply that although the institutional balance defined by the Treaty provisions and secondary legislation rules on the excessive deficit procedure confers on the Council a wide margin of discretion to amend a recommendation, it still has to respect the Commission's right of initiative and cannot subsequently modify this recommendation "without a fresh recommendation" from the Commission.[159] This case law is codified by the Lisbon Treaty, which will enhance the power of the Commission to give warnings and to grant the Commission the power to make a proposal instead of a recommendation, making it more difficult for the Council to change the Commission's proposal.[160]

In general, the Lisbon Treaty strengthens the importance as well as the monopoly of the Commission's right of initiative, which will now cover all the fields of competence of the European Union. The new Article 17 EU will also provide that the Commission "shall promote the general interest of the European Union and take appropriate initiatives to that end". Article 17(2) adds that "Union legislative acts may be adopted only on the basis of a Commission proposal, except where the Treaties provide otherwise".[161] In JHA matters, its right of initiative will be shared with "a quarter of the Member States",[162] whereas currently the Commission or *any* individual Member State may make proposals in this area.[163]

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[158] Case 355/87, *Commission v. Council*, ECR [1989] 1517 paras 42-44.

[159] Case C-27/04, *Commission* v. *Council* [2004] ECR I-6649, paras 80 and 92. See Doukas, "The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado about Nothing?", 32 LIEI 293 (2005), at 307.

[160] Article 126 TFEU (cf. Article 90 of the Lisbon Treaty, amending Article 104 EC).

[161] Based *verbatim* Article I-26(1) and (2) CT (except, of course, for the change of "Constitution" to "Treaty").

[162] Article 68, based *verbatim* on III-264 CT.

[163] On the other hand, the Lisbon Treaty proposes to delete Article 14(4) EU, which now provides that "the Council may request the Commission to submit to it any appropriate proposals relating to the common foreign and security policy to ensure the implementation of a joint action". To a certain extent, this passive right of initiative will be replaced by a new - more active - right of initiative of

4.4.4. Locus standi

Although the EEC Treaty was relatively less ambiguous on the *locus standi* of the Commission than it was on that of the Parliament, still, some important issues regarding whether it could sue or be sued have had to be resolved by the Court. First of all, in *Zwartveld*, the Court was confronted with the question whether the Commission could be obliged to assist in a request for judicial cooperation by a national judge-commissioner investigating a possible breach of national provisions adopted to implement Community rules on fishing quotas. The judge-commissioner requested certain inspection reports, and, when subsequently deemed necessary, that the inspectors take evidence. When the Commission refused, he asked the Court to order the Commission to cooperate with its request. The problem was that there was no legal basis for him to bring such action against the Commission, so he therefore invoked Articles 1 and 12 of the Protocol on the Privileges and Immunities of the European Communities.[164] The Commission argued that the Court had no jurisdiction, since the EEC Treaty set out exhaustively the remedies available before the Court. More specifically, the right of national courts to refer a case to the Court was regulated exhaustively in Article 234, but the request for judicial cooperation did not concern the interpretation of a provision of the Treaty or of secondary legislation.

The Court however held that it could order the Commission to comply with the request, in sum because (1) as it had held in *Costa v. ENEL*,[165] the Community had its "own legal system which [is] an integral part of the legal systems of the Member States", (2) as it had held in *Les Verts*,[166] the Community was subject to the rule of law, and

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the High Representative *sec* or with the support of the Commission. The new Article 20 EU as proposed by the Lisbon Treaty will state that "any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the Commission's support, may refer any question relating to the common foreign and security policy to the Council and may submit to it initiatives or proposals as appropriate". This provision is based almost *verbatim* on III-299 CT.

[164] See also Usher, in Edwards and Spence (eds.), *The European Commission,* (Longman, 1994) 161, at 162. Article 1 of this Protocol provided *inter alia* that the "property and assets of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice". Article 12 stipulated that the immunity of the Community in respect of acts performed by them in their official capacity was subject to the jurisdiction.

[165] Case 6/64, *Costa Enel* [1964] ECR 585

[166] Text accompanying *supra* note 120

(3) as it had held in *Commission v. Greece*,[167] the relation between the Community institutions and the Member States was governed by the principle of sincere cooperation. The Court held that "when analyzed in the light of those principles", the Protocol had a purely "functional and therefore relative, character".[168] The Court furthermore rejected the Commission's claim of inadmissibility, arguing that since (now) Article 220 requires the Court to ensure that in the interpretation and application of the Treaty the law is observed, it should have jurisdiction in this case "in view of the need to avoid any interference with the functioning and independence of the Communities".[169]

Whereas *Zwartveld* essentially meant an extension of the Commission's standing to be sued,[170] the Court had earlier, in the *ERTA* case, given a wide ruling also on its standing to sue. The original text of Article 230 provided that the Court could review acts of the Commission and Council "other than recommendations and opinions". Since the latter two were measures mentioned in Article 249, the Court had to resolve the question whether "acts" in the sense of Article 230 referred only to the other types mentioned in Article 249 or should be interpreted more broadly.

In *ERTA,* the Commission sought to annul certain conclusions by the Council on an agreement with third countries on international road transport, which was negotiated and concluded by the Member States. The Council submitted that the Commission had no standing, arguing that the proceedings regarding the negotiation and conclusion of the Treaty were not acts as referred to in Article 249, or if this provision should be interpreted broadly, were still devoid of legal effect. The Court held, referring to Article 220, that the objective of Article 249 was to ensure observance of the law in the interpretation and application of the Treaty. Therefore, "an action for annulment must … be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".[171] The Court held that the legal effect of the proceedings differed according to whether they were regarded as constituting powers conferred on the Community or remained vested in the Member States. The Court found that the Community had an implied power to enter into international agreements

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[167] Case 230/81, *Luxembourg v. European Parliament* [1983] ECR 255, para 37.
[168] Case 2/88, *Zwartveld* [1990] ECR 3365, paras 19 and 20.
[169] Id., para. 24.
[170] Although *Zwartveld* could probably be read as providing a (new) remedy against all political institutions of the Community, the Court of Justice especially emphasized the specific role of the Commission as articulated in Article 211 EC.
[171] Case 22/70, *Commission v. Council* [1971] ECR 263, at para. 42

wherever the Community institutions had the power to achieve a particular policy objective internally. Such a competence, although initially held concurrently with the Member States, would become exclusive once exercised by the Community, whether internally or externally. The Court argued that when the Community adopted provisions laying down common rules to implement a common policy envisaged by the Treaty, the Community became exclusively competent to negotiate and conclude the agreement. In other words, at the time the Council adopted the conclusions, these had "definite legal effects both on relations between the Community and the Member States and on the relation between institutions".[172]

The Court rejected the argument of the Council that the Commission's action was devoid of purpose as it could not achieve its aim. It held that, when annulled, the conclusions of the Council would have to be deemed non-existent and the disputed questions would be reconsidered. The Court found that it was therefore "incontestable that the Commission has an interest in pursuing its action".[173] The Court also rejected the Council's argument that the Commission could not pursue this action because the Commission itself was responsible for the situation at hand by not having submitted proposals necessary to allow the relevant Community powers to be exercised. The Court held that "since the questions put before the Court by the Commission are concerned with the institutional structure of the Community, the admissibility of the application cannot depend on prior omissions or errors on the part of the applicant".[174]

4.4.5. Conclusion

Like *Les Verts* and *Chernobyl I* with regard to the European Parliament, the Court of Justice in *Zwartveld* and *ERTA* established or broadened both the Commission's légitimation active and légitimation passive. Moreover, the Court has made a distinction between legislative and executive rules, drawing inspiration from, as it held in *Köster*, "the legal concepts recognized in all the Member States". As argued by Lenaerts: "The Treaty itself alludes to the concept [of delegation of powers] – but not by name – in order to structure the relationship between the legislature and the executive. And the case law of the Court of Justice accepts it."[175]

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[172] Id., paras 54-55.
[173] Id., para. 61.
[174] Id., para. 64.
[175] Op. cit. *supra* note 124, at 49

These different aspects were reflected in the Constitutional Treaty – and subsequently in the Lisbon Treaty. In the words of Craig:

> "Th[e] institutional balance is readily apparent in relation to the legislative process. The Commission has retained in general terms its "gold standard", the right of legislative initiative. The EP and the Council both partake in the consideration of legislation and do so now on an increasingly equal footing. The EP and the Council are said to jointly enact legislation. The co-decision procedure under which such laws and framework laws are jointly enacted is now deemed to be the ordinary legislative procedure."[176]

4.5. The Council

In the first eight years of its existence, the Commission[177] managed to use its important position to take the initiative in many policy areas. Between 1958 and 1965 the Commission was probably the most active of the Community institutions and was referred to even as a true federal institution.[178] Far-reaching plans of the Commission in 1965, which would significantly strengthen its own role even further, as well as that of the Parliament – at the expense of the Council – backfired completely. This led to the Luxembourg Accords of 1966, after which the role of the Commission gradually weakened in favour of the Council and later the European Council.[179] This trend was reinforced by the Treaty on the European Union: it is generally accepted that especially the last decade has witnessed a gradual but important decline in the Commission's power at the expense of the Council and the European Council.[180] The weakened role of the Commission is one of the main reasons why, in 2001, the Commission argued for more framework legislation and informal law, and for more Commission control over implementation, at the same time advocating less Comitology influence by the Member States over delegated legislation.[181] These proposals had but one

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[176] Craig, "The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order", EUI Working Paper LAW No. 2004/7.
[177] Or High Authority as it was of course then called, renamed the Commission with the 1965 Merger Treaty.
[178] Neunreither, "Transformation of a Political Role: Reconsidering the Case of the Commission of the European Communities", 10 JCMS 233 (1971), at 238-243.
[179] Id., at 243-249. Also see: Weiler, "The Community system: the Dual Character of Supranationalism", 1 YEL 267 (1981).
[180] Already predicted in 1992 by Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", 30 CML Rev. 17 (1993), at 41.
[181] Commission White Paper: European Governance, COM (2001) 428 final.

objective: to retrieve some of the legislative and executive authority the Commission had gradually lost to the other two institutions.

As mentioned, Article 250 EC provides that the Council can amend proposals of the Commission only by unanimity. In the last decade the requirement that amendments be taken by unanimity has increasingly come under strain. First of all, it is, as de Zwaan has pointed out, hard to imagine that with the accession of the twelve new Member States this rule can be maintained in practice. Even though the Constitutional Treaty would have upheld the principle, de Zwaan argues that for practical reasons it would be better to replace this principle with a form of (super)qualified majority in the Council.[182] Secondly, and perhaps more importantly, the Treaty of Maastricht introduced exceptions to the unanimity rule of Article 250. The new Article 251(4) and (5) provided that in the context of the Conciliation procedure such amendments should be taken by QMV instead of unanimity. This has weakened the Commission's right of initiative and has had important repercussions for the institutional balance between the Commission, the Council and the Parliament.[183] The Lisbon Treaty will furthermore expand the exceptions to a number of budgetary provisions.[184]

Initially, the Maastricht amendments primarily resulted in a strengthening of the Council's right of amendment at the expense of the Commission's right of initiative. Under the so-called third reading, when the Conciliation Committee was unable to reach an agreement, the Council could subsequently "confirm its common position" by qualified majority. This common position could only be rejected by Parliament by an absolute majority of its members. The third reading, which was "perceived by Parliament as a symbol of its subordinate role in legislative procedures",[185] was abolished by the Treaty of Amsterdam. Now, when the Conciliation Committee is unable to reach agreement, the proposed act is to "be deemed not to have been adopted".[186] The result of these amendments has been that "the balance of power has shifted in favour of the European Parliament",[187] leading de Zwaan to conclude that "the institutional position of the Commission has been sacrificed in favour of an increase in the democratic character of the Parliament in the

[182] De Zwaan, op. cit. *supra* note 156, at 57, at 60.
[183] See also: Curtin op. cit. *supra* note 180, at 42.
[184] Article 272 TFEU.
[185] Dehousse, "European Institutional Architecture after Amsterdam: parliamentary System or Regulatory Structure", 35 CML Rev. 595 (1998), at 604.
[186] Article 251(5) EC.
[187] Dehousse, id.

decision making process".[188] These trends are reinforced by the fact that the Commission is a mediator – and not a member – of the Conciliation Committee. As such, rather than defending its own proposals and hence its own right of initiative, it has the duty to "take all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council".[189]

It is difficult to say whether the case law of the Court of Justice contributes to or tries to counterbalance these developments. As mentioned above, overall, the Court does seem to emphasise the importance of the Commission's right of initiative, whilst, on the other hand, also acknowledging a certain discretion of the Council. Recently the Court has held in *IATA and ELFAA* that "the authors of the Treaty confer[red] a wide discretion on the Conciliation Committee"; it can for instance amend or delete certain parts of the draft legislation on which there is no actual disagreement between Council and Parliament.[190] The Advocate General in this case argued that this wide discretion of the Committee would not mean that "the Commission's right of initiative is not at stake" as long as "in the end the joint text [has] the same subject-matter as the original Commission proposal".[191] Nevertheless, this judgment will probably only further reinforce the aforementioned shift of power to Parliament at the expense the Commission's right of legislative initiative.

4.6. The European Council

It is clear that the evolution of the relationship between the Community institutions has witnessed a shift in the balance of power in favour of the Council – and European Council – and the European Parliament, at the expense of the Commission. The emergence of the European Council has amplified these developments, *inter alia* because it has served as a "detraction from the Commission's role as a source of fresh Community ideas".[192] The European Council is currently not a formal Community institution and operates outside the scope of parliamentary control and judicial review. The Lisbon Treaty will change this. The European Council will become an institution, with, as is well known, a full-time rather than rotating President. Article 15 EU as proposed by the Lisbon

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[188] De Zwaan, op. cit. *supra* note 156, at 57.
[189] Article 251(4) EC.
[190] Case C-344/04, *IATA and ELFAA v. Department for Transport* [2006] ECR I-403, paras 57 and 58.
[191] Id., Opinion, para. 98
[192] Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", 30 CML Rev. 17 (1993), at 42

Treaty provides that the European Council "shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof". The provision adds that the European Council shall not, however, exercise legislative functions. An amended version of Article 230 (263 TFEU, as proposed by the Lisbon Treaty) will extend the jurisdiction of the Court of Justice to acts of the European Council. This will, of course, not change the fact that the European Council is "an inter-governmental organ *par excellence* with no supranational features,[193] which has proven to be "a serious threat to the Commission's exercise of its most vital prerogative, namely, its exclusive right of initiative".[194]

4.7. Conclusion

The EEC Treaty incorporated neither a clear system of Separation of Power nor a system of checks and balances. Paradoxically, together with the rapid advancement of European Integration, on the one hand those boundary lines that did exist were "blurred"[195] significantly, while, on the other, the need for a clearer Separation of Powers became ever more apparent. However, as de Witte points out:

> "As a result of the Court's case law [on the principles of institutional balance and that of inter-institutional cooperation], the relations between the Community institutions are now dominated by the twin values of autonomy and cooperation; the principle of institutional balance serves to ensure respect for the separate powers of each institution whereas the duty of sincere cooperation expresses the countervailing power that the institutions should cooperate beyond the formal rules of procedure laid down in the Treaty".[196]

Although important steps towards a clearer system of Separation of Powers and checks and balances were of course also taken by the European Union's Constitutional Legislature – for instance when increasing the role of the Parliament in the decision-making process, it has overall been mainly the Court of Justice which has contributed to such a system. The Court of Justice is of course not the only actor responsible for the rudimentary system of Separation of Powers and checks and balances. Successive Treaty amendments, including those of

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[193] Id., at 26
[194] De Zwaan, op. cit. *supra* note 156, at 64.
[195] Term used by Lenaerts and Corthaut, op. cit. *supra* note 146, at 33
[196] Op. cit. *supra* note 77, at 95.

the Lisbon Treaty, have strengthened the legislative authority of the European Parliament as well as the executive role of the Commission. Both the Constitutional Treaty and the Lisbon Treaty furthermore stress the importance of the Commission's right of legislative initiative. Nevertheless, many of these Treaty amendments codified existing case law of the Court of Justice, such as *Köster, Les Verts* and *Chernobyl I.* Indeed, in the words of Temple Lang: "several fundamental principles of EC law, first stated by the Community Courts, have since been confirmed by express Treaty provisions".[197] In *Köster* and subsequent case law, the Court differentiated between a more executive role of the Commission and a more legislative role of the Council, thus creating a – albeit still very rudimentary – system of Separation of Powers. The Court has essentially tried to detangle or at least to distinguish "those who formulate the laws" from "those who are entrusted with their interpretation, application and enforcement". In the words of Lenaerts:

> "the delegation of executive powers is only an imperfect attempt to organise a kind of separation of powers between the legislature (Council and Parliament, with the Commission having the monopoly of the initiative) and the executive (Commission – at least in principle). In this setting, when the Commission sees itself entrusted with the execution of a Community legislative act ... the separation between the legislature and the executive is guaranteed and the ensuing checks and balances inherent in the constitutional system of the Treaties can operate to their full extent."[198]

Furthermore, the Court of Justice in general guarded the Commission's right of legislative initiative, while at the same time promoting a shift of power to the European Parliament. In the words of Lenaerts and Verhoeven: "*Chernobyl* [*I*] highlights [that] institutional balance … may, as the case may be, move the Court of Justice to take a corrective action when this is needed to see that rule respected".[199] The current status of the European Parliament is mainly the result of cases such as *Les Verts* and *Chernobyl I.* The Court contributed to a system of checks and balances between the Community institutions by significantly increasing the importance of Parliament's consultative power and – consequently – its overall role in the legislative process. The case law of Court of Justice on *locus standi* had similar effects, Lenaerts and Corthaut have described

[197] Temple Lang, op. cit. *supra* note 35 at 133.
[198] Lenaerts, op. cit. *supra* note, 138, at 37.
[199] Lenaerts and Verhoeven, op. cit. *supra* note 17, at 45

this process as "ensuring checks and balances through locus standi".[200] They have argued that cases such as *Chernobyl I* illustrate that:

> "the ECJ has not eschewed fundamentally redrawing the constitutional balance through its case law on locus standi . It is equally important that the Member States, as *Herren der Verträge*, subsequently consummated this fundamental change in the constitutional balance by taken over the formula devised by the Court in the text of the Treaties on the occasion of the following IGC".[201]

In sum, based on the two unwritten principles of institutional balance and sincere cooperation between the institutions, the Court greatly contributed to the introduction of a system of Separation of Powers and checks and balances to the European Union. In its case law on inter-institutional matters, the Court has overall used a functional approach, on the one hand for instance stressing the importance of the Parliament's rights in the institutional balance of the Community, on the other hand also taking into account certain limits to this requirement when the principle of sincere cooperation so required.

5. Judicial Functionalism of the Court of Justice

5.1. Introduction

It is fair to say that the case law of the European Court of Justice on inter-institutional questions has been the subject of considerable academic debate and has evoked much criticism. Commentators on this case law can essentially be split into two opposing "schools of thought", which resemble the dichotomy between "formalism" and functionalism".

Put differently, in the context of the European Union, there are those commentators – referred to here for the sake of the argument in this Chapter as "legal formalists" – who accuse the Court of judicial activism in pursuing a policy of integrationalism, thereby disregarding formal delimitations set by the EEC Treaty (§5.2). On the other hand, there are those – again, purely for the sake of argument, grouped together here under the heading "legal functionalists"[202] – who argue that in order to

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[200] Lenaerts and Corthaut, op. cit. *supra* note 146, at 20

[201] Id.

[202] This dichotomy is in no way related to the distinction between federalists and functionalists in the European Union context. On that dichotomy, see e.g. Sutherland, "The Influences Creating a European Union", in Curtin and O'Keeffe (eds.), *Constitutional Adjudication in European Community and*

ensure that the rule of law is observed, the Court justifiably uses a functional interpretation of the Treaty provisions on inter-institutional relations, as well as towards the Court's own task as defined in Article 220 EC (§5.3). As one of the main arguments of the latter approach is based on the concept of the rule of law, it will also be examined in this section how this concept is understood within the European Union in general and by the Court of Justice more specifically (§5.4). It is then submitted that a third approach is also possible, dubbed in this Chapter "judicial functionalism" (§5.5).

5.2. Legal Formalism

5.2.1. Contra Constitutionem

Legal Formalists, as those commentators which might be grouped under this heading could be called – such as Hartley, Mancini and Keeling, Weatherill, and De Witte – essentially accuse the Court of judicial activism because it disregards formalism. Cases such as *Les Verts, Chernobyl I, ERTA* and *Zwartveld* are characterized as clear examples of judicial activism, mainly because the Court in these cases adopted an interpretation "contra constitutionem". They argue that these decisions are based on principles which cannot be found in – and hence are contrary to – the Treaties. For instance, *Les Verts* is described as a "remarkable example of judicial creativity",[203] and *Zwartveld* and *Chernobyl I* as "highly activist" judgments.[204] Legal Formalists argue that the Court of Justice, by formulating principles which are contrary to the Treaties, subordinated the Treaties to judge-made principles as the supreme law of the European Union.[205]

Legal Formalists base their claim of *rechtsfindung contra constitutionem* on two arguments, both of which are of a legal formal nature. The first argument centres on the textual interpretation of Article 230 EC. Although certainly not using such strong words as for instance de Witte or Hartley, Weatherill – writing together with Beaumont – for instance submits that *Chernobyl I* represented "an activist judicial influence over the evolution of the Community's institutional balance,

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National Law. Essays for the Hon. Mr. Justice T.F. O'Higgins (Butterworths, Dublin, 1992), at 11

[203] De Witte, op. cit. *supra* note 15, at 133, fn 55.

[204] Id., at 148. See also Mancini and Keeling, op. cit. *supra* note 36, at 181

[205] Hartley, *The Foundations of European Community Law* (Oxford University Press, 1998), at 131; Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", 112 LQR 95 (1996), at 107- 108; De Witte, op. cit. *supra* note 15, at 145 and 148

but showed little respect for the wording of Article 230 … and for the fact that Article 230 had not been amended by the SEA although the granting of explicit *locus standi* for the Parliament had been [proposed]".[206] Legal Formalists argue that it was clear from Article 230 at the time of *Les Verts* and *Chernobyl I* that only acts of the Council and Commission could be challenged, and such a challenge could only be brought by a Member State, the Council or the Commission. Despite this "clear wording", the Court allowed Parliament to have both standing to be sued and standing to sue, thereby using an interpretation which was contrary to the text of the Treaty.[207]

Whereas legal functionalists argue that the Court used a justifiable teleological method of interpretation to confer *locus standi* on Parliament in *Les Verts* and *Chernobyl*, legal formalists assert that the Court in *Les Verts* applied a "distortion of the teleological interpretation to come up with an "interpretation" that contradicts the clear words of the text" – in *Chernobyl I* using "the same tactic".[208] By overruling "the clear textual meaning" of this provision, the Court essentially rewrote Article 230 – Mancini and Keeling prefer the term "creative reinterpretation"[209] – the result being nothing more than "a fully-fledged amendment of the Treaty".[210] The Court in doing so crossed the line between constitutional interpretation and constitutional revision.[211]

This leads to the second argument used by legal formalists to substantiate their claim of a *contra constitutionem* interpretation, which concerns the role of the Court as enshrined in Article 220 EC. As mentioned, this provision gives the Court the duty to ensure "that in the interpretation and application of this Treaty the law is observed". Legal formalists agree with legal functionalists that the European Court of Justice is sometimes – when using a teleological or contextual method of interpretation – employing a method of interpretation which is similar to methods of interpretation used by Constitutional Courts, and at least is

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[206] Weatherill and Beaumont, *EU Law* (Penguin, 1999), at 114

[207] Harley, *Constitution Problems of the European Union* (Hart, 1999), at 35-36; and in the Law Quarterly Review, op. cit. *supra* note 205.

[208] Hartley, *European Union Law in a Global Context: Text, Cases and Materials,* (Cambridge University Press, 2004), at 122 and 125 (inner quotation marks in the original).

[209] Op. cit. *supra* note 36, at 180.

[210] De Witte, op. cit. *supra* note 15, at 134 and 145

[211] Id., at 151; and Hartley (in the Law Quarterly Review), op. cit. *supra* note 205, at 103-104

unlike ordinary statutory interpretation.[212] The difference between the two approaches lies in the fact that legal formalists – like their counterparts in the United States – stress that the Court of Justice cannot exceed its role as the interpreter of the law under the Separation of Powers between the Court and the Constitutional Legislature as laid down in the Treaties.[213] Since the aforementioned cases were nothing more than constitutional amendments, the Court trespasses onto the role of the Member States as the Constitutional Legislature.[214] Whereas constitutional interpretation can be "accommodated within the broad formula of Article 220",[215] the power of constitutional revision is, it is argued, attributed to the Member States. Furthermore, whereas legal functionalists argue that *Les Verts* and *Chernobyl I* can be based on the duty to ensure that the law is observed as encapsulated in Article 220, legal formalists reply that this is a "rather problematic view" as it would imply "that the Court may freely determine its own jurisdiction".[216]

5.2.2. Rationale: Integrationalism

For Hartley, Mancini and Keeling, the reason why the Court is using this *contra constitutionem* interpretation is that the Court of Justice is pursuing a policy of integrationalism. Mancini and Keeling provide the most intriguing theory, arguing that the Court's pursuit of integrationalism is justified because this was part of the genetic code of the EEC Treaty:

> "The preference [of the Court] for Europe is determined by the genetic code transmitted to the Court by the Founding Fathers, who entrusted to it the task of ensuring that the law is observed in the application of a Treaty whose primary objective is an "ever closer union among the peoples of Europe"".[217]

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[212] Weatherill, op. cit. *supra* note 220, Chapter VI, De De Witte, op. cit. *supra* note 15, at 149; Hartley (in the Law Quarterly Review), op. cit. *supra* note 205, at 103

[213] Mancini and Keeling take a somewhat different approach in this regard, arguing (op. cit. *supra* note 36, at 181) that the Court would have been abdicating its duty under Article 220 if it would have denied Parliament the right to challenge trespasses on its prerogatives.

[214] Article 48 EU.

[215] De Witte, op. cit. *supra* note 15, at 151

[216] Id., at 145

[217] Op. cit. *supra* note 36, at 186. Inner citation from the preamble to the EC Treaty.

Similarly, Hartley argues that the inspiration for the Court's inter-institutional judgments are examples of a policy of the Court which "may be summed up in one phrase: the promotion of European integration".[218] De Witte and Weatherill also underline the "desire of the Court to reinforce the constitutional character of the Treaty system".[219] Weatherill argues that the activism of the Court serves as an illustration of "the Court's implicit readiness to pursue a path of constitutionalisation", but also underlines the integrationist character of the Court's case law, adding that this path is "divorced from, and even in opposition to, the consensus achievable among the Member States".[220]

5.3. Legal Functionalism

5.3.1. Praeter Constitutionem

Whereas Legal Formalists argue that the Court, when departing from the *verbatim* text, trespasses on the formal limits set by the Treaty, "Legal Functionalists", such as Arnull, Bradley, Bebr, Eeckhout, Tridimas and Constantinesco, reply that it is simply unrealistic to expect that the Court can always use a formal interpretation. Rather than pursuing a hidden policy of promoting European integration, the Court of Justice looks for guidance to the Treaty's general scheme and spirit, its preamble, and its introductory provisions. Rather than arguing that the Court is using a *contra-constitutionem* interpretation, legal functionalists submit that the Court is justifiably using a functional interpretation of the Treaty which remains consistent with its underlying rationales or structural features, that is, with the *intention* of the Treaty – hence a *praeter constitutionem* approach. The Court of Justice has, in so doing, assumed "full responsibility as a true Community Constitutional Court".[221] As Tridimas summarizes his position: "the language of the Treaty is often helpful, teleological interpretation is particularly suited to the interpretation of the Treaties, and the Court exercises the function of a constitutional court".[222]

Legal functionalists explicitly reject the notion that the Court of Justice can be accused of judicial activism. According to Arnull, the Court of Justice can "hardly be criticised for striving to construe the

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[218] *Foundations*, op. cit. *supra* note 205, at 78.
[219] Op. cit. *supra* note 165, at 148
[220] *Law and Integration in the European Union* (Clarendon, 1995), at 193. See *infra,* the text accompanying notes 259 and 260
[221] Bebr, op. cit. *supra* note 118, at 207.
[222] "The Court of Justice and Judicial Activism", 21 EL Rev. 199 (1996), at 209

Treaty in a way which gives effect to its authors' overall design"[223] Or, as Eeckhout submits: "It is within the task and jurisdiction of a constitutional court to fill in the gaps and to construe the constitution so as to render the legal system, which that constitution created, coherent and complete".[224]

In sum, legal functionalists argue that the Court has not articulated judge-made supra-constitutional principles, but has distinguished between the Treaty provisions and rules which can be considered more fundamental and which are more technical. It is argued that the Court has not exceeded its powers, because it has used an interpretation which is characteristic of a Constitutional Court. The Court has established a hierarchy of provisions in order to solve those cases in which norms of different levels contradict each other. In the words of Constantinesco:

> "The Court of Justice's activism lies in reality in the establishing of a super-constitutionality (and not a supra-constitutionality) among the Treaty provisions. When a discrepancy occurs [such as in *Les Verts*], it is the principle of judicial protection, encapsulated in Article 220, that will justify the solution. To discover such principles, and to elucidate them, is part of a normal judicial activity, but it is not exactly the same as "judicial activism".[225]

5.3.2. Rationale: Rule of Law

Legal functionalists argue that it is respect for the rule of law[226] which underlies the case law of the Court on inter-institutional matters.[227] It is argued that the Court has rightfully adopted a broad interpretation of its duty to ensure that the law is observed. Legal functionalists submit that this duty as laid down in Article 220 EC should be understood as imposing on the Court an overall duty to protect the rule of law within the European Union.

Thus, Bebr submits that the Court has rightfully used the principle of the rule of law to fill in the shortcomings and gaps in the judicial protection of the Community, arguing that it follows from the case law of the Court that Article 220 constitutes "a general clause of

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[223] "The European Court and Judicial Objectivity: A Reply to Professor Hartley", 112 LQR 411 (1996), at 412-413

[224] "The European Court of Justice and the Legislature", 18 YEL 1 (1998).

[225] "The Court of Justice as a Law-Maker: Praeter aut Contra Legem?", in O'Keeffe, op. cit. *supra* note 233, at 79.

[226] Or access to justice as an important element of that concept.

[227] E.g. Arnull "Does the Court have inherent jurisdiction?", 27 CML Rev. 683 (1990), at 700; and Bradley, op. cit. *supra* note 121, at 52

jurisdiction", a provision "by means of which the rule of law should under all circumstances be observed".[228] Similarly, Tridimas argues that since the *verbatim* text of the Treaty often proves to be of no guidance, the Court can rightfully rely on principles derived from its scheme, spirit and objectives, such as the rule of law.[229] Eeckhout submits that "most of the judgments which are criticized for over-activism are informed by the desire to strengthen the rule of law in the Community legal order".[230] Bradley argues that, in *Chernobyl I*, "the Court melds two notions of fundamental importance for the Community's legal order, that of *competences d'attribution* reflected in Article 4 EEC, and the Community as "a Community based on the rule of law"". According to Bradley, the Court relied "upon the underlying structural features of the Treaty" and has the authority to do so under Article 220 EC, because

> "the use of the expression "the law," as distinct, for example, from "the provisions of the Treaty and the measures taken by the institutions pursuant thereto" whose application the Commission must ensure (Article 155, third indent), is significant, in that it allows the Court to take account of structural considerations, and it is this wide judicial remit which can justify what is in effect the creation of a new means of recourse".[231]

Similarly, Arnull argues that in cases such as *Les Verts, Chernobyl I* and *Zwartveld*, the Court "demonstrated its willingness … to devise new rights and remedies where necessary to ensure respect for the law".[232] He argues that by adopting a broad interpretation of its scope of judicial review, the Court consolidated its task of ensuring that the rule of law is observed.[233] In broadening its scope of jurisdiction, the Court has in fact done nothing more than follow "the example set by the political institutions which have sought to intervene … in areas which might have

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[228] "Court of Justice: Judicial Protection and the Rule of Law", in Curtin and Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers* (Martinus Nijhoff, 1994) 303, at 305, Bebr had predicted this in his *Rule of Law within the European Communities* (Institut d'Etudes Européennes de L'Université libre de Bruxelles, 1965), at 5.

[229] "The Court of Justice and Judicial Activism", 21(3) EL Rev. 207 (1996), at 211

[230] Op. cit. *supra* note 197

[231] Op. cit. *supra* note 86, at 250-251

[232] "Judging the New Europe", 19 EL Rev. 3 (1994), at 7

[233] Arnull, "The Action for Annulment: a Case of Double Standards?", in O'Keeffe and Bavasso (eds.), *Judicial Review in European Law, Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer, 2000) 177, at 183.

seemed at first sight to fall outside the scope of the Treaties".[234] The Court has rightfully chosen "to give precedence to respect for the rule of law" instead of following "the incomplete system of remedies laid down in the Treaties".[235]

5.4. The European Union's construct of the Rule of Law

5.4.1. Introduction

Although the "legal functionalist" approach provides some forceful arguments, much eventually depends on the question of how exactly the concept of the rule of law is understood within the European Union. It is important in this context to differentiate between the narrow and wide constructions of the concept. It is submitted here that the concept of the Rule of Law as understood in the European Community in general and by the Court of Justice in particular does not encapsulate the concept of Separation of Powers.

5.4.2. The rule book conception

As is well known, a distinction can be made between the British concept of the Rule of Law, on the one hand, and the German and French notions of *Rechtsstaat* and *l'État de droit* on the other.[236] This distinction is essentially quite similar to the two conceptions of the rule of law as have been distinguished by Dworkin. In its first meaning, termed by Dworkin as "the rule book conception", the rule of law is used in a narrow – strictly formal – sense. According to this conception, governments can only exercise power against individuals in accordance with rules which have been set out – and made known to all – in advance. This is similar to Hayek's famous definition of the rule of law, according to which, "stripped of all technicalities, [rule of law] means that government in all its actions is bound by rules fixed and announced beforehand".[237] Similarly, Raz has argued that the rule of law is only one of the virtues of

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[234] Arnull, op. cit. *supra* note 227, at 707-708. Nevertheless, Arnull admits that – unlike *Les Verts – Chernobyl I* could not be solved "simply by taking a broad approach to the interpretation of jurisdiction expressly conferred on it by the Treaties". However, he argues that "*Chernobyl I* simply was a case where there was a lacuna in the Treaties which had to be filled" (op. cit. *supra* note 234, at 700).

[235] Arnull, op. cit. *supra* note 232, at 7

[236] A distinction which poses an interesting problem for the European Union's translating services. Compare the French ("l'État de droit"), German ("Rechtsstaatlichkeit") and English ("Rule of Law") texts of the Preamble, Articles 6 and 11 EU and Articles 177 and 181a EC).

[237] *The Road to Serfdom* (University of Chicago Press, 1944), at 72

a legal system and therefore without any overriding importance. It is morally neutral and should not to be confused with the question whether a law is just or unjust.[238] It is in this sense that the British notion of the rule of law was originally understood.[239]

5.4.3. The rights conception

This can be contrasted to Dworkin's second, substantive, conception of the rule of law, referred to by Dworkin as "the rights conception". This conception also embraces political and moral rights, or, as Dworkin put it: "The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights".[240] The German *Rechtsstaatsprinzip* and the French *L'etat de droit* concept can only be understood in this sense. Both notions also embrace the notion of Separation of Powers. In Germany, for instance, *Rechtsstaatlichkeit* also encompass rules and institutions such as respect for basic rights, the principle of proportionality, the requirement of a legal basis and a system of Separation of Powers.[241]

5.4.4. The concept at the European Union level

Both the new and current versions of the Treaty use a formal conception of the concept, as they differentiate between the rule of law and other values such as democracy and respect for human rights.[242] The Court of

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[238] *The Authority of Law: Essays on law and morality* (Clarendon, 1979), at 211.

[239] The British concept of the Rule of Law has over the years developed a more substantive content (Jowell, "The Rule of Law Today", in Jowell and Oliver (eds.), *The Changing Constitution* (Oxford University Press, 1994), Chapter III). Nevertheless, it is clear that the original conception was a formal one (see also Craig, "Formal and Substantive conceptions of the rule of law: an analytical framework" (1997) *Public Law* 467, at 470-475). For Dicey, the rule of law was one of the two fundamental principles on which the British Constitution was founded, the other of course being the sovereignty of Parliament. According to Dicey, the rule of law consisted of three limbs; first, that people are condemned only under laws which are passed in the correct legal manner and only through the ordinary trial process; second, that, all men are equal before the law; and third, that "the general principles of the constitution" are not enshrined in a written constitution but are the result of "judicial decisions determining the rights of private persons in particular cases brought before the courts". *Law of the Constitution*, (MacMillan, 1950), at 195.

[240] Dworkin, *A Matter of Principle* (Harvard University Press, 1985), at 11-12

[241] See Maurer, op. cit. *supra* note 88, at 174-175 and at 650-663

[242] Article 6(1) of the current EU Treaty provides that: "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". Similarly, a new Article 2 EU, as

Justice initially used a similar distinction. The Court has held – *inter alia* in *Les Verts* and *Zwartveld* – that the rule of law entails that neither the institutions of the European Union nor its Member States can avoid a judicial review "of the question whether the measures adopted by them are in conformity with the basic constitutional charter"[243] which correlates with the narrow, rule book conception of the rule of law.

It is clear that within the European Community in general and its highest court's case law more specifically the concept of the rule of law does not include the concept of Separation of Powers.[244] In other words,

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proposed by the Lisbon Treaty and *verbatim* identical to Article I-2 CT, will state that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". The result of the discussion on whether to refer to Christian norms and values eventually resulted in a new second Recital of the Preamble to the new EU Treaty (based *verbatim* on the First recital to the Constitutional Treaty), which reads: "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, …". A new Article 21 EU as proposed by the Lisbon Treaty provides that "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law" (based *verbatim* on Article III-292(1) CT). With regard to the current Treaties, see also, Arnull, op. cit. *supra* note 227, at 703-704, and "The Rule of Law in the European Union", in Arnull and Wincott (eds.), *Accountability and Legitimacy in the European Union*, (Oxford University Press, 2002), at 254.

[243] *Les Verts*, op.cit. note 120, para. 23; *Zwartfeld* op. cit. *supra* note 168. See also: Case 314/85, *Foto-Frost* [1987] ECR 4199, para. 16; Case C-314/91, *Weber v. Parliament* [1993] ECR I-1093, para. 8; Case C-15/00, *Commission v. European Investment Bank* [2003] ECR I-7147, para. 75 and Opinion 1/91 [1991] ECR I-6079, para. 21.

[244] Since 2002, the Court of Justice seems to find that the rule of law concept does include a review of fundamental rights. In *Unión de Pequeños Agricultores*, the Court of Justice stated that "The European Community is… a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty *and with the general principles of law which include fundamental rights*" (Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council* [2002] ECR I-6677, para. 38). See also: Case C-229/05 P, *PKK and KNK v. Council* [2007] ECR I-439, para. 109; and C-232/05 *Commission v. France* [2006] ECR I-10071, para. 57. However,

the Court of Justice could not, as legal functionalists submit, have based its case law on the Separation of Powers on a duty to respect the rule of law – when taking into account that in those cases, such as *Les Verts* and *Zwartveld*, it used a rule book conception of the rule of law. [245]

5.5. Judicial Functionalism

5.5.1. Secundum constitutionem

In its case law on inter-institutional relations, the Court neither used a *contra constitutionem* nor a *preater constitutionem* interpretation of the Treaty. When confronted with a "constitutionalising" European Union, the Court of Justice needed a proper solution to the constitutional problems with which it was now confronted. This logically led to a constitutionalisation of the relations between the European Union's institutions as well. The Court of Justice needed to resort to "constitutional law" solutions when disputes arising out of this process reached the courts. So, when the Court, for instance, as a result of the growing amount of Community legislation, was confronted with the question whether legislative authority could be delegated, it – in *Köster* and subsequent case law – naturally resorted to constitutional solutions and stressed the distinction between legislative and executive authority. It literally used a *secundum constitutionem* approach, interpreting the Treaty in conformity with a Treaty evolving into a constitution – it was interpreting the Treaty as a Constitution because it was increasingly *becoming* one.

This approach is illustrated not only by *Köster,* but also by both *Les Verts* and *Chernobyl I.* In *Les Verts,* the Court for the first time referred to the Treaty as a Constitutional Charter. It held that Parliament had *locus standi* to be sued even though Article 230 referred to the Council and Commission only, on the ground that whereas initially Parliament only had powers of consultation and political control, it now had the power to adopt measures intended to have legal effects *vis-à-vis* third parties. This required a new interpretation of Article 230, to include the

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see: C-403/05 *Parliament v. Commission* [2007] nyr, para. 56; and Case C-91/05, *Commission and Parliament v. Council* [2008], nyr, para. 65.

[245] In his *The European Union. A Polity of States and Peoples* (Hart, 2005) at 109), van Gerven, rather than examining how the concept is used within the EU context by the Treaties, Court or legal doctrine, examines the different – albeit related – question of whether the Union *possesses* the characteristics of the *Rechtsstaatsprinzip.* He answers this question in the affirmative for the first pillar by examining three characteristics of this concept, namely independent judicial review, legal certainty and respect for basic rights and fundamental freedoms, hence excluding the notion of Separation of Powers.

locus standi of Parliament. The Court argued that, otherwise, "measures adopted by the European Parliament … could encroach on the powers of the other institutions, or exceed the limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court."[246] This is a prime example of how the Court, when faced with a constitutional question for which the Treaty of Rome provided no answer, resorted to a constitutional method of interpretation in order to ensure a rudimentary system of checks and balances. In the words of Weiler:

> "In *Les Verts,* the European Court of Justice spoke matter-of-factly of the EEC Treaty as "the basic constitutional charter" of the European Union. On this reading, the Treaties have been "constitutionalized" and the Union has become an entity whose closest structural model is no longer an international organization but a denser… polity … Put differently, the Union's "operating system" is no longer governed by general principles of public international law, but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles."[247]

Similarly, in *Chernobyl I* the Court of Justice held that the observance of the institutional balance meant that the institutions must also respect each other's powers. The Court of Justice found that:

> "observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament".[248]

The Court emphasized the growing need for judicial review in order to insert a constitutional system of Separation of Powers and checks and balances. It did so after concluding that "the various legal remedies provided for both in the Euratom Treaty and in the EEC Treaty, however

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[246] *Les Verts*, op.cit. note 120, para. 25
[247] Weiler, "*The Transformation Of Europe*", 100 Yale L. J. 2403 (1986), at 2407
[248] *Chernobyl I*., op. cit. *supra* note 123, paras 22 and 23

effective and diverse they may be, may prove to be ineffective or uncertain".[249] This procedural gap – i.e. that the Commission proved inadequate to protect Parliament's prerogatives – needed to be filled precisely because the evolved – now more constitutional – institutional balance had brought this gap to the surface. The Court adopted a wide interpretation of Article 220 EC to hold that it was entrusted with a duty of maintaining and observing the institutional balance. As van Gerven points out:

> "The determination of gaps in the areas of institutional balance depends on the degree of juridicalisation of gaps of the constitutional system concerned. Some legal systems, mainly those who have no constitutional court, rely, when it comes to determine the compatibility of legislative acts proper with the constitutional rules or traditions of the land, on the political judgment of the legislation and do not submit such issues to judicial arbitration. The European Union legal system has chosen, for its first pillar, in favour of judicial arbitration. … This became conspicuously clear by the Court's judgment in [*Chernobyl I*]."[250]

The reasoning in *Les Verts* and *Chernobyl I* is essentially the same: since the Treaty had evolved from a Treaty providing for an Assembly having only minimal consultative power, to a Constitutional Charter providing for a Parliament exercising powers which were more and more at risk of coming into conflict with other political institutions, the Court needed to extend – or "constitutionally interpret" – its own, already broad jurisdiction under Article 220 to ensure that a form of Separation of Powers and checks and balances was observed. It was *this duty,* rather than a duty to observe the rule of law, which prevailed over the "procedural gap" in the Treaty, which did not provide for standing to sue for Parliament to safeguard its prerogatives.[251]

5.5.2. Rationale: Judicial Separation of Powers

As demonstrated in Section 4, the Separation of Powers – albeit still a rudimentary form thereof – currently existing in the European Union is to a great extent the result of the Court's case law on inter-institutional matters. The Court of Justice based this case law on the two unwritten principles of institutional balance and sincere cooperation between the

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[249] Id., para. 16

[250] Van Gerven, "The Role and Structure of the European Judiciary now and in the future", 21 EL Rev. 211 (1996), at 212 (incl. fn 7).

[251] In fact, the "rule of law" is not even mentioned in the *Chernobyl I* case.

institutions. The system of Separation of Powers and checks and balances created by the Court hence is essentially judge made.

The important role thus usurped by the Court of Justice as the ultimate arbiter in the European Union's Separation of Powers is perhaps best illustrated by the *Budget* case of 1986, in which the European Parliament had argued that it was not possible to review the budget by means of an action for annulment.[252] The Court of Justice however held that:

> "each institution is to exercise the powers conferred upon it in respect of the budget with due regard for the provisions of the Treaty. If it were not possible to refer the acts of the budgetary authority for review by the Court, the institutions of which that authority is composed could encroach upon the powers ... of the other institutions or exceed the limits which have been set to their own powers".[253]

The Court of Justice hence explicitly held that if inter-institutional relations within the European Union were not subject to review, there might be a serious danger that the Separation of Powers would be infringed.

In its case law on the relations between the political institutions of the European Union, the Court of Justice at the same time did not impose a system in which the executive and legislative powers were rigidly separated. Overall, functionalism prevailed.[254] Although the substance of the principles it articulated overall have been rather static,[255] they have been dynamically applied.[256] The Court of Justice tried to disentangle the

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[252] The European Parliament argued that, in the context of the budget procedure, the deliberation of the Parliament, at the second reading of the draft modified by the Council, was not a matter which may be made the subject of an action for annulment. The Parliament submitted that, in the context of the budgetary procedure, the roles of the Council and the Parliament are complementary and that the joint action of these two institutions led to the establishment of the budget which constituted a combined act that had no equivalent in any other act of the Community institutions.

[253] Case 34/86, *Council* v. *European Parliament* [1986] ECR 2155, para. 12.

[254] Similarly, Lenaerts, "Some Reflections on the Separation of Powers in the European Community', 28 CML Rev. 11 (1991).

[255] See also Jacqué, op. cit. *supra* note 9, at 387.

[256] See also Gormley. "Disturbing or Rebalancing Powers within the European Union?", in de Zwaan (eds.), *The European Union. An Ongoing Process of Integration. Liber Amicorum Alfred A. Kellermann* (Cambridge University Press, 2004), at 41; and see: Craig and de Burca, op. cit. *supra* note 34, Chapter IV.

executive power of the Commission and the legislative power of Council and Parliament in order meet the requirements of an organisation in which the constitutional deficit became ever more apparent. At the same time, the Court used a functional approach to ensure not only the efficiency of the decision making of this rapidly evolving organisation, but also its own legitimacy in playing this important role in the European Union's Separation of Powers.

5.6. Conclusion

As mentioned, those commentators referred to here as legal functionalists argue that the Court adopts a *preater constitutionem* approach when using a functional, teleological interpretation of the Treaty. They essentially argue that the Court is justifiably using a constitutional method of interpretation which is consistent with the underlying rationales of the EEC Treaty, mainly the rule of law. However, they thereby minimize the fact that – especially in respect of the inter-institutional relations – the EEC Treaty was drafted not as a constitution, but as a treaty describing inter-institutional relations quite similar to those described in other founding treaties of international organisations of its time.[257] Although the Court has in other cases on inter-institutional relations also referred to the rule of law, it has been demonstrated that this concepts cannot adequately serve as a legal basis.

Legal formalists, on the other hand, accuse the Court of interpreting the Treaty contrary to the original text of the EEC Treaty. They argue that the Court of Justice has crossed the formal limits of Articles 220 and 230 EC. Essentially, the crux of this "legal formalism" is that the Court does not observe the inter-institutional relations as set up by the Founding Fathers of the EEC Treaty, but instead pursues a policy of promoting European integration. But this argument fails to take into account the fact that inter institutional relations changed in any event precisely because European integration has advanced, both politically and constitutionally. Furthermore, the case law of the Court of Justice in inter-institutional matters often had centrifugal rather than centripetal consequences. This is perhaps best illustrated by the Court's case law with regard to the role of the Commission. Although, initially, the Commission shared legislative powers with the Council and had

[257] Admittedly, the Court in Opinion 1/91 held that the "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law". Op. cit *supra* note 243. However, as demonstrated above, that concept of the rule of law is used by the Court in a formal sense, and hence does not include a constitutional notion of Separation of Powers.

important powers of its own, the Court by differentiating between a more executive role of the Commission and a more legislative role of the Council essentially only weakened the position of this supranational institution at the expense of the intergovernmental Council. This hardly illustrates that the Court has been guided by, as Jacobs and Karst for instance have argued, a policy of "incontestably favour[ing] the weaker and more Community-minded institutions at the expense of the Council".[258] The *rationale* behind its case law on the relations between the European Union institutions was not to advance European integration, but a European system of Separation of Powers.

6. Concluding Remarks

As concluded in §.4.7., the effect of the case law of the Court of Justice on inter-institutional relations has been that the Court has essentially created a – rudimentary – system of Separation of Powers and checks and balances. Has this been undesirable? From a normative point of view, one could argue that the case law of the Court of Justice perhaps merely responded to a Union which, albeit perhaps also on account of the Court's own work, slowly transformed from an international to a constitutional legal order, with a growing need for more democracy and in which the distribution of powers between the Council and the Commission became increasingly blurred.

From a more principled point of view, however, one could argue that contrary to what the Court held in *Chernobyl I,* Articles 220 and 230 EC could hardly be read as imposing on the Court a task of ensuring that a Separation of Powers is observed, even when a broad interpretation is used. During the SEA negotiations, proposals from Parliament[259] and the Commission[260] to include Parliament in Article 230 were rejected because the Member States could not reach consensus. The Court was well aware of these proposals as it referred explicitly to them in *Comitology.* The Court of Justice essentially used a remarkably wide – constitutional – interpretation of its own role as defined in Articles 220 and 230 EC. Nevertheless, as pointed out in section 2.4., the Court of Justice was, when compared to other courts of international organisations, already entrusted with a remarkably wide jurisdiction.

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[258] "The "Federal" Legal Order: The U.S.A. and Europe Compared – A Juridical Perspective", in Cappelletti, Seccombe and Weiler (eds.), *Integration Through Law* (Walter de Gruyter, 1986), Vol 1., 169, at 195, referring to *ERTA* and the *Isoglucoses* cases.

[259] Article 43 of the Draft Treaty on European Union, OJ 1984, C 77/33.

[260] E.P. Bull. EC 39, Add. 2/1985, October 10, 1985, p.24.

Furthermore, from a comparative point of view, the role played by the Court of Justice is hardly exceptional. The Court of Justice based its role on two premises which are quite similar to the ones used by Marshall in *Marbury v. Madison*. The Court of Justice first of all argued that the powers as enshrined in the Treaty are meaningless unless subject to review, and hence construed broad loci standi for both the European Parliament and the European Commission. Secondly, the Court inferred from its duty "that in the application of the Treaties the law is observed", as enshrined in Article 220, a task of ensuring the observance of the principle of institutional balance, reminiscent of Marshall's famous words that it is "emphatically the province and duty of the judicial department to say what the law is". It was precisely these words by Marshall that served to found the most important – and well established – power of the Supreme Court.[261]

Moreover, contrary to the Supreme Court, the Court of Justice overall used a functionalist approach in its case law on the Separation of Powers. This functional approach implies a qualified form of judicial review: the political institutions are allowed some "room to manoeuvre" and certain incursions into the powers of the other branches are allowed as long as they are substantively consistent with the underlying rationale of the Separation of Powers principle. On the other hand, it has essentially been the Court of Justice that has developed this system of Separation of Powers and checks and balances. The Court used the two unwritten principles of institutional balance and sincere cooperation between the institutions to introduce a system of Separation of Powers and checks and balances to a constitutionalising organization largely devoid of such concepts.

[261] It must be remembered that, before *Marbury v. Madison,* it was generally presumed that the Supreme Court did not have the power to judicially review legislation, whereas the original version of Article 230 EC (Article 173 EEC) did accord such a power to the European Court of Justice.

- III -
POLITICAL QUESTIONS

1. Introduction

In the previous Chapter, it was demonstrated that the Court of Justice has essentially created a judge-made system of Separation of Powers governing the relationship between the Community Institutions. The Court of Justice has played an important role both with regard to the political institutions *inter se* as well its own role *vis-à-vis* these institutions. This Chapter will demonstrate that the Court of Justice has, however, at the same time, in several areas of case law also showed deference towards the political institutions.

According to the United States' political question doctrine, some matters should not be ruled on by the judiciary simply because they are for the political branches of government to be resolved. A court refuses to rule on a question and holds that it is non-justiciable in order to allow the political process to take its course. This doctrine was encapsulated in *Marbury v. Madison*'s famous formula that "it is emphatically the province and duty to say what the law is". As demonstrated in Chapter II, these words of Chief Justice Marshall have been used by the Supreme Court to assert an important role in Separation of Powers questions. However, Marshall in *Marbury v. Madison* also stressed the limits to judicial review. He argued that "questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court".[1] The United States President for instance was invested by the Constitution with certain powers "in the exercise of which he is to use his own discretion ... there exists, and can exist, no power to control that discretion".[2] Marshall thus emphasized that there were certain questions which the Constitution left to the discretion of the political branches, and in such a case this presents a non-justiciable political question. Essentially, the refusal to review certain matters is the negative limb of the duty of the courts to say what the *law* is.[3]

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[1] *Marbury v. Madison,* 5 U.S. 137 (1803), at 170.

[2] Id., at 166 and 167.

[3] See also Monaghan, "Marbury and the Administrative State", 83 Colum. L. Rev. 1 (1983), at 7-9; and Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (Chicago University Press, 2000), at 122-123.

According to Marshall, it was for the judicial branch to draw the dividing line. Marshall argued that "the question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority", hence stressing that it was for the courts alone to distinguish between judicial questions and the discretionary functions of the political institutions.[4] In that sense, the Political Question doctrine has regularly been referred to as a misnomer. The Supreme Court often decides on questions which are political as a matter of course. The political question doctrine does not imply that courts should refuse to review certain questions because they are of a politically sensitive nature, rather they *become* political questions because they are left for the political institutions to be resolved.

As discussed in Chapter II, the European Court of Justice has essentially been entrusted with a similar duty of saying what the law is, Article 220 EC defining that task as ensuring "that in the interpretation and application of [the EC] Treaty the law is observed".[5] This Chapter will demonstrate that the Court of Justice has, to a certain extent, inferred from this task a similar negative limb as that inferred by Chief Justice Marshall. The European Court of Justice has never explicitly held that a question it was presented with constituted a political question, but this of course does not necessarily imply that no such doctrine exists. This chapter will examine whether and to what extent certain characteristics of the United States' political question doctrine can also be found in the case law of the European Court of Justice. Put differently, the United States' political question doctrine will be used to examine whether, in its case law, the Court of Justice has exercised restraint on the ground that the questions involved ought to be resolved by the European Union's political institutions.

As will be demonstrated, however, it is quite difficult to define the United States' doctrine in terms of certain principles or criteria (§2). Therefore, the methodological approach of this Chapter will centre around the main rationale of the doctrine – i.e. Separation of Powers – and the categories in which the United States has applied the doctrine. This will be examined by looking at areas of the case law which are

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[4] See also: *Baker v. Carr*, 369 U.S. 186 (1962), at 211 ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government... is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution".). See also O'Fallon, "Marbury", 44 Stan. L. Rev. (1992), 219, at 250; and Sargentich, "The Contemporary Debate about Legislative-Executive Separation of Powers", 72 Cornell L. Rev. 430 (1987), at 443.

[5] Article 220 EC.

similar to the categories in which the United States Supreme Court has applied the doctrine. (§3).

2. Separation of Powers as main rationale of the doctrine

2.1. Classical and prudential approach

Marshall's reasoning in *Marbury v. Madison* has generally been described as the classical approach to the political question doctrine. In this narrow version of the doctrine, the Supreme Court can, in the words of one of the main advocates of this approach, only refuse to exercise its jurisdiction when "the Constitution has committed the determination of the issue to another agency of government than the courts".[6] In contrast, according to the much wider, so-called "prudential" version of the political question, the grounds for refusal are:

> "the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from". [7]

Put differently, according to this approach the courts should avoid deciding certain cases (1) when they are unable to develop general principles and rules of construction of a particular constitutional provision, (2) when they lack the institutional capacity to review particular judgments of one or both of the other branches; (3) when so appropriate because of the inherently undemocratic nature of the judiciary; or (4) when so required because of concerns for the judiciary's weak political legitimacy.[8] The classical version of the political question doctrine is generally believed to be founded in the text, structure and history of the Constitution, whereas the prudential version has been referred to as a "judge-made overlay", used by the courts at their

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[6] Wechsler, "Toward Neutral Principles of Constitutional Law", 73 Harv. L. Rev. (1959) 1, at 9.

[7] Bickel, *The Least Dangerous Branch.The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962), at 184.

[8] As summarized by Redish, "Judicial Review and the "Political Question", 79 *Northwestern University Law Review* 1031 (1984), at 1043-1044

discretion as "a tool for abstention" to protect their legitimacy and avoid deciding controversial cases.[9]

2.2. The Baker criteria

Although the political question doctrine had been applied by the Supreme Court several times before, the most important case in the evolution of the doctrine was *Baker v. Carr*. In this case, the Court admitted that there "appear[ed] to be uncertainty"[10] as to the applicability and scope of the political question doctrine and therefore saw a need to explain both its scope and function. The Supreme Court stressed that the non-justiciability of a political question was "primarily a function of the Separation of Powers",[11] which could be revealed by a review of the categories in which the political question doctrine had been applied. Having discussed these categories,[12] the Court subsequently held that all of this precedent in general – and the formulations used by the Supreme Court in order to circumscribe the doctrine's applicability and scope more in particular – could be synthesized into a six-part test. The Supreme Court explicitly linked these six criteria to "Separation of Powers" as the doctrine's main function:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the Separation of Powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

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[9] Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy", 102 Colum. L. Rev. 237 (2002), at 253 and 258.

[10] Op cit. *supra* note 4, at 210.

[11] Id.

[12] The Supreme Court distinguished "foreign relations", "dates of duration of hostilities", "the validity of constitutional enactments", "the status of Indian tribes" and "the Guaranty Clause", respectively.

potentiality of embarrassment from multifarious pronouncements by various departments on one question".[13]

The Baker criteria incorporated both the classical version of the doctrine (the first and perhaps also the second criterion when interpreted as informing the first), as well as the prudential version (the remaining four criteria, and perhaps the second).

2.3. Prevalence of the classical approach

Overall, the Supreme Court has mainly followed the classical approach when applying the political question doctrine. Although the criteria were a synthesis of the previous case law of the Supreme Court,[14] in the case law following *Baker*, the first and second criterion related thereto emerged as the predominant ones. The following three cases illustrate this development in particular.

In *Powell* v. *McCormack*, the Supreme Court had to decide whether it could review a refusal by the House of Representatives to admit Representative Powell, who had been accused of misappropriating government funds. The defendants argued that the case presented a political question, because Article I, Section 5 of the Constitution provided that "Each House shall be the Judge of the … Qualifications of its Members". Although Powell *et al.* also submitted that a judicial resolution would produce a "potentially embarrassing confrontation between coordinate branches",[15] the Supreme Court held that it could decide the case on the merits. Clearly adhering to the classical approach, the Supreme Court argued that, since the Constitution enumerated the requirements of age, citizenship and residence of the Representatives, there was "a textually demonstrable commitment to Congress to judge only the qualifications expressly set forth in the Constitution". Implicitly rejecting more prudential arguments, the Court stated:

"Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the

[13] Id. See also at 214: "even in private litigation which directly implicates no feature of Separation of Powers, lack of judicially discoverable standards … may impel reference to the political departments' determination of dates of hostilities' beginning and ending".

[14] But see: Pushaw, "Judicial Review and the Political Questions Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis", 80 *North Carolina Law Review* 1165 (2002), at 1175 ("the Court pretended to honor, but effectively reversed, the long-established case law governing political questions").

[15] Hence using a rather "prudential" approach.

> construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility".[16]

A second case, *Gilligan v. Morgan*, involved a lawsuit brought by students at Kent State University, which, after four of their fellow students were killed during an anti-Vietnam War protest, claimed that the United States government was negligent in failing to properly train the Ohio National Guard. The Supreme Court pointed out that the supervision of the National Guard was textually committed by the Constitution to Congress.[17] It held that the case presented a political question since it addressed "critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government",[18] hence again using the classical rather than the prudential version of the political question doctrine.

A third case of importance is *Nixon v. United States,*[19] which concerned the question whether the Supreme Court could review the impeachment of the federal district court judge Walter Nixon, who had been convicted of committing perjury before a grand jury. The Supreme Court held that this case posed a political question, because the Constitution explicitly provided for two separate proceedings against holders of office charged with wrongdoing: a judicial trial and legislative impeachment proceedings. The Court argued that Article I, section 3, of the United States Constitution – which states that "the Senate shall have the sole power to try all impeachments" – demonstrated a textual commitment of impeachment to the Senate.

Gilligan was the only case between *Baker* and *Nixon* in which the Supreme Court applied the political question doctrine – while rejecting this in fourteen others.[20] Therefore, in the early 1990s doubts began to

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[16] 395 U.S. 486 (1969), at 548.

[17] The Constitution explicitly provides that Congress has the responsibility "for organizing, arming, and disciplining the Militia" (now the National Guard).

[18] 413 U.S. 1 (1973), at 7.

[19] 506 US 224 (1993). Not to be confused with *United States v. Nixon* as discussed in Chapter V.

[20] *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Nixon* 418 U.S. 683 (1974); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Elrod v. Burns*, 427 U.S. 347 (1976); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *INS v. Chadha*, 462 U.S. 919 (1983*); County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Japan Whaling Assn v. American Cetacean Soc*., 478 U.S. 221 (1986); *Quinn v.*

arise as to whether the doctrine still in fact existed.[21] Although some commentators regarded *Nixon* as "breath[ing] life back into the much maligned political question doctrine",[22] others merely saw it as an exception to the doctrine's demise.[23] When, in 2000, the Supreme Court was confronted with questions which would determine the outcome of the presidential election, many commentators wondered whether the Supreme Court would consider the applicability of the doctrine in these cases, especially considering the fact that it had applied the political question doctrine to earlier election cases.

2.4. The 2000 presidential election cases

The events leading up to these cases are well known.[24] In 2000, the state of Florida was the key to the presidential election outcome. When, after a machine recount, George W. Bush's lead had narrowed to a mere 327 votes, Al Gore filed suit under Florida law and received permission to have a hand recount in four counties. Florida's Secretary of State however declared that she would enforce a deadline set before that ruling and refused to extend that deadline when so requested by the four counties concerned. The Florida Supreme Court declared that the Secretary of State, in so doing, had abused her discretion.[25] However, the United States Supreme Court, in *Bush v. Palm Beach County Canvassing Board,* unanimously found that there was "considerable uncertainty as to the precise grounds for [this] decision [of the Florida Supreme Court]".[26] The Supreme Court therefore returned the case to the Florida Supreme Court.

Meanwhile, in another lawsuit initiated by Gore, the Florida Supreme Court had ordered a state-wide recount of all votes in which machine

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Millsap, 491 U.S. 95 (1989); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *Department of Commerce v. Montana*, 503 US 442 (1992).

[21] E.g. Ely, *War and Responsibility. Constitutional Lessons of Vietnam and Its Aftermath*, (Princeton University Press, 1993), at 55.

[22] Gerhardt, op. cit. *supra* note 3, at 118.

[23] See Brown, "When Political Questions affect Individual Rights: the other Nixon v. United States", Sup. Ct. Rev. 125 (1993); Gerhardt, "Rediscovering Nonjusticiability: Judicial Review Of Impeachments After Nixon", 44 *Duke Law Journal* 231 (1994).

[24] For a more comprehensive analysis of these cases see: "Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000", 114 Harv. L. Rev. 2170 (2001).

[25] *Palm Beach County Canvassing Board v. Harris*, 772 So. 2d 1220 (2000), at 1239-1240.

[26] 531 U.S. 70 (2000), at 78, referring to *Minnesota v. National Tea Co.,* 309 US. 551, at 555 (1940).

counts had not detected any choice.[27] The next day, the United States Supreme Court granted a temporary stay of the recounts. The order was accompanied by a concurring opinion by Justice Scalia and a dissenting one by Justice Stevens, who was joined by Justices Souter, Ginsburg and Breyer. Justice Stevens wrote:

> "The majority today departs from three venerable rules of judicial restraint that have guided the Court throughout its history. On questions of state law, we have consistently respected the opinions of the highest courts of the States. On questions whose resolution is committed at least in large measure to another branch of the Federal Government, we have construed our own jurisdiction narrowly and exercised it cautiously. On federal constitutional questions that were not fairly presented to the court whose judgment is being reviewed, we have prudently declined to express an opinion. The majority has acted unwisely".[28]

Similar references to the political question doctrine could be found in the dissenting opinions of Justices Breyer and Souter to the judgment of the Court. Justice Breyer, for instance, pointed out that both the Twelfth Amendment and the 1887 Federal Electoral Count Act left it to Congress to resolve difficult electoral disputes, arguing that although "the selection of the President is of fundamental national importance… that importance is political, not legal". [29]

Such references to the political question doctrine could not, however, be found in the *per curiam* decision of the Supreme Court, which was joined by five of the justices. The Supreme Court held that when the Florida Supreme Court ordered the recount, it did not set standards for doing so, even though the counties used varying standards to determine *inter alia* what was a legal vote, which votes were to be recounted and who would recount the votes or was permitted to observe the recounting. The five justices found that the Florida Supreme Court's failure to prescribe uniform standards violated the Constitution's equal protection clause, as it meant that ballots could be treated differently. Furthermore, instead of the case being returned to the Florida Supreme Court for it to articulate such standards, the Supreme Court decided to end the counting process, arguing that remanding would violate Florida State Law requiring that any controversy be resolved on December 12. The Supreme Court reversed the recount ordered by the Florida Supreme

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[27] *Gore v. Harris*, 772 So.2d 1243 (2000).
[28] *Bush v. Gore,* 531 U.S. 1046 (2000), at 1047.
[29] *Bush v. Gore,* 531 U.S. 98*,* (2000), at 153.

Court and mandated that any manual recount be concluded by that date. The Court held:

> "None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront".[30]

The fact that the Supreme Court did not even consider the political question doctrine in these cases was seen by many as certain proof of the doctrine's fall.[31] The reason could not have been that the issue was not raised; the Supreme Court has consistently held that justiciability issues are jurisdictional and hence must be raised by the Court on its own motion.[32]

Many commentators argued that the Court should have at least considered whether the circumstances of these cases presented a political question, especially considering the fact that the doctrine probably applied, irrespective of whether the prudential or its, much narrower, classical version was used.[33] One commentator even saw these cases as reflecting a broader vision of the Supreme Court according to which "it appears to believe that it is superior to the other branches on [the

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[30] Id., at 111.

[31] E.g. Barkow, op. cit. *supra* note 336; Chemerinsky, "Bush v. Gore Was Not Justiciable", 76 *Notre Dame Law Review* 1093 (2001), at 1094-95; Choper "Why the Supreme Court should not have decided the Presidential Election of 2000", 18 *Constitutional Commentary* 335 (2001), at 341-342; Issacharoff,, "Political Judgments", in Sunstein and Epstein (eds.), *The Vote: Bush, Gore, and the Supreme Court* (University of Chicago Press, 2001), at 55; Tushnet, "Law and Prudence in the Law of Justiciability: the Transformation and Disappearance of the Political Question Doctrine", 80 *North Carolina Law Review* 1203 (2002); Tribe, "Comment, and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors", 115 Harv. L. Rev. 170 (2001), at 178 and 276-83; and "The Unbearable Wrongness of Bush v. Gore", 18 *Constitutional Commentary* 335 (2002), at 592-607.

[32] See e.g. *Clinton v. Jones,* 520 U.S. 681 (1997), at 700, *Allen v. Wright*, 468 U.S. 737 (1984), at 750-752; *Warth v. Seldin*, 422 U.S. 490 (1975), at 498.

[33] See e.g. Issacharoff, op. cit. *supra* note 31, at 76 ("what emerges most clearly from *Bush v. Gore* is that this Court appears seriously lacking in the appropriate spirit of reluctance") and other references cited there.

interpretation of] virtually all constitutional questions".[34] Even the Florida Supreme Court held in a follow-up case that developing uniform standards for recounting of ballots had to be left to the legislature.[35] Some argued, however, that the Supreme Court rightly decided to hear *Bush v. Gore*, arguing that it is "the role of the court is to adjudicate disputes, even if the public or some portion of it does not like the outcome".[36]

2.5. Re-emergence in *Vieth v. Jubelirer*

In fact the political question doctrine was not dead and burried, and the Supreme Court again applied it in 2004 in the *Vieth v. Jubelirer* case.[37] In this case, the Democratic Party in Pennsylvania claimed that the Republican-controlled legislature in that state had violated the Equal Protection Clause by drawing strangely shaped federal congressional districts – so-called gerrymandering[38] – in order to ensure a Republican two-thirds majority, even though only half of its citizens voted Republican. The plurality of the Supreme Court found that these gerrymandering cases constituted non-justiciable political questions. The Court examined a range of possible tests but found that none could qualify as judicially manageable standards in order to review the case, hence again relying predominantly on the first and second of the *Baker* criteria.

The four dissenting Justices offered three different standards which could be used to review the case on its merits. This was the first time the Court attempted to define what was meant by judicially manageable standards. From the Supreme Court's opinion, as well as some of its

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[34] Barkow, op. cit. *supra* note 9, at 336.
[35] *Gore v. Harris*, 773 So. 2d 524 (2000).
[36] Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 Harv. L. Rev. 16 (2000), at 52. And see: Epstein, "In Such Manner as the Legislature Thereof May Direct: The Outcome in Bush v. Gore Defended", in Sunstein and Epstein (eds.), *The Vote: Bush, Gore, and the Supreme Court* 13, 14 (University of Chicago Press, 2001), at 14.
[37] 541 U.S. 267 (2004).
[38] In 1812, the Republican-controlled state legislator of Massachusetts adopted a bill rearranging district lines to assure them an advantage in the upcoming senatorial elections, which was only reluctantly signed by Governor Elbridge Gerry. One of the new bizarrely shaped districts looked remarkably like a salamander, so a Federalist editor is said to have exclaimed upon seeing the new district lines, "salamander! Call it a Gerrymander".

precedent, Fallon has distilled three – albeit somewhat ambiguous – criteria used to make this determination:[39]

a) For a standard to count as judicially manageable "the most basic requirement is intelligibility, or the capability of being understood".[40] However, it is uncertain how to assess whether a standard is intelligible.

b) Secondly, there are certainly five "practical desiderata"[41] which need to be taken into account:

i) the test must have an "analytical byte";[42] it must be capable of being applied in a non-arbitrary way.[43]

ii) the test must have a "formal realizability;[44] it would have to lead to clear results, with little need for further contestable judgments.

iii) it should be able to generate general predictable and consistent results.

iv) it must be administrable "without overreaching the Court's empirical capacities";[45] it must not require the Court to make empirical findings for which it lacks competence.

v) it must be capable of "structuring the awards of remedies";[46] an appropriate remedy must follow directly from the test applied.[47]

c) The third criterion Fallon discerned is simply referred to as "further normative determinations of fitness of adjudication",[48] by which Fallon means that all of these criteria "raise questions of sufficiency; [for instance,] how much analytical bite, or how much predictability or consistency of judicial decision making, is needed for a test to count as

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[39] Fallon, "Judicially Manageable Standards and Constitutional Meaning", 119 Harv. L. Rev. 1274 (2006), at 1285-1297.

[40] Id., at 1285, quoting Webster's New Twentieth Century Dictionary of the English Language.

[41] Id., at 1287.

[42] Id.

[43] A good example is the distinction between direct and indirect effect on interstate trade, which was abandoned by the Court for being unworkable in practice. See Chapter IV, section 2.

[44] Op. cit. *supra* note 39, at 1287.

[45] Id., at 1291.

[46] Id., at 1292.

[47] Op. cit. supra note 37, at 292. Again, Fallon stresses the inconsistency of the Court on these five desiderata. For instance, as regards the last one, he points out that in *Gilligan* the Court had held that there were no judicially manageable standards to decide the case, mainly because the Court lacked the practical judicial competence to design a remedy. Yet in another case arising from the same incident (*Scheuer v. Rhodes*, 416 U.S. 232 (1974)), in which the plaintiffs sought damages rather than injunctive relief, the Court did not even consider whether the case presented a political question.

[48] Op. cit. supra note 39, at 1293.

judicial manageable?"[49] This, at the end, requires a cost-benefit analysis of whether the costs of adjudication outweigh the benefits. It requires the Supreme Court to assess whether deciding the case on its merits will not do more harm than good.[50]

2.6. Ambiguous nature of the doctrine

Despite these criteria, the political question doctrine has over the years received qualifications such as "an enigma",[51] "confusing and unsatisfactory",[52] and "mixed up and inconsistent with its own purposes".[53] The reasons for this enigmatic nature of the political question doctrine are threefold.

First of all, it is clear that the Supreme Court has been ambiguous on the question of when the applicability of the doctrine must be considered in the first place, regardless of the outcome of such consideration. The Supreme Court did not even mention it in the 2000 election cases, even though many argued that the Supreme Court should have at least considered whether the doctrine applied. Although the doctrine has been somewhat revived by *Vieth*, the Court remarkably did not even mention it in a strikingly similar case only two months later,[54] again leaving commentators puzzled about its fate.[55]

Second, when the Supreme Court does examine its applicability, the criteria the Court has used differ significantly from case to case. Even though the Court, for instance, claimed to summarize its previous case

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[49] Id.

[50] This was a recurring theme in the plurality, concurring, and dissenting opinions of *Vieth*. See e.g. the plurality opinion of Justice Scalia (at 301): "Is the regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process and the partisan … enmity it brings upon the courts, worth the benefit to be achieved – an accelerated (by some unknown degree) effectuation of the majority will? We think not".

[51] Redish, op. cit. *supra* note 8, at 1031.

[52] Chemerinsky, *Constitutional Law. Principles and Policies* (Aspen, 2002), at 130.

[53] Brown, "When Political Questions affect Individual Rights: the Other Nixon v. United States", Sup. Ct. Rev. (1993), 125, at 153. Henkin has even claimed that the political question does not exist at all, arguing that the Court's decision not to resolve a case is a decision on the merits and is nothing more than ordinary constitutional interpretation. ("Is there a "Political Question" Doctrine?", 85 Yale L. J. (1976), at 597).

[54] *Cox v. Larios*, 542 U.S. 947 (2004).

[55] See e.g. Issacharoff and Karlan, "Where to Draw the Line? Judicial Review of Political Gerrymanders", 153 *University of Pennsylvania Law Review* (2004), at 541.

law in *Baker v. Carr,* in subsequent case law it remarkably relied on predominantly only the first and second of these criteria, yet never explicitly rejecting any of the other – prudential – ones.

Third, even if one does assume that the Supreme Court has now narrowed the political question doctrine to its original, classical version, this focus on the first and second of the Baker criteria has proven to be of little guidance. At least one commentator has described them as "useless for identifying what constitutes a political question" simply because many important constitutional provisions are written in broad, open-textured language and certainly do not contain judicially manageable standards.[56] The United States Constitution does not mention the judicial review of the political branches of government, "much less limit it by creating textually demonstrable commitments".[57] Even though the *Vieth* criteria attempt to explain what is meant by judicially manageable standards, these criteria, as Fallon demonstrates, are used inconsistently, they allow for arbitrary use or disagreement about their applicability and at the end still require a normative cost-benefit analysis.

Precisely because of its enigmatic nature, it is difficult to define the United States' political question doctrine in terms of a general principles test. Overall, it seems that the Supreme Court has, since Baker, predominantly relied on the classical approach towards the doctrine, focusing on examining whether there is a textually demonstrable constitutional commitment to a political department or whether there is a lack of judicially manageable standards for resolving the issue. Especially the last of these criteria has been further explained by the Supreme Court in *Vieth,* but none the less does not provide for much clarification.

3. A European Political Question doctrine?

3.1. Introduction

Because of the difficulty in defining the doctrine in terms of a general principles tests, it is not possible to properly develop standards which could be used as a comparative prism. This problem is circumvented here by focusing, on the one hand, on the main rationale of the doctrine and, on the other, on the areas in which the Supreme Court has applied the doctrine. In other words, this section will examine whether the Court of Justice used judicial restraint for Separation of Powers reasons in areas of the case law of the European Court of Justice which are similar

[56] Chemerinsky, op. cit. *supra* note 52, at 129. Internal citations omitted.
[57] Id.

to those areas in which the United States Supreme Court has applied the political question doctrine.

Precisely because of the inconsistent application and confusing nature of the doctrine, a categorical method is – also – often preferred in the American literature on the political question doctrine.[58] Overall, it is possible to categorize the case law of the Supreme Court into seven different categories, namely (1) external relations, (2) congressional self-governance, (3) instances where the court cannot shape effective equitable relief, (4) the electoral process, (5) removal from office, (6) the process for amending the Constitution, and (7) federalism.[59] This section will look at some similar areas of the case law of the European Court of Justice, focusing on the first three of these categories, not only because these three are most closely related to the doctrine's basic function of Separation of Powers – the latter category will be discussed in Chapter V. – but especially because these categories most lend themselves to fruitful comparison with the European Union.[60]

3.2. External relations

3.2.1. Introduction

The Supreme Court has often applied the political question doctrine to several areas of foreign policy, such as the ratification and interpretation

[58] Chemerinsky, for instance, has argued that because of the uselessness of the first of the Baker criteria "the political question can be understood only by examining the specific areas where the Supreme Court has invoked it" (id., at 130).

[59] See Chemerinsky, (id., at 133-148) and Tushnett, "Principles, Politics and Constitutional Law", 88 *Michigan Law Review* 49 (1989).

[60] It is important to point out that the question here is one concerning deference towards the political institutions of the Union, not towards the Member States in general and their courts more in particular. The Court has, for instance, repeatedly held that while it is in principle bound to give a ruling where the questions submitted concerned the interpretation of Community law, it might refuse to rule on a question referred for a preliminary ruling by a national court where it was quite obvious that the interpretation of Community law that was sought bore no relation to the actual facts of the main action or its purpose, where the problem was hypothetical, or where the Court did not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. See e.g. Case C-415/93, *Bosman* [1995] ECR I-4921, para. 61; Case C-316/04, *Stichting Zuid-Hollandse Milieufederatie* [2005] ECR I-9759, para. 30; Case C-13/05, *Chacón Navas* [2006] ECR I-6467, paras 32 and 33; and Case C-467/04, *Gasparini and Others* [2006] ECR I-9199, paras 44-46.

of treaties,[61] the recognition of foreign governments,[62] and the determination of when a war begins or ends.[63] In the United States, the area of foreign policy is sometimes regarded as having a somewhat special status among the categories in which the political question is applied.[64] This is illustrated by the – mainly prudential – arguments used by those advocating the application of the political question doctrine to this area, who argue that the judiciary is unable to assess or interpret the factual evidence in this area[65] and should therefore simply refrain from developing rules on it,[66] or risk embarrassing the government internationally by overruling the other branches of government.[67] Critics counter these arguments on a more formal – or "classical"– note, arguing that it is the judiciary's duty to ensure the observance of the rule of law,[68] that it is "the Courts' responsibility to interpret the Constitution",[69] and that the risk of embarrassment "cannot outweigh the need for the judiciary to perform its function of judicial review".[70]

As with regard to the doctrine more generally, it is difficult to develop a set of substantive criteria from this case law which have been used by the Supreme Court in these cases. Overall, it appears that the Supreme Court has applied the doctrine especially to cases involving foreign policy based on an exclusive competence of the legislative or

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[61] See e.g. *Terlinden v. Ames*, 184 US 270 (1902), *Goldwater v. Carter,*444 US 996 (1979).

[62] See e.g. *United States v. Belmont*. 301 US 324 (1937); *Oetjen v. Central Leather co*., 246 US 297 (1918).

[63] See e.g. *Commercial Trust Co. v. Miller*, 262 US 51 (1923), *Martin v. Mott*, 25 US 19 (1827).

[64] See e.g. Nzelibe "The Uniqueness of Foreign Affairs, 89 *Iowa Law Review* 941 (2004). Or, for a more European discussion of this argument, see Flinterman "Judicial Control of Foreign Affairs: the political question doctrine", in Bakker *et al.* (eds.), *Judicial Control - Comparative Essays on Judicial Review* (Ius Commune, 1995), at 45.

[65] Burley, "Are Foreign Affairs Different?", 106 Harv. L. Rev. 1980 (1993).

[66] Jaffe, "Standing to Secure Judicial Review: Public Actions", 74 Harv. L. Rev. 1265 (1961), at 1303. See also: Bickel, op. cit. *supra* note 7, at 186-189.

[67] Scharpf, "Judicial Review and the Political Question: A Functional Analysis", 75 Yale L. J. 517 (1966), at 538-39.

[68] Frank, *Political Questions/Judicial Answers: Does the Rule of Law apply to Foreign Affairs?* (Princeton University Press, 1992).

[69] Chemerinsky, "Controlling Inherent Presidential Power", 56 *Southern California Law Review*, 863 (1983), at 899.

[70] Redish, "Judicial Review and the "Political Question", 79 *Northwestern University Law Review* 1031 (1984), at 1051, adding that "… other nations are asked to understand our complex constitutional system of checks and balances, and we somehow manage to survive as a nation".

executive branch of government, while showing less deference when individual rights were at stake.[71] However, the Court has recently implied that the application of this doctrine to this area must be mainly assessed on a case-by-case basis.[72] It is nevertheless clear that the judicial deference in this area is based on or inspired by the basic rationale of Separation of Powers; the Supreme Court's treatment of certain aspects of foreign policy as political questions "reflects a desire to avoid intrusion into the domain of the other braches".[73]

3.2.2. Broad scope of review

3.2.2.1. Introduction

Can a similar kind of deference towards the political institutions be inferred from the case law of the European Court of Justice on external relations? As is well known, Article 46 EU denies any jurisdiction to the Court of Justice concerning matters falling within the Second Pillar. It follows from this provision that the Court cannot review the compatibility of Union legislation with the Common Foreign and Security Policy (hereinafter: CFSP), although Article 47 does allow judicial review when CFSP action infringes EC Treaty obligations.[74] On the one hand, this exclusion of the CFSP provisions from judicial review in Article 46 EU is understandable, since, as Mancini and Keeling have put it, "most judges would in any case be reluctant to charge headlong into the political thorns and brambles of the foreign affairs thicket".[75] On the other hand, one of the *rationales* for this provision was exactly to counterweight "the nature and record of the Court, whose doctrines in the sphere of external relations lay much more emphasis on the integrations purpose of the Treaties and less on presuming a minimum derogation from individual sovereign powers".[76] As Oliver has pointed

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[71] Blumoff, "Judicial Review, Foreign Affairs And Legislative Standing", 25 *Georgia Law Review* 227 (1991).

[72] *Sosa v. Alvarez-Machain*, 542 US 692 (2004), at 733, fn.21; *Republic of Austria v. Altmann,* 541 US 677 (2004), at 701.

[73] Chemerinsky, op. cit. *supra* note 52, at 146.

[74] Similarly, the Lisbon Treaty proposes, in an amended Article 11 EU, to exclude from the Court's jurisdiction a great number of foreign policy matters, except for sanctions against individuals and the dividing line between the EU Treaty and the new Treaty on the Functioning of the European Union.

[75] Mancini and Keeling, "Language, Culture and Politics in the Life of the European Court of Justice", 1 Colum. J. Eur. L. 397 (1995), at 411.

[76] Eeckhout, *Does Europe's Constitution stop at the Water's Edge. Law and Policy in the EU's external Relations* (Europa Law Publishing, 2005), at 18. See

out, Article 46 EU is illustrative of "the traditional reluctance of Member States to give up their powers [in this area]".[77] This illustrates that a review of the European Union's competences on external relations is, as Eeckhout has put it, "a politically sensitive endeavour, mainly because it is so closely linked with national sovereignty".[78]

3.2.2.2. Gradual extension of the scope of review

Despite the "warning signal" in Article 46, the case law of the Court of Justice seems to suggest that the Court is gradually extending the scope of its review of the European Union's external relations. This is perhaps best illustrated by the *Air Transport Vista*, the *Gestoras Pro Amnistía* and *Segi* cases.

In *Airport Transit Visa*,[79] the Commission brought an Article 230 action for annulment of a Joint Action on airport transit arrangements, which was adopted by the Council on the basis of Article 31 EU.[80] The United Kingdom claimed that the Court lacked jurisdiction, since the contested act had been adopted outside the framework of the EC Treaty. The Court however held that it followed from Article 46 in conjunction with Article 47 that it was "the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article 30 EU[81] do not encroach upon the powers conferred by the EC Treaty on the Community".[82]

The Gestoras Pro Amnistía[83] and *Segi*[84] cases signified another clear extension of the Court's scope of review in this area. In the judgments in

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also: Denza, *The intergovernmental Pillars of the European Union* (Oxford University Press, 2002), at 312.

[77] Oliveira, CML Rev. 99 (1999) 149, at 156.

[78] Eeckhout, op. cit. *supra* note 76, at 12.

[79] Case C-170/96, *Commission v. Council* [1998] ECR I-2763.

[80] Then Article K.3. The Commission argued that the measure should have been taken under Article 100c EC (now deleted) and therefore infringed Article 47 EU (then Article M).

[81] Then Article K.3(2).

[82] *Airport Transit Visa*, op. cit. *supra* note 79, paras 15-17. The Court argued that it had jurisdiction to review the content of the Joint Action in the light of Article 100c EC in order to ascertain whether it affected the powers of the Community under that provision and to annul the Act if it appeared that it should have been based on Article 100c EC. On the relationship between the first and the third pillar, see also Case C-176/03, *Commission v. Council* [2005] ECR I-7879; and C-440/05, *Commission v. Council*, *Commission v Council* [2007] ECR I-9097.

[83] Case C-354/04 P, *Gestoras Pro Amnistía and Others v. Council,* [2007] ECR I-1579.

these two cases, delivered on the same day, the Court held that it could give preliminary rulings on Common Positions despite Article 35(1) EU Treaty explicitly rejecting this possibility. The cases concerned Common Position 2001/340 on the application of specific measures to combat terrorism, adopted on the basis of Articles 15 and 34 EU. A list of persons, groups or entities involved in terrorist acts appeared in the Annex to that common position and included Gestoras Pro Amnistía and Segi. When the Court of First Instance rejected actions seeking damages for the harm allegedly suffered as a result of their inclusion in the aforementioned list,[85] Gestoras Pro Amnistía and Segi appealed before the Court of Justice. The Court reiterated that the right to make a reference to the Court for a preliminary ruling should exist in respect of all measures, whatever their nature or form, which were intended to have legal effects in relation to third parties.[86] The Court now held that these measures could also include Common Positions, despite Article 35(1) EU rejecting the possibility of national courts referring a question to the Court for a preliminary ruling on a Common Position. That provision limits the Court's jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions, or on the interpretation of conventions established under Title VI, or on the validity and interpretation of the measures implementing them.

The Court however held that given that the preliminary rulings procedure was designed to guarantee the observance of the law in the interpretation and application of the Treaty, it would run counter to that objective to interpret Article 35(1) EU narrowly. The Court added that it followed from Article 6 EU that institutions are subject to a review of the conformity of their acts with the treaties and the general principles of law, in the same way that the Member States are reviewed as to their implementation of the law of the European Union. The Court held that in light of these principles, a national court hearing a dispute which indirectly raised the issue of the validity or interpretation of a common position adopted in the context of the third pillar and which had serious doubts as to whether that Common Position was truly intended to produce legal effects in relation to third parties, might still ask the Court to give a preliminary ruling. It would then fall to the Court to find, where appropriate, that the Common Position was intended to produce legal

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[84] Case C-355/04 P, *Segi and Others v. Council*, [2007] ECR I-1657.

[85] Case T-333/02, *Gestoras Pro Amnistía and Others v. Council* (not published) and Case T-338/02, *Segi and Others v. Council* [2004] ECR II-1647.

[86] Case 22/70, *Commission v. Council (ERTA)* [1971] ECR 263. This was confirmed in Case C-57/95, *France v. Commission* [1997] ECR I-1627.

effects in relation to third parties, to accord it its true classification and to give a preliminary ruling.

The Court of Justice recently adopted an even wider interpretation of Article 47 EU. In the *Proliferation of Small Arms* case,[87] the Court held that a measure having legal effects adopted under Title V. of the EU Treaty affected the provisions of the EC Treaty within the meaning of Article 47 EU Treaty whenever it could have been adopted on the basis of the EC Treaty. It was unnecessary to examine whether the measure prevented or limited the exercise by the Community of its competences.[88]

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[87] C-91/05, *Commission v. Council* [2008], nyr.

[88] The second important – and of course related – aspect of this case concerned the required legal basis. The Court has repeatedly held that if an examination of a measure revealed that it pursued a twofold aim or that it had a twofold component and if one of those was identifiable as the main one, whereas the other was merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component (Case C-211/01 *Commission v. Council* [2003] ECR I-8913; Case C-338/01, *Commission v. Council* [2004] ECR I-7829; and Case C-94/03, *Commission v. Council* [2006] ECR I-1; and, with regard to the application of Article 47 EU, Case C-176/03, *Commission v. Council* [2005] ECR I-7879 and Case C-440/05, *Commission v. Council,* op. cit. *supra* note 82). The Court, however, had in the past articulated an exception to this single basis requirement. It held that with regard to a measure which simultaneously pursued a number of objectives or which had several components, without one being incidental to the other, such a measure would have to be founded, exceptionally, on the various corresponding legal bases (Case C-211/01, *Commission v. Council* [2003] ECR I-891; and Case C-94/03, *Commission v. Council* [2006] ECR I-1). The Court now construed an exception to this exception. It held that, under Article 47 EU, such a solution was impossible with regard to a measure which pursued a number of objectives or which had several components falling, respectively, within development cooperation policy and within the CFSP, and where neither one of those components was incidental to the other. Since Article 47 precluded the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union could not have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fell within a competence conferred by the EC Treaty on the Community. Taking account of its aim and its content, the contested decision contained two components, neither of which could be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP. The Council had infringed Article 47 by adopting the contested decision on the basis of Title V. of the EU Treaty, even though it also fell within development cooperation policy. The contested decision was therefore annulled.

Cases such as *ERTA* indicate that the Court has also played a "pivotal role in defining the extent of the Community's power to enter into international agreements".[89] As discussed in the previous Chapter, the Court in *ERTA* – by recourse to the principle of implied powers – established a broad concept of the Community's exclusive competence to conclude international agreements.[90] The Court of Justice has construed a broad scope of review under Articles 230 and 234 EC, extending even to non-binding recommendations adopted under an international agreement and to the "national" provisions of mixed agreements.[91]

3.2.2.3. Rejections of restraint

As mentioned, in the United States, those commentators arguing that the political question doctrine should be applied to foreign policy, submit that the judiciary is unable to assess or interpret the factual evidence in this area, should not develop rules thereon, or must avoid embarrassing the government internationally by overruling the other branches of government. The Court of Justice is certainly aware of these risks and the disadvantages of judicial scrutiny in this area. However, the Court has rejected the notion that such risks imply a form of deference towards the political institutions. This is illustrated in particular by Opinion 1/75, the *PNR* cases and *FEDIOL I*.

In Opinion 1/75, the Court was asked to interpret Article 228(1) (now Article 300(6)) EC, which provided that the Council, the Commission or a Member State might request the Court to give an opinion as to the compatibility with the provisions of the Treaty of an agreement to be concluded with one or more third countries or with an international

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[89] Arnull, *The European Union and its Court of Justice* (Oxford University Press, 2006) at 642. See also: Barav "The Division of External Relations Power between the EEC and the Member States in the Case-Law of the Court of Justice" in Timmermans and Volker (eds.), *Division of Powers between the EC and their Member States in the field of External Relations* (Kluwer, 1981), at 52.

[90] See also the Open Skies cases, delivered by eight different judgments (Case C-466/98, *Commission v. United Kingdom* [2002] ECR I-9427, Case C-467/98, *Commission v. Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575; Case C-469/98, *Commission v. Finland* [2002] ECR I-9627; Case C-471/98, *Commission v. Belgium* [2002] ECR I-9681; Case C-472/98, *Commission v. Luxembourg* [2002] ECR I-9741; Case C-475/98, *Commission v. Austria* [2002] ECR I-9797; and Case C-476/98, *Commission v. Germany* [2002] ECR I-9855); and confirmed by Case C-523/04, *Commission v. the Netherlands* [2007] ECR I-3267

[91] See Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (Oxford University Press, 2005), Chapter 8.

organization. The Court argued that a possible decision of the Court to the effect that such an agreement was incompatible with the Treaty "could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries".[92] It was precisely the purpose of this provision to avoid complications which could arise out of legal disputes involving international agreements which are binding upon the Community. Therefore, the question whether the conclusion of an agreement was within the power of the Community and whether such power had been exercised in conformity with the Treaty was "in principle a question which may be submitted to the Court of Justice, either directly, under Article 169 Article 173 (Now Articles 230 and 234) of the Treaty".[93]

In other words, in Opinion 1/75, the Court of Justice essentially admitted that by overruling the other branches of government it could risk embarrassing the European Union internationally. This was, however, not seen as a reason to deny a review, but, quite the opposite, as a reason to ask the Court for an Opinion in advance in order to ensure the legality of the agreement concerned and thus to avoid such embarrassment. Since Opinion 1/75, the Court has consistently held that it has the authority to review international agreements under Article 230 EC,[94] including the jurisdiction to review decisions of Community institutions authorizing the conclusion of such agreements.[95] In *France v. Commission*, the Court for the first time annulled such a measure, holding that under Article 230 the "exercise of the powers delegated to the Community institutions in international matters cannot escape judicial review".[96]

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[92] Opinion 1/75, *OECD Local Cost Standard* [1975] ECR I-1355.

[93] Id.

[94] In Case 181/73, *Haegeman* [1974] ECR 449, the Court confirmed that the Court also had jurisdiction to give preliminary rulings on international agreements under Article 234 EC. The Court argued that an association agreement with Greece – which was not yet a Member State – came within its scope of review since it was concluded by the Council and formed, from its coming into force, an integral part of Community law.

[95] See e.g. Case C-360/93, *Parliament v. Council* [1996] ECR I-1195; Opinion 3/94 [1995] ECR I-4577.

[96] Id., judgment, para. 16. This case concerned an agreement between the Commission and the United States. Advocate General Tesauro argued that the Community legal system made provision for a judicial review, without exception, of all the acts and practices of the institutions, and that it was therefore not "reasonably possible to exclude review of the legality of the

The *PNR* cases[97] involved the validity of a Decision by which the Council authorized the conclusion of an Agreement between the European Community and the United States. By this agreement, the European Community and the United States agreed to share information about transatlantic airline passengers. The European Parliament sought to annul this decision,[98] arguing that it could not be based on Article 95 and infringed fundamental rights, in particular the right to the protection of personal data and the right to private life as enshrined in Article 8 ECHR.[99] The European Parliament, on very similar grounds, also asked for the annulment of a related Commission Decision, which was adopted under Article 3(2) of this Directive. In a remarkably short judgment, the Court held the Decisions to be void on the ground that they could not have been adopted under Article 95 and Directive 95/46, respectively. Since the Decisions for this reason should be annulled, the Court saw no need to consider the other pleas put forward by Parliament. Although, as will be demonstrated below, the Advocate General pleaded for judicial deference on one of the other issues raised by the European Parliament – hence one which the Court did not consider – neither Advocate General Léger nor the Court saw any reason to consider whether a more limited form would be appropriate.[100]

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procedure for concluding an agreement with a non-member country" (Opinion in Case 327/91, *France v. Commission* [1994] ECR, I-3641, para. 11).

[97] Joined Cases C-317/04 and C-318/04, *Parliament v. Council* [2006] ECR I-4721. More specifically, the Court preserved the effect of the Commission's decision until the date upon which the Agreement came to an end. The Agreement stipulated that termination of the agreement took effect 90 days from the date of notification of termination to the other party.

[98] The European Parliament had already asked the Court of Justice for an Opinion on the legality of this Decision, but this request was withdrawn when the agreement was adopted (Opinion 1/04, removed from the register of the Court by order of the President of the Court of 16 December 2004).

[99] Furthermore, since the agreement would require an amendment of Directive 95/46 on the protection of personal data, the assent of the European Parliament should have been obtained in light of Article 251 EC.

[100] The Court essentially simply referred to its previous case law on Directive 95/46 and Article 95 in general and to *Lindqvist* more in particular. On this case (and the Directive), see Chapter VI, section 3.2. The Court did however preserve the effects of the Decisions for reasons of legal certainty. The judgment was quite similar to Case C-360/93, *European Parliament v. Council* [1996] ECR I-1195, in which the Court annulled two Council Decisions authorizing the conclusion of a government procurement agreement with the US and extending the benefits of a Community directive to the US. As in the *PNR* cases, the Court simply referred to its legal basis case law as expressed in *Tariff Preferences* and subsequent case law. It did, however, hold that all of the effects of the annulled

Perhaps the clearest rejection of using restraint in this area can be found in *FEDIOL I*, which concerned a Commission communication stating that anti-subsidy proceedings would not be initiated in respect of imports of soya-bean oil-cake from Brazil.[101] The EEC seed crushers and oil processors federation sought a declaration that this communication was void. The Commission argued that Regulation 3017/79, which formed the legal basis for the disputed communication, did not confer on undertakings and federations the right to compel the initiation of an anti-subsidy proceeding. The Commission pointed out that that regulation gave it a wide discretion, the exercise of which touched upon the economic and political interests of the Community and which, therefore, was not subject to review by the Court. The Court of Justice dismissed that argument. Referring to "the spirit of the principles which lie behind Articles 164 (now 220) EC and 173 (now 230) EC", it held that "the Court is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the Regulation".[102]

3.2.2.4. Conclusion

Prima facie it seems that the Court has hardly shown any restraint in the field of foreign relations. The cases discussed illustrate that the Court of Justice is "not easily impressed by arguments derived from the special nature of international relations and agreements",[103] even when so raised by the Advocate General or one of the parties. The Court is ignoring constitutional warnings to use more restraint, even though its case law has had important effects with regard to both the Separation of Powers and Division of Powers.

3.2.3. Judicial Restraint

3.2.3.1. Introduction

A closer look, however, reveals that the Court of Justice has in some cases used a form of deference towards the political institutions which is quite similar to the political question doctrine in the United States. In this section, it will be demonstrated that, in three areas in particular, the

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decisions should be conserved for reasons of legal certainty. The Court furthermore reached a similar conclusion in Case 165/87, *Commission v. Council* [1988] ECR 5545.

[101] Case 191/82, *FEDIOL v. Commission* [1983] ECR 2913.

[102] Paras 29 and 30, resp. Emphasis added.

[103] Eeckhout, op. cit. *supra* note 91, at 246.

Court's approach can certainly be characterised as one of judicial restraint.

The Court of Justice has never explicitly discussed whether a review of the international obligations of the European Union calls for a limited form of review – or no review at all. In three cases, the Advocate General had called for a form of deference towards the political institutions of the Community which was remarkably similar to the United States' political question doctrine. However, two of these cases – *FYROM* and the *ITC* case – were withdrawn after the Opinions had been delivered, in the third one – the *PNR data* case – the plea was not discussed by the Court of Justice for the reasons mentioned above.

First of all, in *FYROM,* the Commission sought a declaration under Article 225(2) (now Article 298) EC) that Greece could not rely on Article 224 (now Article 297) EC to justify a unilateral prohibition on trade with the Former Yugoslav Republic of Macedonia (hereinafter: FYROM). Advocate General Jacobs *inter alia* discussed the question whether Greece was entitled to rely on Article 297 on the ground of war or serious tension constituting a threat of war by the FYROM. He argued that the matter required an extremely limited form of judicial review on the ground that there was "a paucity of judicially applicable criteria that would permit this Court … to determine whether serious international tension exists and whether such tension constitutes a threat of war".[104] This criterion was no different than, for instance, the Supreme Court's reasoning in *Baker* that the "lack of judicially discoverable standards … may impel reference to the political departments' determination of dates of hostilities' beginning".[105] Advocate General Jacobs stressed both the unpredictability and subjectivity of what constitutes an international tension, arguing that "security is a matter of perception rather than hard fact".[106]

Secondly, the *ITC* case concerned the collapse of the International Tin Council, of which the European Community had been a member. After attempts to sue the ITC proved unsuccessful, various creditors of the ITC started litigation against its Members; one of these creditors commenced proceedings against the European Community.[107] The

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[104] Opinion of AG Jacobs in Case C-120/94, *Commission v. Greece* [1996] ECR I-1513, paras 60 and 50 respectively.

[105] *Baker v. Carr,* op cit. *supra* note 4, at 214. This argument was in fact – albeit indirectly – derived from the first of the *Baker* criteria, as Advocate General Jacobs referred to Lord Wilberforce in *Buttes Gas and Oil Co v. Hammer* (1982 AC 888), who, during his term, had quoted *Baker v. Carr* (Id., at at 938).

[106] Para. 54.

[107] For a discussion of the other ITC cases, as well as the settlement reached in the present one, see Cheyne, 39 ICLQ 4 (1990), 945-952.

Advocate General *inter alia* examined the claim by the Council and Commission that the application was inadmissible because it referred to "acts and transactions of the Community concerning the conduct of international relations".[108] It argued that reference might "usefully be made here to the US doctrine of "political questions", which can lead to the Court's abstention when dealing with a case to which it believes there is no legal solution".[109] After an extensive examination of the relevant case law of both the Community and – in fact, all of the – Member States' courts, he concluded that for the Court to adopt a concept analogous to a political question doctrine would prove difficult to reconcile with the case law of the European Court of Justice.[110] Stressing that the role of the courts was to ensure that the law was observed, he argued "that refusal by the court to adjudicate – or more appropriately, the impossibility for the court to do so – ensues only from an examination of the substance of the claims put forward".[111] He therefore proposed that the Court should consider, together with the substance of the case, the question of admissibility. However, a settlement was reached after Advocate General Darmon had delivered his Opinion.

As will be demonstrated below, in its case law on the Common Agricultural Policy the Court of Justice held that it will only use a marginal form of review when the Council is entrusted with a discretionary power in this area. The Court in such a case merely examines whether the measure is in conformity with the proportionality principle, hence limiting its review to the question whether the measure concerned was manifestly inappropriate having regard to the objective which the competent institution was seeking to pursue.

In his Opinion on the *PNR* cases, Advocate General Léger advocated an extension of this CAP case law to the combating of terrorism.[112] He argued that in light of the nature and importance of the objective of combating terrorism, the Council and Commission should have a wide margin of appreciation in negotiating the agreement with the US authorities, also "having regard to the politically sensitive context" in which these negotiations had taken place. He found that the Court should therefore only review whether there was "any manifest error of

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[108] Opinion of AG Darmon in Case C-241/87, *Maclaine Watson & Company Limited v. Council and Commission* [1990] ECR I-1797, para. 45.
[109] Id., at para. 78. The Advocate General referred to *Baker v. Carr* in footnotes 51 and 52.
[110] Some of which is discussed in the next section.
[111] Id., at para. 100.
[112] Opinion, para. 232.

assessment on the part of those two institutions".[113] By carrying out only a limited form of review, the Court would "avoid the pitfall of substituting its own assessment for that of the Community political authorities as to the nature of the most appropriate and expedient means of combating terrorism and other serious crimes".[114] However, as mentioned, these arguments were not discussed by the Court, which, after holding that the Decisions were void on the ground that they could not have been adopted under Article 95 and Directive 95/46, respectively, saw no need to consider the other pleas put forward by the European Parliament.

3.2.3.2. WTO law as an exception to the EU's monistic system

Nevertheless, although the Court of Justice has never explicitly examined the applicability of a political question doctrine, there are three areas of case law concerning the international relations of the European Union in which the Court of Justice has applied a certain deference towards the European Union's political institutions (§3.2.3.2 - §3.2.3.4.)

Eeckhout has pointed out that two cases in particular – *Portugal v. Council* and *Van Parys* – constitute a form of deference to the European Union's political institutions which is quite similar to the political question doctrine.[115] As is well known, it follows from Article 300(7) EC that the European Union, like the United States, has a monistic constitutional system.[116] The Court in the *Kufperberg* case confirmed that international agreements concluded by the Community have direct effect in the Community and take precedence over national law.[117] The Court held that the fact that the courts of one of the parties recognised such direct application of an agreement concluded by the European Community – whereas the courts of the other party did not – was not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.

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[113] Id., para. 231.
[114] Id.
[115] Eeckhout, op. cit. *supra* note 76, at 14-18.
[116] Case C-61/94, *Commission v. Germany* [1996] ECR I-3989, para. 52; Case C-173/07, *Emirates Airlines – Direktion für Deutschland v. Schenkel, nyr,* para. 43. See e.g. Kuijper and Bronckers, "WTO Law in the European Court of Justice", 42 CML Rev. 1313 (2005), at 1314. According to this provision, agreements concluded by the Community under the conditions of Article 300 are binding on the Community institutions and on Member States.
[117] Case 104/81, *Kupferberg* [1982] ECR 3641, paras 14 and 16. Confirmed for instance in Case C-61/94, *Commission v. Germany* [1996] ECR I-3989; Case C-311/04, *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609; and recently in Case C-308/06, *Intertanko* [2008], nyr.

Despite this monistic nature, the Court has made an important – dualistic – exception when it comes to WTO law.[118] In *Portugal v. Council,* the Court of Justice established the rule that because of their nature and structure, WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.[119] The Court stated that the WTO law itself did not provide this – either expressly or implicitly, but the preamble to the WTO Agreement stated that it was founded on the principle of reciprocity. The Court found that the WTO Agreement was therefore distinguished from the agreements concluded between the Community and non-member countries which introduced a "certain asymmetry of obligations", or created "special relations of integration with the Community",[120] such as the agreement which the Court was required to interpret in *Kupferberg*. The Court pointed out that some of the WTO Members had concluded from the subject-matter and purpose of the WTO agreements that they were not among the rules applicable by their judicial organs when reviewing the legality of their domestic laws. The Court held that "to accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature *would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners*".[121] The Court thus rejected direct effect on the ground that it did not want to limit the discretionary powers of the European Union's political institutions.

A similar deference can be found in the Court's approach in *Van Parys*. This case concerned the question whether the so-called *Nakajima* principle – an important exception to the lack of direct effect of WTO law – also applied to WTO dispute rulings. According to the *Nakajima* principle, it is for the Court to review the legality of the Community measure in question in the light of the WTO rules only where the Community has intended to implement a particular obligation assumed

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[118] Eeckhout, op. cit. *supra* note 91*,* at 98.

[119] Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, para. 47; confirmed in the Order of May 2, 2001 in Case C-307/99, *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159, para. 24; Joined Cases C-27/00 and C-122/00, *Omega Air and Others* [2002] ECR I-2569, para. 93; and Case C-76/00 P, *Petrotub and Republica v. Council* [2003] ECR I-79, para. 53 and Case C-93/02 P, *Biret International v. Council* [2003] ECR I-10497, para. 52.

[120] Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, para. 42.

[121] Id., para 46. Emphasis added.

in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements.[122]

In 1997, the WTO ruled that the Community's banana regime infringed WTO rules. WTO law stipulated that a contracting party has to comply with such ruling within a "reasonable period". The Community amended its regime in 1998 with a view to ensuring compliance, but in 1999 the WTO ruled that the new regime still breached certain provisions of WTO law. The question here was whether, in light of the *Nakajima* principle, the Court could review the validity of the Regulations establishing the new system. The Court answered this question in the negative, essentially on the ground that its *Portugal v. Council* case law also applied to the effect of WTO rulings. It held that the measures by which the Community sought to reconcile its obligations under the WTO law "could be compromised if the Community Courts were entitled to judicially review the lawfulness of the Community measures in question".[123]

Portugal v. Council and *Parys* illustrate that in exceptional circumstances the Court is aware that there are certain risks involved when tying the hands of the Community's political institutions internationally. Nevertheless, with regard to the direct effect of international law, "WTO law is still a lone exception" and "sits uneasily" with the general body of case law on international agreements.[124] There are, however, two other strands of case law on external relations which reveal – albeit more implicitly – some significant signs of deference to the political institutions (§.3.2.3.3. and §.3.2.3.4.).

3.2.3.3. Assessment of the Community's general interests

In the *Adams* case, the applicant sought compensation for damage which he had allegedly suffered as result of the Commission's failure to refer a matter to the joint committee set up under the free trade agreement between the EEC and Switzerland. The Commission argued that "the manner of conducting external relations" was not subject to judicial review, arguing that "the question as to what would have been the most

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[122] Case 69/89, *Nakajima v. Council* [1991] ECR I-2069, para. 31. See also Case 70/87, *Fediol v. Commission* (*Fediol IV*) [1989] ECR 1781, paras 19 to 22; *Portugal v. Council,* op. cit. *supra* note 119, para. 49, and *Biret International v. Council*, op. cit. *supra* note 119, para. 53.

[123] Case C-377/02, *Van Parys v. Belgisch Interventie- en Restitutiebureau* [2005] ECR I-1465, para. 50.

[124] Eeckhout, op. cit. supra note 76, at 15.

vigorous and most appropriate diplomatic action is not one to which a legal answer can be given".[125]

Although the Court of Justice did review the case, it held that there were indeed certain matters which were not subject to judicial review as they involved political assessments of the other institutions. The Court of Justice held that the Decision whether or not to refer the matter to the joint committee might not be taken "except for purposes which have to do exclusively with general interests of the Community, following an assessment which is essentially political and which cannot be challenged before the court by an individual".[126] Although, as mentioned, the political question doctrine does not relate to the political nature of the questions concerned, *Adams* can also be read as implying that the Court will not review the general interests of the Community because there are simply no judicially manageable standards which could be used for such judicial review.

3.2.3.4. Accession of new Member States

The *LAISA* cases[127] concerned actions for damages and the annulment of certain provisions of annex I to the Act of Accession of Spain and Portugal. The Court of Justice pointed out that the adaptations set out in annex I were the subject of an agreement between the Member States and the applicant state as provided for in Article 237 EC. As they did not constitute an act of the Council but provisions of primary law, they, according to Article 6 of the Act of Accession, could not be suspended, amended or repealed otherwise than by means of the procedure laid down for the revision of the original Treaties. Consequently, they were not among the acts which could be reviewed by the Court on the basis of Article 230 EC. The Court furthermore pointed out that Article 8 of the Act of Accession provided that provisions of that act the purpose or effect of which was to repeal or amend acts adopted by the Community institutions were to have the same status in law as the provisions which they repealed or amended and were subject to the same rules as those provisions. The Court held that, consequently, it had no jurisdiction under Articles 235 and 288(2) EC to hear or determine an action for damages.

The *LAISA* cases essentially concerned the constitutional rather than the political limit of judicial review, the Court of Justice showing deference towards the European Union's constitutional legislature rather

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[125] Case 53/84, *Adams v. Commission* [1985] ECR 3595, para. 12.
[126] Id., para. 15.
[127] Joined Cases 31/86 and 35/86, *LAISA and CPC Espana v. Council* [1988] ECR 2285, para. 17.

than its political institutions. The Court would later confirm that this judicial restraint would only apply to primary and not to secondary Community law.[128] In that sense, this case law is perhaps more related to the sixth category mentioned above in which the United States' political question doctrine has been applied: the process of amending the Constitution.

In *Mattheus v. Doego*, in which the Court of Justice held that it could not review the substance of a question concerning the conditions of accession of new Member States, the Court reached this conclusion using a somewhat different approach. This case concerned the question whether the Court had jurisdiction to decide on the substance of an agreement concerning the conditions for the accession of Spain, Portugal and Greece to the European Community. Article 237 EEC (now, after amendment, Article 49 EU) provided that any European state might apply to become a member of the European Community, adding that the conditions of admission and the adjustments to the EC Treaty necessitated thereby should be the subject of an agreement between the Member States and the applicant state.

The Court argued that this Article laid down a precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession were to be drawn up by the authorities indicated in the Article itself. The Court held that, therefore, the legal conditions for such accession "remained to be defined in the context of that procedure without its being possible to determine the content judicially in advance".[129] The Court therefore could not in proceedings pursuant to Article 234 give a ruling on the form or subject-matter of the conditions which might be adopted and accordingly declared that it had no jurisdiction to answer the questions referred. The Court hence refused to answer the preliminary question, leaving it to the political negotiation process to decide on the matter.[130]

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[128] Confirmed in Case C-259/95, *European Parliament v. Council* [1997] ECR I-530, para. 9; and Case C-122/95, G*ermany v. Council* [1998] ECR I-973, paras 44-47. See furthermore Bieber, "Les limites matérielles et formelles à la révision des traités établissant la Communauté européenne", RMC 343 (1993).

[129] Case 93/78, *Mattheus v. Doego* [1978] ECR 2203.

[130] See: Lenaerts: *Lenaerts, Constitutie en Rechter* (Kluwer, 1983), paras 360 and 517. Although these two cases imply that the Court of Justice shows deference on the subject of the accession of new Member States, the Court has recently, in Case C-273/04, *Poland v. Council* [2007] ECR I-8925, scrutinized Decision 2004/281 adapting the Act of 2004 concerning the conditions for the accession of the ten new Member States. Advocate General Poiares Maduro argued extensively that the right to effective judicial protection implied that the case was admissible despite arguments of the Council to the contrary. The

3.2.3.5. Conclusion

To define the role of the Court of Justice in the area of the European Union's external relations one is inclined to think in terms of judicial activism rather than judicial restraint. The Court of Justice has played a pivotal role in this area, even explicitly rejecting claims for judicial restraint.[131] However, this picture is not clear-cut. In the three areas discussed, there are important signs of deference to the political institutions, which are essentially guided by reasons of Separation of Powers. In *Portugal v. Council* and *Parys,* the Court, on rather prudential grounds, found that it did not want to limit the room for manoeuvre of the political institutions internationally. In line with more classical arguments, *Adams* can, as mentioned, be read as implying that the Court will not review the general interests of the Community because there are no judicially manageable standards for judicial review. Similarly, the

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Council put forward a plea of inadmissibility with regard to the action under Article 91 of the Rules of Procedure, arguing that it was manifestly inadmissible for being out of time. The Advocate General admitted that "under the Court's case-law, which ordinarily is particularly vigilant in regard to the observance of procedural time-limits and, more broadly, the conditions as to admissibility, the action would appear to be out of time". Nevertheless, the Advocate General found that "the principles underlying the legal order of the Union, in particular the principle of effective judicial protection and the way it has been progressively interpreted by the Court should … militate in favour of a different solution" (para. 13). The Court, in a remarkably short statement, simply held - without any argumentation whatsoever - that "the Court considers it necessary to rule at the outset on the substance of the case". (Para. 33). One explanation between the difference between *Poland v. Council,* on the one hand, and the *Mattheus v. Doego* and *LAISA* cases, on the other, could be that, in the former case, the applicant had alleged an infringement of fundamental rights, namely the principle of non-discrimination and the principle of good faith. It is also in line with the spirit of the EU Treaty and Article 46 EU more in particular. Despite the fact that Article 46 EU excludes the CFSP from the jurisdiction of the Court of Justice, it follows from Article 46(1)(d) in conjunction with Article 6(2) EU that the Court can review the compatibility of "[CFSP]- action of the institutions" with fundamental human rights. See also Lenaerts, "Fundamental Rights in the European Union", (2000) EL Rev. 25(6), 575, esp. at 576-577.As mentioned, the Supreme Court does not apply the political question doctrine when it is alleged that individual rights are infringed.

[131] As regards the intensity of judicial review, it seems that the Court of Justice does not treat external relations as being any different to internal matters. However, this does not mean that the Court will always interpret international agreements in accordance with the ordinary meaning given to its terms. See e.g. MacCleod, Hendy and Hyett, *The External Relations of the European Communities*, (Clarendon Press, Oxford 1996), at 140-141.

Court in the *LAISA* cases essentially held that amending the conditions for the accession of new Member States was "textually committed" to the Council, whereas the Court, in *Mattheus v. Doego,* rejected a review of the matter concerned on the ground that there were no judicial standards for judicial review (yet) and should therefore be left to the "political negotiation process".[132]

3.3. Internal rules of the political institutions

3.3.1. Introduction

A second area in which the Supreme Court has applied the political question doctrine is congressional self-governance. The Supreme Court has considered that congressional decisions relating to its own processes and members should not be reviewed by the federal judiciary. However, as in the other areas mentioned above, the Supreme Court has been somewhat inconsistent both as regards applicability and scope. The seminal case in this area is *Field v. Clark*, in which it was alleged that the version of a statute which was signed by the President omitted a section that had been included in the version approved by both the House of Representatives and the Senate. The plaintiffs intended to prove this fact by reference to the legislative "Journals" that the Constitution explicitly requires each house to keep as a record of its proceedings.[133] The Supreme Court held, however, that it could not review this matter because it presented a political question. The Supreme Court argued:

> "The signing by the speaker of the House of Representatives, and by the president of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. The respect due to coequal and independent departments requires the judicial department to act upon that

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[132] See the Opinion of Advocate General Darmon in Case 241/87, *Maclaine Watson & Company Limited v. Council and Commission* [1990] ECR I-1797, fn. 75. See also: Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, para. 18; Joined Opinions of Advocate General van Gerven in Case C-57/93, *Anna Adriaantje Vroege v. NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1994] ECR I-4541 and Case C-128/93, *Geertruida Catharina Fisscher v. Voorhuis Hengelo BV and Stichting Bedrijfspensioenfonds voor de Detailhandel* [1994] ECR I-4583; and the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-30/02, *Recheio - Cash & Carry SA v. Fazenda Pública/Registo Nacional de Pessoas Colectivas* [2003] ECR I-6051.

[133] Article I, Section 5 of the United States Constitution, the so-called "Journal Clause".

> assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated, is in conformity with the constitution".[134]

Field v. Clark is the only case in which the Court has held that challenges to Congressional procedures were not justiciable.[135] The Court has on all other occasions dismissed such claims.[136] Nevertheless, *Field v. Clark* does illustrate that there is a normative question for the courts to consider. This section will therefore examine to what extent the Court of Justice judicially reviews the internal rules of the political institutions of the European Union.

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[134] [1892] 143 U.S. 649, 672.

[135] See Fisk and Chemerinsky, "The Filibuster", 49 Stan. L. Rev. 181 (1996-1997), at 226. For a discussion of some similar cases of lower courts, see Miller, "The Justiciability of Legislative Rules and the "Political" Political Question Doctrine", 78 *California Law Review* 1341 (1990).

[136] As mentioned above, the Court in *Powell v. McCormack* rejected the argument that the case presented a political question because the Constitution provided that "each House shall be the Judge of the … Qualifications of its Members". Along the same lines, the Court in *Roudebush v. Hartke* dismissed arguments based on the same Constitutional provision, which also provides that each house shall be the judge of the elections of its Members" (405 U.S. 15 (1972)). In *U.S. Department of Commerce v. Montana,* the Court – *inter alia* referring to Gilligan – dismissed the government's argument that Congress' selection of an apportionment method presented a political question. It held that "respect for a coordinate branch of Government raises special concerns not present in our prior cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it" (503 U.S. 442, (1992), at 459). Finally, in *United States v. Munoz-Flores*, the Supreme Court held that it could review a federal statute for violating the Constitution's Origination Clause, which provides that all bills for raising revenue shall originate in the House of Representatives. The statute concerned, which required courts to impose a monetary "special assessment" on defendants who pleaded guilty to federal misdemeanours, arose in the Senate and not in the House of Representatives. Congress argued that since there were no judicially manageable standards to decide the case, it was non-justiciable. The Court, although reiterating that the Political Question doctrine was "designed to restrain the Judiciary from inappropriate interference in the business of the other branches", rejected this argument (495 U.S. 385, at 386). It held that "the courts must develop standards for making the revenue and origination determinations, but the Government suggests no reason that developing such standards will be more difficult in this context than any other" (Id. at 395-396).

3.3.2. The principle of institutional autonomy

According to the principle of institutional autonomy each institution has the authority to determine its own organisation and internal decision-making procedure, provided that it complies with the principles and the rules laid down in the Treaties. The Court of Justice has in several cases stressed the importance of the principle of institutional autonomy for the Commission,[137] the Council,[138] the European Parliament,[139] and the other Community institutions such as the European Investment Bank.[140] The Court of Justice has furthermore held that the principle of institutional autonomy can be overruled by both the principle of institutional balance[141] and the principle of sincere cooperation, as have been discussed in the previous Chapter.[142]

It follows from the principle of institutional autonomy that each Community institution has the power to adopt its own rules of procedure,[143] with the well known exceptions of the Court of Justice,[144] the Court of First Instance,[145] the Civil Service Tribunal and other judicial panels yet to be created,[146] and the Court of Auditors,[147] whose

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[137] See e.g. Case 5/85, *AKZO* v. *Commission* [1986] ECR 2585, paras 37-40.
[138] Case C-58/94, *Netherlands v. Council* [1996] ECR I-2169, paras 37-43.
[139] See, next to the cases cited in the subsequent notes, the Order in Case 78/85, *Group of the European Right v. Parliament* [1986] ECR 1753, para. 11; and Joined Cases 358/85 and 51/86, *France v. Parliament* [1988] ECR 4821, paras 32-42.
[140] Case C-15/00, *Commission v. European Investment Bank* [2003] I-7281, paras 67-68.
[141] Case 149/85, *Wybot v. Faure et al*. [1986] ECR 2391, para. 23.
[142] This follows – indirectly – from Special Aid for Turkey, in which the Court held that the discretionary powers were limited by the principle of sincere cooperation to ensure that the institutions did not exercise these powers "in a manifestly wrong or arbitrary way". This is also true for the vertical application of the principle of sincere cooperation, see Case 230/81, *Luxembourg v. European Parliament* [1983] ECR 255, para. 38. That the principle of institutional autonomy can be overruled by both the principle of institutional balance essentially already followed from the *Algera* case, in which the Court held that each institution has the right to organize autonomously its own activities, but added that this did not thwart "the need to harmonize the life of the four institutions" (op. cit. *supra* note 73)
[143] See Case 230/81, *Luxembourg v. European Parliament* [1983] ECR 255, para. 38 and Article 199 (European Parliament), Article 207(3) (Council), Article 218(2) (Commission), Article 260 (Economic and Social Committee), and Article 264 (Committee of the Regions).
[144] Article 223 EC.
[145] Article 224 EC.
[146] Article 225(a) EC.

Rules of Procedure need the approval of the Council. Although by their object one might presume that these Rules of Procedure only have internal effect, the Court of Justice has on several occasions stressed that they can have legal consequences vis-à-vis third parties. In fact, the Rules of Procedures of the various institutions even have a "very high ranking in the hierarchy of norms" used for judicial review.[148]

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[147] Article 248(2) EC. At the Justice and Home Affairs Council Meeting on April 19-20, 2007, the Council approved, by qualified majority, the Rules of Procedure of the Civil Service Tribunal. See Council Document 7844/07.

[148] Levefre, "Rules of Procedure do Matter: The Legal Status of the Institutions Power of Self-Organisation", 30(6) EL Rev. 3 (2005). As in the area of case law discussed in the previous section, the approach of the Court of Justice in this area seems somewhat inconsistent. For instance, in Case 230/81, *Luxembourg v. Parliament* [1983] ECR 255, the Court held that, pursuant to the power to determine its own internal organization, the European Parliament was allowed to adopt a resolution by which it decided to hold its part-sessions in Strasbourg and its committee and political group meetings in Brussels. Yet in a subsequent case, the Court did strike down a decision by which, in line with its previous one, it decided to divide up the staff of the Secretariat in the most rational manner among the places of work (Case 108/83, *Luxembourg v. Parliament* [1984] ECR 1945, para. 19). For a further discussion, see Bradley, "Maintaining the Balance: the Role of the Court of Justice in Defining the Institutional Position of the European Parliament", 24 CML Rev. 41 (1987), at 58-60. A second example: the Court has held that the European Parliament is authorized, under the power of internal organization, to take "appropriate measures to ensure the proper functioning and conduct of its proceedings", but it at the same time made clear that these measures must respect the competence of the Governments of the Member States (Case C-345/95, *France v. Parliament* [1997] ECR I-5215, para. 31; and Joined Cases C-213/88 and C-39/89 *Luxembourg v. Parliament* [1991] ECR I-5643, para. 29). A third example: in *Les Verts*, the Court held that a financing scheme which purported to permit an effective dissemination of information concerning the European Parliament and its political groupings in the run-up to the 1984 Parliamentary elections did not come within that power of internal organization, since it could not be distinguished from a scheme providing for the flat-rate reimbursement of election campaign expenses, the setting up of which remained within the competence of the Member States (Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, paras 46-47). On the other hand, the Court has also emphasized that the Member States have the duty, in exercising their competence to determine the seat of the institutions, to respect the European Parliament's power to determine its own internal organization and to ensure that such decisions do not stand in the way of the proper functioning of that institution (Joined Cases 358/85 and 51/86, *France v. Parliament* [1988] ECR 4821, para. 35).

3.3.3. Rules of Procedure producing external effects

The Court has consistently held that the failure to comply with a rule of procedure producing external effect must be regarded as an infringement of an essential procedural requirement within the meaning of Article 230 EC. For instance in Case 68/86, the Court held that the Council was under a duty to comply with its Rules of Procedure and could not depart from a procedural rule, not even on the basis of a larger majority than is laid down for the adoption or amendment of the Rules of Procedure, unless it formally amended those rules. The case concerned a decision by the Council to adopt a Directive contrary to the votes of the United Kingdom and Denmark by means of the written procedure before December 31, 1985. On December 23, 1985 the Secretary-General of the Council sent a telex message to the British Minister for Agriculture asking for the United Kingdom's vote – before December 30, 1985, at 16.00 hours – on the directive in accordance with the written procedure. In a letter dated December 31, 1985, the United Kingdom replied that it opposed the use of the written procedure as well as the Directive itself. On the same day, the United Kingdom was notified that the directive had been adopted by way of the written procedure. The Court held that the Council had failed to comply with Article 6 (1) of the Council's Rules of Procedure. This constituted an infringement of an essential procedural requirement within the meaning of 230 (1) EC.[149]

3.3.4. Rules of Procedure not producing external effects

In Case 68/86, the Court did not consider the admissibility of the action – for instance on the ground that the Rules of Procedure lacked external effect – essentially because no admissibility points were raised by the Council.[150] This was considered, however, in the *Front National* case,[151] in which the Presidents of – the other – political groups within the European Parliament had raised objections concerning the formation of a

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[149] Case 68/86, *United Kingdom v. Council* [1988] ECR 885.

[150] The Council did argue, in its written submissions, that the action was inadmissible because the United Kingdom had no interest in bringing the action. It argued that it might be assumed that if the Directive were annulled a measure of identical substance would be adopted. The Advocate General argued that to proceed on the basis of such considerations seemed to him to be "ill-advised". Even if the Directive were to be annulled, a decision on this matter would then have to be taken involving two further Member States. Given that fact alone, it was not certain that a measure identical in substance to the annulled measure would actually be adopted. Unfortunately, the Court did not consider any points of admissibility (Opinion, para. 13).

[151] Case C-486/01 P, *Front national v. European Parliament*, [2004] ECR I-6289.

political group of independent MEPs – the so-called Groupe Technique des Députés Indépendants (hereinafter: "TDI Group"). Since it was argued that the persons composing the TDI Group lacked political affinities between them, the European Parliament's Committee on Constitutional Affairs was called upon to give an interpretation of Article 29(1) of the Rules of Procedure of the European Parliament, which stipulated that Members of the European Parliament might form themselves into groups according to their political affinities. The Committee on Constitutional Affairs decided that the formation of the group was not acceptable within the meaning of this Rule, since it openly rejected any political character and all political affiliation between its Members. The European Parliament subsequently adopted an act by which the rules of the TDI Group were declared incompatible with Article 29 of its Rules of Procedure.

The Front National claimed that it was adversely affected by this act and therefore brought an action to annul this decision before the Court of First Instance. The Court of First Instance declared this action admissible – though dismissing it as unfounded – on the ground that the contested act was capable of forming the subject-matter of a review as to its legality by the Community judicature, since it had legal consequences as regards the conditions under which Members might exercise their electoral mandate.[152] The Front National subsequently appealed before the Court of Justice. In a cross-appeal, the European Parliament claimed that the action was inadmissible, because the contested act only regulated the situation of certain MEPs and produced no legal effects with regard to third parties such as a national political party. The European Parliament argued that if the proposition that the contested act also produced legal effects with regard to a national political party such as the Front National were accepted, the Members of the European Parliament would amount to no more than intermediaries between the European Parliament and their party, with no independence or responsibility of their own. This would constitute a clear infringement of the principle of the independence of the European electoral mandate as laid down in the 1976 Act on the election of representatives to the European Parliament by universal suffrage.

The Court held that although it could not be denied that no implementing measure was necessary for the contested act to produce effects, there was also no question that, pursuant to the actual wording of Rule 29, the act could produce effects only on the legal situation of Members of the European Parliament and not on that of national political

[152] Joined Cases T-222/99, T-327/99 and T-329/99, *Martinez and others v. European Parliament* [2001] ECR II-2823.

parties from whose lists those Members were elected. Such an act could therefore not directly produce effects for the legal situation of the Front National. The Court of First Instance therefore erred in law in holding that the contested act directly affected the Front National.[153]

In *Front National*, the Court essentially scrutinized the Rules of Procedure to conclude that Article 29(1) of the Rules of Procedure did not produce legal effects vis-à-vis the *Front National.*[154] The Court could also have held, as the European Parliament had argued at first instance, that the act was simply not amenable to judicial review because of the nature of the Rules of Procedure. This would not have been an entirely fictional scenario, since, in two earlier cases also involving far-right, nationalist MEPs, the Court had stressed that it could not review Rules of Procedure which were concerned only with the internal organization of the work of the European Parliament.

The *Group of the European Right* case concerned a political group formed within the European Parliament from the members elected on the lists of the Front D'Opposition Nationale Pour L' Europe des Patries, the Movimento Sociale Italiano - Destra Nazionale and the Greek EPEN. This group asked the Court of Justice to annul a Decision taken by the President of the European Parliament, which held admissible a motion setting up a committee of inquiry into the rise of fascism and racism in Europe. The motion was taken in accordance with Rule 95 of the European Parliament's Rules of Procedure. The group claimed that the Decision of the President of the European Parliament was contrary to this rule. The Court of Justice held, however, that the action was inadmissible because this Decision was not such as to produce legal effects vis-à-vis third parties. The Court held that the committees of inquiry which might be set up on a motion under Rule 95 have only investigatory powers. Therefore, the acts relating to their setting up concerned only the internal organization of the work of the European Parliament.[155]

These arguments were reiterated by the Court in the *Blot* case. In this case, Mr Blot, an MEP belonging to the Group of the European Right, brought an action under Article 230 EC together with the Front National for the annulment of three measures adopted by the European Parliament concerning, respectively, the calling of a meeting on January 16, 1990 of

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[153] Consequently, the Court dismissed the action which the Front National had brought before the Court of First Instance as inadmissible.

[154] See also: Order in Case C-488/01 P, *Martinez v. Parliament* [2003] ECR I-13355.

[155] Order in Case 78/85, *Group of the European Right v. European Parliament* [1986] ECR 1753.

the European Parliament's Interparliamentary Delegation for relations with Switzerland, the procedure for the appointment of the chairman of that delegation, and the appointment on that same day of Mr Topmann as chairman of the delegation. The applicants argued that a document of October 9, 1989 giving the names of the chairmen forwarded by the political groups made it clear that Mr Blot was appointed as chairman of the delegation. They claimed that the election of Mr Topmann – a member of the Socialist Group – was the result of a "fraudulent intrigue", arguing that the procedure for appointing him was invalid on the ground that it infringed the Rules of Procedure of the European Parliament and the principle of equality. The Court held, however, that it could not review the propriety of the procedure by which the chairman of an interparliamentary delegation was appointed. The Court held that the powers of the interparliamentary delegations were limited to matters of information and contact and that measures relating to the appointment of their members and the election of their chairmen concerned solely the internal organization of the work of the European Parliament.[156]

3.3.5. Other internal rules of the European Parliament

Since the rules of procedure are founded on the principle of institutional autonomy, it logically follows that this judicial restraint is not necessarily limited just to Rules of Procedure, especially since – as mentioned above – the Court has consistently held that the principle of institutional autonomy included Parliament's power to adopt "*appropriate measures* to ensure the proper functioning and conduct of its proceedings".[157] In the *Weber* case, the Court pointed out that in *Group of the European Right* and *Blot*, it had held that measures which related only to the internal organization of the work of the European Parliament could not be challenged in an action for annulment. It now held that that class of measures "include[d] measures of the European Parliament which either do not have legal effects or have legal effects only within the European Parliament as regards the organization of its work and are subject to review procedures laid down in its Rules of

[156] Order in Case C-68/90, *Blot and Front national v. Parliament* [1990] ECR I-2101.

[157] Case 230/81, *Luxembourg v. Parliament* [1983] ECR 255, para. 38; Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, para. 44. Joined Cases C-213/88 and C-39/89, *Luxembourg v. Parliament* [1991] ECR I-5643, para. 29. Case C-345/95 *France v. European Parliament* [1997] ECR I-5215, para. 31. See also: Joined Cases T-83/99, T-84/99 and T-85/99, *Carlo Ripa di Meana, Leoluca Orlando and Gastone Parigi v. European Parliament*, ECR [2000] II-3493. Emphasis added.

Procedure".[158] The Court hence did not exclude the possibility that other measures would also fall within this class of measures.[159]

A similar conclusion followed from *Les Verts-II*. As mentioned, in *Blot* the Court referred to its decision in the first *Les Verts* case[160] that an action for annulment might lie only against those measures of the European Parliament which were intended to have legal effects vis-à-vis third parties. In a follow-up case, the Court was in fact asked to annul "all the Decisions implementing the 1984 budget of the European Economic Community in respect of item 3708". The Court of Justice held, however, that measures relating to commitments of expenditure and validating, authorizing or implementing the payment of expenditure had only internal legal effects within the administration, and so gave rise to no rights or obligations on the part of third parties. They therefore did not constitute Decisions adversely affecting any person and the action was therefore dismissed as inadmissible.[161]

3.3.6. Internal rules of the other political institutions

In the *Stability and Growth Pact* case[162] as discussed in the previous Chapter,[163] the Commission brought an action under Article 230 EC for

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[158] Case C-314/91, *Weber v. European Parliament,* [1993] ECR I-1093, para. 10. Emphasis added.

[159] See also: T-17/00, *Rothley and Others v. Parliament*, ECR 2002, II-579 and the Orders in *Stauner and Others v. Parliament and Commission*: T-236/00, 1 and 3, paras 54-55; T-236/00 RII_1 and RII_3, para. 51; and T-236/00 R_1, para. 43.

[160] Case 294/83 *Parti écologiste "Les Verts" v. European Parliament* [1986] ECR 1339.

[161] Case 190/84, *Parti écologiste "Les Verts" v. European Parliament* [1988] ECR 1017. Another important case in this context is Case C-208/03 P, *Le Pen v. European Parliament* [2003] ECR I-7939. Mr Le Pen challenged a declaration of the President of the European Parliament disqualifying him from holding office as a Member of the European Parliament following a criminal conviction. He argued that that declaration was not intended to produce legal effects of its own. The Court of Justice, referring to *Les Verts,* reiterated that, in order to determine whether an act may be the subject of a challenge in an action under Article 230 EC, it is the substance of the act in question and the intention of its author which should be taken into account. The Court held that the form in which an act or decision is adopted is in principle irrelevant. The Court found that whilst, from that perspective, it could not therefore "be excluded that a written communication, or even a mere oral statement, are subject to review by the Court under Article 230 EC, that possibility cannot extend to an infringement of the rules and procedures governing the election of members of Parliament" (para. 47).

[162] Case C-27/04, *Commission* v. *Council* [2004] ECR I-6649.

the annulment of a series of measures taken by the Council in connection with the excessive deficit procedures initiated in relation to France and Germany under Article 104 EC. In 2003, the Commission recommended that the Council take decisions under Article 104(8) EC in relation to Germany and France. At a meeting on November 25, 2003, the Council decided not to adopt these recommendations. Instead, it adopted "conclusions" which "welcome[d] the public commitment by [the Member State concerned] to implement all the necessary measures to ensure that the deficit will be below 3% of GDP in 2005 at the latest". These conclusions stipulated that the Council agreed to hold the excessive deficit procedure in abeyance for the time being. The Council declared itself ready to take a decision under Article 104(9) EC if it were to appear that the Member State concerned was not complying with the commitments which it had entered into.

The Commission sought to annul these conclusions, but the Council argued that this application was inadmissible "because in reality it relates to purely political acts, the adoption of which is at the discretion of the Council".[164] It argued that the conclusions did not in any way prejudice the Commission's rights and powers, since their sole aim and effect was to record the situation reached in the ongoing excessive deficit procedures.

The Court of Justice disagreed, however. Referring to *ERTA,* the Court reiterated that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.[165] In examining whether the Council's conclusions were intended to have such effects, the Court noted that the decisions to hold the ongoing excessive deficit procedures in abeyance were conditional on compliance with the commitments made by the Member States concerned. Contrary to the Council's claims, they did not merely confirm that the procedures were de facto held in abeyance. Furthermore, the commitments in question were unilateral commitments, made by the two Member States concerned outside the framework of the recommendations previously decided upon under Article 104(7) EC. The Council thus rendered any decision to be taken under Article 104(9) EC conditional on an assessment which would no longer have the content of the recommendations adopted under Article 104(7) EC as its frame of reference, but the unilateral commitments of the Member State concerned. According to the Court, the Council thus in

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[163] See section 4.4.4.
[164] Opinion AG, para. 53.
[165] Case 22/70, *Commission v. Council* [1971] ECR 263, para. 42. See also Case C-316/91, *Parliament v. Council* [1994] ECR I-625, para. 8.

reality modified the recommendations previously adopted under Article 104(7) EC. It followed that the Council's conclusions were intended to have legal effects.

3.3.7 Conclusion

Although, of course, the Court of Justice did review the conclusions, it follows *a contrario* from the *Stability and Growth Pact* case that had these conclusions not produced legal effects they would have fallen outside the Court's scope of review. This implies that the aforementioned case law with regard to internal rules of the European Parliament also applies to the internal rules of the Council. Other case law seems to suggest that this conclusion also applies to the internal rules of the Commission.[166]

It follows from these cases that the Court will deny any review of measures of the political institutions which only produce internal legal effects, or do not produce any legal effects at all.[167] This is, on the one hand, a confirmation of, but, on the other, also an important limit to its *ERTA* case law – as codified in Article 230(1) – according to which an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.[168] Overall, the Court of Justice has used judicial restraint when asked to review internal matters of the European Union's political institutions. The Court of Justice will deny a review of all measures of the institutions which only produce internal legal effects,

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[166] This follows – albeit only indirectly – from the PVC cases (Case C-137/92 P, *Commission v. BASF* (*PVC-I*) [1994] ECR I-2555, paras 72-79; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and others v. Commission* [2002] ECR I-8375, paras 45 and 46).

[167] Another important case in this context is Case C-470/00 P, *European Parliament v. Ripa di Meana and others* [2004] ECR I-4167, which concerned two letters from the College of Quaestors of the European Parliament rejecting an application by former MEPs Mr Ripa di Meana and Mr Orlando to join the Members' provisional pension scheme retroactively. The question was whether the Court could review the action for annulment. The Court argued that where such letters affected the specific financial situation of the Member concerned, they constituted measures having legal effects going beyond the internal organisation of the work of the European Parliament and could *therefore* be made the subject-matter of an action for annulment.

[168] Case 22/70, *Commission v. Council* [1971] ECR 263, para 42; See also Case 60/81, *IBM v. Commission* [1981] ECR 2639, para. 9; Joined Cases C-181/91 and C-248/91*, European Parliament v. Council and Commission* [1993] ECR I-3685, para. 13.

irrespective of the form by which they were adopted. Since the Court has based this limit to its scope of judicial review on the principle of institutional autonomy – which also applies to the other institutions – it is reasonable to presume that this case law also applies to decisions of the other institutions of the European Union. It is clear from the outset that this judicial restraint is based on Separation of Powers considerations. Essentially, the Court of Justice infers this restraint vis-à-vis the political institutions from its own task as laid down in Articles 220 and 230 EC. This also follows from the *Weber* case, in which the Court, referring to *Les Verts I*, [169] *Group of the European Right* and *Blot*, held:

> "As regards the admissibility of the claim for annulment, the Court observes that the European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. As the Court held in [*Group of the European Right* and *Blot*], measures which relate only to the internal organization of the work of the European Parliament cannot be challenged in an action for annulment".[170]

As demonstrated in the previous Chapter, within the European Union in general and the case law of the Court of Justice more specifically the concept of the rule of law does not include the notion of Separation of Powers. Neither did the "basic constitutional charter" contain such a system.[171] Rather, the rule of law is used here to define the Court's own role vis-à-vis these political institutions. To judicially review rules with no external legal effect would be contrary to the Court's role of stating what the law is.

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[169] In *Blot*, the Court also referred to *Les Verts I,* but this reference was limited to its holding that an action for annulment might lie only against such measures of the European Parliament as were intended to have legal effects vis-à-vis third parties.

[170] Case C-314/91, *Weber v. European Parliament* [1993] ECR I-1093.

[171] Which was also rejected in Joined Cases 188/80 to 190/80, *France, Italy and United Kingdom* v. *Commission* [1982] ECR 2545, para. 6.

3.4. Complex assessments by one of the political institutions

3.4.1. Introduction

A third area where the Supreme Court has considered the application of the political question doctrine concerns instances where the Court could not shape effective equitable relief. As mentioned, in *Gilligan v. Morgan*, the Court argued that the supervision of the National Guard was textually committed by the Constitution and therefore presented a political question. Chief Justice Burger, however, also argued that to review the case

> "would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies … Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so".[172]

The distinction between legal and equitable remedies underlying the argument by Chief Justice Burger that it could not shape effective equitable relief is of course a typical aspect of common law systems. which, prima facie, makes this area of the case law of the Supreme Court difficult to compare with the case law of the European Court of Justice. Nevertheless, it is clear that the application of the political question doctrine by the Supreme Court in this area is closely related to its main function of Separation of Powers. In *Gilligan*, the Supreme Court pointed out that "the complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches".[173] In other words, the Supreme Court essentially held that the case was non-justiciable because it admitted that it was "effectively incapable of questioning the expertise of the professionals involved in the making of the original decisions".[174] The Supreme Court hence tried to avoid excessive judicial interference in the domain of the political and legislative branches of

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[172] [1973] 413 U.S. 1, at 8. .
[173] Id. at 10.
[174] Redish, op. cit. *supra* note 8, at 1056.

government by reviewing complex assessments of one of these branches. This section will therefore analyze whether there are instances in which the Court of Justice has used judicial restraint on the ground that it was effectively incapable of reviewing complex assessments of one of the political institutions of the European Union.

3.4.2. Rejections of restraint

As in the other two areas of the case law discussed here, the European Court of Justice at first sight showed little willingness to use restraint, even when called for by the Advocate General. For instance, in the *Golden Share* cases, Advocate General Ruiz-Jarabo Colomer advocated a marginal interpretation of Article 295, although "aware … that the interpretation which I propose is tinged by a degree of what has come to be called judicial restraint.[175] Although this restraint concerned deference towards the Member States rather than the political institutions, the Advocate General argued that this restraint was required by the economic reality of the various sectors of activity subject to the privatization process. In the absence of specific legislation, the Court of Justice was, according to the Advocate General, "ill-equipped to carry out complex evaluations of economic policy; it does not have the necessary resources, nor is that its task".[176]

The Court of Justice admitted that – depending on the circumstances – certain concerns might justify the retention by Member States of a degree of influence within undertakings that had been privatised. However, those concerns could not entitle Member States to plead their own systems of property ownership, referred to in Article 295 EC, by way of justification for obstacles, resulting from a system of administrative authorisation relating to privatised undertakings, to the exercise of the freedoms provided for by the Treaty. The Court concluded that this provision did not therefore have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty. [177]

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[175] Joined opinion of Advocate General Ruiz-Jarabo Colome in Case C-367/98, *Commission v. Portugal*, Case C-483/99, *Commission v. France*, and Case C-503/99, *Commission v. Belgium* [2002] ECR I-4731, at para. 72.

[176] Id.

[177] Another example is in the *Stability and Growth Pact* case discussed above (op cit. supra note 171). As mentioned, in this case the Council stressed the political nature of its conclusions to dispute the admissibility of the action of the Commission. It subsequently "recalled the observations" with regard to the substance of the action (para. 56). The Council added that even if the Court were to annul its conclusion, this would not "alter in fact or in law the state of the ongoing excessive deficit procedures" (Id., para. 57). The Court, however,

3.4.3. Marginal review of complex assessments

On the other hand, the Court has in several cases used a clear form of marginal review when the Commission had wide discretion with regard to certain complex assessments. For instance, in the recent *Sison* case, the Court stressed that with regard to the judicial review of the proportionality principle, "the Community Legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments".[178] Furthermore, in its competition case law, the Court has held that when reviewing competition analyses by the Commission, it must take into account a certain margin of discretion, which is "justified by the complexity of the economic rules to be applied".[179] This deference is also notable in the field of the common transport policy.[180]

As early as 1975 the Court of Justice – in the *Deuka* case – established that it could not, when examining the lawfulness of complex assessments, substitute its own evaluation of the matter for that of the

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referring to "the importance that the framers of the Treaty attached to observance of budgetary discipline and by the aim of the rules laid down for applying budgetary discipline", held that those rules were to be given an interpretation which ensured that they were fully effective. Although the Court admitted that "responsibility for making the Member States observe budgetary discipline lies essentially with the Council", it nevertheless reviewed the excessive deficit procedure in full. The Court reiterated that the Council had discretion on the basis of a different assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned. The Court nevertheless held that the wording and the broad logic of the system established by the Treaty implied that the Council could not escape from the rules laid down by Article 104 EC and could therefore not have recourse to an alternative procedure.

[178] Case C-266/05, *Sison v Council* [2007] ECR I-1233. See also Case C-344/04, *IATA and ELFAA* [2006] ECR I-403, para. 80; Case C-84/94, *United Kingdom v. Council* [1996] ECR I-5755, para. 58; Case C-233/94, *Germany v. Parliament and Council* [1997] ECR I-2405, paras 55 and 56; Case C-157/96, *National Farmers' Union and Others* [1998] ECR I-2211, para. 61; and Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] I-11453, para. 123.

[179] Case C-12/03 P, *Commission v. Tetra Laval* [2005] ECR I-987, paras 38 to 40; see also Case T-158/00, *ARD v. Commission* [2003] ECR II-3825, paras 328 and 329; Case T-102/96, *Gencor v. Commission* [1999] ECR II 753, para. 163. For a recent example see: Case C-202/06 *P, Cementbouw Handel v. Commission* [2007] ECR I-12129, paras 53-54.

[180] See: Joined Cases C-248/95 and C-249/95, *SAM Schiffahrt and Stapf* [1997] ECR I-4475, para. 23, and Joined Cases C-27/00 and C-122/00, *Omega Air and Others* [2002] ECR I-2569, para. 63.

competent authority. The Court held that it must restrict its review to examining whether the evaluation of the competent authority contains a patent error or constitutes a misuse of powers.[181] In several cases since, the Court has stressed that when the Treaty conferred on the Commission a wide discretion the exercise of which involved economic and social assessments which must be made in a Community context, a judicial review of the manner in which that discretion is exercised must be limited. The Court will confine its review to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with, to verifying the accuracy of the facts relied on and to reviewing whether there has been an error of law, misuse of powers, or a manifest error of assessment with regard to the facts.[182]

Probably the first policy area in which the Court has used this form of marginal review was in its case law on the Common Agricultural Policy. The Court of Justice has held repeatedly that when the Council had been entrusted with a discretionary power in this policy area – in the sense that certain "political responsibilities"[183] were imposed upon it – the Court of Justice would only use a marginal form of review and would only examine whether the measure was in conformity with the proportionality principle. The Court has on several occasions stressed that

> "the Community Legislature has a wide discretion where the common agricultural policy is concerned, corresponding to the political responsibilities given to it by Articles 34 to 37 EC. Consequently, judicial review by the Community Court must be limited to verifying that the measure in question is not vitiated by any manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of its discretion".[184]

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[181] Case 5/75, *Deuka* [1975] ECR 777.

[182] See e.g. Case C-372/97, *Italy v. Commission* [2004] ECR I-3679; Case C-114/00, *Spain v. Commission* [2002] ECR I-7657; and Case C-351/98, *Spain v. Commission* [2002] ECR I-8031.

[183] Case C-331/88, *Fedesa and others* [1990] ECR I-4023, para. 14; Case 265/87, *Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau* [1989] ECR 2237, para. 4; Case 179/84, *Bozzetti v. Invernizzi SpA and Ministero del Tesoro* [1985] ECR 2301, para. 30. The Court of First Instance has extended this line of case law to antidumping duties, see Case T-162/94 *NMB France and Others v. Commission* [1996] ECR II-427, para. 70.

[184] Case C-310/04, *Spain v. Council* [2006] ECR I-7285; see furthermore Case C-189/01, *Jippes and Others* [2001] ECR I-5689, para. 80; Case 265/87, *Schraeder* [1989] ECR 2237, paras 21 and 22; and Case 179/84, *Bozzetti v. Invernizzi* [1985] ECR 2301.

This deference of the Court of Justice towards the Council could already be found in the 1979 *Stölting* case,[185] in which the Court was asked to rule on the validity of Council Regulation 1079/77 on the charging of a co-responsibility levy in the milk sector. The referring court asked whether this regulation was invalid, because the EEC Treaty contained no power under which it could be adopted. The Regulation was based on Article 43 EEC (now Article 37 EC), but the plaintiff denied that that provision authorized the Community institutions to charge a levy on the production of milk. The Court held, however, that the Council was entitled to use Article 43 EEC as a legal basis, since it followed from the Preamble to this Regulation that the regulation was intended to contribute to the stabilization of the markets in question, which was one of the objectives of the CAP.

The Court of Justice subsequently considered the argument of the plaintiff that the adoption of a co-responsibility levy had the effect of reducing the production of milk and thus stabilizing the market. In his submission, the charging of such a levy had the effect not of reducing production and supply but on the contrary of encouraging their growth. The Council and the Commission challenged these arguments. The Court pointed out that this difference of opinion concerned in particular the expediency and effectiveness of the measure adopted in the regulations in question. It argued that if a measure was "patently unsuited" to the objective which the competent institution sought to pursue, this might affect its legality, but nevertheless held that "the Council must be recognized as having a discretionary power in this area *which corresponds to the political responsibilities which Articles 40 and 43 impose upon it*".[186] The Court subsequently reviewed the regulation only marginally. It concluded *inter alia* that the level of the rate of levy did not "appear to be disproportionate in relation to the facts referred to by the Council". Consideration of the aforementioned arguments therefore "disclosed no factor of such a kind as to affect the validity of Regulation 1079/77".[187]

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[185] Case 138/78*, Stölting v. Hauptzollamt Hamburg-Jonas,* [1979] ECR 713, para. 7.

[186] *Stolting*, id., para. 7 (emphasis added).

[187] Id. The Court was also asked to rule on the validity of Commission Regulation 1822/77, but since this was a measure which implemented Regulation 1079/77, the same conclusion applied as to Regulation 1822/77.

3.4.4. Conclusion

On the one hand, the Court has repeatedly stressed, as in its case law on the principle of institutional autonomy, both the wide scope and the limits of the discretionary powers of the political institutions. This has played an important role in defining the extent of these powers.[188] On the other hand, the Court has used a qualified form of reviewing complex assessments of the political institutions when such assessments were based on discretionary powers of the political institutions. Although not completely denying the possibility of a review, the Court of Justice does use a marginal form of review which is clearly based on Separation of Powers considerations.

As the Court held in *Sison,* its deference towards the political institutions when asked to review complex assessments is based on an acknowledgment that such assessments often "involve political, economic and social choices on its part".[189] In many of these cases, the Court explicitly based its restraint on the ground that it was not able to effectively review due to the complexity of the assessments involved and it was – therefore – more appropriate for the political institutions of the Community to resolve the matter in question.

3.5. Conclusion

The question whether there is a political question doctrine in the European Union is perhaps as difficult to answer as the question whether there is one in the United States. All three areas of case law discussed in this section show important signs of both judicial activism and judicial restraint. Nevertheless, it is possible to conclude from the case law discussed that the Court of Justice has indeed in all three areas used judicial restraint, sometimes using a marginal form of review, in other cases holding the question to be non-justiciable by considering that the case in question was inadmissible. In the previous Chapter, it was demonstrated that the Court has played an important role with regard to the relationship between the European Union's political institutions, by

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[188] The Court of Justice has, for instance, also consistently held that the Commission has a wide margin to resolve the technical and economic problems caused by the calculation of the incidence on the prices of dependent products of the monetary compensatory amount fixed for a basic product, at the same time again stressing that that discretion "which may even extend to general assessments … nevertheless has limits". See: Case 4/79*, Société Coopérative 'Providence Agricole de la Champagne' v. ONIC* [1980] ECR; Case 109/79, *Sàrl Maïseries de Beauce v. ONIC* [1980] ECR 2883; and Case 145/79, *Roquette Frëres v. French Customs Administration* [1980] ECR 2917.

[189] Op. cit. *supra* note 178.

creating what essentially could be referred to as a judge-made system of Separation of Powers. As demonstrated in the present chapter, the Court of Justice has at the same time also delineated its own role *vis-à-vis* these political institutions.

As mentioned, for Chief Justice Marshall, when a court decided that a case presented a non-justiciable political question this was part and parcel of its duty to say what the law is – and what it is not. Essentially the same line of reasoning is used by the Court of Justice in *Weber;* the Court inferred from its task of ensuring "that in the interpretation and application of the EC Treaty the law is observed" a similar role vis-à-vis the European Union's political institutions. Again to quote the Court of Justice in *Weber,* the Court acknowledged that its task was to review "the *legality* of measures adopted by the institutions" – to say what the law is, not to review measures which only produce internal legal effects or no effects at all, or, in its case law on complex assessments, which belonged to the political responsibilities of these institutions.

- IV -

DIVISION OF POWERS

1. Introduction

1.1. Main question

More than any of its predecessors, the Treaty of Lisbon tries to guarantee that amendments made by it do not in any way affect the Division of Powers between European Union and its Member States, not least by putting in place a number of safeguards of a constitutional nature in order to control and curtail the powers of the European Union. For instance, Article 5 of the new EU Treaty – a greatly amended version of the current Article 5 EC – will put more emphasis on a number of fundamental principles governing the competences of the European Union, such as the principle of conferral and the principles of subsidiarity and proportionality. Similarly, many of the declarations annexed to the Lisbon Treaty – as well as new protocols introduced by it – seek to avoid unwanted centralist developments. For instance, Declaration (no 18) in relation to the delimitation of competences provides:

> "The Conference underlines that, in accordance with the system of division of competences between the Union and the Member States as provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union, competences not conferred upon the Union in the Treaties remain with the Member States".[1]

As is well known, with *Van Gend en Loos* and *Costa Enel,* the Court has played an important role in the transition of the European Union from an international organisation to a organisation *sui generis*.[2] These judgments contributed the process of constitutionalisation, especially with regard to the relationship between the European Union and its

[1] See also Declaration (no 24) concerning the legal personality of the European Union, and Declaration (no 14) concerning the Common Foreign and Security Policy.

[2] Lecourt, "Quel eût été le droit des Communautés sans les arrêts de 1963 et 1964?", in *Mélanges en hommage à Jean Boulouis - L'Europe et le droit* (Dalloz, 1991).

Member States.[3] But what constitutional role – if any – has the Court of Justice played in subsequent case law? This Chapter will examine the role of the Court of Justice in the Division of Powers between the European Union and its Member States.[4]

1.2. Methodology

Much – if not all – of the case law of the European Court of Justice in one way or another affects the Division of Powers between the European Union and its Members. Therefore, rather than giving a broad and general overview of the role of the Court in this case law, this Chapter will examine this role by focussing on one specific area of case law in particular, namely its case law on Articles 28 and 95 EC. This approach in general and the case law on these provisions in particular is preferred here for a number of reasons. First of all, as is well known, Article 95 is one of the – if not *the* – most often used legal basis for Community legislation. Secondly, it is perhaps for this reason that it is also this legal basis which has been most often disputed before the Court of Justice.[5] Thirdly, more than any other provisions of the EC Treaty, Article 95 itself allows for a particularly wide interpretation when used as a legal basis for Community legislation. Dashwood even argues that "it is there, if anywhere, that a risk of the creeping extension of Community powers might lie".[6]

1.3. Comparative perspective

There are significant parallels between Articles 28 and 95 EC on the one hand and the so-called commerce power and the dormant commerce clause of the United States constitution on the other. Like Article 95 EC, the United States Congress is empowered under the commerce clause to "regulate commerce … among the several states".[7] Similarly, whereas Article 28 EC prohibits quantitative restrictions between Member States relating to trade and measures having an equivalent effect, the United States Supreme Court has derived from the Commerce Power the "dormant commerce clause", according to which state legislation is

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[3] See e.g. Birkinshaw, "Constitutions, Constitutionalism and the State", 11:1 EPL 31 (2005).

[4] As mentioned before, the terminology "Division of Powers" is used here to describe the relationship between the European Union and its Member States.

[5] See Van Ooik, *De Keuze der Rechtsgrondslag voor Besluiten van de Europese Unie* (Kluwer, 1999), at 462-464.

[6] Dashwood, "The Limits of European Community Powers", 21 EL Rev. 113 (1996), at 126.

[7] Article I, section 8, clause 3 of the United States Constitution

unconstitutional if it places an undue burden on interstate commerce. Like Article 95, the Commerce Power is probably the most often used legislative basis of the United States Constitution. In both constitutional systems, these provisions have been used for all kinds of topics which *prima facie* seem only indirectly related to interstate commerce. In both legal systems, these provisions have for instance been used for the regulation of tobacco products,[8] food additives,[9] and human rights.[10] Furthermore, both the Supreme Court and the European Court have – relatively recently – introduced limits to the afore-mentioned wide scope of these legal bases, in *Lopez*[11] and *Tobacco Advertising I,*[12] respectively. For the Supreme Court, this was the first time in almost 60 years it declared an act to be unconstitutional for exceeding the scope of the Commerce Power. For the European Court of Justice, this was the first time ever that it had declared Community legislation to be *ultra vires* by exceeding the scope of Article 95 EC.

1.4. Outline

In the United States, the Supreme Court case law on the (dormant) commerce clause has been at the core of the jurisprudential (and academic) debate on federal-state relations. It is generally agreed that, with this case law, the Supreme Court has had an important effect on the Division of Powers in the United States. Division of powers considerations has led the Supreme Court sometimes to make important changes in its case law. This Chapter hence essentially addresses the question whether by its case law on Articles 28 and 95 EC, the European

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[8] For federal legislation in the United States in this area, see Hoffstadt, "Retaking the Field: The Constitutional Constraints on Federal Legislation that Displaces Consent Decrees", 77 *Washington University Law Quarterly* 53 (1999) and *FDA v. Brown & Williamson,* discussed infra note 42. See, for the European Union context, e.g. Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453; Case C-434/02, *Arnold André* [2004] ECR I-11825; and Case C-210/03, *Swedish Match* [2004] ECR I-11893.

[9] See, for the United States context, e.g. the important 1938 Food, Drug, and Cosmetic Act. See, for the European Union context, e.g. Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECR I-6451.

[10] See the Civil Rights Act of 1964, as upheld by the Supreme Court in *Heart of Atlanta Motel v. United States* [1964] 379 U.S. 241, at 258-259; and Article 1 of Directive 95/46, the validity of which was questioned by the Advocate General (although not by the European Court of Justice) in Case C-101/01, *Bodil Lindqvist* [2003] ECR I-12971, see Chapter VI, section 3.1.

[11] *United States v. Lopez,* 514 US 549 [1995] at 559.

[12] Case C-376/98, *Germany v. Parliament and Council* [2000] ECR 8419.

Court of Justice has played a similar role. To answer this question, the case law on the Commerce Power will be compared with that of Article 95 (section 2) and the case law on the dormant commerce clause principle with that of Article 28 (section 3).

2. Positive integration

2.1. The United States' Commerce Power

2.1.1. Before 1890

Over the course of the United States' history, the Commerce Power has been the focus of a significant body of case law. Overall, the case law of the Supreme Court on the Commerce Power can be distinguished into four timeframes ((§§ 2.1.1-4). These changes mainly concerned the meaning of the terminology "commerce", "among the states" and "to regulate".

The first time the Supreme Court had to decide on the scope of the commerce power was in *Gibbons v. Ogden.*[13] At issue was the constitutionality of a steamboat monopoly law of the state of New York. Aaron Ogden had acquired a licence based on this monopoly. Gibbons operated a competing ferry under a license granted by an Act of Congress. Ogden argued *inter alia* that since the vessels only carried passengers between two States, they were not engaged in "commerce" in the constitutional sense, but in "navigation". Chief Justice Marshall, writing for the court, rejected this argument. He equated the term "commerce" with intercourse comprehending all phases of business, including navigation. On the basis of the meaning of "among the states", he argued that Congress had the authority even to regulate *intra*state trade if it had an impact on interstate activities. Thirdly, he stated that the power "to regulate" knew "no limitations, other than are prescribed in the Constitution".[14] In short, Chief Justice Marshall construed a broad scope of the Commerce Power; Congress had the authority to regulate all phases of business – the Supreme Court would only intervene if these activities lacked any (indirect) impact on interstate activities. Of course, the difficulty of this approach was how to determine which activities exactly affected interstate commerce. According to Chemerinsky, this required "line-drawing and a case-by-case inquiry",[15] which actually

[13] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).
[14] Id., at 196-197.
[15] Chemerinsky, *Constitutional Law, Principles and Policies,* (Aspen Law & Business, 1997), 176.

culminated in a substantial divergence of opinion within the Supreme Court in the subsequent years.[16] As a result, the era between *Gibbons* and the adoption of the Interstate Commerce Act and the Sherman Anti-Trust Act (in 1887 and 1890, respectively), showed, in the words of Tribe, "inconsistent doctrinal themes".[17] The adoption of these two statutes, however, ushered in a new era of judicial review of commerce clause cases.

2.1.2. Between 1890 and 1937

In the years between 1890 and 1937, the Supreme Court systematically held matters regulated by federal legislation beyond the scope of the Commerce Power.[18] In *United States v. E.C. Knight Company*[19] – the "springboard for doctrines narrowing Congress' reach under the commerce clause"[20] – the federal government filed a civil challenge under the Sherman Anti-Trust Act against the Knight Company, which had acquired all of the stock of its leading competitors. The Supreme Court held that the Act could not be applied to this situation. It explicitly rejected Marshall's opinion in *Gibbons* and argued manufacturing had to be distinguished from commerce.[21] On the meaning of "among the states", the Supreme Court argued that the resulting restraint on interstate commerce would be "indirect"; the Court now equated "among the states" with requiring a *direct* effect upon interstate commerce.[22] Thirdly,

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[16] As is revealed in its two subsequent commerce clause cases decided under Marshall (*Brown v. Maryland* 12 Wheat. (25 U.S.) 419 (1827); and *Wilson v. Blackbird Creek Marsh Co.* 2 Pet. (27 U.S.) 245 (1829). See Goldman, *Constitutional law, Cases and Essays,* (Harper & Row, 1987), 286. This divergence of opinion continued under Chief Justice Taney (Compare *United States v. Coomb* 12 Peters 72 (1838) and *The Daniel Ball* 10 Wall. (77 U.S.) 557 (1871), with *United States v. DeWitt* 9 Wall. (76 U.S.) 41 (1870), at 45 and *The Trademark cases* 10 Otto (100 U.S.) 82 (1878).

[17] Tribe, *American Constitutional Law* (The Foundation Press, 1988), at 306. To discuss these themes clearly is outside the scope of this Chapter.

[18] See e.g. *Williams v. Fears* 179 U.S. 270 (1900); *Diamond Glues Co. v. United States Co.* 187 U.S. 611 (1903); *Browning v. City of Waycross* 233 U.S. 16 (1914); *Blumenstock Bros. v. Curtis Publishing Co.* 252 U.S. 436 (1920); and *Federal Baseball League v. National League of Professional Baseball Clubs* 259 U.S. 200 (1922).

[19] 156 U.S. 1 (1895), at 13.

[20] Goldman, op. cit. *supra* note op. cit. *supra* note 16, at 288.

[21] This was followed by a distinction between commerce and mining in *Oliver Iron Company v. Lord,* 262 U.S. 172 (1923) and *Carter v. Carter Coal Company* 298 U.S. 238 (1936).

[22] Later cases confirmed that the Act could only be applied against *direct* restraints on interstate commerce, see e.g. *Addyston Pipe & Steel Co. v. United*

the Court in *Hammer v. Dagenhart* stated that the power "to regulate" entailed nothing more than "to control the means by which commerce is carried on".[23] By narrowly defining "commerce", "among the states" and "to regulate", the Court limited Congress' power under the commerce clause substantially. In 1935 and 1936, the Supreme Court used these judicial doctrines to strike down important pieces of the New Deal legislation,[24] leading to a collision between the judicial and political branches of government.

2.1.3. Between 1937 and 1995

Because of this case law, Roosevelt proposed to increase the size of the Court following his landslide victory in the 1936 elections. The proposal was rejected, mainly because Justice Roberts in 1937 bowed to political pressure and changed his position, becoming the fifth judge to uphold several laws on subjects that before had been held beyond the Commerce Power's scope. Three cases in particular[25] illustrate this Constitutional Revolution of 1937.

First of all, in *NLRB v. Jones & Laughlin Steel Corp.,*[26] the Supreme Court upheld the Wagner Act of 1935, which aimed to protect the right of employees to organize into labour unions both in businesses operating in interstate commerce, as well as in those the activities of which affected interstate commerce. Jones & Laughlin – one of the United States' major steel manufacturers – had fired ten leaders of the local labour union at one of its plants. The National Labour Relations Board, established by the Wagner Act, ordered the company to rehire the men.

States 175 US 211 (1899). In *Northern Securities Company v. United States* 193 U.S. 197 (1904), the Court articulated a comparable distinction between reasonable and unreasonable restraints of trade, which it employed until 1937, e.g. in *Cincinnati, New Orleans and Texas Pacific Railway Company* 162 U.S. 184 (1896); *United States v. American Tobacco Company* 221 U.S. 106 (1911); *United States v. Winslow* 227 U.S. 202 (1913); *United States v. Steel Corp* 251 U.S. 417 (1920); *Houston, East and West Texas Railway Company v. United States, Texas and Pacific Railway Co. v. United States* 234 U.S. 342 (1914), *A.L.A. Schechter Poultry Corp. v. United States.* 295 U.S. 495 (1935).

[23] 247 U.S. 251 (1918), at 269-270.

[24] E.g. in *Schechter Poultry* and (under other congressional powers); *Panama Refining Company v. Ryan* 293 U.S. 388 (1935); *Louisville Joint Stock Bank v. Radford* 295 U.S. 555 (1935); and *United States v. Butler* 297 U.S. 1. (1936)

[25] But also see e.g. *Kentucky Whip & Collar Co. v. Illinois Central R.R.* 299 U.S. 334 (1937); *Mulford v. Smith* 307 U.S. 38 (1939); *United States v. Rock Royal Cooperative* 307 U.S. 533 (1939); and *United States v. Wrightwood Diary Co.* 315 U.S. 110 (1942).

[26] 301 U.S. 1 (1937).

The defendant argued the act had no application, *inter alia*, because it affected manufacturing and not commerce. Chief Justice Hughes, writing for the Court, however argued commerce *included* manufacturing.[27] He also implied that a direct effect upon interstate commerce was no longer required.[28] Chief Justice Hughes furthermore stated that "the power to regulate commerce is the power to enact *all* appropriate legislation for its protection or advancement. ... That power is *plenary*".[29] Applying this broad scope, the Court upheld the authority of the National Labour Relations Board and the validity of the Wagner Act.

A second important case is *United States v. Darby Lumber Co.*[30] The Fair Labor Standards Act of 1938 set minimum wages and maximum hours for all employees "engaged in commerce or in the production of goods for commerce".[31] The Darby Lumber Company was charged with violating Section 15 of this Act, which prohibited the shipment by interstate commerce of goods produced by the employment of workers at wages or hours contrary to the Act. Justice Stone, writing for a unanimous Court, not only stipulated that manufacturing was part of commerce,[32] but also gave an unprecedented width to the definition of the power "to regulate"; the statute fell within the scope of Congress" Commerce Power, because:

> "the motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. Whatever their motive and purpose, regulations of

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[27] This was confirmed in two companion cases; see *NLRB v. Fruehauf Trailer Company* 301 U.S. 49 (1937) and *NLRB v. Friedman- Harry Marks Clothing Company* 301 U.S. 58 (1937).

[28] This return to the *Gibbons*-doctrine was confirmed in later cases upholding the authority of the NLRB, in which this 'substantial affect" test was applied to permit broad federal regulation of labour relations. See *Associated Press v. Labor Board,* 301 U.S. 103 (1937); *Santa Cruz Company v. Labor Board,* 303 U.S. 453 (1938); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938); *Labor Board v. Fainblatt,* 306 U.S. 601 (1939); *Polish Alliance v. Labor Board* 322 U.S. 643, (1944); *Guss v. Utah Labor Board* 353 U.S. 1, (1957); *NLRB v. Reliance Fuel Oil Corp.* 371 U.S. 224, (1963).

[29] *Jones & Laughlin,* 36-37. Citations omitted. Emphasis added.

[30] 312 U.S. 100, (1941); also see *Opp Coton Mills v. Administrator,* 312 U.S. 126 (1941).

[31] Cited in Pritchett, *The American Constitution*, (McGraww-Hill, 1977), at 196.

[32] Justice Stone did make some sort of distinction between manufacturing and the shipment of manufactured goods, but this was significantly eroded in later case law concerning the FLSA. See e.g. *Kirschbaum v. Walling* 316 U.S. 517 (1942) and *Borden Co. v. Borella* 325 U.S. 679 (1945).

commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."[33]

In a third important case – *Wickard v. Filburn*[34] – the Supreme Court even found that home grown wheat of which none was sold on the open market, still could have an effect upon interstate commerce. Justice Jackson, writing for the Court, stressed that the Court would no longer follow any of the doctrines it had hitherto adopted, arguing that "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect"".[35]

Following *Wickard* the Court construed a remarkable wide scope of the Commerce Power; Congress could "legislate on" and "govern" all phases of business provided that the activity concerned had a substantial effect on interstate commerce. In *Heart of Atlanta Motel Inc. v. United States*[36] the Court even erased the word "substantial" from this test. The Civil Rights Act, which prohibited discrimination in places of public accommodation, could be applied to a motel refusing to provide accommodation to Black Americans. The Court argued that this was rightfully adopted under the commerce clause, since "Congress had a rational basis for finding that racial discrimination by motels affected commerce". This what became known as the "rational basis test" was confirmed in the companion case of *Katzenbach v. McClung*.[37] The Supreme Court departed from this approach in the famous *Lopez* case of 1995.

2.1.4. After 1995: Lopez and Morrison

In *United States v. Lopez,* school officials at a High School in Texas had caught the 12th grade student Alfonso Lopez carrying a concealed .38 calibre handgun. When sentenced to six months in prison for violating the Gun-Free Zones Act prohibiting the possession of firearms within 1000 feet of school grounds, he appealed on the ground that the statute

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[33] *United States v. Darby Lumber Co.* 312 U.S. 100 (1941), at 114. He thus construed an even broader definition than Marshall had used in *Gibbons.* Justice Stone also reiterated the *Gibbons* or "substantially effect" doctrine (Id., at 118).

[34] 317 U.S. 111 (1942).

[35] Id., at 129.

[36] *Heart of Atlanta Motel v. United States* 379 U.S. 241 (1964), at 258-259.

[37] The Court found that the Act could regulate the racially discriminatory seating practices of Ollie's Barbecue, a small restaurant in Alabama, since Congress had rationally concluded that discrimination by restaurants cumulatively had an impact on interstate commerce. Also see *Hodel v. Indiana* 452 U.S. 314 (1981).

was an unconstitutional exercise of the Commerce Power. Chief Justice Rehnquist, writing for the Court, stated Congress could, under the Commerce Power, regulate three categories of activity: "the use of the channels of interstate commerce", "instrumentalities of, … or persons or things in interstate commerce, even though the threat may come only from intrastate activities" and "those activities having a substantial relation to interstate commerce".[38] He argued that the activity regulated did not fall within either the first or second category, so went on to consider the third. Clearly departing from the rational basis doctrine used in previous cases, Rehnquist stated that, within this third category, "the proper test requires an analysis of whether the regulated activity *substantially* affects interstate commerce". According to Rehnquist, the Gun-Free Zones Act did not substantially affected interstate commerce, since it was "a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise".[39]

Five years after *Lopez,* the Supreme Court in *Morrison v. United States*[40] held a section of the Violence Against Women Act of 1994 beyond the scope of the Commerce Power. A college student had filed suit against Morrison and Crawford, alleging both men had raped her at a party. The student invoked Section 13891 of the 1994 Act, which allowed the victims of gender-motivated violence to sue for compensatory and punitive damages, but Morrison and Crawford questioned its validity. Chief Justice Rehnquist, writing for the Court, found that the section could not be considered a regulation of an activity that substantially affected interstate commerce,[41] *inter alia* because this activity was a question of "non-economic, criminal conduct".[42]

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[38] *Lopez*, op. cit. *supra* note 11, at 559.

[39] Id.

[40] 529 U.S. 598 (2001).

[41] Rehnquist reiterated the three categories of activity articulated in *Lopez*. Both petitioners contented the act was based on the third.

[42] The Court applied the narrow construction of the Commerce Power in *Lopez* in other cases as well, not to invalidate the federal act concerned but to substantially limit the scope thereof by giving a narrow interpretation to certain provisions or terms. In *Jones v. United States,* 529 US 848 (2000) – decided a week after *Morrison* – Jones had thrown a Molotov cocktail into his cousin's home and was convicted of violating federal legislation. The Supreme Court reversed the decision. Ginsburg J, writing for a unanimous court, argued that the disputed legislation covered "only property currently used in commerce or in an activity affecting commerce" . *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000) concerned the Food, Drug and Cosmetic Act, which established the Food and Drug Administration (hereinafter: FDA) and granted it the authority to regulate, among other items, "drugs" and "devices". The FDA

Although, in 2005, Supreme Court in *Gonzales v. Raich*[43] again upheld a federal law adopted under the Commerce clause which prohibited the possession acquirement and manufacturing of cannabis for personal medical use, this case is generally seen as confirmation of *Lopez* and *Morisson.* The Surpeme Court reiterated the three categories of activity Congress may regulate under the Commerce Clause. It distinguished the circumstances of this case from *Lopez* and *Morrison,* arguing that contrary to those cases, the federal legislation in the present case regulated an activity that substantially affected interstate commerce, thus fell within the third category.

2.2. Case law on Article 95 EC

2.2.1. The Inner and Outer Limit of Article 95

According to the principle of conferral as enshrined in Article 5 EC, the Community can only legislate "within the limits of its powers conferred upon it by this Treaty and of the objectives assigned to it therein".[44] Much emphasis was put on this principle during the Lisbon Treaty IGC. The Lisbon Treaty provides that "the Limits of Union competences are governed by the principle of conferral",[45] stressing twice that in

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asserted jurisdiction to regulate tobacco products. Brown & Williamson successfully challenged this jurisdiction. In *SWANCC v. United States Army Corps Of Engineers,* 531 U.S. 159 (2001), a municipal corporation had purchased a site for disposing of waste but was denied a permit required under the Clean Water Act by the Corps, which asserted jurisdiction on the grounds that use of the area as habitat for migratory birds substantially affected interstate commerce. Referring to *Lopez* and *Morrison,* Chief Justice Rehnquist argued that this contention raised "significant constitutional questions". In *Pierce County v. Guillen* 537 US 129 (2003), the Court did hold the federal act concerned within the scope of the Commerce Power, but it unambiguously confirmed the *Lopez* judgment. In a short argument, Justice Thomas, writing for a unanimous court, reiterated the first two categories of activity outlined in *Lopez*. Since the disputed legislation purported to improve the safety of the United States highways, Justice Thomas argued it was, "aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce". Although a split decision (4-1-4), this case was essentially confirmed in *Rapanos v. United States*, 547 US 715 (2006).

[43] 545 U.S. 1 (2005)

[44] This principle is also referred to as the principle of attribution of powers. See furthermore Lauwaars, *Lawfulness and Legal Force of Community Decisions* (Leiden, 1973); Peter, "La base juridique des actes en droit communautaire", RMC 324 (1994).

[45] Article 5(1) EU. This article was copied from Article I-11 of the Constitutional Treaty.

accordance with this principles the "[c]ompetences not conferred upon the Union in the Treaties remain with the Member States".[46]

As mentioned, Article 95 EC is one of the most important legal bases of EU legislation. It follows from the wording of Article 95 that it is a *lex specialis* of Article 94,[47] which is confirmed by the Lisbon Treaty, which will slightly amend the wording of Article 94.[48] Article 95 is also a *lex specialis* of Article 308, as it is settled case law that Article 308 EC may be used as the legal basis only where no other provision of the Treaty gives the Community institutions the necessary power to adopt legislation.[49] Before the introduction of Article 95,[50] Article 94[51] served as the only legal basis for the harmonization of the common market. It is generally assumed that prior to 1986, Article 94 was interpreted broadly by the European Court of Justice.[52]

The case law on Article 95 can be divided into two categories, reflecting that the legal basis of Article 95 essentially has two legislative limits. On the one hand, there are those cases which concern what is referred to here as the *inner limit* of Article 95. These cases involve a choice of legal basis between Article 95 and an alternate provision. In analysing the aim and content of the measure concerned, the Court "in particular" examines its effects; for example to conclude that it only has an "ancillary" or "incidental" effect on interstate trade. On the other

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[46] Articles 4(1) and 5(2) EU. The IGC furthermore added "only" to the wording of 5 EC, Article 5(2) of the consolidated EU Treaty thus providing that the Union shall act "only within the limits of the competences conferred upon it by the Treaties".

[47] See *inter alia* van Ooik, op. cit. *supra* note 5, at 137-138. See Case 45/86, *Commission v. Council* [1987] ECR 1493, para. 13. Article 95 is a *lex generalis* of some other Treaty provisions.

[48] This perhaps also illustrated by the fact that the Lisbon Treaty will reverse the order of Articles 94 and 95 (Article 80 Lisbon Treaty). The new Article 95 (hence current Article 94) EC will provide that "*without prejudice to Article 94* (hence the current Article 95), the Council shall, acting in accordance with a special legislative procedure unanimously …".

[49] This follows from the wording of Article 95 and has been held consistently by the Court, e.g. in Case C-84/94, *United Kingdom v. Council* [1996] ECR 5755, para. 12; and Case 202/88, *France v. Commission* [1991] ECR 1223, para. 25. Also see Craig and de Burca, *EU law* (Oxford University Press, 1998), at 1119.

[50] Then Article 100A EC.

[51] Then Article 100 EC.

[52] See e.g. Tizzano, *The Powers of the Community, in Thirty Years of Community Law* (European Perspectives, 1981), at 43; and Usher, "The gradual widening of European Community policy on the basis of Articles 100 and 235 of the EEC Treaty" in Schwarze and Schermers (eds.), *Structure and Dimensions of European Community Policy* (Nomos, 1988), at 25.

hand, after 1993 the Court also decided on cases which concerned what is referred to here as the *outer limit* of Article 95. [53] The question here is whether a measure is properly based on Article 95 or is *ultra vires*. This section will discuss the evolution of these two limits of Article 95.

Similar to the United States case law on the Commerce Power discussed above, the modifications by the European Court of Justice with regard to the scope of its Article 95 case law can be distinguished into three timeframes. First, the case law in the period between the Single European Act and the Treaty of Maastricht will be discussed (§ 2.2.1.); secondly, the case law between the Treaty of Maastricht and the Treaty of Amsterdam (§ 2.2.2), and thirdly, the most recent cases (§ 2.2.3).[54] Subsequently, the impact of this case law on the Division of Powers will be examined (§ 2.3).

2.2.2. Before Maastricht

Before the adoption of the Maastricht Treaty, the Court of Justice decided on the scope of Article 95 in *Titanium Dioxide* and *Chernobyl*, both of which involved the inner limit of Article 95, hence the question whether the measure involved had been adopted under the proper provision of the Treaty or should have been based on an alternate one. The Court of Justice had prior to these cases articulated the so-called centre of gravity-doctrine, according to which, when confronted with a choice of legal basis, the Community Legislature should adopt the measure involved on the legal basis most related to its main subject. The Court added that this choice has to be "based on objective factors which are amenable to judicial review".[55] Currently, this case law on the choice of legal basis is well developed; if examination of a measure reveals that it pursues a twofold aim or that it has a twofold component and if one of those is identifiable as the main one, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component.[56] With regard to a measure

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[53] See also note 97.

[54] Cases in these subsections are discussed in chronological rather than in numerical order.

[55] Case 45/86, *Commission v. Council* [1987] ECR 1493 (*Tariff Preferences*), para. 11. See van Ooik, op. cit. *supra* note 5, at 83 *et seq.*; also see the opinion of AG Tesauro in *Titanium Dioxide*, (Case C-300/89, *Commission v. Council* [1991] ECR I-2867), paras. 4 and 8.

[56] Case C-211/01, *Commission v. Council* [2003] ECR I-8913, para. 39; Case C-338/01, *Commission v. Council* [2004] ECR I-4829, para. 55, and Case C-94/03 *Commission v. Council* [2006] ECR I-1, para. 35; and see, with regard to the application of Article 47 EU, Case C-176/03, *Commission v. Council* [2005]

which simultaneously pursues a number of objectives or which had several components, without one being incidental to the other, such a measure would have to be founded, exceptionally, on the various corresponding legal bases.[57]

In the well known 1987 *Titanium Dioxide* case, the Commission brought an action for annulment of Directive 89/428 on waste from the titanium dioxide industry. The Commission claimed the Directive, which was adopted under Article 130S,[58] should instead have been based on Article 100A.[59] The Court repeated the aforementioned centre of gravity theory and found "objective factors" to include in particular the aim and content of the measure.[60] Since the Directive was aimed at "both the protection of the environment and the elimination of disparities in conditions of competition",[61] the Council, in principle, should have based the directive on *both* provisions.[62] However, the Court regarded this as impossible in the present case, since these provided for two conflicting legislative procedures; Article 100A provides for qualified majority voting (hereinafter: QMV), whereas Article 130S at the time required unanimity.[63] The Court argued that sufficient account could be taken of environmental requirements under Article 100A and because, therefore, this was the appropriate legal basis, it annulled the Directive.

ECR I-7879, paras 51 to 53, and Case C-440/05, *Commission v. Council* [2007] ECR I-9097, paras 71 to 73.

[57] See Case C-94/03 *Commission v. Council* [2006] ECR I-1, The Court has recently held that under Article 47 EU, such a solution is impossible with regard to a measure which pursued a number of objectives or which has several components falling, respectively, within the CFSP and another policy area, and where neither one of those components was incidental to the other. The Court held that since Article 47 EU precluded the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union could not have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fell within a competence conferred by the EC Treaty on the Community (Case C-91/05, *Commission v. Council* [2008], nyr., paras 72-78).

[58] Now Article 175 EC. In this section, old numbering is used when case law prior to the Treaty of Amsterdam is discussed.

[59] Now Article 95.

[60] Case C-300/89, *Commission v. Council* [1991] ECR 2867, para. 10.

[61] Id. para. 13.

[62] See Case 165/87, *Commission v. Council* [1988] ECR 5545.

[63] Article 175 was amended by the Treaty of Maastricht and the Treaty of Amsterdam and now also requires QMV, save when a measure is adopted under Article 175 (2) EC.

In *Chernobyl*,[64] the European Parliament claimed that Article 100A was the proper legal basis for a Regulation adopted under Article 31 of the European Atomic Energy Community Treaty (hereinafter: "EAEC") on the protection of health. This was an attempt by Parliament to defend its prerogatives, as Article 31 of the EAEC Treaty provides that Parliament has only to be consulted, whereas Article 100A requires its cooperation.[65] The Court, examining the aim and content of the measure, admitted that the Directive indeed prohibited the placing on the market of foodstuffs and therefore had an effect on the functioning of the internal market. But since this effect was only "incidental",[66] the Directive was validly adopted on the sole basis of Article 31 EAEC.

2.2.3. From Maastricht to Amsterdam

The remarkable result of *Titanium Dioxide* implied the Council could now legislate on environmental matters by QMV, even though Article 130S EEC required unanimity. This led to strong opposition by several Member States during the Treaty of Maastricht negotiations to the implication that they had surrendered their veto right in this area. After 1992, the legal question of *Titanium Dioxide* returned in *Waste Directive,* in which the Commission – supported by the Parliament – sought to annul a Directive on waste disposal based on Article 130S. The Commission argued that since the Directive had as its object both the protection of the environment and the establishment and functioning of the internal market, it should have been based – solely – on Article 100A EC. The Court rejected this argument. It held that the Directive was concerned primarily with the protection of the environment and had only "ancillary effects"[67] on the internal market. Accordingly, it found the contested Directive was validly adopted under Article 130S EEC exclusively. *Transfer of Waste* also involved the choice between Article 100A and 130S EEC. The Court again held that Article 130S was the proper legal basis.[68]

Two other cases of this era – *Business Registers* and *GATT* – involved the inner limit of Article 95 too. In *Business Registers*,[69] the German Government claimed a Council Regulation adopted under Article 213 EEC (now Article 284 EC) should have been adopted under

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[64] Case C-70/88, *Parliament v. Council* [1990] ECR 2041.
[65] Both provisions require QMV.
[66] *Chernobyl*, para. 17.
[67] Case C-155/91, *Commission v. Council* [1993] ECR 939*,* para. 20. On this case in general, see Wachsmann, 30 CML Rev. 1051 (1993).
[68] See e.g. Case 187/93, *Parliament v. Council* [1994] ECR 2857, para. 25.
[69] Case C-426/93, *Germany v Council* [1995] ECR 3723

Article 100A. Its primary argument was that Article 213 could not constitute an autonomous legal basis for a measure of the Council. The Court, however found it could. It argued that Article 100A EEC could not be used as the legal basis since the effects of the Regulation were "merely ancillary to the aim of the Regulation". In the *GATT* case,[70] the European Parliament claimed two council Decisions concerned with the conclusion of an Agreement between the EU and the USA should have been adopted on the basis not only of Article 113, but also of Articles 57, 66 (Now Article 133 EC) and 100A EC, which at the time, unlike Article 113, required the cooperation procedure. The Court found Article 47, 55, 100A and 113 the proper legal bases and consequently, held both decisions void.

From 1993 onwards, the Court also had to deal with cases on the outer limit of Article 95 EC, thus those involving the question whether the Community had any legislative authority *whatsoever*, to base the measure concerned on Article 95. The *Product safety* case[71] concerned a Directive – adopted under Article 100A – which aimed to ensure a certain degree of safety for products placed on the internal market. The German Government sought to annul Article 9 of the Directive, which conferred upon the Commission the power to adopt decisions requiring individual Member States to take measures on a particular product. It argued this provision had no legal basis as the Council lacked the legislative authority to confer such power on the Commission. In other words, it argued the provision was *ultra vires.*[72] There was no mention of a choice of legal basis.[73] The Court held that Article 95 did fall within the scope of Article 100A. Similarly, in *Certificate for medicinal products*,[74] the Government of Spain sought to annul a Council Regulation based on Article 95 concerned with the creation of a supplementary protection certificate for medicinal products. The Court had consistently held in earlier case law that the Community had no power to regulate substantive patent law.[75] The Government of Spain

[70] Case C-360/93, *Parliament v. Council* [1996] ECR 1195 (*GATT*)
[71] Case C-359/92, *Germany v. Council* [1994] ECR 3681.
[72] Also see the opinion of AG Jacobs in this case, esp. paras 14-16 (and 28-33). Council and Commission argued that the legal basis of Article 9 of the Directive was Article 100A *in conjunction with* Article 145 third indent. Also see *Product safety,* para. 40.
[73] This is also manifest in the arguments of the Court.
[74] Case C-350/92, *Spain v. Council* [1995] ECR 1985.
[75] See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig v. Commission* [1966] ECR 450; Case 24/67, *Parke, Davis and Co. v. Centrafarm* [1968] ECR 82; Case 78/70, *Deutsche Grammophon v. Metro* [1971] ECR 487; Case 4/73,

therefore argued principally that the Regulation was *ultra vires*; that "in the allocation of powers between the Community and the Member States, the latter have not surrendered their sovereignty in industrial property matters". [76] Contrary to *Product Safety,* reference was made to Articles 94 and 308 EC, yet only in the Government's subsidiary argument;[77] if the Court were to hold that the Community did have such power, the only possible legal bases for such a Regulation were Articles 100 and 235, since both require unanimity and therefore do not affect the sovereignty of Member States. The Court again found the Regulation was *intra vires*.

2.2.4. After the Treaty of Amsterdam

In the case law from after the adoption of the Treaty of Amsterdam, *Beaf and Veal*[78] and *Administrative Assistance*[79] concerned the inner limit of Article 95. In the former case, the European Commission sought to annul a Council Regulation – based on Article 43 EC[80] – which established a system for the identification and registration of bovine animals. The Commission claimed that the correct legal basis was Article 100A (and 43 EC) and therefore should have been adopted in accordance with the co-decision procedure. The Court held Article 43 to be the proper legal basis. *Administrative assistance* concerned a Council Regulation, which established an automated Customs Information System (hereinafter: CIS). The Commission claimed it should have been based on 100A (and 43) EC. The Court held it was properly based on Article 235 EC (and 43). This was rather remarkable, since the CIS did have a harmonizing effect; the Member States had to adopt certain legislation in order to take part in the CIS. The Court argued however that "the CIS did not *itself*

Nold v. Commission [1974] ECR 491; Case 30/90, *Commission v. United Kingdom* [1992] ECR 829.

[76] Case C-350/92, *Spain v. Council* [1995] ECR 1985, at para. 12

[77] Case C-271/94, *European Parliament v. Council* [1996] ECR 1689 (*Edicom*) represented the opposite situation. The European Parliament, supported by the Commission, sought to annul a Council Decision adopted under Article 235 EC. Parliament argued it should have been based on [then] Article 129D(3) (now Article 155, it now provides for the co-decision procedure). The Commission claimed Article 100A was the proper legal basis. The Court disagreed. Although the decision also served objectives of the internal market, it found those objectives "merely ancillary in relation to [its] main objective" (para. 32).

[78] Case C-269/97, *Commission v. Council* [2000] ECR I-225.

[79] Case C-209/97, *Commission v. Council* [1999] ECR I-8067.

[80] Now, after amendment, Article 37 EC.

harmonise national laws" and that harmonisation was "only an incidental effect of the legislation".[81]

Tobacco Advertising I, on the other hand, involved the outer limit of Article 95. In *Tobacco Advertising I*,[82] the Court for the first time held that a measure based on Article 95 was *ultra vires*. Directive 98/43 prohibited all forms of advertising and sponsorship of tobacco products. The German Government claimed the banned activities lacked interstate effect,[83] arguing further that the decision could not have been based on Article 95, since its centre of gravity was concerned not with promoting the internal market, but with protecting public health. Article 129(4) EC[84] expressly prohibited harmonizing measures to be adopted under that provision.[85] Consequently, the Community did not have the legal authority to adopt the Directive by recourse to a legal basis, which was merely incidental to its true aim and content. The Court agreed and annulled the Directive. It argued that Article 95 could not be used as a legal basis to circumvent the express exclusion of Article 129(4). The Court stated that: "a measure adopted on the basis of Article 100A ... must *genuinely* have as its object the improvement of the conditions for the establishment and functioning of the internal market".[86]

The Court has since Tobacco Advertising not again struck down Community legislation for infringing Article 95, even though it had the opportunity to do so in quite a number of cases. The Court has upheld legislation on such topics which at first glance do not seem directly related to the internal market; namely on biotechnological inventions,[87]

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[81] Op. cit. *supra* note 79, paras 36-37.

[82] This case is a clear example of an outer limit case and does not involve, in the words of AG Fennelly, "a choice between possible legal bases", since "[i]t is abundantly clear that Article 129(4) of the Treaty does not constitute an alternative basis for the Advertising Directive, by virtue of its exclusion of harmonising measures" (Opinion, para. 69). On this case in general and its background, see Usher, in 38 CML Rev. 1519 (2000); Khanna, "The Defeat of the European Tobacco Advertising Directive: A Blow for Health", 20 YEL. 113 (2001).

[83] Id., para. 13.

[84] Now Article 152 EC. The Treaty of Amsterdam has substantially amended this provision.

[85] Hence, this case also showed characteristics of an inner limit case.

[86] *Tobacco Advertising I,* para. 84. Emphasis added. Compare e.g. with the more flexible criterion in para. 37 of *Product Safety (* "[t]he measures which the Council is empowered to take under that provision are aimed at the establishment and functioning of the internal market".).

[87] Case C-377/98 R, *Netherlands v. Parliament and Council* [2000] ECR I-6229

food supplements[88] and the manufacture, labelling and sale of tobacco products.[89] In *Tobacco Advertising II,* the Court even upheld certain provisions of the second Tobacco Advertising Directive. The Court held that this Directive was now correctly based on Article 95.[90]

Nevertheless, it follows from the strict criteria now used by the Court that *Tobacco Advertising I* did mark a clear break with previous case law.[91] Recourse to Article 95 for instance is not possible when there is a mere finding of disparities between national rules. The Court has stressed that there have to be differences between the rules of the Member States which are such as to obstruct the fundamental freedoms and therefore have a direct effect on the functioning of the internal market. Furthermore, although Article 95 can be used to prevent the emergence of future obstacles to trade, the emergence of such obstacles must be likely and the legislation adopted must be designed to prevent them.

2.3. Impact on Division of Powers

After *Gibbons,* Congress could regulate all phases of business provided it had an impact on interstate activities, whereas between 1890 and 1937, the Court significantly narrowed the power's scope, drastically curtailing powers at the federal level. Then, after 1937, the Supreme Court under political pressure seemed to maximize the scope of the Commerce Power. The Supreme Court would not intervene as long as Congress had a rational basis for believing that the legislation concerned had an effect on commerce. *Lopez* and *Morrison*[92] marked the return to a narrow(er) interpretation thus restricting the scope of Congress' power to regulate. It follows that the case law on the scope of the scope of the Commerce Power has directly affected the Division of Powers in the United States. The question is whether a similar conclusion can be reached with regard to the case law on Article 95 EC.

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[88] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECR I-6451

[89] Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453; Case C-434/02, *Arnold André* [2004] ECR I-11825; and Case C-210/03, *Swedish Match* [2004] ECR I-11893

[90] Case C-380/03, *Germany v. Parliament and Council* [2006] ECR I-11573

[91] Mortelmans and Van Ooik, "Het Europese verbod op tabaksreclame: verbetering van de interne markt of bescherming van de volksgezondheid", 50 AA 114 (2001), 120. For an outline of these criteria, see Crosby, "The new Tobacco Control Directive: an illiberal and illegal disdain for the law", 27 EL Rev. 177 (2002), at 179-180 and Bono, "L'arrêt "tabac" ou l'apport de la Cour de justice au débat sur la délimitation des compétences", RTDE 790 (2001)

[92] And related commerce clause case law as discussed in previous note.

Because of the distinction between inner and outer limit case law, the impact of Article 95 case law on the Division of Powers is more difficult to determine than that of the Commerce Power case law. The outer limit case law essentially has similar effects; following *Tobacco Advertising I,* the European Court of Justice has used a more stringent set of criteria to determine whether Community legislation can be based on Article 95 EC. In redefining and limiting the scope of Article 95, the Court asserted a role comparable to that of the Supreme Court in *Lopez.* Lopez was regarded as a clear attempt by the Supreme Court to halt the Congress' broad use of the Commerce Power for all kinds of (non- commercial) legislation after cases such as *Laughlin, Darby, Wickard, Heart of Atlanta Motel* and.[93] Similarly, the criteria articulated in *Tobacco Advertising* thus curtailed the Council's broad use of Article 95 as allowed before by the Court of Justice in cases such as *Titanium Dioxide, Product safety* and *Certificate for medicinal products.*

One could of course argue that when the Court of Justice finds a measure to be beyond the outer limit of Article 95, this does not necessarily imply that the Community lacks legislative authority; the Court could imply that the Council could possibly re-adopt the same measure under an alternate treaty provision. After *Tobacco Advertising I,* the Court adopted a new Directive which was clearly more in conformity with the requirements articulated in that case. It follows from the system of the EC Treaty that would the Council have adopted the exact same Directive under an alternative legal basis, that provision would in all probability have required unanimity.[94] Since the Council is composed of Member States representatives, the sovereignty of the Member States remains unaffected when a legal basis requiring unanimity is chosen instead of one providing for simple or qualified majority voting.[95] Furthermore, when a legal basis is chosen requiring relatively more involvement of the Parliament – e.g. its cooperation instead of its consultation – the legislative process "reaches a higher degree of decisional autonomy from the Member States".[96] These effects of course also apply to the inner limit case law.[97] It is exactly for these reasons that

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[93] *Lopez* could also be compared to *Knight,* which narrowed the wide scope as allowed before by the Marshall Court.

[94] E.g. when resource was made to Article 94, 175 or 308 EC.

[95] Also see Lenaerts, *Constitutie en Rechter* (Kluwer, 1983), e.g. 518 *et seq.*

[96] Lenaerts, "Some Thoughts About the Interaction Between Judges and Politicians in the European Community", 12 YEL 1 (1992), 26-27.

[97] It could be argued that when a measure is found *intra vires*, there is no need for the Court to discuss other provisions, hence making an implicit choice between Article 100A and an alternate provision. According to this argument, only *Tobacco Advertising I* could be regarded as a true outer limit case. Be that

the Court of Justice has held that, in light of the principle of conferral, "the choice of the appropriate legal basis has constitutional significance".[98] The EC Treaty sometimes even prohibits harmonization of legislation on a particular subject matter, which implies that an *ultra vires* ruling of the Court of Justice cannot be followed by a re-adoption of the measure concerned.[99]

3. Negative integration

3.1. Introduction

As mentioned, Article 28 EC prohibits quantitative restrictions between Member States relating to trade and measures having an equivalent effect.[100] The Lisbon Treaty will not make any changes to this provision.[101] After a short discussion of the dormant commerce clause case law of the Supreme Court (§3.2), this section will examine the case law on the scope of Article 28, or, more specifically, of "measures having an equivalent effect to a quantitative restriction" (hereinafter MEQR) (§3.3.).[102] Then, the effect of this case law on the Division of Powers in the European Union will be examined (§3.4.).

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as it may, the consequences for the division of powers as discussed in this section remain the same.

[98] Opinion 2/00, *Carthagena Protocol* [2001] ECR I-9713, para. 5

[99] E.g. Article 129(4) EC, referred to in *Tobacco Advertising I.*

[100] The prohibition of quantitative restrictions and of all measures having equivalent effect as laid down in Article 28 EC, applies not only to national measures but also to measures adopted by the Community institutions (see Case 15/83, *Denkavit Nederland* [1984] ECR 2171, para. 15, Case C-51/93, *Meyhui* [1994] ECR I-3879*,* para. 11, Case C-114/96, *Kieffer and Thill* [1997] ECR I-3629, para. 27, *Arnold André*, op. cit. *supra* note 89, para. 57 and *Alliance for Natural Health,* op. cit. *supra* note 88, para. 47. This section will however primarily deal with its application to the national level.

[101] The Constitutional Treaty rather remarkably merged Articles 28 and 29 EC, but the Lisbon Treaty does not.

[102] The focus of this Chapter will be on the interpretation of MEQR's. The notion of a "quantitative restriction" was defined broadly in the Case 2/73*, Geddo v. Ente Nazionale Risi* [1973] ECR 865, para. 7, also see e.g. Case 34/79, *R. v. Henn and Darby* [1979] ECR 3795 and Case 288/83 *Commission v. Ireland* [1985] ECR 1761.

3.2. The Dormant Commerce Clause

3.2.1. Before 1890

The principle that state legislation is unconstitutional if it places an undue burden on interstate commerce was first articulated in 1852 by the Supreme Court in *Cooley v. Board of Wardens of the Port of Philadelphia.*[103] This case involved a Pennsylvania statute, which stipulated that any vessel entering or leaving the port of Philadelphia was required to either engage local pilots or pay a fee that went into a fund for the relief of infirm pilots and pilots' widows and orphans. Since this affected interstate commerce, the statute was challenged as an interference with the Commerce Power. Justice Curtis, writing for the Court, adopted the so-called principle of selective exclusiveness, which differentiated between subject matter that is national, in which case state laws are held void under the dormant commerce clause, and subject matter that is local, in which case state laws are allowed. Justice Curtis regarded pilotage laws as regulating local subject matter and upheld the Pennsylvania statute.

3.2.2. Between 1890 and 1938

The Supreme Court employed this principle of selective exclusiveness until 1890.[104] The Supreme Court, however, soon[105] realised the principle

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[103] [1852] 12 How. (53 U.S.) 299, 319. The Marshall court had rejected the existence of this principle in *Gibbons,* and in *Wilson v. Blackbird Creek Marsh Co* [1829] 2 Pet (27 U.S.). Similar to its case law on the Commerce Power, the Supreme Court's early dormant commerce clause case law is somewhat inconsistent. E.g., in the *License Cases (Thurlow v. Massachusetts; Fletcher v. Rode Island; Peirce v. New Hamspire,* 5 How. (46 U.S.) 504 (1847)), it delivered nine separate opinions written by six different justices. In the *Passenger Cases* (*Smith v. Turner; Norris v. Boston*)*,* 7 How. (48 U.S.) 283 (1849))*,* the reasoning of the majority of five was so diverse that the Court's reporter found it impossible to come up with a majority opinion. It was not until the *Cooley case that* the Taney Court was able to achieve a coherent resolution on the scope of the dormant commerce clause.

[104] See *Welton v. Missouri* 91 US 275 (1875), *Wabash, St. Louis & Pacific Ry. Co. v. Illinois.* 118 U.S. 557 (1886), *Henderson v. Mayor of New York,* 92 U.S. 259 (1875); *Chy Lung v. Freeman*, 92 U.S. 275 (1875); and *People v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1882).

[105] That is, after it had used the principle of selective exclusiveness *in Western Union Telegraph Company v. Pennsylvania*, 128 U.S. 39 (1888); *Western Union Telegraph Company v. Alabama Board of Assessment* 132 U.S. 472 (1889); *McCall v. California* 136 U.S. 104 (1889); *Norfolk and Western Railroad Company v. Pennsylvania* 136 U.S. 114 (1889); *Minnesota v. Barber* 136 U.S.

was "more conclusory than explanatory"[106] and therefore sought more precise approaches to the dormant commerce clause. The Court began to make a distinction between state laws that "directly burden[ed] interstate commerce"[107] and were invalidated and those that had only an indirect effect and thus were to be allowed.[108] This test, however, was criticized for being "too mechanical".[109] Indeed, as a result of this mechanical application, the Supreme Court, during the same period in which it limited the scope of the Commerce Power (1890-1937), almost simultaneously also narrowed that of the dormant commerce clause principle.[110] The Supreme Court often upheld state legislation on subjects such as transportation[111] and state taxation,[112] later overruling such decisions when it adopted the so-called "modern approach" used after 1938.[113]

3.2.3. After 1938

The main question posed under the – clearly wider – "modern approach" is whether the state statute concerned affects interstate commerce. If so, it is prohibited under the dormant commerce clause principle. If not, the second question is whether the state law discriminates against interstate commerce. This is sometimes clear from the statute itself,[114] but the

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313(1889); *Brimmer v. Rebman* 138 U.S. 78 (1890); *Voight v. Wright* 141 U.S. 62 (1890); *Harman v. Chicago* 147 U.S. 396 (1893); *Brennan v. Titusville* 153 U.S. 289 (1893); and *Illinois Central Railroad Company v. Illinois* 163 U.S. 142. (1895).

[106] Tribe, op. cit. *supra* note 17, at 408.

[107] Justice McKenna, in *Seaboard Air Line Ry. v. Blackwell* 244 U.S. 310, (1917), at 314.

[108] See *Smith v. Alabama* 124 U.S. 465 (1888); *Erb v. Morasch* 177 U.S. 584 (1900); *Chicago, R.I. & Pacific Ry. Co v. Arkansas* 219 U.S. 453 (1911); *Atchison T. & S.F. Ry. Co. v. Railroad Comm.* 283 U.S. 380 (1931); *DiSanto v. Pennsylvania* 273 U.S. 34. (1927)

[109] Justice Stone in his dissenting opinion in *DiSanto*, at 44.

[110] Chief Justice Hughes, in *Atchison,* 292-293; and in *South Carolina State Highway Dept. v. Inc*. 303 U.S. 177 (1938), at 184-185.

[111] Compare e.g. *Buck v. Kuykendall* 267 U.S. 307 (1925) and *Barnwell Bros. with Southern Pacific Co. v. Arizona* 325 U.S. 761 (1945); *Raymond Motor Transportation, Inc. v. Rice* 434 U.S. 429 (1978) and *Kassel v. Consolidated Freightways Corp.* 450 U.S. 662 (1981).

[112] Compare e.g. *Maine v. Grand Trunk R. Co.* 142 U.S. 217 (1891) and *United States Express Co. v. Minnesota* 223 U.S. 335 (1912) with *Complete Auto Transit v. Brady* 430 U.S. 274 (1977).

[113] This, of course, also implies that the articulation of the modern approach led to a broader scope of the dormant commerce clause.

[114] See e.g. *Reynoldsville Casket Co. v. Hyde* 514 U.S. 749 (1995).

Court has also found that a state statute which itself is neutral can be discriminatory if it has a substantial discriminatory effect or protectionist purposes.[115] According to the so-called *Pike*-test, the Court will, if it finds a state statute not discriminatory, balance the law's burdens on interstate commerce against its benefits and will declare the concerned statute void when it finds the burdens it creates to exceed the benefits.[116] State legislation is often declared unconstitutional when this test is used and permitted only if it is proven that the law is necessary to achieve a "legitimate local purpose",[117] that is, has a non-protectionist intention.[118] So far, recent case law has not revealed any intention of the Supreme Court to deviate from this approach. For example, in *Oklahoma Tax Commission v. Jefferson Lines*,[119] the Supreme Court used the well-established *Complete Auto* four-part test it has used ever since 1977[120] to find the disputed tax to be consistent with the dormant commerce clause. In the 2005 *United Haulers Association* case, the Supreme Court confirmed much of its precedent by upholding a local ordinance

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[115] See e.g. *Milk Control Bd. v. Eisenberg Farm Prod.* 306 U.S. 346 (1978); *Hunt v. Washington State Apple Advertising Commission* 432 U.S. 333 (1977) and *C&A Carbone, Inc. v. Town of Clarkstown* 114 S.Ct. 1677 (1994).

[116] The Court articulated this test in *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970), 142, but it used comparable balancing tests ever since 1939, e.g. in *Parker v. Brown* 317 U.S. 341 (1943); and *Southern Pacific Co. v. Arizona* 325 U.S. 761 (1945).

[117] See e.g. *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794 (1976), at 804; *Maine v. Taylor* 477 U.S. 131 (1986), at 138; *Sporhase v. Nebraska* 458 U.S. 941 (1982), at 954.

[118] See e.g. *Wyoming v. Oklohoma*. Two exceptions to this doctrine have emerged. Firstly, according to the market participant doctrine the dormant commerce clause does not apply when a state is a participant in – instead of a regulator of – the market (*Hughes v. Alexandria Scrap Corp.* 426 U.S. 794 (1976)). Secondly, state laws burdening interstate commerce are allowed if Congress has approved them (see e.g. *Western & Southern Life Ins. Co. v. State Bd.* 451 U.S. 648 (1981) and *Northeast Bancorp. v. Board of Governors* 472 U.S. 159 (1985).

[119] 514 US 175 (1995).

[120] In *Complete Auto Transit*, the Court held (at 279) that a state tax would be valid under the commerce clause if it "is applied to an activity with a substantial nexus with the taxing state, is fairly proportionate, does not discriminate against interstate commerce and is fairly related to the services provided by the state". This test has often been used ever since, see e.g. *Goldberg v. Sweet* 488 U.S. 252 (1989); *Commonwealth Edison Co. v. Montana* 453 U.S. 609 (1981); *D.H. Holmes Co. v. McNamara* 486 U.S. 24 (1988*); Container Corp. v. Franchise Tax Board* 463 U.S. 159 (1983); *Commonwealth Edison Co. v. Montana* 453 U.S. 609 (1981).

requiring that all waste within the jurisdiction be sent to a government processing facility. Writing for the Court, Chief Justice Roberts held that disposing of trash had been a traditional government activity for years, and laws that favoured the government in such areas but treated every private business, whether in-state or out-of-state, exactly the same did not discriminate against interstate commerce.[121]

3.3. Case law on Article 28 EC

3.3.1. Dassonville

Any analysis of the case law of the Court of Justice on measures having an equivalent effect to a quantitative restriction should of course start with the famous *Dassonville* case. This case concerned Belgian legislation which provided that goods bearing a designation of origin could only be imported if they were accompanied by a certificate of authenticity issued by the government of the exporting country. Dassonville was prosecuted for importing Scotch whisky into Belgium from France without being in possession of such a certificate from the British authorities. He argued that the Belgian law constituted a measure having an equivalent effect to a quantitative restriction (hereinafter: MEQR). The Court of Justice held that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as [MEQR's]".[122]

With this famous formula, the Court appeared to maximize the scope of Article 28 EC.[123] First of all, the crucial factor in deciding whether a Member State measure constituted a MEQR was its discriminatory *effect* on interstate trade; a discriminatory intention was not (even) required.[124] Secondly, the Court, in subsequent *Dassonville* case law, clarified that this principle was not affected by any *de minimis* rule; *any* possible

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[121] *United Haulers Association v. Oneida-Kerkimer Solid Waste Management Authority* 127 S. Ct. 1786 (2007). Nor do other recent cases seem to depart from precedent. See e.g. *Granholm v. Heald*, 544 U.S. 460 (2005).

[122] Case 8/74, *Procureur du Roi v. Benoit and Dassonville* [1974] ECR 837, para. 5.

[123] Or, as one commentator asked, "Are there any trading rules enacted by Member States which are not at least potentially and indirectly capable of hindering intra-Community trade?" (White, "In search of the limits to Article 30 of the EEC Treaty?", 26 CML Rev. 235 (1989), at 235).

[124] Also see Craig and de Burca, op. cit. *supra* note 49, at 585.

effect, however indirect, was sufficient to constitute a MEQR.[125] Thirdly, the Court stipulated that the use of Article 28 was not restricted to trading rules, but covered all state measures.[126] Fourthly, as a result of *Dassonville*, the number of cases in which the Member States were obliged to justify their measures under Article 30 increased considerably. Consequently, the Court held that exceptions to Article 28 were possible but had to be narrowly construed[127] and were in particular subject to the principle of proportionality.[128]

3.3.2. Cassis de Dijon

A second well known case is *Cassis de Dijon*, which involved the intended import into Germany from France of a fruit liqueur with an alcohol content of between 15 and 20 per cent. German authorities refused to allow the importation, because German legislation only allowed the marketing of fruit liqueurs with a minimum alcohol content of 25 per cent. The importer submitted that this rule constituted a MEQR. The German government argued that the legislation was discriminatory in neither a formal nor a material sense; any obstacles to trade were merely the result from the fact that France and Germany had different rules for the minimum alcohol contents of fruit liquors. The Court of Justice articulated the so called principle of mutual recognition: when goods had been legally marketed in a Member State, they should be admitted into any other Member State without restriction.

As is well known, the Court has in its *Cassis de Dijon* case law allowed Member States to regulate on certain matters not falling within the scope of Article 28, if these measures were recognized as being necessary in order to satisfy mandatory requirements such the protection

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[125] See e.g. Joined Cases 177/82 and 178/82, *Criminal proceedings against Jan van de Haar and Kaveka de Meern BV* [1984] ECR 1797; Case 16/83, *Prantl (Karl)* [1984] ECR 1299.

[126] See e.g. Case 4/75, *Rewe- Zentralfinanz Gmbh v. Landwirtschatfskammer* [1975] ECR 843; Case 104/75, *Officier van Justitie v. de Peijper* [1976] ECR 613.

[127] See Weiler, "The Constitution of the Common Market Place" in Craig and de Burca, *The Evolution of EU Law,* (Oxford University Press, 1999), 363.

[128] See Oliver, *Free Movement of Goods in the European Community* (Sweet and Maxwell, 1996), 182-189. Furthermore, a national authority invoking Article 30 bears the burden of proving that the contentious measures are justified under that provision (Case 251/78, *Denkavit Futtermittel v. Minister für Ernährung* [1979] ECR 3369. Also see Case 227/82, *Van Bennekom* [1983] 3883).

public policy and public security,[129] consumers,[130] health and life of humans,[131] the child,[132] the environment,[133] cultural works,[134] or fundamental rights such as the freedom of assembly[135] and the freedom of expression, [136] to name but a few. These mandatory requirements hence allow Member States – in the absence of harmonisation[137] – to derogate from Article 28 on grounds other than those listed in Article 30, provided that the national legislation in question applies without distinction, is in the general interest, is such as to take precedence over the free movement of goods and complies with the proportionate principle.[138] Although the articulation of these mandatory requirements *prima facie* seems to limit the scope of Article 28, the Court in *Cassis* essentially expanded it by bringing in a much wider category of national measures within the ambit of judicial review of Articles 28 and 30 EC. As mentioned, the Court stated that the *Cassis*-formula doctrine applies to measures that affect *without discrimination* both domestic and imported products,[139] whereas Article 28 previously did not apply to

[129] Case 154/85, *Commission v. Italy* [1987] ECR 2717, Case C-239/90, *Boscher* [1991] ECR I-2023; Case 7/78, *Thompson* [1978] ECR 2247; Case C-426/92, *Deutsche Milchkontor* [1994] ECR I-2757.
[130] Case 27/80, *Fietje* [1980] ECR 3839; Case C-344/90, *Commission v. France* [1992] ECR I-4719
[131] Case 120/78, *Rewe* [1979]; Case 215/87 *Schumacher* [1989] ECR 617, para. 15; Case C-347/89, *Eurim-Pharm* [1991] ECR I-1747; Case C-62/90, *Commission v. Germany* [1992] ECR I-2575; and Case C-320/93, *Ortscheit* [1994] ECR I-5243.
[132] Case C-244/06, *Dynamic Medien Vertriebs,* [2008], nyr.
[133] Case 302/86, *Commission v. Denmark* [1988] ECR 4607
[134] Joined Cases 60/84 and 61/84 *Cinéthèque SA and others* [1985] ECR 2605
[135] Case C-112/00, *Schmidberger* [2003] ECR I-5659
[136] Case C-368/95, *Familiapress* [1997] ECR I-3689; Case C-71/02, *Karner* [2004] ECR I-3025
[137] See e.g. Case C-37/92, *Vanacker and Lesage* [1993] ECR I-4947; Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897; and Case C-99/01, *Linhart and Biffl* [2002] ECR I-9375.
[138] See e.g. Case 174/82, *Sandoz* [1983] ECR 2445; Case 227/82, *van Bennekom* [1983] ECR 3883; Case C-51/94, *Commission v. Germany* [1995] ECR I-3599; Case C-114/96, *Kieffer and Thill* [1997] ECR I-3629; Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilipoulos and Carrefour-Marinopoulos* [2006] ECR I-8135;
[139] This is implied in *Cassis,* but was enunciated more explicitly in Case 788/79 *Italy v. Gilli & Andres* [1980] ECR 2071, para. 6.

national measures unless these measures had in some way a discriminatory effect.[140]

3.3.3. Cinéthèque

It is important to point out that the *Cassis de Dijon* formula – which has been applied repeatedly in subsequent case law[141] – concerns the question of how to deal with obstacles created by disparities between national laws; goods produced in one Member State and complying with the national rules of that State, also have to submit themselves to a *second* set of – albeit non-discriminatory – regulations of the State of importation in order to be marketable in that State. These measures are referred to as dual burden rules. The impact of *Cassis* is to render these measures incompatible with Article 28 except when justified by a mandatory requirement (or Article 30 EC). By contrast, equal burden rules are measures that have an *equal* impact on imports and domestic products. They are not designed to be protectionist and may have an impact on the *overall* volume of trade, but have no greater impact on imported products than they do on domestic ones.[142] Important examples of these rules are measures that regulate the selling arrangements within a Member State. Six years after *Cassis,* in *Cinéthèque* and the *Sunday Trading cases*, the Court found these measures to be within the scope of Article 28 too, even though, as the Court admitted, their impact on interstate trade was "purely speculative".[143]

The *Cinéthèque* case concerned a French law prohibiting the sale or rental of videocassettes of any film during the first year in which the film was released. The Advocate General argued that the measure fell outside Article 28, since it applied equally to imported and domestic videos. The Court took the opposite view and held that Article 28 caught equal burden rules such as the French prohibition (unless they were justified).[144] This was confirmed in the *Sunday Trading Cases*. *Torfaen*,

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[140] Also see Arnull, *et al*, *Wyatt and Dashwood's European Union Law* (Sweet and Maxwell, 2000), 323; and Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999), 265.

[141] See e.g. *Gilli and Andres*, op. cit. *supra* note 139; Case 130/80, *Kelderman* [1981] ECR 527; Case 6/81, *Industrie Diensten Groep v. Beele* [1982] ECR 707; Case 94/82, *De Kikvorsch* [1983] ECR 947; Case 176/84, *Commission v. Greece* [1987] ECR 1193; and Case 90/86, *Zoni* [1986] ECR 4285.

[142] Weatherill and Beaumont, *EU Law* (Penguin, 1999), at 608 et seq.; Craig and de Burca, Craig and de Burca, op. cit. *supra* note 49, at 610-616; and Bernard, "Discrimination and Free Movement in EC Law", 45 ICLQ 82 (1996), 92-93.

[143] Case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B&Q plc* [1992] ECR 6635, para. 15.

[144] *Cinéthèque,* op. cit. *supra* note 134.

the first of these cases, concerned the United Kingdom's Shops Act of 1950, which prohibited retail shops from opening for business on Sundays.[145] Echoing its approach in *Cinéthèque,* the Court held that the rule was *prima facie* caught by Article 28, but could be justified in the present case by reference to the mandatory requirements and provided it also satisfied the requirement of proportionality.[146] The *Torfaen*-judgment was confirmed in the other *Sunday Trading* judgments.[147] *Cinéthèque* and subsequent case law on equal burden rules marked a further widening of the scope of Article 28.[148]

3.3.4. Keck

The 1993 *Keck* case signified a volte-face of the Court of Justice similar to *Tobacco Advertising.* Keck and Mithouard were prosecuted for selling

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[145] Except for certain types of products, such as meals or refreshments.

[146] Case 145/88, *Torfaen BC v. B & Q plc* [1989] ECR 3851, paras 12-14. See Arnull, "What Shall We Do On Sunday?", 16 EL Rev. 112 (1991); and Gormley, "Case 145/88,Torfaen Borough Council *v.* B&Q Plc", 27 CML Rev. 141 (1990).

[147] Case 306/88, *Rochdale BC v. Anders* [1992] ECR I-6457 ; Case 312/89 *Union Departementale des Syndicats CGT de l'Aisne v. Conforama* [1991] ECR 997; Case C-332/89 *Minisère Public v. Marchandise* [1991] ECR 1027; Case C-169/91, *Council of the City of Stoke-on-Trent and Norwich City Council v. B&Q plc* [1992] ECR 6635; Case 304/89 Reading *BC v. Anders* [1991] ECR I-2283. See generally Barnard "Sunday Trading: A Drama in Five Acts", 57 Mod. L. Rev. 449 (1994) and Arnull, *The European Union and its Court of Justice* (Oxford University Press 2006), at 282-286.

[148] The Court of Justice has however been somewhat inconsistent in its case law on equal burden rules. E.g. in Case 155/80 *Oebel* [1981] ECR 1993*,* the Court held a ban on the delivery of bread during the night to be compatible with Article 28, because it applied (para. 20) "to the same extent to all producers, wherever they are established". Similarly, in Case 75/81, *Belgian State v. Blesgen* [1982] ECR 1211*,* the Court considered that a legislative provision that concerned the sale of strong spirits for consumption on the premises in all places open to the public, was not in breach of Article 28, since these restrictions made (para. 9) "no distinction whatsoever based on their nature or origin". And in Case 148/85, *Directeur- Général des Impôts v. Forest* [1987] ECR 565, nationally imposed flour-milling quotas fell outside the scope of Article 28, because these quotas applied in the same way to imported and domestic wheat. Yet, as Gormley points out, ("Obstacles to Free Movement of Goods", 9 YEL 197 (1989), at 200) "[a]lthough these cases do not present a model of clear reasoning, it is … clear that they do not represent a narrowing of the concept of what constitutes a MEQR" and it is apparent from the Court judgment in Joined Cases C-267/91 and C-268/91, *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097 that *Cinéthèque* and *Torfain* indeed intended to widen the scope of Article 28 (see text accompanying note 150).

goods at prices below the actual purchase price, an act prohibited by French law. The Court stated that it was necessary to reconsider and to clarify the case law on Article 28 in view of the "increasing tendency of traders to invoke [ex] Article 30".[149] It differentiated between national rules laying down requirements to be met by goods themselves and rules that regulate the selling arrangements. The *Cassis* principle applied to the former category of product requirements, but the Court held in *Keck* that "contrary to what had previously been decided" in cases such as *Cinéthèque* and *Torfaen,*[150] Article 28 did not cover national provisions regulating selling arrangements,[151] since they *per se* do not have an effect an interstate trade the Court, even if they reduce the volume of sales. This is the case providing, however, that the measure concerned applies equally to all affected traders within the Member State territory and neither *de jure* nor *de facto* discriminates between imported and domestic products. Furthermore, the purpose of the national rule must not be the regulation of trade in goods between Member States.[152]

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[149] *Keck*, para. 14.

[150] Although the Court did not mention these cases explicitly, subsequent case law, especially on the subject of Sunday trading (see note 152) support the presumption that this was the case law the Court was referring to.

[151] Even though the Court speaks of "*certain* selling arrangements", subsequent case law confirms that all types of selling arrangement fall outside the scope of Article 28. See Oliver, "Some further Reflections on the Scope of Articles 28-30 (Ex. 30-36) EC", 36 CML Rev. 783 (1999), at 794.

[152] *Keck,* para. 15-16. Also see Snell, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms,* (Oxford University Press, 2002) 78-80. Thus, the Court has now found - meeting these conditions - that Article 28 does not apply to restrictions on Sunday opening hours of shops (Joined Cases 69/93 and 258/93, *Punto Casa SpA v. Sindaco del Commune di Capena* [1994] ECR 2355; Joined Cases 401/92 and 402/92 *Criminal Proceedings against Tankstation 't Heustke vof & JB.E. Boermans* [1994] ECR 2199; and Joined Cases 418/93 to 421/93, 460/93 to 462/93 and 464/93, 9/94 to 11/94, 14/94, 15/94, 23/94, 24/94 and 332/94 *Semeraro Casa Uno Srl v. Sindaco del Commune de Erbusco* [1996] ECR 2975), nor to other selling arrangements such as a national rule prohibiting television advertising in a particular sector (Case C-412/93, *Société d"Importation Edouard Leclerc- Siplec v. TFI Publicité SA and M6 Publicité SA* [1995] ECR 179), to legislation prohibiting advertising certain products outside pharmacies (Case C-292/92 *Hunermund (R) v. Landesapthekerkammer Baden- Württemburg* [1993] ECR 6787), to a prohibition of misleading advertisement and advertisement aimed at children less than 12 years of age (Joined Cases C-34-36/95 *Konsumentombudsmann (KO), v. De Agostine (Svenska) Forlag AB & TV- Shop i Sverige AB* [1997] ECR 3843), and to a national rule stipulating that processed milk for infants be sold exclusively in pharmacies (Case C-391/92 *Commission v. Greece* [1995]

3.4. The impact on the Division of Powers

The impact of the dormant commerce clause case law on the Division of Powers in the United States is apparent. The dormant commerce serves as an effective limit to the powers of the states; by modifying the scope of the dormant commerce clause the Supreme Court can control those powers. Redish has even argued that the dormant commerce clause cannot be reconciled with the federal distribution of powers as laid down in the United States Constitution.[153]

Modifications in the scope of Article 28 have had similar effects. The Court of Justice in *Dassonville* limited the Member States' legislative powers – Article 28 now prohibiting all trading legislation "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[154] These powers were further limited by the Court in *Cassis*. After *Cinéthèque* and the *Sunday Trading*-cases, the Member States could no longer adopt equal burden rules, but they regained this authority with *Keck*. As pointed out by Bernard, the constitutional tension underlying this case law on Article 28 is "the balance of powers between the Member States and the Community".[155] According to Reich, "there is no doubt about the constitutional impact of different readings of Article 30 [now Article 28]… The broader the reading of Article [28], the smaller the powers which remain with the Member States".[156] Or, in the words of Maduro:

ECR 1621, also see Case C-387/93 *Banchero* [1995] ECR 4663). In contrast, measures such as a restriction as to the designation of certain products (Case C-315/92 *Verband Sozialer Wettbewerb v. Clinique Laboratoires SNC* [1994] ECR 317), and a prohibition on the sale of ice-cream bars in wrappers marked with the symbols "+10%", according to the Court, constituted product requirements and therefore fell within the scope of Article 28 (Case C-470/93 *Verein gegen Unwesen im Handel v. Mars* [1995] ECR 1923). On the (precise) meaning of selling arrangements, see Oliver, op. cit. *supra* note 151, at 794; Higgins, "The Free and Not so Free Movement of Goods since Keck", 6 *Irish Journal of European Law* 166 (1997), 168; and Picod, "La nouvelle approche de la Cour de Justice en matière d'entraves aux échanges", 34 RTDE 169 (1998), 173-177.

[153] Redish, *The Constitution as Political Structure* (Oxford University Press, 1995), Chapter III

[154] Unless when justified under Article 30. Yet, as mentioned, exceptions were narrowly construed and subject to the principle of proportionality.

[155] Bernard, op. cit. *supra* note 143, at 82. And see Snell, op. cit. *supra* note 153, at 33; Maduro, *We the Court. The Court of Justice and the European Economic Constitution* (Hart Publishing, 1998), at 67-68; Wils, "The Search for the rule in Article 30 EEC: Much Ado About Nothing?", 18 EL Rev. 475 (1993), at 478- 9.

[156] Reich, "Europe's Economic Constitution, or: A New Look at Keck", 19 OJLS 337 (1999), at 341.

"the extent of the regulatory powers left to Member States will largely depend on the scope given to Article 28 … the decision to review [through Article 28] national regulations and, if so, according to which criteria, implies choices regarding the division of competences between the Member States and the Union… Article 28 and the rules on free movement are essential instruments in the distribution of power within the constitutional order of the union. The review of States' regulatory measures distributes power … between Member States and the European Union political process".[157]

4. Synthesis

4.1. Introduction

It has been demonstrated that changes to the scope of Article 95 have an effect on the Division of Powers when (1) a measure was found to be either *ultra* or *intra vires*, (2) a legal basis requiring QMV instead of unanimity is chosen or contrariwise; and/or (3) a legal basis requiring either relatively more or less involvement of the Parliament is chosen. There are, of course, similar effects with regard to Article 28 EC. The high importance of this provision for the achievement of single market integration is well known, as well as the volume of the case law on this Article.

The case law on Articles 28 and 95 EC in particular is often referred to by those commentators accusing the Court of centralistic traits. To a great extent, similar arguments are used as those referred to in Chapter II as legal formalists and legal functionalist.[158] The present chapter does not attempt to make a similar distinction, but arguments used to assess the impact of the case law on Articles 28 and 95 essentially follow similar lines. In short, the Court has, in this context, been accused of being subjective, ignoring the rule of law and favouring European integration. Crosby, for instance, has argued that:

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[157] Maduro, "Reforming the Market or the State? Article 30 and the European Constitution; Economic Freedom and Political Rights", 3 ELJ 55 (1997), at 72.

[158] This does not necessarily imply that those which have been referred to in Chapter II as "Legal Formalists" or "Legal Functionalist" have similar ideas with regard to the role of the Court of Justice in the Division of Powers in the European Union. However, this is also true in the United States (see eg. Elmendorf "Note, State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs", 110 Yale L. J. 1003 (2001), at 1025: "Formalist and functionalist thinking also figure into the federalism debates, but with an altogether different cast".

> "Directive 89/428/EEC did seem to be primarily concerned with the protection of the environment. Competition concerns did seem secondary: they were not even addressed in the recitals. However, in [Titanium Dioxide] this secondary and faint competition element was sufficient for the Court of Justice to justify resource to Article 100A EEC alone. … Insufficient respect is being paid to the rule of law. Article 100A EEC is being misused".[159]

According to Barnard, "[p]erhaps the Court's fundamental desire [was] to support QMV, since it effectively prevents a state from exercising the power of veto".[160] According to Edwards, the fact that Article 95 was used by the Council for all kinds of non-commercial activities was "largely the result of the Court of Justice's wide interpretation of open-ended powers in the EC treaty".[161] With regards to Article 28, it has been argued that *Cassis de Dijon* resulted from the "enthusiasm for Europe" of a number of Judges at the time.[162] Stone Sweet found that the interpretation of Article 28 by the Court of Justice in *Dassonville* was "more expansively integrationist than any in circulation at the time", adding that this interpretation, "if put to a vote … would not have been accepted by a majority, let alone all of the Member States".[163]

4.2. Division of Powers considerations

Like the United States Supreme Court, the European Court of Justice has played an important role in the Division of Powers in the European Union. As demonstrated, the case law on Articles 95 and 28 have had important effects on the Division of Powers. Since these provisions are at the core of the European Union's legal framework, the significance of the role of the Court of Justice in this regard should not be underestimated. Like *Lopez, Tobacco Advertising* can be seen as part of a backlash against the "creative" use of a commerce power to achieve non-commercial results, and specifically "the expanding use and the broad interpretation of Community competences".[164] The result of the previous case law of the Court of Justice on Article 95 was essentially

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[159] Grosby, "The Single Market and the Rule of Law", 16 EL Rev. 451 (1991), at 464-465.
[160] Barnard, "Where politicians fear to tread?", 57 EL Rev. 127 (1994), at 133.
[161] Edwards, "Fearing Federalism's Failure: Subsidiarity in the European Union", 44 *American Journal of Comparative Law* 537 (1996), 583.
[162] Dehousse, *The European Court Of Justice: The Politics Of Judicial Integration*, (Palgrave, 1998).
[163] Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press, 2000).
[164] Editorial Comments, 37 CML Rev. 1301 (2000), at 1303.

that the Council now had "an almost free choice to legislate", as it could harmonize "all national legislation which … may exercise an effect on intra-Community trade… a factual *Kompetenz- Kompetenz* to the Community".[165]

The Court of Justice seems to be well aware of the effects of its case law on the Division of Powers in the European Union. In *Titanium Dioxide*, the legislative procedure of Article 95 was the decisive factor in the Court of Justice's choice of this provision as the legal basis. Not only did the Court held that "[t]he essential element of the cooperation procedure would be undermined"[166] if the Council had to act unanimously as a result of a dual legal basis of Articles 100A and 130, it also concluded that "the very purpose of the cooperation procedure, which is to increase the involvement of the European Parliament in the legislative process would … be jeopardized".[167] Furthermore, in *Tobacco Advertising,* the Court of Justice curtailed the broad legislative authority under Article 95 on the ground that:

> "to construe [Article 95] as meaning that it vests in the Community Legislature a general power to regulate the internal market would … be incompatible with the principle embodied in … Article 5 EC that the powers of the Community are limited to those specifically conferred on it".[168]

4.3. A hidden agenda of integrationalism?

Do these considerations necessarily imply that the Court of Justice has been guided by a hidden policy of integrationalism? In the words of Weatherill, overall it is clear that "the pattern of jurisprudence under Article 30 [now Article 28] is characterized by a great deal more sophistication than could be captured by an "integration only" label".[169] Neither was the case law on Article 95 only directed at increasingly granting the Community more powers. Admittedly, during the same period in which the Court in *Titanium Dioxide* and *GATT* preferred Article 95 (QMV, cooperation with Parliament) as the legal basis to

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[165] Barents, "The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation", 30 CML Rev. 85 (1993), at 106-107.

[166] Case C-300/89, *Commission v. Council* [1991] ECR I-2867 (*Titanium Dioxide*), para. 19.

[167] Id., para. 20.

[168] *Tobacco Advertising*, para. 83.

[169] Weatherill, "Recent case law concerning the free movement of Goods: Mapping the Frontiers of Market Deregulation", 36 CML Rev 74 (1999), at 85. See also his *Law and Integration in the European Union* (Oxford, 1995), at 236-237

Article 174 (unanimity, consultation),[170] it, in *Product Safety* and *Certificate for Medicinal Products*, seemed reluctant to find the disputed measures to be *ultra vires.* However, in *Waste Directive* and *Transfer of Waste*, the Court preferred a provision requiring unanimity to Article 95, whereas in *Chernobyl,* the Court preferred a provision requiring consultation with Parliament to one requiring its cooperation, although both provisions required QMV.

In other words, these cases illustrate that the Court is not pursuing a hidden agenda of integrationalism or ignoring the rule of law. Rather they illustrate that the Court is – and at least has to be – aware that choosing between two legal bases with different legislative processes requires it to take into account the important consequences for the Division of Powers. The Court prefers a pragmatic, more functional role, described by Oliver and Roth as that of

> "an arbiter between the demands of the internal market on the one hand and the effectiveness of a decentralized decision-making process on the level of the Member States on the other".[171]

5. Conclusion

It has been demonstrated that changes to the scope of Article 95 have had effects on the Division of Powers when (1) a measure was found to be either *ultra* or *intra vires*, (2) a legal basis requiring QMV instead of unanimity is chosen or contrariwise; and/or (3) a legal basis requiring either relatively more or less involvement of the Parliament is chosen. The high importance of this provision for the achievement of single market integration is well known, as well as the volume of the case law on this Article. There are, of course, similar considerations with regard to Article 28 EC.

It is precisely because its case law on Article 28 and 95 has a "direct impact on the structure and balance of the decentralized decision-making process in the Union", the Court is forced to play a constitutional role of arbiter giving "different answers to different situations".[172] The Court of Justice is aware of its own role vis-a-vis the political institutions of the

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[170] *Edicom* concerned the question whether the Council Decision – adopted under Article 235 EC – had to been based on Article 129D or 100A. These provisions provide, respectively, for the cooperation and co-decision procedures, whereas Article 235 merely provides for the Parliament to be consulted. The Court held that 129D was the proper legal basis.

[171] Oliver and Roth, "The internal market and the four freedoms", 41 CML Rev 407 (2004), at 413

[172] Id.

European Union, not attempting to usurp the role of the Community Legislature but rather to provoke its response. Essentially, after *Tobacco Advertising I* and *Keck,* the Court of Justice's approach with regards to the Division of Powers within the European Union has been similar to its approach towards the Separation of Powers as expounded in Chapter III. On the one hand, the Court has articulated several criteria which must be met in order to assess whether Article 28 or 95 has been infringed. On the other hand, it has used a functional approach towards these criteria rather than acting as a "driving force of integration". The Court of Justice has been well aware of the constitutional impacts of its case law on Articles 28 and 95, but has used a form of judicial functionalism both with regard to the impact of this case law on the Division of Powers as well as with regard to the implications of this case law concerning its own role towards the political institutions of the European Union.

- V -

SUBSIDIARITY

1. Introduction

It would not be an understatement to say that the subsidiarity principle has received mixed reactions ever since it was introduced. The principle has received qualifications ranging from "a concept of enormous, even alarming, breadth"[1] and "having an ambitious air",[2] to "just a word",[3] a "weaselword",[4] a "Community juju or totem-pole",[5] "Eurospeak",[6] "elusive"[7], "deliciously vague",[8] "vague but not unintelligible",[9] "riddled with uncertainty",[10] "discussed by everyone and understood by virtually no one",[11] or simply "the wrong idea, in the wrong place, at the wrong time".[12] It has been argued that the principle is ambiguous and open-

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[1] Barber, "The Limited Modesty of Subsidiarity", 11(3) ELJ (2005) 308, at 308

[2] Koopmans, "The Quest for Subsidiarity", in Curtin and Heukels (eds.), *Institutional Dynamics of European Integration* (Martinus Nijhoff, 1994) 43, at 43.

[3] Grimm, "Subsidiarität ist nur ein Wort", *Frankfurter Allgemeine Zeitung*, September 17, 1992, at 217, quoted by Pernice, "The Framework Revisited: Constitutional, Federal and Subsidiarity Issues", 2 Colum. J. Eur. L. 403 (1996), at 405.

[4] De Burca, "Reappraising Subsidiarity's Significance after Amsterdam", Harvard Jean Monnet Working Paper 7/99, at 9.

[5] Lord Mackenzie-Stuart, "A Busted Flush", in Curtin and O'Keeffe "Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr. Justice T.F. O'Higgins" (Butterworths, 1992) 19, at 23

[6] Van Kersbergen and Verbeek, "The Politics of Subsidiarity in the European Union", 32(2) JCMS 215 (1994), at 215.

[7] Toth, "A Legal Analysis of Subsidiarity", in O'Keefe and Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994), 37 at 37.

[8] Weiler, "A Constitution for Europe", 40 JCMS 563 (2002), at 571.

[9] Lasok, "Subsidiarity and the Occupied Field", 142 *New Law Journal* 1228 (1992), at 1228.

[10] Steiner, "Subsidiarity under the Maastricht Treaty", in O'Keefe and Twomey (eds.), op. cit. *supra* note 7, 49 at 49.

[11] Joschka Fischer, "From Confederacy to Federation - Thoughts on the finality of European integration", speech at the Humboldt University in Berlin (June 12, 2000).

[12] Davies, " Subsidiarity, the wrong idea, in the wrong place, at the wrong time", 43 CML Rev. 63 (2006).

ended and has only been nominally applied by the Court of Justice simply for integrationalist purposes.[13] This Chapter will examine whether the Court of Justice has indeed deliberately refrained from using this principle to avoid introducing new limits to the legislative powers of the European legislature. To what extent should the European Court of Justice apply this sometimes ambiguous principle? Has the Court of Justice, as has been argued,[14] contributed to – rather than attempted to clarify – the ambiguity of the principle? In other words, this Chapter will assess the constitutional effects of the case law of the Court of Justice on subsidiarity.

It will be demonstrated that it is not only possible to infer from the wording and legislative history of the concept of subsidiarity a principled test – consisting of four successive questions – but also that these questions are to a large extent reflected in the case law of the Court of Justice (§ 2). It will also be demonstrated that while this case law has had important constitutional implications for both the Separation of Powers and the Division of Powers in the European Union, the Court has, at the same time, shown important deference towards the Community's political institutions and the Member States. This deference can be explained – and justified – by examining this case law of the European Court of Justice from a comparative perspective, looking at the case law of the United States Supreme Court on the Tenth Amendment (§§ 3-4). In this chapter, it will be argued that the approach of the European Court of Justice towards the subsidiarity principle is not dominated by a hidden agenda of integrationalism, but rather aimed at seeking the proper balance between the European Union's – intertwined – Separation of Powers and Division of Powers.

2. The subsidiarity test

2.1. Introduction

As set out in Article 5(2) EC, the subsidiarity principle entails that the Community is to take action only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reasons of the scale or effects of the proposed action, be better achieved by the Community. Article 2 EU extends the applicability of the principle to the second and third pillars. The

[13] Most forcefully advocated by Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002). See furthermore the text accompanying notes 218 and 219, *infra.*
[14] Id.

principle, with its well known Roman Catholic pedigree,[15] can be applied to literally all areas of Community policy – from indirect taxation on transactions in securities to the conditions in which animals are kept in zoos.[16] This is provided, however, that the area concerned does not fall within the Community's exclusive competence. It has been repeatedly stressed – in fact ever since the principle was first mentioned in the Community context[17] – that the subsidiary principle does not apply to the European Union's exclusive competences. This is confirmed by the new Article 3b TFEU as proposed by the Lisbon Treaty.[18]

2.2. Historical development

The preamble to the Lisbon Treaty provides that the European leaders are "resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". According to the Subsidiarity Protocol annexed to the EC Treaty (hereinafter: the First Protocol), the primary aim of the subsidiarity principle is to ensure "that decisions are taken as closely as possible to the citizens of the Union".[19] For that reason, the subsidiarity principle was initially also referred to as a principle of "nearness".[20] During the 1992 European Council in Birmingham it was stressed that subsidiarity was essential if the Community was to develop "with the support of its citizens".[21] It has been repeatedly emphasized that measures implementing the principle are aimed at strengthening the democracy

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[15] See the definition in the 1931 Enclyclical letter, Quadragesimo Anno (referred to for the first time in the Community context by Wilke and Wallace, "Subsidiarity Approaches to Power Sharing in the European Community" (Report for the Royal Institute for International Affairs, 1990)): "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do".

[16] Examples derived from Annex 2 to the Conclusions of the Presidency on Subsidiarity, adopted at the Edinburgh European Council of 11-12 December 1992 (hereinafter: "Edinburgh Conclusions").

[17] Report on European Union (European Commission, 1975), Bull EC Supp. 5/75, at 11.

[18] Article 2 Lisbon Treaty.

[19] Article 3 of Protocol No 30, annexed to the EC Treaty, on the application of the principles of subsidiarity and proportionality, OJ 1997, C 340 1.

[20] Conclusions of the Birmingham Council, Bull SN/ 343/1/92, PE 162.260, October 19, 1992, at 5. (hereinafter: the "Birmingham Conclusions").

[21] Id.

and transparency of the European Union.[22] Implementing measures by the Commission have even included the "improvement in the treatments of telephone, mail, and personal contacts between citizens and the Commission".[23]

The rise of the principle of subsidiarity mainly coincided with the institutional transition within the European Community from unanimity to qualified majority voting. The concept was introduced into the European legal system by the Single European Act, which applied the principle to environmental policy only. Article 130r(4) EEC provided that the Community was to take action only when the environmental objectives set out in the Treaty could be "attained better at the Community level than that of the individual Member States". The status of the principle was raised significantly by the European Parliament's draft Treaty on European Union of 1984 – or the Spinelli draft, as it is commonly referred to. This document, next to explicitly referring to the principle in its Preamble, provided that "the Union shall only act to carry out those tasks which may be more effectively undertaken in common than by Member States acting separately".[24] The principle was again given an important position in the Treaty of Maastricht eight years later. It was inserted in Article 3b (now Article 5) EC and furthermore was referred to in the Preambles to both the EC and EU Treaty. Article 130r(4) EEC was deleted. Articles A and B EU extended the application of the principle to the newly established two pillars.

The principle was subsequently put high on the political agenda during the Treaty of Nice negotiations. The famous 2001 Laeken Declaration on the Future of Europe made the principle the primary instrument for deciding on the relationship between the European Union and its Member States in the post-Nice era. It stressed that one of the key questions for the future of the European Union was "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity".[25]

As is well known, it was this Declaration that established the Convention on the Future of Europe, the first Working Group of which was entrusted with the task of examining how "compliance with the principle of subsidiarity [could] be monitored in the most effective

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[22] See e.g. the Interinstitutional Declaration on Democracy, Transparency and Subsidiarity, OJ 6/12/93,C -329/134, at 135, and the Declaration of the European Parliament's delegation concerning democracy, transparency and subsidiarity, OJ 6/12/93, C - 329/142.

[23] Interinstitutional Declaration, id. at 134.

[24] O.J. 1984, C 77/33.

[25] Laeken European Council, SN 273/01, December 15, 2001.

manner possible?"[26] This resulted in the second Protocol on the Application of the Principles of Subsidiarity and Proportionality (hereinafter: the Second Protocol), which was annexed to the Treaty Establishing the Constitution for Europe (hereinafter: CT).

Further importance was attached to the principle by the Lisbon Treaty. The new Article 5 TFEU[27] will provide that "the use of Union competences is governed by the principles of subsidiarity and proportionality".[28] Furthermore, the new Article 12 EU will provide that "National Parliaments contribute actively to the good functioning of the Union … by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality".[29] This Protocol (hereinafter: the Third Protocol) is very similar to the Second Protocol.[30]

All in all, these developments illustrate that the subsidiarity principle has steadily gained the status of having a "constitutional task and role"[31] in defining the relationship between the European Union and its Member States.

2.3 The Subsidiarity test

2.3.1 Introduction

Despite many claims that subsidiarity is an ambiguous principle, a rather clear four-phased subsidiarity test can be distilled from the wording and legislative history of the principle. The wording of Article 5 EC itself reveals the two main questions: whether the objectives of the action concerned have been sufficiently achieved by the Member States, and, secondly, whether that action "therefore … [could be] better achieved by the Community".[32] When viewed against the legislative history of the

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[26] CONV 71/02, Mandate of the Working Group on the principle of subsidiarity, May 30, 2002, at 2.

[27] Proposed as Article 3b EU by Article 2 of the Lisbon Treaty.

[28] Copied *verbatim* from Article I-11 of the Constitutional Treaty. This provision is an amended version of the current Article 5 EU, which will be repealed.

[29] Proposed as Article 8 C EU by Article 2 of the Lisbon Treaty.

[30] Although it does contain a new Article 7(3), which also aims to increase the role of the national parliaments in the monitoring of the subsidiarity principle

[31] Von Bogdandy and Bast, "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform", 39 CML Rev. 227 (2002), at 251.

[32] See furthermore: Von Borries and Hauschild, op. cit. *supra* note 232, at 377-378; and Toth, op. cit. *supra* note 7, at 43

subsidiarity principle, these two questions can essentially be boiled down to "should the Community exercise a particular power?"[33] and "to what extent should that power be exercised?" Although the use of "therefore" in Article 5 EC could imply that these two questions are essentially one and the same, it has been repeatedly emphasised by the Community Legislature – *inter alia* at the Intergovernmental Conference on the Treaty of Amsterdam – that these are different criteria which must be cumulatively observed. This also follows from the Article 5 First Protocol. Two other, preliminary questions, must, however, be answered – positively – first. Firstly, does the Community posses the particular power concerned? Secondly, is that power a non-exclusive one? This section will discuss these successive four questions (§2.2-5) and will examine to what extent they are reflected and applied in the case law of the European Court of Justice.

2.3.2. First question: a Community power?

2.3.2.1. Legal context

Logically, before considering the applicability of the subsidiarity principle to the exercise of a power, it must first be established whether the Community actually has that particular power. The subsidiarity principle does not apply to the division of powers, but rather to how those powers which have already been transferred to the EU level are subsequently exercised. The subsidiarity principle can hence not be invoked to question the division of powers between the European Union and its Member States. In other words, the subsidiarity principle applies to powers which have already been entrusted to the Community and hence are already within its competence. The question is merely whether and to what extent these powers are to be exercised. The First Protocol states in paragraph 3 that the principle of subsidiarity does not call into question the powers conferred upon the Community by the Treaty.

Although this first question *prima facie* might seem somewhat trivial, its importance becomes clear when looking at the two other principles of Community law enshrined in Article 5 EC. The legal basis principle of Article 5(1) EC entails that the Community is to act within the limits of the powers conferred upon it by the EC Treaty and of the objectives assigned therein. The principle of proportionality as laid down in Article 5(3) EC provides that "any action by the Community shall not go beyond what is necessary to achieve the objectives of [the EC] Treaty". The main difference between the first and latter two principles is that only the legal basis principle effectively applies to the division of powers as it is

[33] Edinburgh Conclusions, Annex 1 to Part A, at 6

classically understood. The legal basis principle simply entails that the Member States have entrusted only limited powers to the Community, which they can exercise "on pain of acting ultra vires", whereas the principle of proportionality and the principle of subsidiarity, on the other hand, "operate as limits to be observed intra vires".[34] Both these latter two principles concern the allocation *of the exercise* of powers. They only apply when it has been established that the power has actually been transferred to the Community and do not call into question the existence of a Community power.[35] It is for this reason that the new Article 5 EU as proposed by the Lisbon Treaty states that "the *use* of Union competences is governed by the principles of subsidiarity and proportionality".[36]

It follows that the first preliminary question before considering the application of the subsidiarity principle to a specific area should be whether the subject matter that the European Union intends to regulate can be based on one of the powers of the European Union.

2.3.2.2. Case law of the Court of Justice

That the subsidiarity principle cannot be invoked to question the division of powers between the European Union and its Member States is reflected in the case law on subsidiarity. The Court has emphasized the importance of this element, especially when one of the parties to a case invoked the subsidiarity principle in order to substantiate that the Community lacked a particular power.[37] For instance, in *British American Tobacco*[38] the Court was asked to rule on the validity of Directive 2001/37 on the harmonization of the manufacture, labelling and sale of tobacco products, which was based on Article 95 EC.[39] The claimants invoked the subsidiarity principle, arguing that no evidence had been adduced to show that the Member States could not adopt the

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[34] Lenaerts, "Subsidiarity and Community Competence in the Field of Education", 1 Colum. J. Eur. L. 1 (1994), at 2.

[35] See e.g. Article 3 First Protocol and Article 1(2) of the Interinstitutional Agreement on procedures for implementing the principle of subsidiarity (OJ C 329, 6.12.1993; Bull. EC 10-1993).

[36] Emphasis added.

[37] This element has also been emphasised by the Court of First Instance, see T-339/04, *France Télécom v. Commission* [2007] ECR II-521, paras 88-89 ("The principle does not call into question the powers conferred on the Commission by the EC Treaty. … Accordingly it has not been established that the principle of subsidiarity was infringed").

[38] Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453

[39] OJ 2001 L 194, at 26.

measures of public health protection which they considered necessary. In *Alliance for Natural Health*,[40] the applicants used a somewhat similar reasoning to substantiate their claim that certain provisions of Directive 2002/46, which harmonized Member States' legislation regarding food supplements, was incompatible with Community law. Invoking the principle of subsidiarity, they argued that the provisions interfered unjustifiably with the powers of the Member States in a sensitive area involving health, social and economic policy. It was added that the Member States were the best placed to determine, on their respective markets, the public health requirements which would justify a barrier to the free marketing of food supplements on their national territory. In both cases, the Court, however, before considering the conformity of the Directive concerned with the subsidiarity principle, first emphasised that Article 3 of the First Protocol stated that the principle of subsidiarity did not call into question the powers conferred on the Community by the Treaty as interpreted by the Court.

2.3.3. Second question: a non-exclusive power?

2.3.3.1. Exclusive and non-exclusive powers

Almost every Community document on the subsidiarity principle has underscored that the principle only applies to areas for which the Community does not have exclusive competence.[41] The European Constitution was the first Treaty to introduce a distinction between exclusive powers, shared competences and "areas of supporting, coordinating or complementary action".[42] With regard to exclusive competences, only the European Union may legislate and adopt legally binding acts. Member States are only allowed to legislate when so empowered by the European Union or when acting as implementing agents of the European Union.[43] The Constitutional Treaty proposed that in the areas of shared competence, both the European Union and the Member States might legislate, but once adopted, EU legislation would

[40] Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECR I-6451.

[41] See e.g. Article 12(2) of the Draft Treaty of 1984; Edinburg Conclusions, at 19; Article 3 of the First Protocol .

[42] See Article I-11(1), Article I-11(2) and Article I-11(5) (formerly I-16(3)) CT, which, if the Lisbon Treaty will be ratified, will become Article 5(1) EU).

[43] Article I-12 CT (Article 2 TFEU as proposed by Article 2 of the Lisbon Treaty).

supersede national competence to legislate in the covered area.[44] Such supersession would not occur in areas of supportive actions.[45]

The Lisbon Treaty uses a somewhat different approach. The Protocol on the Exercise of Shared Competence, as proposed by the Lisbon Treaty, provides that when the European Union has taken action in a certain area of shared competence, the scope of this exercise of competence only covers those elements governed by the Union act in question and, therefore, does not cover the whole area. A new Article 2(2) TFEU (a rewritten version of Article I-12(2) CT), provides that "the Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".[46] The amendments to this provision attempt to emphasise that Member States can regain competence if the EU stops acting.[47] Furthermore, in the area of supportive actions, it is emphasised that the European Union is only supporting Member States' actions in this area.[48]

The tripartite distinction between exclusive, concurrent and supportive powers is of course not an unfamiliar feature of federal

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[44] Article I-13 CT (Article 3 TFEU as proposed by Article 2 of the Lisbon Treaty).

[45] Article I-16 CT, which has not returned in the Lisbon Treaty.

[46] This is different from I-12(2) CT, which provided that "'the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence".

[47] See also para. 2 of Declaration (No. 18) in relation to the delimitation of competences: "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests".

[48] Whereas, originally, the Article provided that the Union could "carry out supporting, coordinating or complementary action", it now provides that the Union shall have competence to take action to support, coordinate or complement the actions of the Member States.

systems.[49] Other systems use bipartite distinctions between exclusive powers on the one hand, and non-exclusive or concurrent powers on the other.[50] Although the European Constitution used a tripartite distinction, previously a bipartite distinction between exclusive and non-exclusive powers was generally used in the context of the European Union.[51] To a certain extent, the Lisbon Treaty returns to this bipartite distinction by downplaying the importance of the European Union's supportive powers. The United States Constitution differentiates between enumerated exclusive powers of the federal level and the so-called reserved powers of the states. These latter powers are, under the Tenth Amendment, those which are not delegated to the United States by the Constitution, nor prohibited by it to the States, and therefore "are reserved to the States respectively, or to the people".[52]

2.3.3.2. Case law on exclusive and non-exclusive powers

Since none of the European Constitution's predecessor Treaties explicitly made a bipartite differentiation between exclusive and non-exclusive powers,[53] it is often argued that it is difficult to genuinely make a distinction, and, hence, for the Court of Justice "to say with any degree of certainty whether a particular matter is or is not governed by subsidiarity".[54] The distinction has been described as confusing and uncertain and one "which ultimately adds little to any attempt to understand or operationalise the subsidiarity principle".[55]

There is, however, no particular reason why the European Court of Justice would find it difficult to use such a distinction. It was the Court

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[49] Regardless of the question whether the European Union should be regarded as a federal system. See also Article 74 and 74a of the German Basic Law and Articles 10 to 16 of the Austrian Constitution.

[50] See e.g. Articles 71 and 72 of the Russian Constitution, Chapter II of the Swiss Constitution, Chapter VI of the Canadian Constitution and Article 51 and 90 of the Australian Constitution.

[51] See e.g. Von Bogdandy and Bast, op. cit. *supra* note 31, at 241.

[52] According to the elastic clause – or the necessary and proper clause – the federal government has, furthermore, the implied power to pass any law which is "necessary and proper" for the execution of its express powers.

[53] Except, of course, in Article 5(2) EC. And see also Article 43(d) EU. Leaving aside the question whether the Constitutional Treaty was a Constitution or a Treaty.

[54] See e.g. Toth, "Is Subsidiarity Justiciable?", 19 EL Rev. 268 (1994), at 270; and Steiner, op. cit. *supra* note 10, at 5 et seq.

[55] De Burca, op. cit. *supra* note 4, at 21.

itself which, already in 1961,[56] introduced the distinction between exclusive and non-exclusive powers in the Community context – and which subsequently quite thoroughly defined the main differences between the two categories. In the 1970s, the Court of Justice delivered a range of important judgments in which it classified certain Community powers as exclusive, *inter alia* in the areas of external trade,[57] external relations,[58] customs duties,[59] and the common fisheries policy.[60] Moreover, in *Ruling 1/78,* the Court of Justice held that the European Atomic Energy Community had exclusive powers to enter into treaties on the supply of nuclear materials.[61]

As to the differences between exclusive and non-exclusive powers, the Court has consistently held that an exclusive power entails that the mere existence of a certain norm imposes an obligation on the Member States to refrain from acting in that area. For instance, in *ERTA,* the Court explicitly stipulated that the "existence of Community powers excludes the possibility of concurrent powers on the part of the Member States".[62] Some years later, the Court of Justice held that it was not even possible for Member States to adopt interim measures when the Community had failed to exercise an exclusive competence.[63]

The Court of Justice seems to emphasise that the main reason for classifying certain powers of the European Union as exclusive powers is to ensure the coherence of the policy area concerned.[64] This element of

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[56] In Case 30/59, *Gezamenlijke Steenkolenmijnen in Limburg v. High Authority* [1961] ECR 1, the Court of Justice stated that "in the Community field, namely in respect of everything that pertains to the pursuit of the common objectives within the common market, the institutions of the community have been endowed with exclusive authority".

[57] Opinion 1/75, *Local Costs Standard* [1975] ECR 1355.

[58] Case 22/70, *Commission v. Council* (*ERTA*) [1971] ECR 263.

[59] See e.g. Case 40/69, *Bollmann* [1970] ECR 69, para. 80.

[60] Joined Cases 3/76, 4/76 and 6/76, *Kramer and others* [1976] ECR 1279; and Case 804/79, *Commission v. United Kingdom* [1981] ECR 1045.

[61] Ruling 1/78, *Physical Protection of Nuclear Materials* [1978] ECR 2151

[62] Op. cit. *supra* note 58.

[63] Case 804/79, *Commission v. United Kingdom* [1981] ECR 1045.

[64] For instance, in Opinion 1/75, op. cit. *supra* note 57, the Court argued (at 1364) that powers relating to the common commercial policy were of an exclusive nature, because this policy was conceived in Article 113 EC in the context of the operation of the common market, for the defence of the common interests of the European Community, "within which the particular interests of the Member States must endeavour to adapt to each other". This conception would be incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power. The Court held that unilateral action of the Member States would lead to a distortion of the competition between

cohesion is also of fundamental importance for the application of the subsidiarity principle. The reason why the subsidiarity principle does not apply to exclusive powers is precisely because there might otherwise be a risk of endangering the cohesion within that particular policy area. Already in the first document ever to mention the subsidiarity principle in the context of Community law it was stressed that "in deciding on the Union's competence, application of the *principe de subsidiarite* is restricted by the fact that the Union must be given extensive enough competency for its cohesion to be ensured. Thus there will be a number of matters which fall exclusively within Union competence".[65]

2.3.3.3. Case law on subsidiarity

As far as the applicability of the subsidiarity principle is concerned, the Court of Justice has always emphasised that the principle only applies to the European Union's non-exclusive competences. For instance, in *British American Tobacco,* the applicants submitted that the principle of subsidiarity was applicable to measures relating to the internal market such as Directive 2001/37 and that, when the latter was adopted, the Community Legislature should have taken the principle into account. They argued that, had the Community Legislature applied the principle, it would have reached the conclusion that there was no need to adopt the Directive, since harmonised rules had already been established by two other Directives which aimed to eliminate barriers to trade in tobacco products.[66] The Court stressed that the principle of subsidiarity applied where the Community Legislature made use of Article 95 EC, inasmuch as that provision did not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence

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undertakings of the various member states in external markets. Furthermore, Member States might adopt positions which differed from those which the Community intended to adopt, which would distort the institutional framework, call into question the mutual trust within the Community and would risk compromising the effective defence of the common interests of the Community. It therefore concluded that "the provisions of Articles 113 and 114 EC concerning the conditions under which, according to the Treaty, agreements on commercial policy must be concluded show clearly that the exercise of concurrent powers by the Member States and the Community in this matter is impossible".

[65] Report on European Union (European Commission, 1975), Bull. EC Supp 5/75, at 11

[66] The intervening Belgian Government and European Parliament maintained that the principle of subsidiarity did not apply to the Directive. They argued that the Directive, being adopted for the purpose of attaining the internal market, came within one of the areas of exclusive competence.

for the purpose of improving the conditions for its establishment and functioning. [67] The Court – explicitly – stated that the distinction between exclusive and non-exclusive powers was "a preliminary",[68] which need be dealt with first before considering the substantive elements of the subsidiary concept.

Nor will the consequences of the distinction between exclusive and non-exclusive powers be any different when the subsidiarity principle is considered by the Court. In the *AvestaPolarit* case, the Court was asked to rule on Article 2(1)(b) of Directive 75/442. That provision stated that waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries was to be excluded from the scope of the Directive where it was already covered by other legislation. In short, the referring Court *inter alia* asked whether "other legislation" within the meaning of that provision meant also national legislation, and if so, whether that meant exclusively national legislation which was already in force at the time of entry into force of the amending Directive or enacted afterwards. The Court reiterated that the subsidiarity principle applied "to areas which do not fall within its exclusive competence, which is the case at this stage as regards the environment".[69] It held that, in accordance with the subsidiarity principle, Article 2(1)(b) of Directive 75/442 must be interpreted as meaning that other legislation within the meaning of that provision might have entered into force either before or after the date of entry into force of the Directive.[70]

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[67] Op. cit. *supra* note 38, para. 179. See also Case C-376/98, *Netherlands v. Parliament and Council* (*Tobacco Advertising I*) [2001] ECR I-7079, paras 83 and 95.

[68] *British American Tobacco,* op. cit. *supra* note 38, para. 179

[69] Case C-114/01, *AvestaPolarit Chrome Oy* [2003] ECR I-8725, paras 56-57

[70] The Court of Justice *inter alia* took into account that when adopting Directive 91/156, the Community Legislature considered it appropriate that, until specific Community rules were adopted on the management of certain individual categories of waste, the authorities of the Member States should retain the option of ensuring that management outside the framework laid down by Directive 75/442. It pointed out that the Community Legislature neither expressly excluded the possibility of that option being used on the basis of national legislation subsequent to the entry into force of the amending Directive nor set out considerations enabling a distinction to be drawn between such national legislation and legislation prior to that entry into force.

2.3.4: Third question: should that power be exercised?

2.3.4.1. Introduction

Once it has been determined that the proposed action is within the limits of the Community power concerned – and that that power is a non-exclusive one – the next question is whether that power should be exercised in light of "the objectives laid down in the Treaties".[71] Similarly, the Court of Justice in the *Working Time Directive* case held that the principle of subsidiarity essentially concerned "the *need* for Community action".[72]

There are several criteria relevant to this third question.[73] The first criterion which needs to be considered is whether, in light of the objectives as laid down in the Treaties, Community action would be more efficient and effective than Member State action. Although it is often argued that this is the only criterion for the subsidiarity principle,[74] it is submitted here that are other important – albeit interrelated – criteria which should be considered too. This is confirmed by the case law of the Court on the subsidiarity principle.[75] Next to looking at the question whether Community action would be more efficient and effective, (§2.3.4.2), it should also be considered whether applicability of the principle would threaten the cohesion within the European Union (§2.3.4.3.), whether Member States action alone would be insufficient and unsatisfactory (§2.3.4.4), and whether Community action is necessary because of the scale and effect of the proposed action (§2.3.4.5). All these elements must be substantiated by qualitative or, wherever possible, quantitative indicators.[76]

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[71] See e.g. Article 1(1) of the Interinstitutional Agreement of 1993 ("the purpose of the procedures for implementing the principle of subsidiarity shall be to govern the manner in which the powers assigned to the Community institutions by the Treaties, in order to enable them to achieve the objectives laid down by the Treaties, are to be exercised", op. cit. *supra* note 35). See also Edinburgh Conclusions, Annex 1 to Part A, at 7.

[72] Case C-84/94, *United Kingdom v. Council (Working Time Directive)* [1996] ECR I-5755. Emphasis added.

[73] That these criteria determine whether a Union power should be exercised *in light of the objectives of the proposed action* also follows from the wording of Article 5 EC

[74] Lenaerts, op. cit. *supra* note 81; Timmermans, "How Can One Improve The Quality Of Community Legislation", 34 CML Rev. (1997) 1229, at 1243.

[75] See e.g. op. cit. *supra* note 38, paras 180-185, esp. 180 and 184

[76] Edinburgh Conclusions, Annex 1 to Part A, at 7, *verbatim* incorporated in both Article 5 of the First Protocol and Article 5 of the Second Subsidiary Protocol.

2.3.4.2. Community action more efficient and effective

This first criterion essentially entails that Community action, in light of the objectives concerned, should be more efficient than Member State action. For this reason, subsidiarity has also been described as a "better attainment test",[77] "efficiency by better results test"[78] a "more effective attainment test"[79] or simply as "positing that what the lesser entity can do adequately should not be done by the greater entity *unless it can do it better*"[80] As mentioned, Article 130r(4) EEC already provided that the Community was to take action relating to the environment if the objectives of the environmental policy could be attained better at the Community level than at that of the individual Member States. As Lenaerts has pointed out, this test in Article 130r(4) essentially prescribes "a comparative enquiry into the efficiency of the Community and the individual Member States in attaining the objectives of European environmental policy".[81] This efficiency test became an important element of the general subsidiarity principle as enshrined in Article 3b (now Article 5) EC. The Commission, for instance, in a Communication to the Council described subsidiarity as a test "of comparative efficiency between Community action and that of Member States".[82]

Next to the element of efficiency, it seems that the question should also be examined whether Community action would be more *effective*. The Spinelli draft stated that subsidiarity principle requires that "the Union shall only act to carry out those tasks which may be undertaken

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[77] Kapteyn, op. cit. *supra* note 231

[78] Steiner, "Subsidiarity under the Maastricht Treaty", in O'Keeffe and Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery, London, 1994), at 227

[79] Emiliou, "Subsidiarity: An Effective Barrier against "the Enterprises of Ambition"?", 17 EL Rev. 383 (1992)

[80] CONV 71/02, *Mandate of the Working Group on the principle of subsidiarity*, at 2. Emphasis added.

[81] Lenaerts, "Subsidiarity and Community competence in the field of education", 1 Colum. J. Eur. L. 1 (1994), at 23. See also: Lenaerts, "The Principle of subsidiarity and the environment in the European Union: keeping the balance of Federalism", 17 *Fordham International Law Journal* 846 (1994).

[82] Communication to the Council and the Parliament of October 27, 1992, European Commission, 10 Bull. EC 116 (1992). The initial draft of the EC Treaty, proposed by the Luxembourg Presidency in April 1991, introduced as the sole criterion for subsidiarity that question whether the objectives of the proposed action could be "better achieved by the Community than by the Member States acting separately" (1991 Europe Documents, No. 1722/1723). This, as Lenaerts (op. cit. *supra* note 81, at 23) has pointed out, "clearly is a comparative efficiency test (the sheer effectiveness of Member States in reaching the required outcome being only the basic ingredient of that test)".

more effectively in common than by the Member States acting separately".[83]

It is remarkable – especially when compared to the other three elements discussed in the next sections – that the Court has so far refrained from using similar terminology. Neither "efficiently" nor "effectively" has ever been used by the Court in its case law on the subsidiarity principle.[84]

2.3.4.3. Threat to cohesion when power not exercised

As mentioned above, the *rationale* for applying subsidiarity only to non-exclusive powers is that the principle could otherwise threaten the cohesion within the European Union. Such a possible threat to cohesion should also be considered in the context of the third question of the subsidiarity test.[85] As early as 1975, it was stressed that subsidiary was aimed at avoiding "divergent responses from the Member States which would threaten the cohesion of the Union".[86] It follows from the legislative history of the subsidiarity principle that Community action is required when there is a need (1) to correct distortion of competition (2) to avoid disguised restrictions on trade, or (3) to strengthen economic and social cohesion, or (4) when action would otherwise significantly damage Member States' interests.[87]

The following four cases demonstrate that the Court of Justices takes similar aspects into account in its subsidiarity review. First of all, in *Bosman*, the Court was asked to rule on the compatibility with Community law of rules which permitted football clubs to demand transfer fees and rules which restricted the access of foreign footballers to competitions. The Court held that the application of the principle of

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[83] Article 12(2) of the Draft Treaty on European Union of 1984.

[84] Although the Court has, more generally, held that "as regards the question whether a Directive was adopted in keeping with the principle of subsidiarity, it must be considered whether the objective of the proposed action could be better achieved at Community level", *British American Tobacco,* op. cit. *supra* note 38, para. 180, *Alliance for Natural Health*, op. cit *supra* note 40, para 104

[85] See, *inter alia,* the Edinburgh Conclusions, Annex 1 to Part A, at 7

[86] Report on European Union (European Commission, 1975), Bull EC Supp 5/75, at 22

[87] Article 5 of the First Protocol. These elements have returned in other documents on the subsidiarity principle. The above mentioned Commission Communication (op. cit. *supra* note 82) spoke of "the possible limits on action at national level (including cases of potential distortion where some Member States were able to act and others were not able to do so), the cost of inaction, the necessity to maintain a reasonable coherence and the necessity to ensure that competition is not distorted within the common market".

subsidiarity could not lead to a situation in which the freedom of private associations to adopt sporting rules restricted the exercise of rights conferred on individuals by the Treaty. The Court *inter alia* took into account that the removal as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.[88] It furthermore observed that working conditions in the different Member States were governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 EC were confined to acts of a public authority there would be a risk of creating inequality in its application.[89]

Secondly, in the *Rental and Lending Rights* case,[90] the Commission argued that a Portuguese Decree, which transposed the Rental and Lending Rights Directive into national law, was incompatible with Community law.[91] In its defense, Portugal argued that under the principle of subsidiarity, the activity of public lending should remain within the sphere of competence of the Member States. The Court rejected this argument on the ground that a Member State could not properly plea the unlawfulness of a directive or decision addressed to it as a defence in an action for a declaration that it had failed to implement that decision or comply with that directive.[92] The Court, however, added that "in any event … the difference in the legal protection which protected cultural works enjoyed in the Member States as regards public lending is such as to affect the normal functioning of the internal market of the Community and create distortions of competition".[93]

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[88] See also Case 36/74, *Walrave v. Union Cycliste Internationale* [1974] ECR 1405 para. 18

[89] Case C-415/93, *Bosman* [1995] I-4921, paras 81-83

[90] Case C-53/05, *Commission v. Portugal (Rental and Lending Rights)* [2007] ECR I-6215

[91] The Decree exempted all categories of public lending establishments from the obligation to pay remuneration to authors for public lending, whereas the directive provided that Member States might not exempt all, but only certain categories.

[92] See Case C-74/91, *Commission v. Germany* [1992] ECR I-5437, para 10; Case C-154/00, *Commission v. Greece* [2002] ECR I-3879, para. 28; and Case C-194/01, *Commission v. Austria* [2004] ECR I-4579, para. 41).

[93] *Rental and Lending Rights*, op. cit. *supra* note 90

Thirdly, in *Biotechnological Inventions,*[94] the Netherlands sought the annulment of Directive 98/44 on the legal protection of biotechnological inventions, *inter alia* on the ground that it was contrary to the principle of subsidiarity. The Court held that the subsidiarity principle was not infringed because the objective pursued by the Directive was "to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions".[95] Since the scope of that protection had immediate effects on trade, and, accordingly, on intra-Community trade, the Court found that the objective in question could be better achieved by the Community. It held that "compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market".[96]

Fourthly, in the *German Firefighters* case,[97] the Commission brought an Article 226 action against Germany on the ground that legislation of certain *Länder*, which made personal protective equipment for firefighters subject to additional requirements, infringed a Directive on the harmonization of legislation on personal protective equipment. The German Government *inter alia* maintained that the interpretation of the directive had to observe the subsidiarity principle. The Court held that the directive concerned complied with the principle, since the significant differences between Member States' legislation in this area might constitute "a barrier to trade with direct consequences for the creation and operation of the common market".[98]

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[94] Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079

[95] Id., para 32

[96] Id., para. 33

[97] Case C-103/01, *Commission v. Germany (German Firefighters)* [2003] ECR I-5369

[98] Id., para 47. The element of cohesion is also reflected in some of the cases already mentioned above. For instance, in *British American Tobacco*, the main reason for the Court to reject the subsidiarity plea was that the Directive was aimed at eliminating the barriers raised by the differences which still existed between the Member States' legislation on the manufacture, labeling and sale of tobacco products. The Court of Justice held that "the multifarious development of national laws in this case … call [ed] for action at Community level" (op. cit. *supra* note 38, paras 181-182). Furthermore, in *Alliance for Natural Health* the Court pointed out that Directive 2002/46 had the objective of removing barriers resulting from differences between the national rules on vitamins, minerals and vitamin or mineral substances authorised or prohibited in the manufacture of

2.3.4.4. Member States action alone insufficient and unsatisfactory

A third element which must be considered is whether action by the Member States alone would be insufficient and unsatisfactory. This *inter alia* follows from Article 5(2), which provides that "the Community is to take action only and in so far as the objectives of the proposed action cannot be *sufficiently* achieved by the Member States".[99] Subsidiarity implies that "legislation at the Community level is only possible for problems for the solution of which the range of efficient action available to the Member States is insufficient".[100] This requires an assessment as to whether the objectives of the proposed action could not have been "sufficiently achieved by Member States' action in the framework of their national constitutional system".[101] A related question is whether the subject matter concerned could not have been "satisfactorily regulated" by the Member States.[102] The European Union should only exercise its powers when this is "required to complete successfully the tasks they may carry out more satisfactorily than the States acting independently".[103]

Similar considerations can be found in the case law of the Court of Justice. For instance, in the *Deposit-guarantee schemes*- case,[104] the German government sought to annul a Directive on such schemes on the ground that the Directive did not set out the grounds to substantiate its compatibility with the subsidiarity principle.[105] The Court disagreed. The Court held that the Community Legislature had sufficiently demonstrated why its action was in conformity with the principle of subsidiarity, *inter alia* because the preamble to the Directive stated that the action taken by the Member States in response to a Recommendation of the Commission had not fully achieved the desired result. The Court found that the Community Legislature, therefore, could reasonable have

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food supplements, whilst ensuring, in accordance with Article 95(3) EC, a high level of human-health protection. The Court held that, therefore, to leave Member States the task of regulating trade in food supplements … would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned".

[99] Emphasis added.

[100] Edinburgh Conclusions, Annex 1 to Part A, at 7

[101] Article 5 First Protocol

[102] Id.

[103] Preamble Draft Treaty European Parliament O.J. 1984, C 77/33

[104] Op. cit. *supra* note 221

[105] The German government therefore argued that the Directive infringed the duty to give reasons as laid down in Article 190 EC.

concluded "that the objective of its action could not be achieved sufficiently by the Member States".[106]

Furthermore, in *Biotechnological Inventions,* the Court found that the subsidiarity principle was complied with on the ground that the objective of the Directive "could not be achieved by action taken by the Member States alone".[107] In both *British American Tobacco* and *Alliance for Natural Health*, the Court held that the objective of the Directive concerned could not be "satisfactorily" achieved by action taken by the Member States.[108]

2.3.4.5. Action needed because of scale and effect

Article 5(2) also states that a Community power should only be exercised when the action concerned can "by reasons of scale or effects of the proposed action, be better achieved by the Community".[109] The Edinburgh Conclusions already stipulated that in order to examine whether the subsidiarity principle is fulfilled the Council must be satisfied that action at Community level "would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States".[110]

To a large extent, this requirement can be equated with a requirement of interstate effects. The aforementioned Commission Communication stated that the effect of the scale of the operation must be examined by looking at "transfrontier problems, critical mass, etc".[111] This is consistent with other documents on the principle which state that Community action is only possible when "the issue under consideration has transnational aspects".[112]

Nevertheless, a mere interstate effect is not sufficient. It is clear from the legislative history of the subsidiarity principle that the requirement of transfrontier elements must not be thought of too lightly. The Edinburgh

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[106] Case C-233/94, *Germany v. European Parliament and Council* (*Deposit-guarantee schemes*) [1997] ECR I-2405, at para 27

[107] Op. cit. *supra* note 94, para. 32

[108] *Alliance for Natural Health*, op. cit *supra* note 40, para 101. *British American Tobacco,* op. cit. *supra* note 38, paras 180-182.

[109] Again, although the use of the word "therefore" in this provision could imply that this element is part of the fourth question discussed below, it follows from the legislative history of the subsidiarity principle that it must be considered here (see text accompanying op. cit. *supra* note 32).

[110] Edinburgh Conclusions, Annex 1 to Part A, at 7, incorporated *verbatim* in Article 5 of the First Protocol.

[111] Op. cit. *supra* note at 116.

[112] Edinburgh Conclusions, Annex 1 to Part A, at 7, incorporated *verbatim* in Article 5 of First Protocol.

Conclusions stressed that the "objective of presenting a single position of the Member States *vis-à-vis* third countries is not in itself a justification for internal Community action in the area concerned"[113] It has even been advocated, although only with respect to the EMU, that proper application of the subsidiarity principle implied that Community action should only be taken when collective decision-making was necessary, meaning that all policy functions which could be carried out at national (and regional and local) levels without adverse repercussions on the cohesion and functioning of the EMU would then remain within the competence of the Member States.[114]

This important element of the subsidiarity test also appears in the case law of the Court of Justice.[115] In the *Volger* case,[116] the Court was asked to rule on the validity and interpretation of Regulation 1408/71 on social security schemes to self-employed persons and to members of their families moving within the Community. Mr Vogler was a self-employed hotelier residing in Austria and a self-employed farmer in Germany. He brought an action against a decision of the Agricultural Pension Fund Schwaben, which had found that, as a farmer, Mr Vogler was required to be a member of and pay contributions under the German pension insurance scheme for farmers pursuant to the Law on Farmers' Pension Insurance. He argued that, under Regulation 1408/71, he had to pay social security contributions in Austria only. The Agricultural Fund, on the other hand, *inter alia* contended that it would be incompatible with the principle of subsidiarity for persons covered by that Regulation to be subject, in principle, only to the social security legislation of a single Member State. According to the Agricultural Fund, the Member States alone were competent to determine their social policy, it fell to the Community Legislature only to coordinate, but not harmonise, the social security systems of the Member States. The Court, however, rejected this argument. It held that:

> "the differences between national social security schemes give rise to restrictions on the freedom of movement … As the Council found it that it was necessary to remove the obstacles to freedom of movement for [self-employed workers and members of their families], the

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[113] Id.

[114] Report on Economic and Monetary Union in the European Community ("the Delors Report"), in OJ C 329/44 (1989).

[115] As well as in the case law of the the Court of First Instance, see e.g.. T-168/01, *GlaxoSmithKline v. Commission* [2006], nyr, para. 201

[116] Order of the Court in Case C-242/99, *Vogler v. Landwirtschaftliche Alterskasse Schwaben* [2000] ECR I-9083

> attainment of such an objective … necessarily presupposed action covering the *entire* Community. In those circumstances no impairment of the principle of subsidiarity is discernible in connection with the adoption of measures to coordinate national social security schemes in order to safeguard freedom of movement and the right of residence for persons within the Community".[117]

Similarly, in *Biotechnological Inventions,* the Court held that "given the scale and effects of the proposed action, the objective in question could be better achieved by the Community".[118] In the German Firefighters case, the Court found that the directive did not infringe the subsidiarity principle because "with regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another … the harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community Legislature".[119]

2.3.4.6. Concluding remarks

When the outcome of the third question is negative and, hence, no action will be taken at the Community level, this does not mean that the Member States are authorized to avoid Community obligations. The First Protocol explicitly stipulates that where the application of the principle of subsidiarity leads to no action being taken by the Community, Member States are required in their actions to comply with the principle of loyal co-operation as laid down in Article 10 EC, "by taking all appropriate measures to ensure fulfilment of their obligations under the Treaty and by abstaining from any measure which could jeopardise the attainment of the objectives of the Treaty".[120]

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[117] Id. paras 22-23.

[118] Op. cit. *supra* note 94, para 32.

[119] Op. cit *supra* note 97, para. 47. Similarly, in the *Deposit-guarantee schemes*-case, another reason for the Court to find that the Community Legislature had properly explained why it considered that its action was in conformity with the subsidiarity principle, was that the preamble to the Directive stated that Community action was "indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community". According to the Court, this showed that, in the Community Legislature's view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level (op. cit. *supra* note 104, para. 26).

[120] Article 8 of the First Protocol. For instance, in the *Cable transmissions* case, the Court of Justice held that a Member State could not evade obligations under Community law by invoking the principle of subsidiarity. (Case C-11/95,

2.3.5. Fourth question: how should the power be exercised?

2.3.5.1. Introduction

The Interinstitutional Agreement of 1993 stressed that implementation of the subsidiarity principle "affected both the content of a proposal as well as the choice of legal instrument".[121] This fourth question hence essentially deals with the extent, nature and form of the action.[122] Rather than asking whether the Community should act, this fourth question widens the subsidiarity test to providing "a guide as to *how* those powers are to be exercised at the Community level".[123] This important difference between the third and fourth question is also recognized by the Court of Justice.[124] It will be demonstrated that the Community Legislature is obliged to choose the smallest extent of regulation (§2.3.5.2.) and the simplest form (§2.3.5.3.).

2.3.5.2. Smallest extent of regulation

Article 130r(4) EEC already provided that the Community was to take action relating to environment "*to the extent* to which the objective referred to in paragraph can be attained better at the Community level of the individual Member States".[125] Similarly, Article 7 of the First Protocol provides that:

> "regarding the nature and the extent of Community action, Community measures should leave as much scope for national

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Commission v. Belgium [1996] ECR I-4115, paras 52-53). See also the *Bosman* case, op. cit. *supra* note 60.

[121] Article 2(4) of the Interinstitutional agreement of 1993, op. cit. *supra* note 35.

[122] Articles 6 and 7 of the First Protocol. It is not entirely clear whether these two provisions actually apply to the subsidiarity principle or the proportionality principle, considering that the protocol deals with the application of both principles. However, the fact that Articles 5 and 8 deal entirely with subsidiarity (see also the first sentence of Article 8) suggests that Articles 6 and 7 concern this principle too.

[123] Article 3 of the First Protocol. Emphasis added.

[124] For instance, in *British American Tobacco,* the Court held that "it must first of all be considered whether the objective of the proposed action could be better achieved by the Community", to subsequently hold that "second, the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity … It follows that, in the case of the Directive, the objective of the proposed action could be better achieved at Community level" (op. cit. *supra* note 38. at paras 180 and 184).

[125] Emphasis added.

decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organization and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures".[126]

The Court of Justice has, however, never reviewed this particular element of the subsidiarity test.

2.3.5.3. Simplest form of legislation

The Court has also never reviewed whether the Community Legislature has used the *simplest* form of legislation. This, however, is an important part of the subsidiarity principle. Whereas the element discussed in the previous section required an analysis of the extent of the regulation, this element concerns the means or form chosen.[127] Article 6 of the First Protocol provides that the form of Community action must be as simple as possible. Community institutions have to examine "if there are other methods available for Member States, for example legislation, administrative instructions or codes of conduct, in order to achieve the objectives in a sufficient manner".[128] This might be illustrated by the fact that the Commission, in implementing the subsidiarity principle, has not only limited the number of new legislative proposals, but – together with the other Community institutions – has also sought to employ alternative legislative methods.[129] In 1993, the Commission committed itself to promote the establishment of self-regulation by special interest groups by asking them to draft a code of conduct and a directory.[130]

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[126] Article 7 of the First Protocol

[127] This distinction is also made in Articles 6 and 7 of the First Protocol.

[128] Communication to the Council and the Parliament of October 27, 1992, European Commission, op. cit. *supra* note 82, at 116.

[129] Azzi, "Better Lawmaking: the Experience and the View of the European Commission", 4 Colum. J. Eur. L. 617 (1998), at 621

[130] Interinstitutional declaration on democracy, transparency and subsidiarity, op. cit. *supra* note 23, at 134. The Commission since then has for instance concluded agreements with industry on environmental matters for the attainment of environmental policy objectives (see for instance, Council Resolution of October 7, 1997, 1997 O.J. (C 321); European Parliament Resolution of July 17, 1997, 1997 O.J. (C 286)) as well as agreements under the Social Policy Protocol, which provide for the possibility of self-regulation by the social

2.4. Conclusion

This section has demonstrated that it is possible to distill from the legislative history of the principle a set of tangible "subsidiarity"-criteria. It was also demonstrated that the European Court of Justice has used similar criteria in order to examine whether the subsidiarity applies to a particular case and whether it had been complied with, although it has refrained from examining whether Community action would be more efficient or effective. Nor has the Court ever reviewed whether the Community Legislature had resorted to the smallest extent of regulation or the most simplest form. The Court has never found Community legislation to infringe the subsidiarity principle, although this could have played an indirect role in *Tobacco Advertising I,* in which the Advocate General had argued that the Directive concerned infringed the principle. The Court did not discuss this aspect as such, but, as discussed in the previous Chapter, held the Directive to be void on the ground that it could not have been based on Article 95 EC.

3. The Tenth Amendment

3.1. Introduction

Like its European counterpart, the Tenth Amendment of the United States Constitution has received descriptions ranging from "a truism",[131] "essentially a tautology",[132] "not free from controversy",[133] "[providing] no textual guidance"[134] and "at the bottom of any list of comprehensibility".[135] The Amendment states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people".

There are some important similarities between the Tenth Amendment and the subsidiarity principle. First of all, similar to the principle of subsidiarity, the Tenth Amendment asserts "that state power can impose

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partners. (See COM (96) 26 (Feb. 1996), Council Directive 96/34, 1996 O.J. (L 145) and COM (97) 392 (July 1997)).

[131] *United States v. Darby,* 312 US 100 (1994), at 124 .

[132] *New York v. United States,* 112 S.Ct. 2408 (1992), at 2418.

[133] Monaghan, "The Sovereign Immunity "Exception", 110 Harv. L. Rev. 102 (1996), at 119, referring, more specifically, to the anti-commandeering doctrine of *New York v. United States* (see *infra*).

[134] Rubin and Feeley, "Federalism: Some Notes on a National Neurosis", 41 *UCLA Law Review* 903 (1994), at 928 (continuing that the Tenth Amendment "employs no recognized language and invokes no established concepts").

[135] Id.

an affirmative limitation on federal action";[136] the Tenth Amendment is hence viewed as placing a restraint on the *exercise* of the legislative powers of Congress. In the case law of the Supreme Court, this has mostly concerned the legislative authority under the Commerce clause.

A second parallel can be found in the historic background of the Tenth Amendment. The final words of the Tenth Amendment illustrate that, just as subsidiarity, the Tenth Amendment's main aim was to ensure that decisions were taken as closely as possible to the citizens of the United States. [137] In fact,

> "… the fears that gave rise to the Tenth Amendment stood near the center of the debate over the omission from the Constitution of a bill of rights, that it was viewed by its proponents as crucial to ensure the rights of the people. … The Antifederalists who insisted upon the provision that became the Tenth Amendment saw it as a means for reserving rights to the people; the Federalists who opposed them agreed, but felt that the provision was repetitive since Article I of the Constitution already reserved rights to the people by enumerating the powers of the federal government".[138]

Although the wording of the Tenth Amendment suggests that it is more closely related to the above mentioned legal basis principle of Article 5(1) EC, the Tenth Amendment is generally given a meaning which is more related to the subsidiarity principle.[139]

3.2. Judicial enforceability

The key question in both case law and academic debate on the Tenth Amendment is whether the Amendment is a judicially enforceable limit

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[136] Abrams, "On Reading and using the Tenth Amendment", 93 Yale L. J. 723 (1984), at 723.

[137] In the words of Justice O'Connor: "Because the powers delegated to the United States were "few and defined", the framers believed that states retained significance. Indeed, the States were to retain authority over those local concerns of greatest relevance and importance to the people". *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

[138] McAffee, "The Original Meaning of the Ninth Amendment", 90 Colum. L. Rev. 1215 (1990), at 1243. See also at 1308: "The last four words of the tenth amendment were almost certainly added to summarize the popular sovereignty doctrine, that the people retain what they have not delegated to their state governments, a concept that the original wording of the tenth amendment, with its roots in the notion of state sovereignty contained in the Articles of Confederation, left unclear".

[139] See for instance Abrams, op. cit. *supra* note 136, at 737.

on the legislative power of the United States Congress.[140] For instance, in his dissenting opinion in *Morrison*, Justice Souter argued "that politics, not judicial review should mediate between state and national interests … whereas today's majority says that the Supreme Court should draw the line to keep the federal relationship in proper balance".[141]

Several scholars have advocated that it should not be the role of the judiciary to protect the interests of the States under the Tenth Amendment, but instead, that such protection should be left to the political process. Advocates of this notion first of all argue that critical interests of the States are adequately protected through their representation in Congress, since decisions by Congress to intervene in the affairs of the States are made by the representatives of the States themselves.[142] Those commentators in favour of judicial enforceability of the Tenth Amendment, however, reply that "the realities of political life, in fact, suggest that congressional interests frequently clash with those of state and local governments".[143] They furthermore point out that "state interests with respect to certain issues are not necessarily shared by all States, [and] legislation may be enacted despite its threat to the continued functioning of a minority of States".[144] Protecting the minority opinion of those states would in itself be a ground for judicial enforcement.

Another – closely related – argument in favour of leaving enforcement of the Amendment to the political process originates from

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[140] See also Chemerinsky, *Constitutional Law. Principles and Policies* (Aspen, 2001), at 304.

[141] Op. cit *supra* note 40

[142] See for instance Mishkin, "Some Further Last Words on Erie - The Thread", 87 Harv. L. Rev. 1682 (1974), at 1683 and 1685, arguing that the fact that Congress may have constitutional power to make federal law displacing state substantive policy "does not imply an equal range of power for federal judges.... [in part because] the states, and their interests as such, are represented in the Congress but not in the federal courts"). See also: Tribe, "Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism", 89 Harv. L. Rev. 682 (1976) ("The point, of course, is that the Constitution creates a structure in which the states, and their interests as states, are represented in the Congress but not in the federal judiciary and only to a lesser degree in the executive"). See furthermore Choper, *Judicial Review and the National Political Process* (University of Chicago Press, 1980).

[143] Jones Merritt "The Guarantee Clause and State Autonomy: Federalism for a Third Century", 88 Colum. L. Rev. 1 (1988), at 17 (adding that "national representatives often have a strong incentive to harness the energy of state and local governments for national purposes".

[144] "Municipal bankruptcy, the Tenth Amendment and the New Federalism", 89 Harv. L. Rev. 1871 (1976).

the Supreme Court decision in the *Garcia* case. In that case, Justice Blackmun argued that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority".[145] Therefore, he continued, "they are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power".[146]

Justice Blackmun derived his opinion from the so-called theory of the political safeguards of federalism as expounded by Wechsler. According to this theory, since the composition of the United States federal Government was designed by the Founding Fathers to protect the interests of the States, "the Court is on weakest ground" when it exercises judicial review to protect state interests.[147] This was why the States have a role in the selection of both the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections.[148] The States furthermore have direct influence in the Senate, since each State receives equal representation and each Senator is to be selected by the legislature of his State.[149]

In *Garcia*, Justice Blackmun concluded that "the effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation".[150] His arguments have, however, been criticised as "highly questionable",[151] "difficult to support",[152]"wholly unsatisfactory",[153] and even "implausible" [154] and "a good-hearted joke".[155] Critics point out that the only constitutional provision that might have ensured some congressional representation for these institutional interests – the selection of Senators by state

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[145] Id., at 552.
[146] Id.
[147] Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government" (1954) 54 Colum. L. Rev. 543.
[148] Articles I(2) and II United States Constitution.
[149] Article I(3) United States Constitution.
[150] Id. at 553.
[151] Chemerinsky, "Formalism and Functionalism in Federalism Analysis", 13 *Georgia State University Law Review* 959 (1997), at 967.
[152] Field, "*Garcia v.* San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine", 99 Harv. L. Rev. 84 (1985), at 109, fn.127.
[153] Jones Merrit, op. cit. *supra* note 143, at 16.
[154] Van Alstyne, "The Second Death of Federalism", 83 *Michigan Law Review* 1709 (1985), at 1724, fn.64.
[155] Id.

legislatures – was repealed in 1913 by the Seventeenth Amendment. Justice Blackmun did acknowledge that "changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process". However, for Justice Blackmun, this did not alter his conclusion that restraints on the exercise of the legislative powers "must be tailored to compensate for possible failings in the national political process" rather than to dictate a "sacred province of state autonomy".[156] Importantly, Justice Blackmun did acknowledge that there are "limits on the Federal Government's power to interfere with state functions".[157] These limits should simply not be construed by the judiciary.

3.3. Historical development

The question whether the Tenth Amendment ought to be regarded as a judicially enforceable limit or merely a political declaration has clearly persisted through the development of the principle throughout history. The nineteenth century opinion on the Tenth Amendment corresponded with the prevailing notion of federalism at that time, which essentially entailed that the federal government had the authority to deal with all problems of society as long as it had legislative authority under the Constitution.[158] The Tenth Amendment merely served as a reminder of this latter prerequisite, rather than a judicially enforceable limit to Congress' legislative power. In *Gibbons v. Ogden*, Chief Justice Marshall for instance wrote that

> "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects … The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are… the sole restraints on which they have relied, to secure them from its abuse".[159]

Marshall hence made clear that the Tenth Amendment could not be used to invalidate Acts of Congress – political restraints were the sole check on Congress' legislative powers.

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[156] Id., at 554.
[157] Id at 547.
[158] Chemerinsky, "Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor", 58 Stan. L. Rev. 1763 (2006), at 1764.
[159] Op. cit. *supra* note 13 1, at 87, at 197.

Contrary to its life in the nineteenth century, the Tenth Amendment "has ridden a roller coaster ride for much of the twentieth century". [160] As described in the previous Chapter IV,[161] from the late nineteenth century until 1937 the Supreme Court allowed only a narrow scope of Congress to legislate under the Commerce Clause. At the same time, the Supreme Court held that the Tenth Amendment reserved a zone of activities for exclusive state control. In *Hamer v. Dagenhart,* for example, a federal law prohibiting child labor was declared unconstitutional on the ground that it violated the Tenth Amendment.[162] On the same ground, the Supreme Court in *Bailey v. Drexel Furniture Co,*[163] struck down a federal statute imposing tax on goods produced by child labour and in *United States v. Butler,*[164] declared unconstitutional a federal tax on agricultural producers for impermissibly controlling production.

Conversely, after 1937, hence again parallel to its case law on the Commerce Clause, the Supreme Court explicitly rejected the notion that the Tenth Amendment was a judicially enforceable limit on Congress' powers. In *United States v. Darby,* the Supreme Court upheld the Fair Labor Standards Act against Tenth Amendment challenges, arguing that:

> "There is nothing in the history of its adoption to suggest that [the Tenth amendment] was more than declaratory of the relationship between the national and state governments . . . or that its purpose was other than to allay fears that the new national government might

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[160] Gershengorn "Private Party Standing to Raise Tenth Amendment Commandeering Challenges", 100 Colum. L. Rev. 1065 (2000), at 1065.

[161] Section 2.1.3

[162] Justice Day – delivering the opinion of the Court – wrote that "the grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution".

[163] 259 U.S. 20 (1922). Writing for the Court, Chief Justice Taft wrote (at 38): "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states". According to the Court, the federal law was also outside the scope of the commerce clause.

[164] 297 U.S. 1 (1936).

seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers".[165]

After *Darby,* the Tenth Amendment languished for the next three decades. Federal legislation during this time was never found by a majority of the Supreme Court to infringe the Tenth Amendment. Thus, in *Maryland v. Wirtz*, the Supreme Court upheld the application of the Fair Labor Standards Act to employees of public schools and hospitals. In dissent, Justice Douglas argued that allowing Congress to legislate on this matter "was such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism".[166] Similarly, in 1975, the Supreme Court upheld the application of a federally mandated wage freeze to state and local employees, although the Supreme Court did admit in a footnote to the majority opinion that "while the Tenth Amendment has been characterized as a "truism" in [Darby], it is not without significance".[167]

However, one year later, the Supreme Court "stunned legal scholars"[168] by declaring that the Tenth Amendment sheltered some "traditional governmental functions"[169] from federal regulation. In *National League of Cities v. Usery,* the Supreme Court held that amendments to the Fair Labor Standards Act that extended the minimum wage, maximum hour, and overtime provisions of that act to virtually all state and local public employees, to be unconstitutional. The Court argued that "that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Article I of the Constitution".[170] Although not relying on the Tenth Amendment explicitly,[171] then Associate Justice Rehnquist argued that these amendments did not "comport with the federal system of government embodied in the Constitution".[172] *Usery* surprised many,[173] and it was

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[165] Op. cit *supra* note 131, at 124.
[166] 392 U.S. 183 (1968), at 203.
[167] *Fry v. United States,* 421 U.S. 542 (1975), at 548.
[168] Jones Merrit, op. cit. *supra* note 143, at 1.
[169] *National League of Cities v. Usery,* 426 U.S. 833 (1976), at 852.
[170] Id., at 842.
[171] Justice Rehnquist mentioned the Tenth Amendment only once in the opinion of the Court, see id. at 842-843. See also Berner, "The Repudiation of National League of Cities: the Supreme Court Abandons the State Sovereignty Doctrine", 69 Cornell L. Rev. 1048 (1984), at 1051-1052 and Engdahl, "Sense and Nonsense About State Immunity", 2 *Constitutional Commentary* 93 (1985), at 99-101.
[172] Id, at 852.

eloquently pointed out by one commentator that it was "thoroughly inconsistent with the constitutional trends and decisions of the past forty years".[174]

Although some expected that *Usery* would mark a new era of case law on the Tenth Amendment,[175] within less than nine years its scope of application was significantly narrowed[176] and it was eventually expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.[177] In that case, Justice Blackman, writing for the Court, wrote that the *Usery* distinction between traditional and non-traditional governmental operation was "unsound in principle and unworkable in practice".[178] However, in Garcia, dissenting Justices Rehnquist and O'Connor threatened that the case might be short lived[179] and one commentator rightfully predicted that "[t]he evil that may be done by raising the ghost of state sovereignty may … outlive the immediate decision of the Court".[180]

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[173] See e.g. Matsumoto, "National League of Cities - From Footnote to Holding - State Immunity from Commerce Clause Regulation" *Arizona State Law Journal* 35 (1977), at 89; Tribe, "Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services", 90 Harv. L. Rev. 1065 (1977).

[174] Cox, "Federalism and Individual Rights under the Burger Court 73 *Northwestern University Law Review* 1 (1978), at 22.

[175] Michelman, "States' Rights and States' Roles: Permutations of "sovereignty" in National League of Cities *v.* Usery", 86 Yale L.J. 1165 (1977).

[176] *Hodel v. Virginia Surface Mining & Reclamation Association* U.S. 264 (1981); *United Transportation Union v. Long Island Railroad* 455 U.S. 678 (1982); *Federal Energy Regulatory Commission v. Mississippi* 456 U.S. 742 (1982); *EEOC v. Wyoming* 103 S. Ct. 1054 (1983); on this development, see: Berner, "The Repudiation of National League of Cities: the Supreme Court abandons the State Sovereignty Doctrine", 69 Cornell L. Rev. 1048. (1948)

[177] 469 U.S. 528. (1985)

[178] Id., at 545.

[179] See also: Epstein, "The Federalism Decisions of Justices Rehnquist and O'Connor: is half a loaf enough?", 58 Stan. L. Rev. 1793 (2006), at 1804-1811.

[180] Schwartz, "National League of Cities *v.* Usery - The Commerce Power and State Sovereignty Redivivus", 46 *Fordham Law Review* 1115 (1978), at 1133-34. One commentator argued that although "the Tenth Amendment was not intended by the Framers to dominate our constitutional landscape … neither was it placed in our founding document to be forgotten" (Harvie Wilkinson III, "Our Structural Constitution", 104 Colum. L. Rev. 1687 (2004), at 1706). It has been pointed out, even by one of the Justices, (see *Florida Department of Health v. Florida Nursing Home Association* 450 U.S. 147 (1981), at 153, fn.10 (Justice Stevens, concurring), that changes in the composition of the Court have certainly affected its case law on the Tenth Amendment. See La Pierre, "Political accountability in the national political process - the alternative to

In the 1992 case of *New York v. United States*,[181] the Supreme Court – for the first time since *Usery* and only for the second time in 55 year – found unconstitutional a federal law for violating the Tenth Amendment.[182] Although not expressly overruling *Garcia*, the Supreme Court struck down certain provisions of a federal law on radioactive waste. Justice O'Conner, writing for the Court, wrote that Congress may not commandeer States and force them to enact laws or adopt regulations. She argued that because of limits placed by the Tenth Amendment and on the legislative powers of Congress "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program".[183]

Some years later, the Supreme Court in *Printz v. United States*[184] held that a provision of a federal law that required state and local law enforcement personnel to conduct background checks before issuing permits for firearms, violated the Tenth Amendment. Justice Scalia, writing for the majority, reiterated that Congress cannot compel the States to enact or administer federal legislation.

3.4. Formal approach of the current Supreme Court

The recent resurgence of the Tenth Amendment in *National League of Cities, New York v. United States* and *Printz* coincides with the formal reasoning in cases such as *Lopez* and *Morrison.* This "New Federalism", as it is being referred to, is characterized by a formal approach accomplished *inter alia* by "revitalising the Tenth Amendment [and by] sharply restricting the power of Congress to legislate under the Commerce clause".[185] Like the formal decisions of the Supreme Court emphasising the distinctive roles of the Legislature, Executive and Judiciary, the Supreme Court in *National League of Cities* followed a formal approach, stressing the separate spheres of the federal legislature and the States.[186] The Supreme Court overruled "this attempt at formal

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judicial review of federalism issues", 80 *Northwestern University Law Review* 577 (1985).

[181] 505 U.S. 144 (1992).

[182] One year before, the Court had already used the Tenth Amendment to construe narrowly - but not to invalidate – a federal law on age discrimination. *Gregory v. Ashcroft* 501 U.S. 452 (1991).

[183] Id., at 188.

[184] 521 U.S. 898 (1997).

[185] Bandes, "Erie and the History of the One True Federalism", 110 Yale LJ 829 (2001), at 832.

[186] O'Sullivan "Dueling sovereignties: U.S. Term limits, inc. v. Thornton", 109 Harv. L. Rev. 78 (1995), at 96.

federalism"[187] in *Garcia,* which rendered Tenth Amendment claims "virtually non-justiciable".[188] In its turn, *New York v. United States* was "classically formalist"[189] – one commentator even called it "the epitome of formal reasoning"[190] – and in *Printz*, the Supreme Court "expressly rejected functionalism as a consideration in the state sovereignty context, replacing it with a structural formalism".[191] Caminker has argued that Justice Scalia's opinion for the Supreme Court in *Printz* was

> "decidedly formalist in two distinct senses. First, the Court embraces "doctrinal formalism," by which I mean the Court takes a formal approach to constructing a judicially enforceable doctrine. … This doctrinal approach helps to send relatively clear signals to political actors, and courts applying the rule in future cases need not directly assess and balance unavoidably contestable values. …Justice Scalia's opinion also embraces "interpretive formalism, by which I mean the Court takes a formal approach to interpreting the meaning of the Constitution. The Court's analysis is driven by its identification of various "essential postulates" revealed by constitutional text and structure concerning both the vertical and horizontal separation of governmental powers".[192]

3.5. Conclusion

The arguments mentioned above illustrate that *National League of Cities, New York v. United States* and *Printz* signify a formal approach both with regards to the Separation of Powers and the Division of Powers in the United States. More generally, it illustrates that the question of what role the Court of Justice has played with regards to the subsidiarity principle should be examined both from a Separation of Powers and a Division of Powers point of view. By adopting a formal approach in its case law on the Tenth Amendment, the Court of Justice imposed a judicially enforceable limit on the legislative power of the United States Congress – to the advantage of the powers of the States – rather than leaving Tenth Amendment questions to the political process.

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[187] Id.
[188] Id.
[189] Id.
[190] Chemerinsky, "Formalism and Functionalism in Federalism Analysis" (1997) 13 *Georgia State University Law Review* 959, at 964.
[191] Gold, "Formalism and State Sovereignty in Printz v. United States: Cooperation by Consent", 22 *Harvard Journal of Law and Public Policy* 247 (1998), at 247.
[192] Caminker, "*Printz, State Sovereignty, and the Limits of Formalism*", Sup. Ct. Rev., 199 (1997), at 200.

4. Judicial deference

4.1. Introduction

Next to receiving a plurality of qualifications, there have also been a considerable number of proposals on the question of *who* should enforce the subsidiarity principle. Weiler, for instance, has repeatedly argued that this should be the task of a special EU Constitutional Council.[193] The Working Group on subsidiarity examined – but eventually rejected – proposals to establish a special "Subsidiary Chamber"[194] or "Competence Chamber"[195] within the Court of Justice. Others have argued that monitoring the implementation of subsidiary should be entrusted to a European Senate,[196] a separate Constitutional Court,[197] or even "a Mr or Ms Subsidiarity" – a Member of the European Commission especially entrusted with this task.[198] As with the discussion on the United States' Tenth Amendment, the question underlying most of these proposals is whether enforcement of the subsidiarity principle should be entrusted to the judicial institutions; or, in other words, whether or not questions involving the subsidiarity principle should be left to the political institutions to be resolved.

4.2. The political nature of the subsidiarity principle

Even two former presidents of the Court of Justice have emphasised the political nature of the principle. Rodriguez Iglesias has described subsidiarity as a "[one of the] hot potatoes which are often very difficult

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[193] See e.g. *The Constitution of Europe* (Cambridge University Press, 1999), (*inter alia*. at 322 and 354), "The European Union belongs to its Citizens: Three Immodest Proposals" EL Rev. 22(2) (1997), 150, at 156. Weiler has, together with Jacqué, also proposed to make the subsidiarity principle justiciable in the negative sense, in that the Court of Justice could be asked to invalidate Community legislation infringes the subsidiary principle (Jacqué and Weiler, "On the road to European Union – A New Judicial Architecture: An Agenda for the Intergovernmental Conference", 27 CML Rev. 185 (1990), at 204-207).

[194] E.g. Working Group I, Working Document 9, "Initial proposals for conclusions", July 29, 2002.

[195] Working Group I, Working Document 09, "Remarks on the "First Proposal for the Conclusions" July 29, 2002, paper by Mr Erwin Teufel.

[196] Sir Leon Brittan (former Vice-President of the European Commission), *Europe: The Europe We Need* (London, 1994).

[197] See e.g. Ole Due, "A Constitutional Court of the European Communities" in Curtin and O'Keeffe, *Constitutional Adjudication in European Community and National Law. Essays for the Hon. Mr. Justice T.F. O'Higgins*, op. cit. *supra* note 5, 3, at 3.

[198] See e.g. Piris, op cit. *infra* note 232.

to adjudicate on legal grounds".[199] Similarly, Lord Mackenzie Stuart has advocated that "subsidiarity reflects a political choice and not a principle of law",[200] although adding that "there is nothing to suggest that [Article 5 EC] is not justiciable". Both former presidents have forcefully rejected criticism that the Court has acted as a "motor of integration" or has been politically prejudiced. Lord Mackenzie-Stuart has argued that the Court "has demonstrated its independence of Member States and Community Institution alike".[201] Rodriguez Iglesias has described the role of the Court as that of "the guardian of the appropriate division of powers between the Community and its Member States", having to "strike a balance between the protection of the legitimate prerogatives of the Member States and those of the Community, which represents the common interest of all of them"[202]

The question whether subsidiarity could or should be judicially enforced was also considered during the second European Convention.[203] The mandate of the Working Group on Subsidiarity included the questions whether a monitoring mechanism or procedure should be established and, if so, whether this procedure should be of a political and/or legal nature.[204] Welsh Secretary Peter Hain[205] argued that "the inherently political nature of the issue of subsidiarity demand[ed] monitoring by a political mechanism". Finnish Prime Minister Matti Vanhanen stressed before the Working Group that the principle of subsidiarity was "political by nature and therefore it should be controlled primarily politically".[206] The majority of the Working Group as well as of its advisors agreed that although the subsidiarity was "a principle of an essentially political nature", there was nevertheless an important role for the European Court of Justice to play in the *ex post* monitoring of the principle. In its conclusions, the Working Group even proposed to

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[199] "The Court of Justice, Principles of EC Law, Court Reform and Constitutional Adjudication", 15 *European Business Law Review* 1115 (2004), at 1117.

[200] Op. cit. *supra* note 5, at 23.

[201] Id.

[202] Op. cit. *supra* note 199, at 117-118.

[203] See e.g. WD 016 - WG I: "The Principal of Subsidiarity: Judicial or Political Overview?" September 5, 2002; CONV 27/02, "A report for the Joint Oireachtas Committee on European Affairs", April 10, 2002; WD 22 - WG I, "Copy of a draft letter from Mr. Hain to Mr. Mendez de Vigo", September 18, 2002.

[204] Op. cit. *supra* note 26.

[205] Who was the UK government's lead minister in the convention negotiations.

[206] Working Group I, Working document 8, "The principle of subsidiarity", 18 July 2002.

broaden the conditions for referral to the Court of Justice.[207] Rodriguez Iglesias, reflecting on these conclusions, found that this balanced division between *ex ante* monitoring by the political institutions and *ex post* monitoring by the Court had "the merits of acknowledging and enhancing the constitutional role of the Court of Justice".[208]

4.3. Subsidiarity unsuitable for judicial review?

Over the years, several commentators have argued that the subsidiarity principle is principally unsuited for judicial enforcement.[209] Wilke and Wallace have argued that the principle is "in essence … a socio-political term".[210] Weatherill has advocated that "the impression is that once it is determined that a competence to establish common rules exists, the political decision to exercise that competence seems in practice immune from judicial subversion".[211] Much emphasise is put on the apparent dangers of judicial review of the subsidiarity principle. Emiliou, for instance, has argued that interpreting subsidiarity would "inevitably allow the Court of Justice to indulge in political considerations (i.e. second guessing)", adding that this would "destroy the credibility of the Court of Justice".[212] Similarly, Dehousse has argued that the Court of Justice would "risk clashes with political organs",[213] while van Kersbergen and Verbeek argue that one of the main consequences of the principle with respect to the process of integration will be "the politicalisation of the European Court of Justice".[214]

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[207] CONV 286/02, Conclusions of Working Group I on the Principle of Subsidiarity, September 23, 2002.

[208] Op. cit. *supra* note 199, at 117.

[209] Next to references in subsequent footnotes, see e.g. Dehousse, *Europe after Maastricht. An ever closer Union?* (Munich: Beck, 1994), at 108; Koopmans "Subsidiarity, Politics and the Judiciary", 1 EU Const. 112 (2005)

[210] Wilke and Wallace, *supra* note 15, at 4.

[211] Weatherill, "Better Competence Monitoring", 30(1) EL Rev. (2005), at 23.

[212] Emiliou, "Subsidiarity, Panacea or Fig Leaf', in in O'Keeffe and Twomey, op. cit. *supra* note 78, at 78.

[213] Dehousse, *The Politics of Judicial Integration, The European Court of Justice: The Politics of Judicial Integration* (Palgrave Macmillan, 1998), at 183.

[214] Van Kersbergen and Verbeek, op. cit. *supra* note at 6, at 229. Some, however, have argued that the Court should have a role in interpreting and applying the principle. A rather limited role is advocated by Toth who has argued that "subsidiarity is justiciable before the Court only up to a certain point and subject to the restrictions arising from the limited nature of the Court's jurisdiction in cases involving judicial review" (Toth, op. cit. *supra* note 7, at 285). Steiner, on the other hand, has advocated that the Court is in fact "the best institution placed to undertake that task. It is immune from political pressures [and] is accustomed to applying general principles of law which are often

As mentioned above, many have argued that the Court has – deliberately – neglected the importance of the subsidiarity principle by hardly applying it in its case law. Barber, recently, wrote of "a clear failure of the Court to develop subsidiarity as a legal constraint on Community action".[215] By contrast, Young has argued that the Court of Justice has been "reluctant to interpret subsidiarity as a strong limit on Community power", in fact because it "has long been willing to construe Community law with a clear view toward furthering the public value of integration".[216]

In short, the Court of Justice is deemed to be too biased to be entrusted with judicial review of the subsidiarity principle. Van Kersbergen and Verbeek for instance have argued that review of the principle "might prove to be … counter-productive, [since] the Court is generally considered to lean towards integrative decisions".[217] Estella has argued that "the Court is not currently implementing subsidiarity because, given that the principle is devoid of clear legal content, the Court could be putting its own legitimacy at risk if it decided to do so".[218] Estella's second explanation is that "the Court has its own political agenda, [which] is dominated by the idea of integration" – the principle therefore poses "a real danger for the fulfillment of the Court's plans for integration".[219]

4.4. Assessment of case law on subsidiarity

It is submitted here that these arguments do not properly reflect the case law on subsidiarity and the role of the Court of Justice with regard to this principle in general.

First of all, the case law discussed above hardly justifies a conclusion that the Court of Justice has deliberately ignored the subsidiarity principle. The Court has, on quite a number of occasions, applied the principle. In fact it referred to the principle for the first time a mere three years after its inclusion in the EC Treaty by the Treaty of Maastricht, in the famous *Bosman* case.[220] This can be contrasted with the fact that before *Bosman,* the concept of subsidiarity had only been marginally

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political in nature" (Steiner, "Subsidiarity under the Maastricht Treaty", in *Legal Issues Maastricht Treaty*, at 62).

[215] "Subsidiarity in the Draft Constitution", 11 EPL 2 (2005), 197, at 198.

[216] "Protecting Member State Autonomy In The European Union: Some Cautionary Tales from American Federalism", 77 *New York University Law Review* 1612 (2002), at 1680 and 1714.

[217] Op. cit. *supra* note 6, at 229.

[218] Op. cit. *supra* note 13, at 139.

[219] Id., at 139 and 170.

[220] Op. cit. *supra* note 89.

discussed by Advocates General[221] and was hardly invoked by litigants.[222] This is to a certain extent remarkable, since often the Court only starts to refer to certain principles after it has first been referred to them by Advocates General, litigants, the Court of First Instance, or referring national courts[223] – the rights and principles of the Charter of Fundamental Rights of course being the most important example.[224]

Secondly, the case law on the subsidiarity principle discussed above does not support the argument that the subsidiarity principle is too ambiguous to be judicially enforced. As was demonstrated, it is certainly possible to derive from the wording and legislative history a principles

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[221] Only minor discussions of the principle can be found in the Opinions of Advocate General Van Gerven in Case C-18/93, *Corsica Ferries Italia Srl v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; and of Advocate General Jacobs in Joined Cases C-430/93 and C-431/93, *Van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; A first discussion at length can be found in the Opinion of AG Léger in C-233/94, *Germany v. European Parliament and Council* [1997] ECR I-2405 (*Deposit-Guarantee Schemes*).

[222] It was mainly the Commission who invoked it, see e.g. Case C-163/88, *Georgios Kontogeorgis v. Commission* [1989] ECR 4189, and Case T-120/89, *Stahlwerke Peine-Salzgitter AG v. Commission* [1996] ECR II-1547.

[223] It was eventually the Court itself which in 1998 had to point out that the subsidiarity principle could not apply to legislation adopted before the entry into force of the Treaty of Maastricht. In *Kellinghusen and Ketelsen*, the referring national court *inter alia* asked whether Article 15(3) Council Regulation 1765/92 of June 30, 1992 infringed the principle of subsidiarity. The Court, however, pointed out that Article 3b (now Article 5) of the Treaty was not yet in force when Regulation 1765/92 was adopted and that that provision could not have retroactive effect (Joined Cases C-36/97 and C-37/97, *Kellinghusen and Ketelsen* [1998] ECR I-6337, para. 35).

[224] Another example for instance is the principle nulla poena sine lege. The Court of Justice only in 2005 started to apply this principle (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v. Commission* [2005] ECR I-5425; and Case C-3/06 P, *Groupe Danone v. Commission* [2007] ECR I-01331), but was invoked before the Court of Justice for the first time already in 1979 (Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission* [1979] ECR 461). The Court of Justice has always refrained from applying it, even when raised by a referring Court (see e.g. Case 137/85, *Maizena and others v. BALM* [1987] ECR 4587), or when invoked by one of the parties (see e.g. Case 8/83, *Officine fratelli Bertoli SpA v. Commission* [1987] ECR 1649; Case C-177/95, *Ebony and Loten Navigation v. Prefetto della Provincia di Brindisi and others* [1997] ECR I-1111, Case C-210/00; *Käserei Champignon Hofmeister v. Hauptzollamt Hamburg-Jonas* [2002] ECR I-6453; and Case C-195/99 P, *Krupp Hoesch Stahl AG v. Commission* [2003] ECR I-10937, to name only a few).

based subsidiarity-test. Admittedly, when viewed as a "principle of nearness", neither wording nor legislative history offers much guidance. However, subsidiarity is generally understood as governing not the relationship between the European Union and its citizens, but that between the European Union and its Member States. When that is taken into account, it is certainly possible to construe a set of substantive criteria. Nor has the Court deviated from the meaning of the subsidiarity principle as intended by the Community Legislature; it closely follows several elements of subsidiarity, drawn from the legislative history of the principle.

4.5. Deference to Political Institutions

In fact, by adhering to the criteria which the Community Legislature deemed to be important with regard to the subsidiarity principle, the Court can hardly be accused of judicial activism in this context. In fact, it emerges from the case law discussed above that the Court has reviewed the subsidiarity principle only marginally, hence allowing a certain deference to the political institutions of the European Union.[225] Overall, the Court of Justice has limited its review to examining whether the Community Legislature could have reasonably arrived at its conclusion that the legislation concerned was in conformity with the subsidiarity principle. Perhaps the best example of such deference is the *Vogler* case, in which the Court rejected the claims in the applications that the subsidiarity principle was infringed, by observing:

> "As the Council found that it was necessary to extend Regulation No 1408/71 to self-employed workers and members of their families so as to remove the obstacles to freedom of movement for that category of workers, the attainment of such an objective, in particular by the adoption of rules for determining the applicable legislation, necessarily presupposed action covering the entire Community, which was taken by the adoption of Regulation 1390/81. In those circumstances no impairment of the principle of subsidiarity is discernible in connection with the adoption of measures to coordinate national social security schemes in order to safeguard freedom of movement and the right of residence for persons within the Community".[226]

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[225] The leeway it grants to the Community Legislature is sometimes striking, in one case even limiting its review to the holding that "it is inconceivable that the principle of subsidiarity has been infringed" (Order in Case C-323/00 P, *Dradenauer Stahlgesellschaft v. Commission* ECR I-3919 [2002], para. 69).

[226] Op. cit. *supra* note 116, para 23.

In *Belgium v. Commission*, the Court of Justice rejected the argument that the contested regulation contravened the subsidiarity principle, simply on the ground that the Commission had remained within the powers the regulation delegated to it.[227] Furthermore, in the *Deposit-Guarantee Schemes* case, the Court held that an express reference to the subsidiarity principle was not required.[228] The Court merely examined whether "in the Community Legislature's view … the action could best be achieved at Community level"[229]. In *AvestaPolarit,* the Court only examined *how* "the Community Legislature" had acted in conformity with the subsidiarity principle, rather than looking at whether it had done so *correctly*. Similarly, the Court in *Biotechnological Inventions* merely held that compliance with the principle of subsidiarity was "necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive".[230] In the *Working Time Directive* case, the Court simply concluded that it was the responsibility of the Council, under Article 118a EC, to adopt minimum requirements so as to contribute, through harmonization, to achieving the objective of raising the level of health and safety protection of workers which, in terms of Article 118a(1) EC, was primarily the responsibility of the Member States. Once the Council had found that it was necessary to improve the existing level of protection as regards the health and safety of workers and to harmonize the conditions in this area while maintaining the improvements made, achievement of that objective necessarily presupposed Community-wide action.

4.6. Explanations for judicial deference

It follows that, while the Court of Justice has on the one hand not shied away from judicial review of the subsidiarity principle, it has, on the other hand refrained from substituting its own opinion for that of the Community Legislature. This deference is justified for three reasons in particular.

First of all, it has repeatedly been pointed out that the subsidiarity principle is already playing an important role in the legislative action of the European Union institutions. This was the case even before the

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[227] Case C-110/03, *Belgium v. Commission* [2005] ECR I–2801.

[228] Case C-233/94, *Germany v. Parliament and Council* [1997] ECR I-2405, at para. 28. See also: C-150/94, *United Kingdom v. Council of the European Union* [1998] ECR I-7235.

[229] Case C-233/94, op. cit. *supra* note 233, at para. 26.

[230] Para. 33.

adoption of the Maastricht Treaty,[231] and has not changed since.[232] Just before the EU Treaty went into effect, the three political institutions of the European Union concluded the Interinstitutional Agreement of 1993,[233] the thrust of which was incorporated in the First Protocol. In accordance with Article III of this inter-institutional agreement and Article 9 of the First Protocol, the Commission each year has to present a report on the application of Article 5 EC. This obligation is also included in the Second and Third protocol.[234] These reports illustrate that the principle has become an "integral part" of the Community's decision making, something which had been repeatedly called for by the Community Legislature in the past.[235]

Secondly, it could also be argued that – despite its clear legal elements – some elements of the "subsidiarity test" are, for reasons similar to those mentioned in the context of the political question doctrine, for the political institutions to decide on.[236] That the Court for instance has not (yet) reviewed whether the Community Legislature has

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[231] Kapteyn, "Community Law and the Principle of Subsidiarity", *Revue des Affaires Européennes* 35 (1991)

[232] Demonstrated *inter alia* by Maher, "Legislative Review by the EC Commission" in Shaw and More (eds.), *New Legal Dynamics of the European Union* (Oxford University Press, 1995), 235; Manin, "The Treaty of Amsterdam", 4 Colum. J. Eur. L. 1 (1998), at 25; and Von Borries and Hauschild, "Implementing the Subsidiarity Principle", 5 Colum. J. Eur. L. 369 (1999), at 387. See also the Report of the Committee on Legal Affairs and Citizens Rights and the Parliament's Resolution on the Commission reports to the European Council, A4-0155/97, O.J. 1997 C 167/34. Jean-Claude Piris, the Director General of the Council's Legal Service, stressed before the European Convention's Working Group on Subsidiarity that "in practice, the question of compliance with the subsidiarity principle often arises in the Council without reference to the term itself, but rather by means of calls for a draft instrument to be amended so as to make it less detailed or to leave more options open to the Member States in implementation" (Working Group I, Working document 4 "Intervention of Mr. Jean Claude Piris, Legal Adviser to the Council of the European Union and Director-General of the Council's Legal Service, at the meeting of the group on June 25, 2002", July 3, 2002).

[233] Op. cit. *supra* note 35.

[234] Id., Article 9 of the Second and Third Protocol.

[235] Edinburgh Conclusions, at 135 and 136; Birmingham Conclusions, at 6; Article II (4) of the Interinstitutional Agreement of 1993 (op. cit. *supra* note 35) and Article 11 of the First Protocol.

[236] See also the Editorial Comments in 39 CML Rev. 677 (2002), at 680, in which it is argued that the true question regarding the subsidiarity principle is "not much one of the substance of the principle, *quite clearly defined in the Treaty*, as of its control, either political or judicial". Emphasis added.

complied with the elements such as efficiency and effectivity could be explained by arguing that the Court considers these elements for the political institutions to resolve. Some of the elements discussed require complex and technical[237] – and therefore political – assessments.[238]

Thirdly, and perhaps most importantly, this deference is perfectly in line with the legislative history of subsidiarity, the Community Legislature having often stressed that the Court should not scrutinize the principle. The Working Group on subsidiarity, in its conclusions, argued that implementation of the subsidiarity principle should entail "a considerable margin of discretion for the [political] institutions".[239]

5. Conclusion

It is clear that the subsidiarity principle has important constitutional effects with regards to both the Separation of Powers and the Division of Powers in the European Union. The Court of Justice, as a Constitutional Court of the European Union, needs to balance these effects when reviewing the subsidiarity principle. Like the United States Supreme Court of Justice, it must weigh the constitutional consequences for the Separation of Powers and Division of Powers. However, whereas the Supreme Court has adopted a formal approach in its case law on the Tenth Amendment by imposing a judicially enforceable limit on the legislative power of the United States Congress – to the benefit of the powers of the States – rather than leaving Tenth Amendment questions to the political process, the European Court of Justice uses an approach which fits well in its overall approach of judicial functionalism. The Subsidiary Protocol annexed to the EC Treaty explicitly rejected any suggestion that subsidiarity is merely a political principle, providing that "in exercising the powers conferred on it, *each* institution shall ensure that the principle of subsidiarity is complied with".[240] This includes the

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[237] See e.g. Barber, "Prelude to the Separation of Powers", 60 *Cambridge Law Journal* 59 (2001).

[238] See Chapter III, section 3.4. See also: Belgian Memorandum on Institutional Relaunch, *Europe Documents*, No. 1608, March 29, 1990; House of Lords, Select Committee on European Communities, *Report on Political Union: Law-making Powers and Procedures*, 17th Report, Session 1990-91 (HL Paper 80); and see the 27th Report of the House of Lords Select Committee on the European Communities, Session 1989-1990. It should be reiterated that the political question doctrine does not involve the question whether the Court should review question which are of a political nature, but simply whether certain matters are for the Court to resolve.

[239] Op. cit. *supra* note 207, at 2.

[240] 1997 OJ C340 1.

Court of Justice, thus making the principle a legally binding norm.[241] The Court of Justice applies these politically developed criteria, but allows leeway to both the political institutions and the Member States, rather than for instance using a judicially created set of criteria to determine the horizontal and vertical relationships. On other words, rather than taking a formal stance on the subsidiarity principle, for instance by completely denying judicial review because of the political nature of the principle or – at the other extreme – by judicial development of the subsidiarity test, the Court plays a complementary – functional – role next to the Community Legislature. It closely follows the criteria which can be derived from the legislative history, and at the same time only marginally reviews whether these have been complied with. Essentially, this judicial functional approach is necessitated by the First Protocol, which states that the "application of the principles of subsidiarity … shall respect the institutional balance [and] shall not affect the principles developed by the Court of Justice regarding the relationship between national and Community law".[242]

[241] See Von Borries and Hauschilld, "Implementing the Subsidiarity Principle", 5 Colum. J. Eur. L. 369 (1999), at 373.
[242] Recital 2. Similarly, Article 1(2) of the Interinstitutional Agreement of 1993, op. cit. *supra* note 35.

- VI -

FUNDAMENTAL RIGHTS

1. Introduction

Perhaps the best illustration of the Court of Justice having a role as Constitutional Court of the European Union can be found in its case law on fundamental rights. 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 Division of Powers in the European Union. This judge-made Bill of Rights will now be replaced by the Charter of Fundamental Rights. On December 12, 2007, the Presidents of the European Parliament, the Council and the Commission met again after 7 years to "solemny proclaim" the Charter of Fundamental Rights for the second time. Perhaps an even more important day for the Charter of Fundamental Rights was the day after – December 13, 2007 – when the Heads of State and Government signed the Lisbon Treaty, which will – like the European Constitution – finally make the Charter of Fundamental Rights a legally binding document.

Nevertheless, especially after the Irish rejection of the Lisbon Treaty, the most important day for the Charter was probably June 27, 2006. On that day, the Court of Justice for the first time referred to the Charter of Fundamental Rights. Although the Charter was referred to many times since it was first "solemny proclamined" in 2000 by Advocates General and the Court of First Instance, it has hence only been three years that it has also been referred to by the Court of Justice. Nevertheless, as the Court of Justice has in nine cases since referred to it,[1] it seems that the Charter of Fundamental Rights is now being attributed a legally binding status even without the Lisbon Treaty being ratified.

The Charter was fully incorporated in the Constitutional Treaty (hereinafter: "CT") as its second part, hence making it legally binding when ratified. But with the French Non and Dutch Nee, its fate was again uncertain. Under the 2007 German Presidency it was decided to add a reference to the Charter in the EU Treaty, rather than to incorporate its full text. The Lisbon Treaty will amend Article 6 EU, to provide that "the Union recognises the rights, freedoms and principles

[1] Last counted on July 9, 2008.

set out in the Charter of Fundamental Rights of December 7, 2000 … which shall have the same legal value as the Treaties". The Lisbon Treaty will slightly modify the Charter to resemble the version of the Charter that was integrated in the Constitutional Treaty. The effect of the Lisbon Treaty with regard to the Charter will thus be exactly the same as that of the Constitutional Treaty.[2] Before and during the Intergovernmental Convention of the Lisbon Treaty further emphasis was put though on avoiding any effects on the Division of Powers in the European Union. Therefore, the new Article 6 EU also provides that "the Charter shall not extend in any way the competences of the Union as defined in the Treaties".

There were several concerns at the European Council mandating the IGC of 2007 that a legally binding Charter could particularly lead to a significant – and hence undesired – shift in the Division of Powers in the European Union. Similar fears had already been expressed at the European Convention for the European Constitution and the Convention which drafted the Charter. The two Conventions 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. Similar safeguards could be found in the highly detailed mandate of the Intergovernmental Convention.

This chapter will examine what the effects of so curtailing the Court's powers will be. It will consider whether and how a legally binding Charter could change the role of the Court of Justice in relation to the Separation and Division of Powers in the European Union. It analyses the possible effects from a comparative perspective, since, remarkably, similar fears were expressed 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 indeed had an important centralizing effect, a process in which the Supreme Court has played a pivotal role.

This chapter will consist of two sections. Section 2 will examine how the new Article 6 EU and Article 51 of the Charter, by limiting the scope *ratione personae* of the European Union's fundamental rights *acquis,* aimed to limit the role of the Court of Justice. It is important to point out that the term "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.[3] Section 3 will discuss what effects the Charter in

[2] OJ 2007 C 303/01.

[3] 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

general will have on the use of the European Union's powers, and how this can subsequently also, indirectly, widen the scope of the Court's fundamental rights review.

2. The role of the Court of Justice

2.1. The current role of the Court of Justice.

2.1.1. Introduction

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.[4] 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.[5] 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",[6] for instance because the framers of the Treaties feared that it "might have become an invitation to extend [the] enumerated powers".[7] On the other hand, the framers of the Treaties probably intended Community law to

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tail. The personal scope of application of the EU Charter of Fundamental Rights", 8 MJ 102 (2001), at 103.

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

[5] See e.g. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press, 2000), at 170-172; Weatherill, *Law and Integration in the European Union* (Oxford University Press, 1995), at 215-216; Mancini, "The Making of a Constitution for Europe", 26 CML Rev. 595 (1989), 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* (forthcoming); Rodríguez Iglesias, "The Protection of Fundamental Rights in the case law of the Court of Justice of the European Communities" (1995) 1 Colum. J. Eur. L. 169, at 181.

[6] Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Lawmaking* (Nijhoff, 1986), at 390. As is well known, this book has received quite some criticism. See Toth(1987) 7 *YEL* 411; Cappelletti, 'Is the European Court of Justice "Running Wild"?' 12 Eur L Rev 3 (1987); Weiler, "The Court of Justice on Trial", 24 CMLR Rev. 555. (1987)

[7] 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* 1103 (1986), at 1112.

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*".[8] 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.

Besides acts of Community institutions, the Court has found that it has jurisdiction to review acts of Member States in the following situations:[9]
a) Agency type situations - Member States implementing EC legislation.[10]
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;[11]

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[8] 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* (Oxford University Press, 1999), at 864. Emphasis added.

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

[10] 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 201/85 and 202/85, *Klensch* [1986] ECR 3477, paras 8-9; Joined Cases 196/88 to 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-74/95 and 129/95, *X* [1996] ECR I-6609, paras 25-26. "The EU Charter of Fundamental Rights and the Federal Question", 39 CML Rev. 945 (2002), at 962-967.

[11] See Case C-260/89, *ERT* [1991] ECR 2925, para 43.

ii) *Cassis de Dijon* exceptions;[12] although the Court initially held that these were not subject to review,[13] it changed this position in *Familiapress*;[14]
iii) *Schmidberger* exceptions;[15] a Member State invokes respect for and protection of fundamental rights as a *direct* justification for its derogation.[16]

The Court has used as sources for its unwritten Bill of Rights the common constitutional traditions of the Member States,[17] international human rights treaties,[18] and the European Convention on Human Rights.[19] As mentioned, the Court has also in nine cases referred to the Charter (§2.1.2), which leads to the question of what the relationship is between these sources on the one hand and the Charter of Fundamental Rights on the other (§2.1.3).

2.1.2. The Charter as a source for judicial review

In Case C-540/03, *Parliament v. Council,*[20] the Court of Justice for the first time ever referred to the Charter of Fundamental Rights. The Court held:

> "The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on December 7, 2000. While the Charter is not a legally binding instrument, the Community Legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter".[21]

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[12] Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.
[13] Joined Cases 60/84 and 61/84, *Cinetheque* [1985] ECR 2605, para 26; Case 12/86, *Demirel* [1987] ECR 3719, para 28.
[14] Case C-368/95, *Familiapress v. Bauer Verlag* [1997] ECR I-3689.
[15] Case C-112/00, *Schmidberger* [2003] ECR I-5659.
[16] 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. This case has been confirmed in Case C-36/02 *Omega* [2004] ECR I-9609, para. 35, in which the Court held that protection of fundamental rights justifies a restriction to freedom to provide services.
[17] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4. See also Case 44/79, *Hauer* [1979] ECR 3727, para 15.
[18] Case 4/73, *Nold* [1974] ECR 491, para 13.
[19] Case 36/75, *Rutili* [1975] ECR 1219, para 32. This case law was codified in Article 6(2) EU.
[20] Case C-540/03 *Parliament v. Council* [2006] ECR I-5769.
[21] Id., para. 38.

The Court furthermore held that the Charter recognised in Article 7 the right to respect for private or family life. It found that this provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter "and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents".[22] The Court of Justice also referred to the Convention on the Rights of the Child and the ECHR. A second – albeit rather short – reference can be found in a case of a couple months later. The Court dismissed an appeal to set aside the judgment of the Court of First Instance in Case T-44/00.[23] The applicant had *inter alia* invoked Articles 46 and 47 of the Charter, but the Court found that it was not "necessary to adjudicate on the question ... whether [the applicant] could rely in the present case on the Charter, which was proclaimed after the adoption of the contested decision"..[24]

The Court has since referred to the Charter usually together with other fundamental rights documents. For instance, in *Unibet*, the Court held that

> "the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union".[25]

In a similar way, the Court has referred to the Charter's right to respect for private life,[26] the right to take collective action,[27] which includes the right to strike,[28] and the rights of the child.[29] However, the fact that the Court has in these cases always referred to the Charter together with other human rights documents can be explained by the fact that the rights articulated in the Charter are to a large extent derived from sources which the Court of

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[22] Id., para. 58.
[23] Case T-44/00, *Mannesmannröhren-Werke AG v. Commission* [2004] ECR II-2223.
[24] Case C-411/04 P, *Salzgitter Mannesmann v. Commission* [2007] ECR I-959, at para. 50.
[25] Case C-432/05, *Unibet* [2007] ECR I-2271, at para. 37.
[26] C-450/06 *Varec v. Beglium* [2008] nyr, at para. 48.
[27] C-341/05, *Laval un Partner*i [2007] ECR I-11767.
[28] C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779.
[29] C-244/06, *Dynamic Medien* [2007] nyr; Case C-540/03, *Parliament v. Council,* op. cit. *supra* note 20.

Justice in one way or another already applies.[30] Several of the rights stated in the Charter of Fundamental Rights are based on the ECHR,[31] 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,[32] others have been inspired by judgments of the Court of Justice;[33] some are based on the European Social Charter of 1961 and the Revised Social Charter of 1996,[34] and some are based on existing EC or EU provisions.[35] Indeed, the whole idea of the Charter was merely to pull together existing rights.[36] This was expressed in C-540/03, *Parliament v. Council*, in which it held that

> "the principal aim of the Charter, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional

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[30] 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., (Weiler, "Editorial: Does the European Union Truly Need a Charter of Rights?", 6 ELJ 95 (2000). It is also an important difference from the United States Bill of Rights, which was adopted at a time when "the states had very imperfect bills of rights" (Levy, *Constitutional Opinions, Aspects of the Bill of Rights* (Oxford University Press, 1986), at 111).

[31] For an enumeration of these provisions, see the Explanatory Memorandum on Article 52 of the Charter. The Explanatory Memorandum was added to the Constitution as "Declaration concerning the explanations relating to the Charter of Fundamental Rights", OJ 2004, C 310/324 and, after the Charter was proclaimed for the second time, again officially published together with the Charter (OJ 2007, C 303/02). The new Article 6(2) provided that "the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".

[32] Compare the Explanatory Memorandum on Articles 10, 14, 17, 20, 27 and 49 of the Charter for different forms of derivation. Article 37 on environmental protection, for instance, "also draws on the provisions of some national constitutions", whereas the right to conscientious objection (Article II-70(2)) "corresponds to national constitutional traditions and to the development of national legislation on this issue".

[33] See the Explanatory Memorandum on Articles 3, 11, 15-17, 20, 41, 45, 47 and 50 of the Charter.

[34] See the Explanatory Memorandum on Articles 15, 26-31, and 33-35 of the Charter.

[35] See the Explanatory Memorandum on Articles 8, 12, 15, 16, 18, 21-23, 34-37, and 39 to 46 of the Charter.

[36] See the Presidency Conclusions of the Cologne European Council, 3 and 4 June 1999.

traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights"

2.1.3. Other Fundamental Rights documents

The question emerges what the relationship is between the Charter of Fundamental Rights and other documents the Court of Justice uses for its fundamental rights review. By merely mentioning the Charter together with other fundamental rights documents the Court of Justice prima facie does not seem to give much weight to the Charter. However, two recent cases in particular reveal that the significance attached to the Charter by the Court of Justice must not be underestimated. First of all, in *Promusicae*,[37] the Court was asked whether Community law, in particular Directives 2000/31, 2001/29 and 2004/48, read also in the light of Articles 17 and 47 of the Charter, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings. A trade group representing the Spanish recording industry had brought proceedings against an internet provider, requesting the Court to order disclosure of the IP addresses of those using the Kazaa application to download music illegally. The Court of Justice held:

> "The national court refers in its order for reference to Articles 17 and 47 of the Charter, the first of which concerns the protection of the right to property, including intellectual property, and the second of which concerns the right to an effective remedy. By so doing, that court must be regarded as seeking to know whether an interpretation of those directives to the effect that the Member States are not obliged to lay down, in order to ensure the effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings leads to an infringement of the fundamental right to property and the fundamental right to effective judicial protection".[38]

The Court held that Directive 2002/58 sought to ensure full respect for the rights set out in Articles 7 and 8 of that Charter. The Court pointed out that "Article 7 substantially reproduces Article 8 of ECHR ... and Article 8 of the Charter expressly proclaims the right to protection of personal data".[39]

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[37] Case C-275/06, *Promusicae v. Telefónica de España SAU* [2008] ECR I-271.
[38] Id., at 61.
[39] Id., at 64 .

Overall, the Court based its judgment mainly on an interpretation of the Charter.

Another second important case in this context is *Advocaten voor de Wereld,* in which a non profit-making organisation of lawyers argued *inter alia* that, because of the removal of verification of double criminality for certain offences, the Framework Decision establishing the European Arrest Warrant was contrary to Article 6 EU. The Court held that

> "by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union. It is common ground that those principles *include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Articles 49, 20 and 21 of the Charter of Fundamental Rights of the European Union. It is accordingly a matter for the Court to examine the validity of the Framework Decision in the light of those principles"*.[40]

2.1.4. Conclusion

Although the Court of Justice in the first case in which it referred to the Charter explicitly held that it was not a legally binding instrument, after nine references it seems difficult to still reach the same conclusion. Overall, it is clear that the Court of Justice is no longer treating the Charter of Fundamental Rights any differently to the other sources for its fundamental rights review mentioned above, hence providing it with a legal or at least quasi-legal status. In *Advocaten Voor De Wereld,* the Court of Justice even seemed to imply that the rights as are laid down in the Charter are part of the general principles of Community law, against which the Court of Justice can review acts of the institutions.

[40] Case C-303/05, *Advocaten voor de Wereld* [2007] ECR I-3633, paras 45-47. Emphasis added.

2.2. Article 51 of the Charter and the new Article 6 EU

2.2.1. Introduction

The Lisbon Treaty IGC and the two Conventions – 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 what Lenaerts called a "federalizing device".[41] 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 [the current] Article 6(2) *juncto* Article 46(d) EU".[42] 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 European Union's human rights *acquis* in Article 51 of the Charter and the new Article 6 EU. These provisions were clearly intended to avert the use of the Charter by the Court of Justice in order to further influence the Division of Powers in the European Union.

2.2.2. The First Convention

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".[43] This first Convention decided to enunciate this notion by a special provision, which was later to become Article 51 of the Charter, then Article II-111 CT and is now Article 51 of the Charter again.[44] The framers of the First Convention wanted to make sure the Charter did not in any way affect the Division of Powers in the European Union. First of all, it construed a narrower scope of personal application than that of fundamental rights case law as articulated by the Court. It limited the Charter's scope *ratione personae* to agency type situations,

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[41] Term borrowed from Lenaerts, "Fundamental Rights to be included in a Community Catalogue", 16 EL Rev. 367 (1991) at 389.

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

[43] CHARTE 4105/00, at 2.

[44] 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.

expressly excluding explicit and *Cassis de Dijon* exceptions.[45] This decision by the Convention displayed "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".[46] By placing only minimal restraints on the Member States' powers, the Convention aimed to minimize the effect of the Charter on the Division of Powers. Secondly, the Convention enunciated, in the second paragraph of Article 51, 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"[47] and confirms the principle of attribution of powers as articulated in Article 5(1) EC and 5 EU.[48] Finally, the Convention was proposed, at one point, even to state explicitly 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";[49] this eventually resulted in the formula that the Charter paid "due regard [to] the powers and tasks of the Union and the principle of subsidiarity".

2.2.3. The Second Convention

Giscard d'Estaing could be rightfully 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".[50] 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

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[45] See also Lord Goldsmith, "A Charter of Rights, Freedoms and Principles", 38 CML Rev. 1201 (2001), at 1205; Weiler, "Human Rights, Constitutionalism and Integration, Iconography and Fetishism", 3 *International Law FORUM du droit international* 227 (2001), at 234; Jacobs, "Human Rights in the European Union: the Role of the Court of Justice", 26 EL Rev. 331 (2001), at 338-339.

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

[47] Lenaerts and De Smijter, op. cit. *supra* note 25, at 288-289.

[48] Pernice, "Integrating the Charter of Fundamental Rights into the Constitution of the European Union: practical and theoretical propositions", 10 Colum. J. Eur. L. 5 (2004), at 25.

[49] CHARTE 4400/00, at 2.

[50] Speech of July 18, 2003.

second Working Group of the Convention 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 legally binding status,[51] 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.[52] As is well known, before the Convention, the status of the Charter had been the subject of considerable political and academic debate.[53] Several Member States, especially the United Kingdom, were strongly opposed to incorporating the full text of the Charter or providing it with legally binding status. Of all the modalities discussed, this was clearly the most significant.

However, as there emerged a growing consensus on the technique of incorporation, during the Convention there were increasing concerns about the possible impact of this modality on the Division of Powers in the European Union. The second Convention clearly wanted to underscore the importance of the *rationale* of Article 51. Although the second Working Group[54] decided right from the start "by general agreement ... that the

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[51] CONV. 354/02, at 2.

[52] CONV. 203/02, at 2. See also CONV. 116/02, at 7-9.

[53] See e.g. CONV 164/02, at 2; Dutheil de la Rochère, "Droits de l'homme: La Charte des droits fondamentaux et au delà", Jean Monnet Working Paper No. 10/01; De Witte, "The legal status of the Charter: Vital question or non-issue?", 8 MJ 81 (2001); 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 531 (2000); and McGlynn, "Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?", 26 EL Rev. 582 (2001), at 583-585.

[54] 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. The Working Group was well aware of the political power of the Court of Justice in this area. According to its minutes "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 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

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 51 to ensure that the Charter would not affect the Division of Powers.[55] According to the minutes: "All speakers stressed the importance, already highlighted by the previous Convention, of the principle that the incorporation of the Charter should not affect the distribution of competences between the Union and the Member States".[56] 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.[57] Amendments were suggested to both the first and second paragraph of Article 51, "in order to render ... clear beyond the slightest doubt" that an incorporated Charter would "in no way" alter the Division of Powers.[58] The Working Group furthermore again emphasized "that the Charter was drafted with due regard to the principle of subsidiarity".[59] 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".[60]

2.2.4. The 2007 IGC

Despite the strong emphasis in (now) Article 51 of the Charter itself to avoid any effect on the Division of Powers whatsoever, during the decision-making process leading to the adoption of the Lisbon again much attention was given to this particular aspect. Next to the aforementioned new Article 6 EU, Declaration (No. 1) on the Charter of Fundamental Rights, annexed to the Lisbon Treaty, provided 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, or modify powers and tasks as defined by the Treaties". Emphasis was again put on the

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definition of Community fundamental rights purely through case law". CONV. 203/02, at 4 (emphasis added).

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

[56] CONV 203/02, at 4.

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

[58] CONV. 354/02, at 5; See also CONV 295/02, at 7.

[59] CONV. 354/02, at 5. This also resulted in the inclusion of Article II-112(6) CT (now Article 52 of the Charter).

[60] Id. 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.

aspect that the Charter was to apply only to Member States when they were implementing Union law.[61] Another Declaration by the Czech Republic on the Charter of Fundamental Rights provided that

> "the Czech Republic recalls that the provisions of the Charter of Fundamental Rights of the European Union are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and division of competences between the European Union and its Member States. The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law, as reaffirmed in Declaration (No 18) in relation to the delimitation of competences. The Czech Republic also emphasises that the Charter does not extend the field of application of Union law and does not establish any new power for the Union. It does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field".[62]

Fears of its apparent effect on the scope of review of Court of Justice were expressed in particular by the British and Polish Governments. Despite the European Parliament's call "that if one or more Member States claim an opt-out from the Charter of Fundamental Rights, this would represent a dramatic setback and cause serious damage to the EU's innermost sense of identity",[63] a new protocol on the application of the Charter to Poland and to the United Kingdom was added to the Treaties, which provided that the Court of Justice cannot hold "the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom" to be in inconsistent with the Charter of Fundamental Rights.[64] A

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[61] See *inter alia* the Opinion of the European Commission on the IGC "Reforming Europe for the 21st Century 11625/07 Brussels, July 13, 2007 ("The Charter of Fundamental Rights will offer Europeans guarantees with the same legal status as the treaties themselves, bringing together civil, political, economic and social rights which the Union's action must respect. Its provisions will also apply in full to *acts of implementation* of Union law, even if not in all Member States"). Emphasis added.

[62] Declaration (No 53) by the Czech Republic on the Charter of Fundamental Rights of the European Union, annexed to the Final Act, CIG 15/07, AF/TL/DC/en 22.

[63] European Parliament resolution of July 11, 2007 on the convening of the Intergovernmental Conference IGC 11626/07, Brussels, July 13, 2007.

[64] Article 1 of Protocol No 30. OJ C 115/313. Article 1 furthermore provides that "In particular, and for the avoidance of doubt, nothing in Title IV [on solidarity]

Declaration by Poland, annexed to the Final Act, expressed similar concerns.[65] Apparently, the opposition of the United Kingdom in particular – with which the Polish would later join[66] – was also the main reason to opt for a reference to the Charter in the EU Treaty rather than a form of incorporation.[67]

2.2.5. Conclusion

Overall, it is clear that the aim of both the IGC and the Conventions was to prevent the Charter from having *any* kind of effect on the Division of Powers in the broadest sense possible. It is for this reason Article 51 of the Charter read in conjunction with the new Article 6 EU 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.[68]

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of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law".

[65]Declaration (No. 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union and Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

[66] See e.g. IGC 2007 Statement by Ms Anna E. Fotyga (the Polish Minister for Foreign Affairs) on the occasion of the opening of the Intergovernmental Conference (CIG 5/07).

[67] See the press release of the German Presidency "a good day for Europe" on http://www.eu2007.de.

[68] The final text of Article 51 Charter provides (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".

2.3. The United States Incorporation Doctrine

2.3.1. Introduction

What effect will these limitations have on the role of the Court of Justice in the Division of Powers? A comparison with the United States Supreme 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. In sum, the United States Bill of Rights was intended neither to affect the powers at the central level, nor to place any restraints whatsoever on the legislative powers of the states. However despite its intended limited scope *ratione personae*, the Bill of Rights 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.[69]

2.3.2. Scope as intended by the Founding Fathers

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 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

[69] Remarkably, the Supreme Court initially *confirmed* that the personal 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 Which prevents government from depriving private persons of vested property rights without payment of just compensation. 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" ([1833] 32 US 243, at 247 and 250-251).

that power".[70] 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,"[71] 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 "[t]his 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".[72] 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",[73] 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 adoption of "a Bill of Rights that would be legally enforceable in the courts".[74] In the first Congress, James Madison fulfilled this promise, but only because he thought that this would "kill the opposition [against the Constitution] everywhere".[75] 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 ...

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[70] Federalist Paper No. 84, in Ball (Ed.), *Hamilton, Madison, and Jay. The Federalist with Letters of "Brutus"* (Cambridge University Press, 2003), at 420.
[71] Levy, op. cit. *supra* note 30, at 106.
[72] Brutus (probably Robert Yates, a recognized leader of the Anti-federalists), Letter no II, in Ball, op. cit. *supra* note 44, at 452.
[73] McLaughlin, *A Constitutional History of the United States* (Appleton, 1935), at 211.
[74] Vile, *A Companion to the United States Constitution and its Amendments* (Greenwood, 2001), at 125.
[75] James Madison, "Letter to Richard Peters, 19 Aug. 1789" in *The Papers of James Madison* (Vol. 12) (University of Virginia Press 1979), at 347. See also Chase and Ducat, *Edward S. Corwin's The Constitution and what it means today,* (Princeton University Press 1974), at 285.

was the chief concern of Congress in approving the Bill of Rights".[76] 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 First Amendment. The limits to be observed by state authorities were to be found in the state constitutions".[77]

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

2.3.3. The application to the state level

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".[78] Generally referred to as the "privileges and immunities" 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 non-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"[79] or "whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples".[80] Secondly, according to the 'selective incorporationist" school, some of the first eight amendments should apply to states, though not all of them.[81] Thirdly, according to the "total

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

[77] Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge University Press, 2003), at 45.

[78] Amendment XIV, Section 1 United States Constitution.

[79] Justice Frankfurter in *Malinski* v. *New York* [1945] 324 U.S. 401, at 414.

[80] Justice Frankfurter in *Adamson* v. *California* [1947] 332 U.S. 46, at 67. See also *Palko v. Connecticut* [1937] 302 U.S. 319; and *Twining* v. *New Jersey* [1908] 211 U.S. 78.

[81] See e.g. the opinion of the Court (delivered by Justice White) in *Duncan v. Louisiana* [1968] 391 U.S. 145.

incorporationist" school, the entire Bill of Rights is incorporated in the Fourteenth Amendment and applies *in toto* to the states.[82] 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 rights apply.[83] 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.[84]

More than half a century after the ratification of the Fourteenth Amendment, the Court in *Gitlow v. New York*[85] 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,*[86] 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.[87]

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 relatively recent – but already seminal – case of *Saenz* v. *Roe,*[88] the Court – for the first time in its history[89] – used the

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[82] See e.g. the opinion of Justice Black in *Adamson*, op. cit. *supra* note 80.

[83] See e.g. the opinion of Justice Douglas in *Poe v. Ullman* [1961] 367 U.S. 497, and the opinion of Justice Murphy in *Adamson*, op. cit. *supra* note 80.

[84] Chemerinsky, *Constitutional Law, Principles and Policies* (Aspen, 2002), at 481.

[85] [1925] 268 U.S. 652.

[86] [1927] 274 U.S. 380.

[87] The Second Amendment right to bear arms, the Third Amendment 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 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.

[88] [1999] 526 US 489.

[89] The Supreme Court in *Colgate* v. *Harvey* ([1935] 296 U.S. 404) held that a state law was void *inter alia* because it infringed a "privilege of citizenship of

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.[90]

2.3.4. Conclusion

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 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.[91] 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".[92] 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 matter of what effect the limitations of Article 51 of the Charter will have on the role of the Court of Justice in the Division of Powers, the question which emerges is whether similar developments to

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the United States", but it overruled this case four years later in *Madden* v. *Kentucky* [1940] 309 U.S. 83.

[90] [1872] 83 U.S. 36. 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 best, ... are inconclusive" (Chief Justice Warren in *Brown v. Board of Education* [1954] 347 U.S. 483, at 489).

[91] 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 412 et seq.; and Kamisar, "The Warren Court and Criminal Justice" in Schwartz (Ed.), *The Warren Court. A Retrospective* (Oxford University Press, 1996), at 116 et seq.

[92] *Prudential Ins. Co. of America v. Cheek* [1922] 259 U.S. 530, at 543.

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 European 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 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. 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 role 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",[93] 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;[94] and[95]

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[93] 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*, *Kremzow* and the Opinion of A.G. Mischo in *Booker Aquaculture*, Joined Cases C-20/00 and 64/00 [2003] ECR I-7411). There is no indication that any of these terms is more comprehensive than another.

[94] *Kremzow*, para 16 in conjunction with Case 180/83, *Moser* [1984] ECR 2539, paras 15, 17 and 18; and *Grogan,* id., 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.

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

b) there is no secondary Community law on the (specific) topic;[96] or there is, but the Member State measure concerned is not "intended to implement"[97] the Community legislation. This is *inter alia* the case when the measure is not designed to ensure compliance with Community legislation,[98] 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.[99]

The Court has, over the years, rejected several feelers to widen its scope of review, put out mostly by Advocates General. Early on, Advocate General Trabucchi in the 1976 case *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.[100] 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 the 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".[101]

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

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[96] *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.

[97] *Annibaldi*, para 21.

[98] *Kremzow*, para 17.

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

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

[101] Opinion of AG Jacobs in *Konstantinidis*, *supra* note 10 para 46.

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".[102] *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 justification for its derogation. The Court relatively 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.[103]

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 51 of the Charter, especially read in conjunction with the new Article 6 EU, 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 51 of the Charter, the Conventions gave a clear signal that the Court should employ a more limited scope *ratione personae* of fundamental rights review.[104] This was further emphasised during the 2007 IGC. One should not forget that Article 46(d) EU already stated that the Court has jurisdiction with respect to Article 6(2) EU only with regard to "action of the institutions". According to Lenaerts, even if this provision was not intended to call into

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

[103] 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. 68 (1999), at 77-79; Eeckhout, op. cit. *supra* note 11, at 959-962; Pernice op. cit. *supra* note 35, at 34.

[104] See also Besselink, op. cit. *supra* note 78, at 79.

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".[105]

This judicial activism of the Supreme Court has had three major effects on the 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 the state level unduly restricts the authority of the states.[106] Secondly, it led to a significant extension of the federal judicial power at the expense of the states.[107] 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".[108] It is virtually certain that, inevitably, similar effects will occur within the European Union.

3. The influence on the powers of the European Union

3.1. How the Charter will affect the EU's powers ...

The effect of the Charter on the role of the European Court of Justice in the Division of Powers will also depend on how the Charter will affect the European 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 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",[109] a doctrine which the Conventions have left unchanged.

However, will the Charter indeed leave the European Union's powers untouched? It is submitted, that the Charter will still, in the words of

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

[106] Total incorporationists reply that preventing violations of human rights is more important than concerns about the division of powers.

[107] See e.g. Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (Harvard University Press, 1973), at 13-15.

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

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

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 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".[110] 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 in any way affect the Division of Powers. This is indeed confirmed by the Amendment's *travaux préparatoires*.[111] 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".[112]

As demonstrated in Chapter IV, the commerce clause is the American equivalent of Article 95 EC and states that Congress has the power "to regulate Commerce ... among ... states".[113] 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,[114] one of the "most important laws ever adopted in American history".[115] Indeed, the reason why the Court of Justice has developed its fundamental rights case law was precisely because of the Community's fast-growing capacity to affect fundamental rights.[116] 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",

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[110] Emphasis added.

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

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

[113] Article I, Section 8, Clause 3 of the United States Constitution.

[114] See *Heart of Atlanta Motel v. United States* [1964] 379 U.S. 241; and *Katzenbach v. McClung* [1964] 379 U.S. 294.

[115] Chemerinsky, op. cit. *supra* note 60, at 257.

[116] 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 866; Weatherill, op. cit. *supra* note 3, at 105-106.

especially a legally binding one.[117] But one could also think, for instance, of Articles 12 and 13,[118] 44, 94, 137,[119] 141,[120] 149,[121] 151[122] and 153 EC,[123] to name but a few. 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 rights to be guaranteed ... require action by the European Union for them to be implemented, and the legislature has broad discretionary powers as regards such action".[124] On several of the Charter's rights, however, the European Union has no legislative competence. This is especially remarkable when one can infer from these rights a positive duty to protect them,[125] 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.[126] A clear example of this is the *Port I* case, in which the Court held that the European 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".[127] Theoretically, the Court could condemn 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 European Union articulated in Article 51 of the Charter "to respect the

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[117] De Burca, "Human Rights: The Charter and Beyond", Jean Monnet Working Paper No. 10/01.
[118] See *infra*, section 3.3.
[119] See the Charter's solidarity Chapter, especially Articles. 28, 30, 31 and 34 of the Charter.
[120] See Article 23 of the Charter
[121] See Art 14 of the Charter.
[122] See Article 22 of the Charter.
[123] See Article 38 of the Charter
[124] CHARTE 4111/00, at 5.
[125] E.g. the rights to marriage, conscientious objection, education, business, workers" rights, and rights concerning social welfare.
[126] 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 10.
[127] Case C-68/95, *T. Port* [1996] ECR I-6065, para 40.

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 European Union,[128] but, as demonstrated in the previous section, the *travaux préparatoires* of Article 51(1) of the Charter clearly aim to forestall any effect on the Division of Powers.

3.2. ... and the scope of judicial review

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

In *Österreichischer Rundfunk*,[129] 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, 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".[130] 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".[131]

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[128] Eeckhout, op. cit. *supra* note 11, at 980 and 984.
[129] Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk* [2003] ECR I-4989.
[130] Article 1(1) of Directive 95/46.
[131] Opinion of AG Tizzano, para 43.

This is a convincing argument, considering that there is no secondary Community law on the *specific* topic; alternately, if one argues that there was a secondary Community law, because of the existence of Directive 95/46, 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,[132] 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 Österreichischer Rundfunk 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, 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.[133]

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

[132] 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.
[133] Opinion of AG Tizzano, para 48.

establishment and functioning of the internal market would also be brought within its scope".[134]

Such a situation would not only be incompatible with Opinion 2/94, but also with *Tobacco Advertising I,* in which the Court held that to use Article 95 EC as "a general power to regulate the internal market"[135] 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 I* 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*".[136] *Therefore*,[137] 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".[138] 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"[139] or "direct link"[140] 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.[141] 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

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[134] Id., para 53.
[135] *Tobacco Advertising I*, para 83.
[136] *Österreichischer Rundfunk*, para 41. Emphasis added.
[137] See para 42: "In those circumstances"
[138] Id.
[139] Id., para 43.
[140] Id.
[141] And it is even questionable whether Directive 95/46 dealt with the same specific topic as the Austrian constitutional law.

internal", or at least have nothing more than a mere indirect connection with Community law.

In *Lindqvist*,[142] 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.[143] 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 I*, 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 this exception to the scope of the Directive "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".[144] 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 had no choice but to apply it, thereby extending its fundamental

[142] Case C-101/01, *Bodil Lindqvist* [2003] ECR I-12971.
[143] Opinion of AG Tizzano in *Lindqvist*, para 37.
[144] *Lindqvist*, cited *supra* note 129, para 42.

rights review of 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 European Union uses its specific legal basis. Furthermore, these two cases, together with *Familiapress*, *Schmidberger* and *Booker Aquaculture* demonstrate the augmentational development by means of which the scope of the European 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 European Union's human rights powers 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. symbiotic relationship between the expansion of the European Union's human rights powers and the expansion of the Court's human rights review.

3.3. Another example: Discrimination

A similar development will most likely occur in the field of discrimination, or is perhaps already occurring. The European 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 European Union has no (real) legislative competence, which according to Eeckhout, is difficult to reconcile with the wording of Article 13 EC.[145] Just as Article 51(1) of the Charter 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, as it would have "add[ed] nothing to the EC Treaty".[146] The function of this phrase is that it limits the specific competence of Article 13 EC – elucidating that it is of an accessory nature – and possibly even "merely refers to the principles of

[145] Eeckhout, op. cit. *supra* note 11, at 986.
[146] Flynn, "The Implications of Article 13 EC - After Amsterdam, will some forms of discrimination be more equal than others?", 36 CML Rev. 1127 (1999), at 1134.

subsidiarity and proportionality".[147] Therefore, this provision can also be used when the Union only has weak legislative competence, such as on education and health.[148]

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 21 of the Charter, 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".[149] 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.[150] Conversely, Article 21 of the Charter could, as demonstrated, lead to a more extensive use of existing EU powers (including Article 13 EC),[151] be it directly or via Article 13. This could be reinforced by the broad personal scope of Article 12 EC as construed by the Court,[152] 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' and IGC's desire to prevent the Charter from having any effect on the 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, as well as the Court of First Instance, were already referring to the Charter in quite a number of cases, the Court of Justice in *Schmidberger* extended the scope *ratione*

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[147] Id., at 1135.
[148] Id.
[149] Emphasis added.
[150] Even despite the Court's judgment in Case C-249/96, *Grant* [1998] ECR I-621. Lenaerts, op. cit. *supra* note 81, at 579.
[151] 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.
[152] This wide scope *ratione personae* of course already broadens the scope of legislative jurisdiction under Article 12 itself.

personae of "its" unwritten Bill of Rights even further, despite the "signalling effect" of then Article 51 of the Charter (and that of Article 46(d) EU after Amsterdam).

Secondly, it seems that the European Union is already using its (enumerated) powers extensively for human rights purposes.[153] 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 xenogamous or 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.

As mentioned, the rights articulated in the Charter are to a large extent derived from sources which the Court of Justice in one way or another already applies. One could argue that this factor might hence mitigate the effects on the Division of Powers, as these rights already limit the Member States' legislative powers. If the Court of Justice were, 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".[154]

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",[155] and it is not unlikely that these will be among the first to be invoked once legally binding. Several of the rights have a much wider scope than those by 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.[156] Also, Article 52 of the Charter implies that the Charter does not prevent the provision of more extensive protection.[157]

Nevertheless, the present wording of Article 53 of the Charter can also be read as providing a lower standard of protection than, for instance, that

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[153] See also Prechal, *Juridisch cement voor de Europese Unie* (European Law Publishing, 2006).

[154] 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 23 (1991), at 29.

[155] Ewing in Cane and Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), at 322.

[156] Besselink, op. cit. *supra* note 78, at 69-71.

[157] See also the Explanatory Memorandum on Article 52(3) and 52(4) of the Charter.

provided by treaties to which only some Member States are a party,[158] 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,[159] 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".[160] 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.[161]

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 has even argued that this "situation conjures up the classic risk of a *gouvernement des juges*".[162] The Court of Justice has furthermore gradually extended its scope of fundamental rights review despite "warning signs" by the Community Legislature as enshrined in Article 51 of the Charter and both the current and the new version of Article 6 EU. Moreover, the Court of Justice has started to treat the Charter of Fundamental Rights as a legally or at least quasi legally binding documents even without the Lisbon Treaty being ratified.

Has the Court of Justice in its case law on fundamental rights trespassed on the boundaries of the European Union's Separation of Powers and Division of Powers it has itself helped to create? Since much of the case law discussed in this Chapter is of a rather recent date, this

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[158] Besselink in Prechal et al. (eds.), op. cit. *supra* note 3.

[159] E.g. in *Williams v. Florida* [1970] 399 U.S. 78, 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.

[160] *Malloy v. Hogan* [1964] 378 U.S. 1, at 10-11 (citations omitted).

[161] Chemerinsky, op. cit. *supra* note 60, at 486. He argues that "[t]his might be criticized on federalism grounds as unduly limiting the states. But rights such as freedom of speech are fundamental liberties, and there is no reason why their content should vary depending on the level of government".

[162] Weiler, op. cit. *supra* note 5, at 1111; see also De Witte in Alston and Weiler, op. cit. *supra* note 6, at 865-867. Many commentators have used similar qualifications to describe the Supreme Court's judicial activism in *Griswold v. Connecticut* [1965] 381 U.S. 479 and *Roe v. Wade* [1973] 410 US 113, in which it applied to state legislation a fundamental right not expressly enumerated in the Bill of Rights. See e.g. Funston, *Constitutional Counterrevolution. The Warren Court and the Burger Court: Judicial Policy Making In Modern America* (Schenkman, 1977), at 307-320; Schwartz, *A History of the Supreme Court* (Oxford University Press, 1993), at 357-361.

question seems difficult to answer. All in all, there are three possible scenarios imaginable as to how the case law on fundamental rights might develop. Based on the overall functional approach of the Court of Justice, it is possible to – to a certain extent – predict which scenario is the most feasible.

Scenario I: a legalistic approach

The Court could first of all choose to adhere strictly to the letter of the Charter, including Article 51 of the Charter. 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-faire*ism 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 51 of the Charter, cannot modify the Union's powers and tasks. When – if ever – the Lisbon Treaty is ratified, 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*.[163] Already, powers such as Article 95 EC are used extensively by the Union to influence all kinds of policy areas. 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 the enumerated powers of the Union, but it will inevitably reshape and widen them. This scenario will hence imply that the Court of Justice will have to limit the margin of discretion is has hitherto allowed to the Community Legislature. The Court will have to scrutinize and probably in most cases will have to annul the increasing amount of EU legislation on fundamental rights. However, *Lindqvist* and *Österreichischer Rundfunk* illustrate that when the Union's powers are used extensively to legislate on human rights, it is difficult for the Court to stop any creative use of legal bases such as Article 95 to legislate on human rights, even at a time when, as demonstrated in Chapter IV, the Court adheres in general to a narrower scope of Article 95 EC.

Scenario II: an accretionary approach

Engel has pointed out the Charter provides the Court of Justice with some "new opportunities for legal activism". The Court could of course use

[163] 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 Article 95 EC. See Weiler and Fries in Alston and Weiler, op. cit. *supra* note 6, at 165.

these opportunities to further widen its scope of review and its use of the Charter. 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.[164] 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, the latter scenario is anything but inconceivable. However, recent case law suggest otherwise. In fact, in the first case in which the Court of Justice referred to the Charter, it held – referring next to the Charter also to the Convention on the Rights of the Child and the ECHR – that "those various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and *cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification*".[165] Although in this case limited to the area of child protection, the Court of Justice does seem to imply that it will, under the Charter, allow for a certain margin of appreciation for the Member States similar to that allowed by the European Court of Human Rights under the ECHR, especially when so explicitly prescribed by the Charter.

Scenario III: a status quo (ante) approach

Even though, when ratified, the European Constitution obliges the Court to apply a narrower scope of fundamental rights review, the Court could also choose to stick to its current scope of review. Since it were 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

[164] See Clapham, "On Complementarity: Human Rights in the European Legal Orders", 21 *Human Rights Law Journal* 313 (2000), 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.
[165] Case C-540/03, op. cit. *supra* note 20.

prudence".[166] Indeed, the current approach of the Court of Justice towards the subsidiarity principle, as discussed in the previous Chapter, suggests that such an approach is entirely feasible. Furthermore, the history of the Court's fundamental rights case law demonstrates that it must take into account its legitimacy *vis-à-vis* national courts. Just as legitimacy concerns initiated the construction of a fundamental rights *acquis* by the Court of Justice in the first place, similar considerations might now lead the Court of Justice not to trespass on the boundaries of the Separation of Powers and the Division of Powers. Already, *Österreichischer Rundfunk* and *Lindqvist* illustrate that the Court of Justice ought to – or even must – allow fundamental rights legislation by the Union inspired by Charter. Of course, Article 51 of the Charter will be significantly eroded if the Court chooses to follow this approach.

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

- VII -

SYNTHESES

1. First synthesis: A Constitutional Court

1.1. Separation of Powers

The original EEC Treaty contained neither a clear system of Separation of Powers or checks and balances, nor a clear system of Division of Powers. Paradoxically, although the need for such systems became increasingly apparent, boundary lines that did exist were blurred significantly, for instance when the Council began to delegate legislative powers to the Commission.

Important steps towards a clearer system of Separation of Powers were of course taken by the European Union's Constitutional Legislature – for instance by increasing the role of the European Parliament in the legislative process. Successive Treaty amendments strengthened the legislative role of the Parliament and, to a certain extent, also the executive role of the Commission, but these were mainly codifications of the existing case law of the Court of Justice. This case law of the European Court of Justice served as an important counterbalance to other – more blurring – developments resulting from actions of the Community's political institutions. As demonstrated, the current status of the European Parliament is mainly the result of case law of the Court of Justice which was subsequently codified into primary Community law. Amendments proposed by the Lisbon Treaty regarding the role of the Commission to a large extent reflect existing case law of the Court. Overall, the Court of Justice has played a crucial role in the development of a system of Separation of Powers and checks and balances in the European Union. Precisely because of the process of European constitutionalisation – a process to which the Court of Justice has of course also contributed – the Court resorted to constitutional solutions when confronted with questions of a constitutional nature which involved the European Union's political institutions. The constitutionalisation process of the European Union in general logically led to the constitutionalisation of inter-institutional relations. Nevertheless, as demonstrated, this system of Separation of Powers and checks and balances was essentially judge-made. As the Constitutional Court of the European Union, it had ultimate – and exclusive – authority over the interpretation of constitutional rules it had itself created.

1.2. Division of Powers

Similar constitutional solutions were found for questions involving the European Union's Divisions of Powers. The Court of Justice, for instance, began to make a distinction between exclusive and non-exclusive powers in order to guarantee coherence within the policy area concerned. For the reasons outlined in Chapter IV, this book has examined the Division of Powers in the European Union by focusing on the case law on Articles 28 and 95 EC, *inter alia* because of the volume of the case law on both provisions, but also because of the constitutional nature and implications of these cases. It has been demonstrated that changes to the scope of Article 95 have had important effects on the Division of Powers, for instance when in *Tobacco Advertising* a measure was found to be *ultra vires*, or when, in other cases, the Court of Justice chose between a legal basis requiring QMV and one requiring unanimity (the inner limit of Article 95 EC). Similarly, it has been demonstrated that the case law on the scope of Article 28 has directly affected the balance of powers between the European Union and its Member States. Before *Keck,* it was even advocated that the Court should develop an Article 28 test which would "reflect the balance between … the desire to limit the influence of national governments … and the desire for governmental intervention".[1]

In its case law on interstate trade, the focus of the Court of Justice has, remarkably, always been on the constitutional rather than the material aspects of the scope of the provisions. In the role of a Constitutional Court, it has developed a strand of case law which is quite similar to the constitutionally-based case law on the Commerce Power and the dormant commerce clause of the Supreme Court. Like the Supreme Court's commerce clause case law, the decisive factor for the Court of Justice in its case law on interstate trade was often the institutional effect of its judgments, rather than the subject-matter of the legislation concerned. The Court of Justice in *Tobacco Advertising* emphasised the constitutional implications of the use of Article 95 for all kinds of non-internal market-related subjects, when it held that such a wide scope of this provision was incompatible with the principle of limited powers as laid down in Article 5 EC. As the Editorial Comments of the Common Market Law Review wrote about this case, *Tobacco Advertising* demonstrated that "the Court will give assurance to the Member States that it will regard its own constitutional role … as an institution defending the Member States and their competences against

[1] Wils, "The Search for the Rule in Article 30 EEC: Much Ado About Nothing", 18 EL Rev. 475 (1993), at 478.

encroachments by the Community. [The Court finally] becomes serious on the *limits of competence*".[2]

Similar to the Supreme Court, which has actively controlled the relationship between the United States' Congress and the states – predominantly through the commerce clause case law – the European Court of Justice in *Tobacco Advertising*, according to Von Bogdandy and Bast, "confirmed that it is both willing and able to assert itself as the highest court in a constitutional order adjudicating on competences".[3]

1.3. Intertwined relationship

Because of the intertwined Separation of Powers and Division of Powers in the European Union, the constitutionalisation in the European Union has led to constitutional spill-over effects between the Separation of Powers and the Division of Powers. This has provided the Court of Justice with a unique position, which is visible in two areas of case law in particular.

First of all, although both inner and outer limits of Article 95 essentially concern the question of whether the subject-matter concerned is within or outside the scope of the Community's power on the internal market – hence primarily concerning the Division of Powers in the European Union – the Court of Justice has also used these cases to influence the Separation of Powers and checks and balances between the Community's political institutions. The somewhat remarkable outcome in *Titanium Dioxide* for instance illustrated that the "the legal basis litigation [at the time was] highly influenced by … the promotion of majority voting … and the strengthening of the intervention of Parliament".[4] Because of the cross-pollination between Articles 28 and 95 EC, when the Court of Justice finds that national legislation falls within the scope of Article 28, but is justified under Article 30,[5] it allocates the competence to regulate the subject-matter to the Community level – *inter alia* under Article 95[6] – and hence widens the scope of the European Union's legislative competence under this

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[2] Editorial Comments in 37 CML Rev. 1301 (2000), at 1302. Original emphasis.

[3] Von Bogdandy and Bast, "The European Union's Vertical Order of Competences: the Current Law and Proposals for its Reform", 39 CML Rev. 227 (2002), at 237-238.

[4] Wachsmann, 30 CML Rev. 1052. (1993)

[5] If the Court finds a national measure unjustified under Article 30, it thereby determines the policy choices of Member States and hence also limits their authority. See Snell, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms* (Oxford University Press, 2002), at 33-35.

[6] But also under Articles 94 and 308 EC.

provision.[7] Conversely, Timmermans' "multiplier effect" – also known as the *Tedeschi* principle[8] – applies to the reverse situation: the adoption of a harmonization measure by the Community Legislature under Article 95 EC – which, when upheld, widens its scope – has as a direct consequence that a Member State is no longer able to use one of the exceptions of Article 30, and hence *automatically* also widens the scope of the prohibition of Article 28.[9]

Secondly, as demonstrated in Chapter VI, there have been similar xenogamous effects in the context of the case law of the Court of Justice on fundamental rights. When the constitutional implications of the principles articulated in *Van Gend en Loos* and *Costa Enel* seemed to weaken its legitimacy *vis-à-vis* national courts, the Court of Justice, as a Constitutional Court, decided to develop a fundamental rights *acquis*. However, the gradual extension of both the scope *ratione materiae* and scope *ratione personae* of this *acquis* increasingly affected the Division of Powers and Separation of Powers in the European Union, despite several attempts by the EU's Constitutional Legislature to halt these developments, most recently – and most elaborately – laid down in the Lisbon Treaty. The wide scope taken by the Court of Justice in its approach to fundamental rights influenced the Community's powers on fundamental rights, which, although the Treaties do not contain any explicit legal basis for such legislation, already uses other legal bases such as Article 95 to legislate on fundamental rights. 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 most likely alter the *ethos* of the European Union – and with it, its powers. Conversely, as was illustrated by *Österreichischer Rundfunk* and *Lindqvist*, using the powers of the European Union extensively to legislate on fundamental rights

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[7] Weiler, in Craig and de Burca, *The Evolution of EU Law* (Oxford University Press, 1999), at 362. Also see Mortelmans, "Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?", 28 CML Rev. 115 (1991), at 129; and Snell, op. cit. *supra* note *5*, at 34.

[8] Case 5/77, *Tedeschi v. Denkavit* [1977] ECR 1555. See e.g. Case C-322/01 *Deutscher Apothekerverband v. 0800 DocMorris and Jacques Waterval* [2003] ECR I-14887, para. 64. Logically, when Article 95 is *not* used to harmonise the national legislation of Member States, this does not *automatically* imply that the scope of Article 28 becomes wider.

[9] Save when recourse is had to Article 95(4) or 95(5) EC. Timmermans, *Het recht als multiplier in het Europese integratieproces* (Kluwer, 1978), 10-11, 19-20. Timmermans used Article 94 instead of Article 95 (which was not yet introduced), but *mutatis mutandis* this effect of course also applies to the relationship between Articles 28 and 95.

will simultaneously widen the scope of the Court's review of Member State measures.

Overall, it is the Court of Justice which has introduced into the European legal system constitutional safeguards concerning both the Separation of Powers between the European institutions and the Division of Powers between the European Union and its Member States. The Court articulated constitutional principles governing the relationship between the political institutions *inter se* and that between these institutions and the Member States. The Court has also construed a wide – constitutional – interpretation of its own role as enshrined in Articles 220, 230 and 234 EC.

The Court of Justice has, in so doing, played an important role in both the Separation of Powers and the Division of Powers. The Court used a *secundum constitutionem* approach, giving a constitutional interpretation to an EEC Treaty evolving into a constitution. However, it is submitted that, in the areas of case law discussed in this book, the Court of Justice has not overstepped the limits of its own constitutional role. The Court of Justice has not usurped the role of the Constitutional Legislature. In the words of Everling:

> "The function of the Court of Justice is primarily to interpret and develop the Community legal order. In so doing, the Court does not usurp the position of the political institutions but it participates, as a judicial institution in the creation of a constitution which is in a constant state of evolution in a pluralistic community".[10]

The Court of Justice has overall used a *secundum constitutionem* – rather than a *contra constitutionem* – approach also with regards to its own role as Constitutional Court of the European Union. Furthermore, in contrast to the US Supreme Court, the Court of Justice was – from the outset – given a wide jurisdiction under Articles 220, 230 and 234 EC. It was given important powers to review acts of the political institutions, including the power to review Community legislation. Moreover, the Court of Justice has predominantly relied on principles which it derived from other constitutional sources – such as the legal systems of the Member States – rather than creating them itself. For instance, the Court of Justice used as its sources for its fundamental rights case law the common constitutional traditions of the Member States, international human rights treaties, the European Convention on Human Rights and now the Charter of Fundamental Rights. In *Köster* and subsequent case

[10] Everling, "The Court of Justice as a decision making authority", 82 *Michigan Law Review* 1294 (1984), at 1304.

law, the Court stressed the distinction found in the national legal systems of the Member States between legislative and executive authority. Although applying those sources to the European Union is a remarkable act of judicial activism, overall, the Court of Justice resolved constitutional questions with which it was confronted by drawing inspiration from the constitutional structures of the Member States or international sources accepted by the Member States. Already in the *Algera* case – discussed in Chapter II – the Court held on the question of the retroactive application of administrative decisions that:

> "the possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the treaty does not contain any rules, unless the court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries". [11]

2. Second synthesis: judicial restraint

2.1. Separation of Powers

According to the political question doctrine, the United States Supreme Court refuses to review certain questions, which are then, in accordance with the doctrine's primary function – the Separation of Powers – for the political institutions to resolve. As demonstrated, the Court of Justice has shown deference towards the European legislature in areas quite similar to the ones applied by the Supreme Court in the political question doctrine. All three areas of case law discussed in Chapter III show important signs of judicial activism, but the Court of Justice has also used judicial restraint, sometimes only sporadically, in other cases even more consistent than in similar case law of the United States Supreme Court. In short, the Court of Justice used restraint with regard to measures of one of the political institutions which only produced internal legal effect or no effect at all, or belonged to the political responsibilities of these institutions because they involved complex assessments or foreign policy issues. The Court of Justice seems to base this kind of judicial restraint on its task as laid down in Article 220 "that in the interpretation and application of the EC Treaty the law is observed". Essentially, this is similar to the political question doctrine in the United

[11] Joined Cases 7/56, 3/57 to 7/57, *Algera and others v. Common Assembly* [1957] ECR 39, at 55.

States, which sprang from Marshall's famous words that it is the task of the courts (only) "to say what the law is".

2.2. Division of powers

It is part of the constitutional role of the Court of Justice not only to apply the subsidiarity principle, but also to use a form of restraint with regard to its interpretation. The Subsidiary Protocol annexed to the EC Treaty explicitly rejected any suggestion that the principle is merely a political principle, providing that "in exercising the powers conferred on it, *each* institution shall ensure that the principle of subsidiarity is complied with", thereby making the principle a legally binding norm for the European Court of Justice to apply. The Court of Justice has embraced the use of the subsidiarity principle, but has used criteria similar to those which can be derived from the legislative history of the principle. Rather than actively using this principle to control the Division of Powers in the European Union, the Court of Justice has limited its role to applying the criteria developed by the legislature. The Court seems to adhere closely to the aforementioned Subsidiarity Protocol, which provides that the principle should respect the institutional balance and should "not affect the principles developed by the Court of Justice regarding the relationship between national and Community law".

2.3. Intertwined relationship

The importance of judicial restraint as part of the constitutional role of the European Court of Justice in the intertwined Separation of Powers and Division of Powers is visible in three areas of case law in particular. First of all, the Court of Justice has shown a certain deference towards the political institutions in its case law on Article 28 EC, described by Weatherill as an "institutional choice".[12] Weatherill has demonstrated that the Court has "on occasion chosen to make explicit its awareness of the institutional implications of its jurisprudence, typically when it feels that it has reached the limits of judicially-driven "negative" harmonization".[13] For instance, in *Ideal Standard,*[14] the Court argued that invalidating, under national law, assignments made for only part of the territory covered by the rights they created could not be achieved by the Court applying Article 28. It held:

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[12] Weatherill, "Recent case law concerning the free movement of Goods: Mapping the Frontiers of Market Deregulation", 36 CML Rev 74 (1999), at 78.
[13] Id., at 78 (inner quotation marks in the original).
[14] Case C-9/93, *IHT Internationale Heiztechnik GmbH v. Ideal-Standard GmbH* [1994] ECR 2789.

> "It is *for the Community Legislature* to impose such an obligation on the Member States by a directive adopted under Article 100a of the EEC Treaty, elimination of the obstacles arising from the territoriality of national trade marks being necessary for the establishment and functioning of the internal market, or itself to enact that rule directly by a regulation adopted under the same provision".[15]

Secondly, as demonstrated, in the areas of the case law discussed in the context of the political question doctrine, the Court of Justice has made clear that it has found as its task to ensure the observance of European law, not to intrude upon the internal and political responsibilities of the political institutions. For instance, despite the sensitive nature of foreign affairs because of the often different interests of the Member States, the Court has assumed broad jurisdiction in this area. Nevertheless, the Court has also used restraint. The Court in its case law on the direct effect of WTO law, has been, in the words of Eeckhout, "unwilling to take the step of tying the hands of the EU's legislative and executive organs … [and thus showed] great deference to the political institutions".[16] This, of course, implied a form judicial restraint with regard to both the Separation of Powers and Division of Powers.

Thirdly, although the subsidiarity principle governs the relationship between the European Union and its Member States, it has been demonstrated that the principle has important implications for the role between the Court of Justice and the European Union's political institutions. By closely following the criteria derived from the legislative history of the principle, the Court showed deference towards the Community Legislature. The Court has in a number of cases clearly refrained from substituting its own opinion for that of the Community Legislature. The result of this case law is that the political institutions are allowed greater discretion. The Court of Justice will only marginally review whether the principle has been complied with. This deference towards the political institutions could be inspired by the political nature of the subsidiarity principle, but also, in the words of the Supreme Court in *Baker v. Carr,* by a "lack of judicially manageable standards for resolving certain matters".[17] It is part of its constitutional role that the Court must adhere strictly to the criteria as articulated by the Constitutional legislature and consequently only marginally apply these

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[15] Id., at para. 58. Emphasis added. Another case to which Weatherill refers is Case C-10/89, *CNL Sucal* v. *Hag* [1990] ECR I-3711.

[16] Eeckhout, *Does Europe's Constitution stop at the Water's Edge. Law and Policy in the EU's external Relations,* (Europa Law Publishing, 2005), at 15.

[17] *Baker v. Carr*, 369 U.S. 186 (1962).

criteria. It is probably for this reason that the Court has so far refrained from reviewing those elements of the "subsidiarity test" which are clearly outside the scope of this task, such as the question whether Community action would be efficient or effective. In that sense, the Court of Justice is acting in accordance with the Birmingham Council Conclusions, which stated that "making the principle of subsidiarity work should be a priority for *all* the Community institutions, *without affecting the balance between them*".[18]

These developments illustrate that the Court of Justice is well aware of the constitutional spillover between the Separation of Powers and the Division of Powers. Precisely because the Court of Justice is provided with a unique position in the intertwined Separation of Powers and Division of Powers, it has resorted to judicial restraint in areas where these spillover effects were most apparent. For instance, to substitute a judge-made set of criteria for the subsidiarity criteria which can be derived from the legislative history of the principle, would not only clearly be outside its role of "stating what the law is" but would also have significant undesired effects both horizontally and vertically. To avoid intrusions into the domain of the political institutions, the Court of Justice chooses to play only a complementary role in these areas.

3. Third synthesis: judicial functionalism

3.1. Separation of Powers

In Chapter II the concept of judicial functionalism was introduced. It was demonstrated that although the Court of Justice has imposed a judicially-created system of Separation of Powers and checks and balances, it has functionally applied the principles it articulated. Rather than using rigid delineations between, for instance, the legislative role of the Council and the executive role of the Commission, the Court has overall preferred a functional approach. This means that it has played a less active role than the Supreme Court. Because the functional approach implies only a qualified form of judicial review, the political institutions are allowed "room to manoeuvre"; certain incursions into the powers of the other branches are allowed as long as they are substantively consistent with the underlying rationale of the Separation of Powers principle. Nevertheless, since it has essentially been the Court which developed this system of Separation of Powers and checks and balances, it is a form of *judicial* functionalism.

Precisely because of the Supreme Court's inconsistency with regard to the criteria it uses, the academic debate on the political question

[18] Emphasis added.

doctrine has only rarely been couched in terms of formalism-functionalism.[19] However, a formal approach towards the political question doctrine implies a "strict and vigorous application" of the doctrine,[20] which, as demonstrated, certainly does not correlate with the practice of the European Court of Justice. The rationale of the deference of the European Court of Justice towards the political institutions is not so much a constitutional commitment towards another institution to resolve the case, but rather a recognition by the Court of Justice that within the institutional balance it itself shaped, there was, as Chief Justice Marshall already made clear in *Marbury v. Madison*, a judicial – and not political – limit to its function. Reviewing measures which only produce internal legal effects or no effects at all, or, in its case law on complex assessments, which belonged to the political responsibilities of these institutions, clearly is outside its task of ensuring "that in the interpretation and application of the EC Treaty the law is observed".

3.2. Division of Powers

The Supreme Court and the Court of Justice *prima facie* seem to be using comparable tests in deciding on the scope of the powers: as mentioned above, both courts focus on the effects on interstate trade. Indeed, before *Lopez* and *Tobacco Advertising I,* the approach of both Courts was essentially similar, being essentially one of judicial restraint.[21] However, after *Lopez* and *Tobacco Advertising I*, each court

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[19] But see e.g. Carter, "From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers", *Brigham Young University Law Review* 719 (1987), e.g. at 720; and Krent, "Separating the Strands in Separation of Powers Controversies", 74 *Virginia Law Review* 1253 (1988), at 1283 – and for criticism of the use of formalism and functionalism in this area, see Cooper, "Considering "Power" In Separation Of Powers", 46 Stan. L. Rev. 361 (1994), at 382-383.

[20] See also: Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1962), esp. 111-198.

[21] The Court of Justice seems to have used a slightly stricter approach, stressing the importance of the aim and content of the measure, whereas, after 1937, the Supreme Court held that Congress had no constitutional limits as regards the motive and purpose of legislation and it was therefore not up to the judiciary to decide on these issues. Furthermore, the Supreme Court in *Wickard* stated that it would not apply doctrines distinguishing *inter alia* between direct and indirect effect, whereas the Court of Justice does seem to do so, distinguishing *inter alia* between a direct and "incidental" (or "ancillary") effect on interstate trade. Accordingly, this is also more stringent than the test used by Chief Justice Marshall, which essentially held that an Act of Congress based on the

started to use a narrow interpretation of the Commerce Power and Article 95 EC, respectively, and they have diverged notably in how they have applied the criteria they developed. In *Lopez,* the Supreme Court articulated three categories in which the Commerce Power could be used, but subsequently "simply" held that the prohibition on firearms near schools did not fall within any of these three categories. Chemerinsky has pointed out that this approach was

> "highly formalist in that it gave no consideration to the functional desirability of having Congress prohibit guns near schools. Obviously, firearms near schools are bad and there is a national interest in law prohibiting this. But the Court gave this interest no weight in its decision-making".[22]

Together with *Morrison,* this approach of the Supreme Court with regard to the Division of Powers has already been dubbed "new formalism".[23] The Court does not look at the desirability of the subject-matter of the legislation as such, but merely whether that subject-matter falls within one the three categories it articulated in *Lopez*. This formal approach has been criticized by Justice Souter, who, clearly adhering to a more functionalist opinion, argued:

> "if we now ask why the formalist economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again".[24]

Conversely, the approach of the European Court of Justice after *Tobacco Advertising I* has been notably more functional. The Court of Justice, like the Supreme Court, considered the constitutional effects of its case law, but overall the Court of Justice has focused more on the functional desirability of the legislation concerned than its American counterpart. The Court has held that a diversity of *prima facie* non-internal market-

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Commerce Power could only be held void if the activity it regulated did not have any effect on interstate trade.

[22] Chemerinsky, "Formalism and Functionalism in Federalism Analysis", 13 *Georgia State University Law Review* 13 (1997), at 961.

[23] See e.g. Klein, "Commerce clause questions after Morrison: some observations on the new formalism and the new realism", 55 Stan. L. Rev. 571. (2002)

[24] *United States v. Morrison* [2000] 529 U.S. 598, at 644.

related topics are *capable* of having a direct effect on the internal market, such as biotechnological inventions, food supplements and the manufacture, labelling and sale of tobacco products. In *Arnold André* and *British American Tobacco*, for instance, the Court argued that "having regard … to the public awareness of the dangers of health of the consumption of tobacco products, it was likely that obstacles to the free movement of those products would emerge".[25]

A similar functional approach by the Court of Justice can be found in its case law on Article 28 EC. With the exception of the recent volte-face in *Lopez,* the Commerce Power case law has mainly coincided with that of the dormant commerce clause: between 1890 and 1938 the Supreme Court used similar formal distinctions, whereas after 1938, it used more restraint.[26] Although the Supreme Court's change of direction in *Lopez* has so far not been reflected in the dormant commerce clause case law, some – formalist – Justices within the Supreme Court have already argued that the Court's dormant Commerce Clause jurisprudence has no foundation in the text of the Constitution.[27] The majority of the Justices of the Court have so far rejected this notion.

The modern approach towards the dormant commerce clause doctrine appears *prima facie* comparable to the *Dassonville* and *Cassis* principles. According to this approach, this dormant commerce clause principle may only be applied when the state statute concerned affects interstate commerce.[28] This, *mutatis mutandis*, is similar to the *Dassonville* formula that Article 28 concerns all rules capable of hindering intra-

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[25] Case C-434/02 *Arnold André* [2004] ECR I-11825*,* para 40; *British American Tobacco*, para. 39.

[26] Lessig, "Translating Federalism: United States v. Lopez", Sup. Ct. Rev. 125 (1995), at 136.

[27] Justice Scalia, for instance, has written that the dormant Commerce Clause has "no conceivable basis in the text of the Commerce Clause" (*Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue* [1987] 483 U.S. 232, at 262). See, furthermore, *Camps Newfound/Owatonna, Inc. v. Town of Harrison* [1997] 520 U.S. 564, 607-613 (Justice Thomas, dissenting, joined by Justice Scalia, and Chief Justice Rehnquist.); *Oklahoma Tax Commission v. Jefferson Lines, Inc.* [1995] 115 S. Ct. 1331, 1346 (Justice Scalia, concurring in the judgment, joined by Justice Thomas.); *CTS Corp. v. Dynamics Corp.* [1987] 481 U.S. 69, 94-95 (Justice Scalia, concurring in part and concurring in the judgment). See, furthermore, O'Sullivan, "Dueling sovereignties: U.S. Term limits, inc. v. Thornton", 109 Harv. L. Rev. 78 (1995), at 107-108.

[28] The Cooley doctrine (see Chapter III, para. 3.2.1.) is largely similar to the "modern approach", including the balancing test as articulated in *Pike*. Also see Mason and Stephenson's description of the Cooley doctrine (*American Constitutional Law,* 1996, at 211). Therefore, in this chapter, only the modern approach will is compared with the case law on Article 28 EC.

Community trade. The second question is whether the state legislation concerned is discriminatory. If not, the Supreme Court will use the balancing test articulated in *Pike*. Similarly, since *Cassis,* the Court of Justice has balanced the burden of the Member States' non-discriminatory (dual-burden) rules on interstate commerce, against their benefits as expressed in the mandatory requirements.[29]

There is an important difference, however, in how these two tests are applied.[30] When compared to the case law of the Supreme Court, the approach of the Court of Justice has been far more balanced. Under the *Pike* test, non-discriminatory legislation is only permitted if it can be demonstrated that it has a non-protectionist intention. Hence, unlike the Court of Justice, "the Supreme Court has introduced an element of discrimination into the concept of a burden on trade".[31] The Court of Justice in *Cinéthèque* and *Torfaen* held that Article 28 covered even equal-burden rules. The Court of Justice – where it, before *Keck*, used a broad construction of Article 28 – thus used a broader scope than the Supreme Court had done in the periods prior to 1890 and after 1938.

Overall, when compared to the case law on the dormant commerce clause, the Court of Justice had used a more functional approach towards Article 28. Essentially, in its case law on Article 28, the Court had moved from its formalist start in *Dassonville* towards a more functionalist approach in *Cassis de Dijon* and *Cinéthèque.* For that reason, many had criticized the Court of Justice for its ambiguity and had called upon the Court to develop a determinative set of criteria.[32]

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[29] See Maduro, *We the Court. The Court of Justice and the European Economic Constitution* (Hart, 1998), at 90; also see Stein, "On Divided-Power Systems; Adventures in Comparative Law", 1 LIEI 27 (1983), at 32-34.

[30] Also see Lackhoff, "Restrictions on state interference with commerce in the U.S.A. and the E.C". 2 Colum. J. Eur. L. 313 (1996).

[31] Maduro, op. cit. *supra* note 29, at 91.

[32] Marenco ("Pour une interprétation traditionnelle de la notion de mesure d"effet equivalent á une restriction quantitative" CDE 291 (1984), at 312) proposed that Article 28 should regulate only those measures that concern situations in which "des importations [sont] moins favorable que celle ou se trouve la production interne". Mortelmans ("Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?", 28 CML Rev. 115 (1991), at 130) argued that Article 28 should be restricted to two categories of market circumstances rules: "First the rules which apply distinctly to national and imported products and secondly the indistinctly applicable rules without a territorial element". Steiner ("Drawing the line: Uses and Abuses of Article 30 EC", 29 CML Rev. 749 (1992)) has suggested a narrowing of the scope of Article 28 as well, whereby it regulates only those measures that are capable of *hindering* trade and not measures that have an *effect* on trade.

In an influential article in 1989, White suggested, in line with other commentators, that the scope of Article 28 should be limited, proposing a distinction between those measures that required certain characteristics of imported products and those concerned with the circumstances in which products were allowed to be sold. By excluding the latter from its scope, Article 28 would no longer cover equal burden rules.[33] In *Keck* the Court adopted an approach which is essentially similar to this test. It is generally accepted that *Keck* was an attempt to restore its legitimacy as the ambiguity with regards to Article 28 "was beginning to damage … the legitimacy of the European Court".[34] The purpose of *Keck* was to exclude from the scope of Article 28 those rules that do not have *any* effect on interstate commerce. Or, in the words of Oliver and Roth:

> "Although it is couched in formal categories – the so-called "product rules" and "selling arrangements" – the real motivation behind this distinction lies in the different effect of these rules on the internal market. Product regulations tend to hinder or impede access to the market, whereas selling arrangements typically leave such access unimpeded".[35]

The Court of Justice stated that Article 28 did not catch selling arrangements, since they did not burden interstate commerce. However, this was subject to the proviso that the Member State legislation concerned applied equally to all affected traders within the Member State territory, and neither *de jure* nor *de facto* discriminated between imported and domestic products. Otherwise, this legislation would – indirectly – affect interstate trade. In other words, the result of *Keck* is that Article 28 *can* cover indirect burdens on interstate commerce.[36]

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[33] White, "In search of the limits to Article 30 of the EEC Treaty?", 26 CML Rev. 235 (1989), at 246-247. For an analysis of White's proposed test, see e.g. Gormley, "Obstacles to Free Movement of Goods", 9 YEL 197 (1989), at 204-207.

[34] Weatherill, "After *Keck*: Some thoughts on how to clarify the Clarification", 33 CML Rev. 885 (1996). Similarly: Friedbacher, "Motive Unmasked: The ECJ, the Free Movement of Goods and the Search for Legitimacy", 2 ELJ 226 (1996), at 238; and Gormley, id., at 199.

[35] "The Internal Market and the Four Freedoms", 41 CML Rev. 407 (2004), at 413. They therefore reject the notion that the approach in *Keck* was a formalist one, as advocated by Reich, "The "November Revolution" of the European Court of Justice: Keck, Meng and Audi revisited", 31 CML Rev. 459 (1994), at 465 and Roth, 31 CML Rev. 849 (1994), at 852.

[36] Also see: Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999), at 289.

Although *Keck* did mark a break with previous case law, its effect was limited, certainly when (also) compared with *Pike*. *Keck* can therefore best be understood as an attempt by the Court not to become more stringent concerning Article 28 *per se*, but to develop a more balanced, more functional approach towards Article 28 EC. With *Keck*, the Court "attempted to replace its sweeping test in *Dassonville* by a more refined approach differentiating between product bound regulations on the one hand and so-called selling arrangements on the other".[37]

3.3. Intertwined relationship

Although there have been periods in which functionalism was the norm, the Supreme Court has over the years mainly adhered to formal approaches in its case law on the Separation of Powers and the Division of Powers. Conversely, the approach of the European Court of Justice in its comparable case law has overall been a functional one. Although the Court of Justice has articulated the most important criteria governing the relationship between the European Union's institutions inter se and between these institutions and the Member States, it has used functional approaches when it has come to the application of these principles. This functional approach could have been guided by the specific role of the European Court of Justice in the intertwined Separation of Powers and Division of Powers. The Court's approach to the subsidiarity principle, for instance, demonstrates its judicial functionalism, in that it has used politically developed criteria and allowed leeway to both the political institutions and the Member States rather than, for instance, using a judicially-created set of criteria to determine these horizontal and vertical relationships.

Clearly more so than the United States, the European Union has evolved from an international to a constitutional entity.[38] It is therefore hardly surprising that over the years the formal approaches of the

[37] Oliver and Roth, "The internal market and the four freedoms" (2004) 41 CML Rev., at 411-412. In 2007, Roth and Enchelmaier even wrote: "Thirteen years after the birth of Keck, a puberty rite is undoubtedly in order. In this instance, the rite will take the form of a discussion as to what extent that judgment still reflects the law today …. No doubt, it has also been keenly aware of the considerable cost, in terms of legal certainty, of discarding Keck in favour of a new test, which might take five or ten years to elucidate. At all events, it has steadfastly continued to work within the framework set by Keck. At the same time, it has cast the scope of Article 28 as widely as that framework will allow" ("Free movement of goods: recent developments in the case law", 44 CML Rev 649 (2007), at 694 and 704).

[38] The point here is merely to describe a relative difference between the Treaty of Rome and the Constitution of the United States.

Supreme Court with regard to Separation and Division of Powers questions have prevailed and, for the same reason, why the Court of Justice could essentially only resort to functionalism. This functional approach is only logical for a court that is both contributing to and part of this developing constitutional context and for that reason is also interdependent of that context.

- VIII -

CONCLUSION

The result of the constitutionalisation of the European Union is that the European Court is now entrusted with the task of defining and interpreting norms of a constitutional nature. The Court of Justice contributed to this process by developing norms both with regard to the Separation of Powers and the Division of Powers in the European Union, firmly establishing its role as the Constitutional Court of the European Union. The Court resorted to constitutional interpretation when confronted with questions of a constitutional nature which involved the Separation of Powers and checks and balances between the European Union's political institutions and the Division of Powers between the European Union and its Member States. It became the ultimate authority to interpret the principles it itself articulated. The Court of Justice could not interpret the Treaties as a static picture, but resorted to a *secundum constitutionem* approach. It gave a constitutional interpretation to a Treaty evolving into a constitution.

It would be going too far to describe the Court as a judicial giant or to accuse it of running wild, or employing judicial activism or radical conservatism. The Court has not consistently – or formally – favoured European integration at the expense of the Member States or the "supranational" Commission and Parliament at the expense of the intergovernmental Council. The role of the Court of Justice is certainly different from that of a "judicial giant" or "the driving force of integration". The Court has not decided in a formal notion all separation or Division of Powers questions. Rather, precisely because of the unique position that it has in the intertwined Separation of Powers and Division of Powers, it has used a balanced – or functional – approach with regard to both the scope and limits of its judicial review.

What will be the future role of the European Court of Justice? At the time of writing,[39] this is a very difficult question to answer, especially after the Irish rejection of the Lisbon Treaty. Nevertheless, some predictions can perhaps be made. First of all, since important parts of its system of Separation of Powers and checks and balances case law have been codified by the Lisbon Treaty, when ratified – if ever – the Lisbon Treaty will strengthen the constitutional role of the European Court of Justice. The Lisbon Treaty will furthermore put in place many

[39] As mentioned in the introduction, the manuscript of this book was closed on July 16, 2008.

constitutional safeguards to control and curtail the powers of the European Union. Against the background of its case law on Article 95 EC, the European Court of Justice could use these safeguards to scrutinize the European Union's Division of Powers. The constitutional role of the European Court of Justice will also be strengthened with a legally binding Charter of Fundamental Rights. However, as concluded in Chapter VI with regard to its case law on fundamental rights, but mutatis mutandis also applying to other areas of the case law of the European Court of Justice, it is far from clear whether these developments will actually be used by the Court of Justice. Other areas of case law suggest that the Court of Justice could also resort to more restraint. Especially after the Irish "ní hea", it seems that the future role of the Constitutional Court of the European Union is as uncertain as the constitutional context it operates in.

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NEDERLANDSE SAMENVATTING

Hoofdvraag

De centrale vraag in dit proefschrift betreft de rol van het Europese Hof van Justitie in de horizontale en verticale scheiding der machten binnen de Europese Unie.

Het Europese Hof van Justitie is de hoogste rechterlijke instantie in de Europese Unie, vergelijkbaar bijvoorbeeld met het Amerikaanse Hooggerechtshof.

Met horizontale scheiding der machten (*Separation of Powers*) wordt bedoeld de onderlinge verhoudingen tussen de drie politieke instellingen van de Europese Unie: de (Europese) Raad, de Europese Commissie en het Europees Parlement. In dit proefschrift is nagegaan wat de gevolgen zijn van de uitspraken van het Europese Hof van Justitie voor de machtsverhoudingen tussen de Europese politieke instellingen onderling, maar ook wat de invloed is van de jurisprudentie van het Hof op de rol van het Hof zelf ten opzichte van deze drie instellingen.

Met verticale scheiding der machten (*Division of Powers*) wordt bedoeld de machtsverhouding tussen de Europese Unie en de lidstaten.

De Europese Unie heeft als belangrijk kenmerk dat de horizontale en verticale scheiding der machten met elkaar vervlochten zijn. Dit proefschrift laat zien dat de gevolgen van uitspraken van het Hof voor de horizontale scheiding der machten zullen doorwerken in de verticale verhoudingen – en *vice versa.*

Daarnaast is, juist vanwege de overeenkomsten met het Amerikaanse Hooggerechtshof, de rol van het Europese Hof van Justitie onderzocht vanuit rechtsvergelijkend perspectief. De rol van het Hooggerechtshof bij de horizontale en verticale scheiding der machten in de Verenigde Staten is gebruikt als rechtsvergelijkend kader om de belangrijkste constitutionele ontwikkelingen in de Europese Unie te verhelderen.

Constitutionalisering

De hierboven beschreven rol van het Europese Hof van Justitie is nagegaan vanuit het gegeven dat de Europese Unie in belangrijke mate een proces van constitutionalisering ondergaat. Hiermee wordt bedoeld dat de Europese Unie steeds meer fundamentele – constitutionele – karakteristieken krijgt en dat in toenemende mate bepaalde basisnormen worden gerespecteerd en centraal komen te staan.[1] Een belangrijk gevolg hiervan is dat de Europese Unie als systeem in zekere zin 'los' komt te staan van de lidstaten. Hiermee houdt verband het gegeven dat het Hof van Justitie steeds meer als het Constitutionele Hof van de Europese Unie wordt gezien, met name omdat het mede verantwoordelijk is geweest voor de ontwikkeling van de genoemde fundamentele eigenschappen en dus voor de constitutionalisering van de Europese Unie.

Vijf invalshoeken

De rol van het Europese Hof van Justitie bij de vervlechting van de horizontale en verticale machten in de Europese Unie is onderzocht vanuit vijf verschillende invalshoeken.

Allereerst zijn de gevolgen nagegaan die de rechterlijke toetsing van het Hof heeft voor de machtsverhoudingen tussen de (Europese) Raad, de Europese Commissie en het Europees Parlement (Hoofdstuk II).

In de tweede plaats is onderzocht in hoeverre het Hof van Justitie zelf grenzen stelt aan deze rechterlijke toetsing en bepaalde vraagstukken aan de politieke instellingen overlaat. Het Hof geeft daarmee dus invulling aan zijn eigen rol ten opzichte van deze instellingen (Hoofdstuk III).

Ten derde is onderzoek gedaan naar de gevolgen van rechterlijke toetsing voor de verticale scheiding der machten in de Europese Unie (Hoofdstuk IV).

In de vierde plaats is gekeken naar de jurisprudentie over een van de belangrijkste beginselen van de verticale machtenscheiding - het subsidiariteitsbeginsel - en naar de effecten hiervan op de rol van het Hof ten opzichte van de politieke instellingen (Hoofdstuk V).

Ten slotte is het effect onderzocht van de groeiende jurisprudentie over mensenrechten op de vervlochten horizontale en verticale scheiding der machten in de Europese Unie (Hoofdstuk VI).

[1] Vertaling van de definitie van Timmermans zoals gegeven in Hoofdstuk I.

Belangrijkste conclusies

Allereerst kan geconcludeerd worden dat het Europese Hof van Justitie in belangrijke mate heeft bijgedragen aan de ontwikkeling van bepaalde fundamentele normen, zowel wat betreft de horizontale als verticale scheiding der machten. Deze normen zijn voor een groot deel overgenomen in de bestaande Europese Verdragen of worden, voor zover dit nog niet is geschied, nu voorgesteld in het Verdrag van Lissabon. Met deze normen heeft het Hof van Justitie de Europese Unie van enkele belangrijke constitutionele kenmerken voorzien.

Wat betreft horizontale scheiding der machten heeft het Hof een zekere scheiding aangebracht tussen een meer wetgevende rol voor de (Europese) Raad – al dan niet in samenwerking met het Europees Parlement – en een meer uitvoerende rol voor de Europese Commissie. Verder heeft het Hof een belangrijke rol gespeeld bij de ontwikkeling van onderlinge controlemechanismen tussen de politieke instellingen en daarmee een rudimentair system van *checks and balances* ontwikkeld.

Daarnaast heeft het Europese Hof van Justitie ook de verticale scheiding der machten in de Europese Unie van enkele belangrijke constitutionele eigenschappen voorzien. Het introduceerde bijvoorbeeld het onderscheid tussen 'exclusieve' en 'niet-exclusieve' bevoegdheden van de Europese Unie. Verder heeft het Hof met de jurisprudentie op het gebied van het handelsverkeer tussen de lidstaten in belangrijke mate de verticale scheiding der machten in de Europese Unie beïnvloed. Laatstgenoemde ontwikkeling heeft ook belangrijke gevolgen gehad voor de machtsverhoudingen tussen de Europese instellingen onderling. Ook in de jurisprudentie van het Hof van Justitie op het gebied van de grondrechten is een dergelijke kruisbestuiving te zien. De graduele verruiming van de reikwijdte van de rechterlijke toetsing heeft tot belangrijke constitutionele ontwikkelingen geleid - zowel binnen de horizontale als de verticale machtsverhoudingen - ondanks diverse pogingen van de *Herren der Verträge* om deze ontwikkelingen een halt toe te roepen.

In de tweede plaats heeft het Europese Hof van Justitie op enkele belangrijke gebieden grenzen gesteld aan de reikwijdte van de eigen rechterlijke toetsing. Het Hof van Justitie heeft terughoudendheid betracht in de rechterlijke toetsing zowel op het gebied van de interne regels van de politieke instellingen als ook bij kwesties die tot de (politieke) verantwoordelijkheden van deze instellingen behoorden, bijvoorbeeld bij complexe of technische vraagstukken. Eveneens heeft het Hof met betrekking tot het subsidiariteitsbeginsel een terughoudende rol gespeeld. Aangetoond kon worden dat het subsidiariteitsbeginsel uiteenvalt in vier successievelijke vragen, welke alle zijn terug te vinden

in de jurisprudentie over dit beginsel. Het Hof is er derhalve niet toe overgegaan om zelf normen op dit gebied te ontwikkelen.

Tenslotte kan worden geconcludeerd dat het Europese Hof van Justitie over het algemeen voor een functionele benadering heeft gekozen ten aanzien van de door het Hof ontwikkelde beginselen. Het heeft deze beginselen niet op een formele – rigide – wijze toegepast, maar juist gekozen voor een benadering waarbij, om functionele redenen, uitzonderingen en overschrijdingen van gestelde grenzen werden toegestaan. Aangezien deze beginselen wel in belangrijke mate door het Hof zelf zijn ontwikkeld, kan de rol van het Europese Hof van Justitie in de vervlochten horizontale en verticale scheiding der machten in de Europese Unie derhalve kortweg worden gekenmerkt als een "juridisch functionalisme".

CURRICULUM VITAE

Allard Knook werd geboren op 12 maart 1978 te Leiden. Hij studeerde van 1996 tot 2002 Nederlands recht aan de Universiteit van Utrecht en studeerde af in de richtingen Staats- en Bestuursrecht en Internationaal Recht. Na in 2003 aangesteld te zijn als junior docent en vervolgens als junior onderzoeker bij de disciplinegroep Staats- en Bestuursrecht van de Universiteit Utrecht, werkte hij daar vanaf 2004 als promovendus en vanaf 2008 als universitair docent. Daarnaast schrijft hij sinds 2006 commentaren voor Lawtel, een juridische database met wereldwijd ruim 90.000 leden. In 2006 won hij de tweejaarlijkse G.J. Wiarda prijs voor zijn artikel in de Common Market Law Review, "The Court, the Charter, and the Vertical Division of Powers in the European Union", 42(2) CML Rev. 367 (2005).