



Hope, Reluctance or Fear?

The Democratic Consequences
of the Case Law of the
European Court of Justice

*Flavia Carbonell, Agustín José Menéndez
and John Erik Fossum (eds)*

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Santiago de Chile, León and Oslo, September 2011

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Introduction

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Introduction

The purpose of this report is to analyse the consequences that the judicial decisions of the European Court of Justice (ECJ) have on the European political system, from both a theoretical and a practical perspective.

Consequences of judicial decisions can be understood, at least, in two ways: on the one hand, as a factor or an argument for the decision; and on the other hand, as a tool for an ex-post analysis of the decision. In the first case, the judge, assuming the internal point of view, incorporates consequentialist argumentation when justifying the judgment; in the second case, an external observer evaluates the consequences of the judge's decision.

From a theoretical point of view, judicial reasoning can include the positive or negative effects of foreseen or foreseeable consequences as a reason to adopt or reject a decision in one sense or another.¹ This

¹ A different but connected issue is what implication does consequentialist argumentation by a court have on the democratic arrangements of a polity, especially

type of reasoning is hypothetical and non-probabilistic, in the sense that it predicts that certain facts will take place in the future without carrying out any probabilistic calculus. More evidently, consequentialist argumentation is based on the causal relation between the decision, understood as a (legal or institutional) fact, and its consequences (fact-consequence relation). Thus, the strength or force of the argument will depend, among other factors, on the proximity between the decision and the consequence inside the chain of causality. From a pragma-dialectical perspective, on the other hand, consequences can be justified by reference to the aims or *telos* pursued by the norm or norms applicable to the case. In this last event, consequentialist, teleological and coherentist reasoning cluster together. Another important element in consequentialist reasoning is the evaluation of the acceptance, goodness, or correctness of the consequences as reasons for the decision that can be made through different formal and substantive standards.

As for the ex-post analysis of the consequences or effects produced by a given judicial decision, the unforeseen or unforeseeable (or, from a different perspective, even unintended) ones are of particular interest. These consequences that the judge did not incorporate (because he or she could not?), neither explicitly nor implicitly, in his or her reasoning, can impact legal and political systems, and lead to the silent redefinition of some of their principles and relations.

Since the chain of consequences can be endless, the contributions to this workshop have focused only on consequences that have a degree of proximity with the decision that can be linked to it without having to do an exercise of argumentative juggling. And since the types of consequences are diverse, the idea is to limit the analysis to the consequences of judicial decisions for democratic legitimacy. In other words, we are interested in the impact of the Court's decisions on the democratic design of the European and national legal and political orders. Accordingly, from the internal point of view, the relevant questions would be: Does the ECJ, either implicitly or explicitly, consider the possible consequences of its decisions on the European or national legal orders, or on the distribution of competences and institutional structure? And if so, how does the Court conceive the

when they incorporate extra-legal future consequences (such as economic, political or social ones) the use of which is not legally permitted.

European Union when choosing one decision that has certain foreseeable consequences instead of other competing ones?

From the external point of view, the guiding questions would be: What are the consequences of certain decisions of the Court on the democratically defined legal-political systems? What democratic answers do we get if evaluating, say, some paradigmatic cases in the light of the consequences they have generated in the legal and political orders?

Analysing democratic legitimacy from a consequentialist – some would say pragmatic – point of view is a new perspective that can contribute to understand the Court as an actor inside a wider net of actors, that both has something to say about how democracy in Europe is being constructed and redefined, and that has impacts on legal and political principles of democracy with its decisions. In turn, the democratic consequences of the ECJ's case law touch on its relations with national courts, in cases in which the Court confers on them the duty to apply EU law according to a certain interpretation.

The jurisprudence of the European Court of Justice is an optimal repository of evidence for the purposes of the workshop that this report emanates from.² This is so for two concurrent reasons. First, the ECJ has played a key role as a constitutional court ensuring through its decisions that 'the law is observed' in the whole of the European Union. As such, it has confronted the same substantive dilemmas in its case law that leading national constitutional courts have met concerning the unintended democratic consequences of judicial decisions. Second, the Court is part of a rather peculiar constitutional setup, which strengthens the underlying tensions. This peculiarity derives from three main elements. First, the substantive core of European Union law is the fabric of the socio-economic order, and in particular, the basic principles which govern the functioning of economic activities (i.e. the four economic freedoms, the principle of undistorted competition, and their uneasy relationship with the regimes of property and of teleological regulation). This is an area in which courts have tended to maximize their self-restraint, for two

² 'Hope, Reluctance or Fear? The Democratic Consequences of the Case Law of the European Court of Justice', international doctoral course/workshop, University of Bergen, 14-16 January 2009.

overlapping sets of reasons: the factual complexity of the background of each decision, and the institutional incapacity to palliate the eventual negative consequences of each decision.

Second, European integration has proceeded in the absence of a normatively salient 'constitutional moment'. On the contrary, integration has been the result of a progressive process of 'constitutional synthesis' in which a common constitutional law has been concretised by means of distilling the commonalities out of the manifold national constitutional norms.³ This deprives the European Court of Justice of authoritative reference points for determining the actual content of European constitutional norms. Not only is there no single document which can be referred to as the embodiment of key European constitutional norms (the founding Treaties not only being numerous, and thus potentially inconsistent among themselves, but also covering only a part of the whole field of European constitutional law, with significant parts being contained in national constitutions and in documents with a peculiar formal status, such as the Charter of Fundamental Rights), but there are also no constitutional debates, or for that purpose, ordinary political debates revolving around the meaning of European constitutional norms to which the Court can refer, contrary to what is ordinarily the case in national constitutional systems. And despite these two factors, the ECJ has affirmed its role as constitutional court, by means of reviewing the (European) constitutionality of national laws against the yardstick of the four economic freedoms plus the principle of undistorted competition (an area where courts, it is worth repeating, tend to be extremely reluctant to intervene) and has been doing so without an obvious authoritative normative reference point to establish derivative constitutional norms in its decisions. This explains why the unintended democratic consequences of the ECJ case law can be more severe than those of the jurisprudence of national constitutional courts.

Third, the peculiarity of the constitutional setup of the European Union has rendered more obviously salient the democratic legitimacy (or lack thereof) of the norms regarded as part of European Union law. This affects in particular the case law of the Court, with specific

³ J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman and Littlefield, 2011).

decisions of the judges sitting in Luxembourg being regarded as the ultimate evidence of the 'democratic deficit' of European Community law (since perhaps the charges raised by Hjalte Rasmussen to the debates surrounding the recent judgment in *Viking* and *Laval*)⁴.

⁴ Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff, 1986).

Chapter 1

Judicial review and the defence of (democratic) constitutionality A critique of the argument from disagreement

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The aim of this chapter is to offer a defence of the practice of constitutional review from the point of view of a theory of democratic legitimacy. I will develop this defence by engaging with the strongest criticism to date of the practice of constitutional review: Jeremy Waldron's and Richard Bellamy's argument that constitutional review violates the principle of democratic equality, respect for which is a necessary condition of legitimate political decision-taking in a pluralist society characterised by reasonable disagreement about rights.²

In a nutshell, Waldron and Bellamy argue as follows: A constitutional court that is exercising review over legislative decisions, by interpreting entrenched constitutional provisions, constitutes a *prima facie* violation of the principle of democratic equality. In a democracy

¹ The author would like to thank John Erik Fossum, Agustín José Menéndez, and Simon Wigley for helpful comments on an earlier draft.

² See J. Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal*, 1346; id., *Law and Disagreement* (Oxford University Press, 1999); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

all citizens should have an equal say on how they are to be governed. But in a political system with constitutional review, a number of key decisions concerning how the community is to be governed are not taken by the people (or their representatives) but by a small group of unelected judges whose views exclude those of ordinary citizens. Such an arrangement would be justifiable only if we were entitled to assume that the judges on a constitutional court are more likely to arrive at substantively correct answers to fundamental questions of political morality than the people or their representatives. However, there is no good reason to make this assumption in a pluralist society whose members are committed to liberal and democratic principles but reasonably disagree about almost all questions of political morality. Hence, constitutional review is an unjustifiable practice, in light of the fact that it constitutes a *prima facie* violation of democratic equality. Even if legislative decision-taking does not necessarily offer better assurances of morally correct outcomes than judicial decision-taking, it is to be preferred on grounds of fairness since it gives every citizen an equal say.

Most defenders of judicial review try to counter this criticism by disputing the claim that a constitutional court is no more likely than the people or their representatives to arrive at morally correct decisions. The courts, in Ronald Dworkin's words, act as a 'forum of principle' and thus arrive at morally correct decisions about questions of political morality more often than legislatures. What is more, concerns about the undemocratic character of judicial review are portrayed as misplaced. Democracy, it is often argued, has no other rationale than the instrumental one of improving the substantive moral correctness of legislative outcomes. Hence, there cannot be any loss of value in adopting non-democratic procedures if they happen to be better than democratic procedures at bringing about substantively correct outcomes.³

³ This strategy is of course associated with Ronald Dworkin, but it is to be found in other key critics of Waldron's work. See R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996), at 1-38 and *id.*, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002), at 184-210. For other outcome-oriented arguments for constitutional review see A. Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy*, 451; J. Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence*, 25, at 44-7.

Since I am uncomfortable with purely instrumental accounts of the value of democracy, I share Waldron's and Bellamy's concern with the implicitly anti-democratic character of some purely outcome-oriented defences of constitutional review. But I believe that this concern need not threaten the justifiability of constitutional review. It is perfectly possible, I will claim, to defend the practice of constitutional review on the ground that it protects the native legitimising force of democratic procedures in the face of moral disagreement.⁴ I will also suggest that the debate about judicial review would benefit from a change of focus. Judicial review is compatible with democracy in some but not in all of its possible forms. Instead of trying to offer general arguments for or against judicial review, we would therefore be well advised to concentrate on the question of what form judicial review needs to take in order not to threaten but to support the integrity of democracy.

I will proceed as follows: In the first section, I will discuss Bellamy's case against constitutional review. This discussion will show that the argument from disagreement against constitutional review is a failure if taken in its simple and unqualified form. In the second section, I

⁴ Broadly similar strategies are pursued in J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); W. J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, 2007); T. Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford University Press, 2008), at 260-300; L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), at 101-75. Needless to say, there are other strategies for justifying judicial review. It has often been argued that judicial review must be legitimate wherever there is a formal constitution, since a formal constitution would be meaningless unless it subjected the ordinary democratic legislator to effective control. If the formal constitution is itself the result of an exercise of popular sovereignty, judicial review may even appear as a defence of the truly democratic decisions of the popular sovereign against the short-term thinking and partisan haggling of parliamentary parties. See B. Ackerman, *We the People 1: Foundations* (Belknap Press, 1991), at 131-62; S. Freeman, 'Constitutional Democracy and the Justification of Judicial Review' (1990) 9 *Law and Philosophy*, 327; S. Holmes, 'Precommitment and the Paradox of Democracy' in id., *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995), at 134-77. I do not think that such defences go to the heart of the matter. For one thing, formal constitutions are very often not the result of genuine exercises of popular sovereignty. What is more, the interpretation of a formal constitution is typically going to give rise to precisely the problems of disagreement that drive Waldron's and Bellamy's views. To answer the argument from disagreement, then, is clearly the fundamental task for anyone who wants to defend the legitimacy of judicial review.

will proceed to outline and criticize Waldron's more carefully qualified version of the argument. Waldron's argument from disagreement is sound, but only at the price of making concessions that restrict the relevance of the argument to such an extent that it no longer supports an interesting general attack on the practice of constitutional review. In the third section, I will conclude with a few brief and tentative remarks on how my argument in this chapter might bear on the constitutional framework of the EU.

Bellamy and the unqualified argument from disagreement

Richard Bellamy's recent attack on constitutional review⁵ is concerned to evaluate the legitimacy of constitutional review in a liberal-democratic society whose members are in principle committed to the view that the state owes equal concern and respect to all citizens and who take it for granted that this commitment entails that people ought to enjoy a robust set of individual rights that protect certain basic interests. According to Bellamy, the rights which are thus acknowledged as necessary in a liberal-democratic society fall into three broad categories: A first category of rights 'offers the supposed prerequisites for individuals to make the autonomous and responsible choices that enable them to secure their livelihoods and engage in a range of meaningful relationships.' This includes rights to freedom of thought and action, as well as rights to property and welfare. A second group of rights aims to ensure equality before the law and due process. Finally, there are political 'rights entailed by a functioning democracy.'⁶

While rights of all these three types are typically acknowledged as necessary in a liberal-democratic society, a liberal-democratic society is likely to be characterised by profound disagreement concerning the interpretation of the commitment to rights. People in an open and pluralist society usually disagree about exactly what rights should be protected and how these rights ought to be understood. None of the three categories of rights listed above, Bellamy claims, is exempt from such disagreement. What is more, the disagreements in question will

⁵ See Bellamy, *supra* note 2. The argument from disagreement was first popularised by Jeremy Waldron, see *Law and Disagreement*, *supra* note 2.

⁶ Bellamy, *supra* note 2, at 18-9.

arise even among conscientious citizens who argue reasonably and in good faith.⁷ The 'burdens of judgment' ensure that any profound disagreement with regard to the interpretation of all claims of right may well, for all we know, be a reasonable disagreement, i.e. a disagreement that would remain even if factors like prejudice, bias, lack of information, etc. could be filtered out.⁸

Despite the presence of profound and reasonable disagreement about rights, a liberal-democratic society will of course have to settle on some scheme of rights. And in order to settle on one scheme or another, a society will have to decide which procedures to adopt for resolving disagreement about rights. There are two basic approaches, Bellamy argues, for evaluating procedures that might be used to settle political disagreement. On the one hand, we could adopt an output-oriented approach. According to the output-oriented approach, we ought to choose the procedure(s) that are most likely to bring about morally correct outcomes, understood as outcomes that treat all citizens with equal concern and respect. On the other hand, we could adopt an input-oriented approach to evaluating procedures for settling disagreement. According to the input-oriented perspective of evaluation, we ought to choose the procedure(s) that treat citizens as equals in the process of political decision-taking. The idea here is that if citizens are given equal powers of participation in the procedures through which laws are made, they have reason, on the ground of the fairness of the procedure, to consider legislative outcomes as legitimate even if they disagree, on a substantive level, about whether the decisions in question are morally correct or not.⁹

From here on out, the argument against constitutional review is fairly straightforward: In Bellamy's view, constitutional review is clearly unjustifiable from an input-oriented perspective, as it appears to violate the principle of democratic equality. To assign the power to choose a particular scheme of rights to an unelected and unaccountable minority is to deny that all citizens are equal in status

⁷ Bellamy, *supra* note 2, at 20-6.

⁸ See J. Rawls, *Political Liberalism* (Columbia University Press, 1993), at 55-7.

⁹ See Bellamy, *supra* note 2, at 27. The distinction between input- and output-oriented perspectives is also used by Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1372-5 and Dworkin, *Sovereign Virtue*, *supra* note 3, at 185-90.

and thus entitled to an equal say as to how they are to be governed. In a system with constitutional review, the majority are subject to the domination of judges whose views need not reflect those of ordinary citizens.¹⁰ This entails, in Bellamy's view, that decisions created through a procedure that includes constitutional review cannot have any legitimacy. Citizens who disagree, on a substantive level, with the wisdom of the decisions that result from constitutional review have no reason to consider these decisions as binding, as they have not been given any say in the matter. We should conclude, Bellamy argues, that if there is a justification of constitutional review it must be one that is based on an output-oriented perspective: It must be possible to show that a procedure including constitutional review is sufficiently superior in creating outcomes that afford substantive equal concern and respect to citizens for our interest in correct outcomes to outweigh the violation of democratic equality entailed by constitutional review.

Bellamy thinks that there are two reasons to reject an output-oriented defence of constitutional review. The first is that a majoritarian procedure may well be as good as or even superior in creating substantively correct outcomes. Bellamy emphasises that almost all modern societies are pluralistic, and he takes this to imply that a government will usually be a coalition of different groups that have to compromise and accommodate each other's interests in order to acquire power. Since such coalitions are typically fragile and fleeting, as well as subject to change brought about through election, it is unlikely that any significant group is going to be permanently excluded from the opportunity to influence legislative outcomes and to extort respect for its interests. The risk of domination may therefore be lower in a majoritarian system than in a system with an entrenched constitution enforced by a politically unaccountable constitutional court.¹¹

In any case, the fact of reasonable disagreement about the interpretation of rights makes an output-oriented defence of constitutional review unavailable. In order to judge procedures by their tendency to produce correct outcomes, Bellamy argues, we need

¹⁰ See Bellamy, *supra* note 2, at 150-1, 166-7.

¹¹ See Bellamy, *supra* note 2, at 209-59.

to rely on some conception of which outcomes are correct. In the face of reasonable disagreement about questions of public morality, however, we are not entitled to rely on any particular conception of the correctness of outcomes as a yardstick for the distribution of decisional authority, especially if that distribution violates democratic equality.¹² Defenders of constitutional review assume, in blatant violation of the democratic ideal of equality, that their own conception of correctness in outcome, which they expect to be enforced in the process of constitutional review, is entitled to more consideration than the equally reasonable views of their fellow citizens who disagree.

Bellamy's overall conclusion, then, is that constitutional review (as well as constitutional entrenchment) is never justifiable as way of settling on or of interpreting a scheme of rights, at least not in a democratic political system. The institution flatly violates the principle of democratic equality, and it offers no benefits that might outweigh the violation. A democracy, then, will always be better off without a system of constitutional review.

In the blunt and unqualified form in which it is put forward by Bellamy, the argument from disagreement runs into difficulties. One problem that has been discussed elsewhere is that the argument appears to be self-defeating.¹³ Bellamy emphasizes that the interpretation of all rights which we take to be implicit in the liberal-democratic project of treating all citizens with equal concern and respect is subject to reasonable disagreement. After all, if some such rights were not subject to reasonable disagreement, there would be no reason not to entrench those rights and to provide for their judicial enforcement. But if disagreement afflicts all categories of rights, including democratic rights of participation, then disagreement cannot be limited to disagreement about the substantive correctness of legislative outcomes. It is clearly possible to disagree, reasonably and profoundly, about the right design of a majoritarian procedure that is to afford equality in the process of law-making. Such disagreement, however, may come to undermine the legitimating

¹² See Bellamy, *supra* note 2, at 93.

¹³ See T. Christiano, 'Waldron on Law and Disagreement' (2000) 19 *Law and Philosophy*, 513.

force of majoritarianism if one accepts the argument from disagreement without any qualification. As we have seen, the argument takes its force from the idea that it amounts to a denial of equal respect for a court to impose on the citizenry a particular answer to a question of political morality about which there is reasonable disagreement. But if this is the case, then it must also be a denial of equal respect to impose an answer through a majoritarian procedure the sufficient fairness of which is subject to reasonable doubt.

Bellamy's response to this problem is not altogether convincing. This point is best brought out by taking a look at his rejection of John Hart Ely's proceduralist defence of constitutional review.¹⁴ Ely argued that the institution of constitutional review does not conflict with democracy, but rather secures that it is functioning well, as long as judges on a constitutional court restrict themselves to the protection of the integrity of the democratic process.¹⁵ In the words of the famous *Carolene Products* footnote, courts are to interfere with democratic legislation if such legislation 'restricts those political processes which can ordinarily be expected to bring repeal of undesirable legislation.' According to Ely, this judicial task of protecting the integrity of the democratic process is not limited to ensuring formally equal rights of participation. Even where there are formally equal rights of participation, courts may be called upon to counteract 'prejudice against discrete and insular minorities' that tends to 'curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'¹⁶

Ely's conception can be understood as a response to the problem of regress outlined above. Democratic procedures can legitimate their outcomes only if they are sufficiently fair, and this means, as long as we assume that democratic procedures can be legitimating, that framers of a constitution, as well as those who are to interpret it, must be licensed to rely on some account of what sufficient fairness

¹⁴ See Bellamy, *supra* note 2, at 107-20.

¹⁵ See Ely, *supra* note 4, at 73-104. For a similar defense of judicial review see C. S. Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996), at 199-207.

¹⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

consists in. As a result, some (suitably limited) form of constitutional review will have to be compatible with democracy, unless we are willing to admit, as critics of constitutional review of course are not, that we cannot explain the normative authority of democratic procedure.¹⁷

Bellamy, though offering a proceduralist view himself, will have none of this. He is troubled in particular by Ely's defence of the view that a constitutional court ought to protect 'discrete and insular minorities' whose interests are not being heard in the majoritarian democratic process, even while they do enjoy formally equal rights of participation. In Ely's view, discrimination against such minorities undermines the legitimating power of the democratic process. Hence, it must be permissible for a court to strike down laws that stem from a discriminatory intention on the part of the majority. In striking down laws on this ground, Ely argues, a court is not usurping the democratic legislator's prerogative to determine legislative outcomes. It is merely protecting the integrity of democratic procedure.

Bellamy rejects this proposal for the reason that any judgment that a legislative intent is discriminatory must, pace Ely, rely on a substantive theory of correct outcomes. For instance, a policy of racial segregation through the provision of 'separate but equal' educational facilities cannot, in Bellamy's view, be classified as unduly discriminatory on the basis of intent alone. After all, one could reasonably claim that such segregation 'might actually counteract discrimination by allowing black children to be educated in an environment where nobody is intimidating them or setting inappropriate standards.'¹⁸ The judgment that a law permitting segregation is discriminatory, then, cannot be based on a finding of discriminatory intent. It must come to rest on the claim that segregation violates the principle of equal concern and respect and is

¹⁷ I do not want to claim that this is how Ely himself understood his argument. Ely tends to work with a misleading distinction between procedure and substance. Consequently, he has been accused of failing to recognise that his view can function as a regress-stopper only if it is taken to be based on a substantive theory, however modest, of the value of democratic equality. See R. Dworkin, 'The Forum of Principle' in *id.*, *A Matter of Principle* (Harvard University Press, 1985), 33-71, at 57-69; Christiano, *supra* note 4, at 263-4.

¹⁸ Bellamy, *supra* note 2, at 117.

therefore a substantively mistaken outcome. But if there is reasonable disagreement, as we should expect, on whether a law permitting segregation is substantively mistaken, Bellamy goes on to argue, the matter must be left to the democratic legislator. Of course, one can still believe that racial segregation is unjust. But if one were to deny the legitimacy of a democratically enacted segregationist law on the basis of that belief, one would, in Bellamy's view, undermine the integrity of democracy instead of protecting it.

Not content to reject the idea of review for discriminatory intent, Bellamy goes on to reject the other part of Ely's conception, the view that a court can, without violating the principle of democratic equality, work to ensure that all citizens have equal access to democratic procedure. Bellamy acknowledges, in attacking Ely, that such a demand must fall to the argument from disagreement if we reject any restriction on its scope:

[Y]ou cannot judge whether the process is fair without a view of what counts as a fair outcome, and one cannot judge a fair outcome without referring to some account of fundamental values. [...] As a result, the distinction between substantive and procedural approaches to judicial review collapses.¹⁹

Since the choice between competing accounts of fundamental values is subject to reasonable disagreement, Bellamy concludes, it must be left to the democratic legislator.

In other words, Bellamy simply bites the bullet when it comes to the problem of regress. He commits to the claim, in effect, that democratic procedure can legitimate its outcomes even where some of those affected by its decisions reasonably claim that it violates basic fairness:

Whatever the inevitable flaws of any [democratic] system, it retains an authority and legitimacy that is independent from the rightness or wrongness of the policies it is employed to decide – including those about democracy itself.²⁰

¹⁹ Bellamy, *supra* note 2, at 110-1.

²⁰ Bellamy, *supra* note 2, at 140-1.

If we accept Bellamy's view, the term 'democratic system' will apparently have to be interpreted in a rather permissive sense. We might no longer be entitled, it seems, to claim that a system is not democratic if it disenfranchises women, practices racial segregation, or is based on some exclusive ethnic homogeneity.²¹ Any such claim, as Bellamy himself emphasises, would have to apply some interpretation of the ideal of equality that tells us who is entitled to participate in legislative decisions. We therefore either have to admit that a system of procedures can justifiably claim to be democratic only if it passes muster with some substantive standard of equality or we have to be willing to call just about any system in which people hold regular elections of some sort a democracy. If we choose the first option, Bellamy's attack against Ely falls flat since we can no longer invoke the argument from disagreement to show that it would be undemocratic for a court to enforce the standard in question. Hence, Bellamy must be committed to the second of the two options.²²

But at this point, we are clearly entitled to ask why one would believe that *any* democratic system (in the permissive sense of the term) will have authority and legitimacy. Bellamy's discussion of the point starts out by admitting that 'if the democratic system is imperfect, then surely any decision will be tainted by its imperfection.'²³ One wonders why Bellamy thinks he is entitled to make such a remark. Clearly, he must be relying on the kind of substantive standard here that he thinks judges mustn't use lest democracy be destroyed. Be that as it may, he goes on to explain why we should discount the flaws as follows:

²¹ This may strike some readers as an uncharitable interpretation. But Bellamy repeatedly claims that enfranchisement (of women, people of colour) has typically been achieved through political and not judicial action, and this claim seems irrelevant to the legitimacy of judicial review unless one holds that this is how problems of enfranchisement ought to be solved.

²² To be sure, Bellamy sometimes talks in ways that would seem to commit him to the first option. See for instance Bellamy, *supra* note 2, at 146, where he claims it is an 'underlying value' of democracy to treat all 'human beings with equal concern and respect' or *ibid.* at 219 where he says that citizens 'cannot be ruled without giving equal consideration to their interests.' But if this is the case, then many democracies will fall short of the threshold of legitimacy and review cannot be inherently undemocratic because it purports to enforce substantive values.

²³ Bellamy, *supra* note 2, at 140.

As with any democratic decision, people can distinguish acceptance of the legitimacy of the democratic procedure from agreement with the policy that emerges from the procedure. Just as I can prefer politician A to politician B, but still regard a majority vote as the legitimate way of choosing between them even if I know most people will opt for B, so I can believe that PR is better than the current plurality system yet acknowledge that the only legitimate way of instituting PR would be by the prevailing system. My preference for PR will be a substantive, results-based view, but I can still acknowledge that there are valid arguments against such a system. As a matter of practical politics, therefore, it will be necessary to defer to some procedure to decide the issue, and as a democrat an imperfect democratic procedure through which citizens have some chance of having their say can be reasonably preferred to one that has fewer democratic credentials.²⁴

The problem with these remarks is not that they are wrong, it is that they are plainly irrelevant to the point Bellamy apparently seeks to establish, namely that any democratic system in the permissive sense has authority, including authority about how to understand democracy. Of course, people can believe that they should accept a politician who has been voted into office as legitimate even if they would have liked to see someone else win the election. But the reasonableness of such an attitude is rather obviously dependent on the assumption that the elections were sufficiently fair, it presupposes a substantive standard of democratic equality.

The example about PR is equally irrelevant. It is true that it might be reasonable for someone to accept the legitimacy of a democratic decision not to use PR even though he believes that the system would be a more perfect democracy if it were to use PR. However, it is reasonable to take such a stand only on the condition that the democratic process in question is already sufficiently fair to legitimise the legislative choice of what one considers to be a morally suboptimal voting system. Hence, the example doesn't generalise to

²⁴ Bellamy, *supra* note 2, at 140.

all decisions 'about democracy.' We obviously cannot justify Jim Crow-laws in quite the same way.

Finally, it is perfectly true that, as a matter of practical politics, it is necessary for members of a political community to defer to some procedure for taking collective decisions. This Hobbesian requirement, however, can be satisfied even by completely non-democratic systems. Hence, it doesn't support the authority of democracy in any way. It is true as well that an imperfect democratic procedure might be preferable to one that has 'fewer democratic credentials'. But of course, whether it is or not will depend on the circumstances of the case. History shows that it is perfectly possible for minorities to find themselves in situations where some form of imperial protection is preferable to victimisation at the hands of a democratic majority. And there is very little reason to think that a formally democratic procedure could not be afflicted by such grave deficiencies as to make the option of constitutional protection look very attractive.

To conclude: Bellamy offers us no good reason to accept the sweeping claim that any democracy in the permissive sense of the term has normative authority and legitimacy. But if we admit that democratic procedure must pass muster with a substantive threshold-standard of some kind to have legitimising force, we cannot justify a wholesale rejection of constitutionalism and constitutional review by invoking the argument from disagreement. To do so leaves us without any resources to explain the normative authority of democracy itself.

Bellamy's failure to address the self-defeatingness objection is, I believe, indicative of a more general mistake about the notion of democratic legitimacy. I do not think it is helpful to think about democratic legitimacy in terms of a hard and fast distinction between input-oriented and output-oriented evaluative perspectives or to associate the concept of legitimacy exclusively with the input-oriented perspective. Any adequate theory of democratic legitimacy will have to combine both perspectives and it is a mistake to jump to

the conclusion that such combination is incoherent or unworkable too quickly.²⁵

To illustrate the point, let me return to Ely's defence of constitutional review. Remember that Ely argues that we cannot limit a constitutional court's competence to the function of guaranteeing fair and equal access to democratic procedure. Discrete and insular minorities need additional protection against legislative majorities, in the form of constitutional review that will strike down legislation with discriminatory intent. Bellamy's point that Ely cannot avoid implicit reliance on some form of outcome-orientation in determining discriminatory intent is certainly plausible. But we should not be too quick to jump to the conclusion that this observation dooms the kind of justification of judicial review Ely is interested in.

Ely's demand for extension of judicial protection is embedded in a more general theory about the purpose of democracy. In Ely's view, majoritarian democracy is an attractive mode of collective decision-taking not least for the reason that it typically protects citizens against state-sanctioned oppression.²⁶ This idea is of course thoroughly traditional. It is based on the assumption that a policy that is supported by a majority of all citizens is unlikely to fail to express a plausible conception of the common interest, as well as on the assumption that if it does, it is likely to be corrected. A more moderate and perhaps more plausible version of the same assumption might claim that a policy that is supported by a majority of all citizens is at least highly unlikely to be nothing more than an expression of a merely partial or sectional interest. In other words, democracy solves the traditional problem of tyranny: it disables an autocrat or a small minority to lord it over the rest and to make laws in their private interest without giving due consideration to the interests of ordinary people. It also disables an autocrat or a small minority from identifying their own interest with the common good in uncritical, unreflective, or self-serving ways.

²⁵ For a similar view see C. Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007), at 136-59.

²⁶ See Ely, *supra* note 4, at 77-8.

Someone who is drawn towards the view that democracy is valuable because it has a tendency to prevent oppression needn't deny that there are other, additional reasons for valuing democracy. Perhaps there could be a non-democratic constitutional order that would be as effective at preventing oppression. If so, we would, I assume, still reject it as failing to pay equal respect to all citizens in denying them participation in the legislative process. What I would like to claim, however, is that it would, in any case, be unreasonable to expect some social group to accept unrestrained majoritarian democracy as authoritative if it patently failed to give that group adequate protection against state-sanctioned oppression.

I should admit that I am not sure how to argue for this claim against someone who would like to deny it in any other way than to ask that person to put himself in the shoes of a member of a minority that suffers from oppression: Would he think that he has a duty to obey the laws of the majority, out of respect for the principle of democratic equality, for the reason that he has enjoyed a formal right to vote? To take a slightly different example that would seem to arise from an embrace of a permissive conception of democracy: Would he think that he ought to accord authority to the law for the reason (if we find ourselves in a democracy with restricted franchise) that the majority of those who have the right to vote might come around to give it to him at some point in the future? If the answer to such questions is negative, then democracy cannot have authority over those it fails to protect from oppression, and it would appear that the protection against oppression which majoritarian democracy affords to some ought to be extended to all, by the extension of the franchise and, if necessary, through the judicial invalidation of manifestly oppressive laws. To reject these extensions is to prevent democracy from fulfilling one of its essential purposes.

To put the point slightly differently: The demand that someone ought not to be subjected to oppression expresses the view that his good, as he understands it, counts for something and that it would therefore be wrong to treat him like a slave, as a mere instrument of someone else's good. To acquiesce in someone's oppression, on the other hand, amounts to a denial of equal status. It makes no sense, therefore, to claim that someone should have to accept the authority of democracy if he is not given a vote. And it makes no more sense to give him the

vote, for the reason that it would be wrong to deny him equality of status, but to withhold judicial protection from majoritarian oppression. To deny someone the right to vote is a public invitation to oppress him, and so, under certain circumstances, is the refusal to allow him access to judicial protection against an abusive majority.

Bellamy is not free to dismiss such considerations, as he defends the idea that democracy has authority because it prevents the standing threat of oppression.²⁷ In the constructive part of his book, Bellamy argues for the traditional theory of pluralist democracy, which claims that the balance of power between different social groups, as well as the need to form coalitions, is likely to prevent the oppression of any one group at the hands of a majority in a democracy, whereas he interprets judicial review as a disruption of that balance that might enable oppression.²⁸ But if interest group-pluralism is to be recommended on the ground that it prevents oppression, it seems that we must, after all, have a capacity to recognise that certain outcomes are undoubtedly oppressive.

This assumption, however, undercuts the claim that Ely's call for judicial protection of 'discrete and insular minorities' is to be rejected because it is outcome-oriented in an objectionable way. It is true that we cannot determine discriminatory intent without relying on intuitions about what outcomes are substantively oppressive. But Bellamy's argument for pluralism must be outcome-oriented in exactly the same way as Ely's argument for judicial review. We will not be in a position to claim that interest group-pluralism is a better mechanism for preventing oppression than judicial review if we are not allowed to characterise at least some outcomes as substantively oppressive. It therefore makes no sense for Bellamy to claim that a constitutional court trying to protect discrete and insular minorities from oppression would itself be an oppressive institution because there will always be reasonable disagreement about whether some policy is substantively oppressive. As a result, Bellamy's rejection of constitutional review ultimately appears to boil down to the empirical claim that the kinds of oppression against which the kind of review Ely envisages is directed simply do not occur in pluralist

²⁷ See Bellamy, *supra* note 2, at 154-75.

²⁸ See Bellamy, *supra* note 2, at 221-39.

majoritarian systems, or at least not with sufficient frequency to make it worth our while to bother with constitutional review. I will leave it to the reader to judge whether this is a plausible assumption.²⁹

The more important point is that the simple argument from disagreement must surely fail if it is possible for us to recognise at least some outcomes as oppressive. The simple argument from disagreement, to recall, claims that we are not entitled to prefer one procedure over another for being more likely to give substantively correct outcomes unless we agree on a conception of what outcomes are substantively correct. But this line of reasoning overlooks that an outcome-oriented argument for choosing one procedure over another can get off the ground on a much less demanding basis. If we can recognise at least some outcomes as being so obviously wrong as to count as oppressive, we are entitled to prefer one procedure over another for the reason that it blocks obviously oppressive outcomes or significantly reduces their likelihood. Such a choice can be made even where we continue to disagree profoundly over the question which among the outcomes that are not obviously oppressive are better and which are worse.³⁰

²⁹ One might argue that Bellamy's approach to constitutional theory is not sufficiently concerned with the possibility of constitutional pathology and crisis, as it has little to say about how a constitution should provide for and react to the kind of breakdown of a system of parliamentary democracy so perceptively analysed in C. Schmitt, *Legality and Legitimacy*, translated by J. Seitzer (Duke University Press, 2004). Bellamy would likely retort that an excessive focus on the extreme case might carry the danger of restricting collective self-determination too much in the situation of normality. But even apart from the possibility of extreme crisis, Bellamy takes a rather optimistic view about the progressive potential of democratic majoritarianism. He goes to great lengths to argue that progressive achievements and effective protection of individual rights are much more likely to result from the rough and tumble of democratic politics than from exercises of judicial review. See Bellamy, *supra* note 2, at 209-59. A comprehensive discussion of Bellamy's evidence for this claim is beyond the scope of this chapter. But it should be noted that the discussion is very heavily biased towards British and American examples, while there is little attempt to engage with other constitutional traditions. Bellamy's optimism about this also does not seem to sit too well with very recent political history. In the 'war against terror' courts have generally been more willing to protect individual rights against legislative overreach than parliamentary majorities.

³⁰ It has been pointed out by other critics that the simple argument from disagreement fails even on grounds of correctness. We frequently have reason to assume that a procedure designed in a certain way is more likely to produce substantively correct outcomes even while we do not know or reasonably disagree

There is little reason, moreover, to think that we need detailed advance knowledge of the strategies of legislative oppression an unrestrained legislator might attempt to pursue in order to design procedures that will reduce the likelihood of oppressive outcomes. Legislative strategies of oppression come in many forms, and what form they are likely to take in a particular social context is typically going to be difficult to anticipate. It is precisely for this reason that equal rights of participation for all those affected by the legislative process usually provide the best procedural protection against oppressive outcomes. We don't have to be able to anticipate all possible oppressive outcomes, and much less do we have to have a ready-made and agreed-upon theory of the substantive moral correctness or moral optimality of outcomes, in order to know that oppression is much more likely where significant groups of citizens are excluded from equal participation in the legislative process and are deprived of an effective voice.

If this is a valid rationale for democratic legislation, it is hard to see why one should reject Ely's attempt to extend this rationale so as to justify (some form of) judicial review. Unless we flatly (and implausibly) deny that pure majoritarianism may give rise to oppression of discrete and insular minorities, there seems to be no good reason to deny that the institution of constitutional review may have an oppression-inhibiting effect. If a discrete and insular minority has the right to appeal to an institutionally independent third party empowered to overturn oppressive outcomes enacted by the majority, the legislative process is much more likely to accommodate the minority's interests and to give it a genuine voice. What is more, if the minority is nevertheless subjected to oppression, the likelihood that a court will provide a remedy is probably going to be higher than the likelihood that the oppressing majority will. The institution of judicial review, then, can reasonably be expected to reduce the danger of oppression.

what outcomes are correct. See Kavanagh, *supra* note 3, at 460-5. David Estlund has argued that it would be impossible to justify democratic authority without the assumption that democratic decision-taking exhibits this feature. See David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2008), at 65-116.

To sum up: we cannot reject the view that judicial review can be justified as a means to protect the integrity of the democratic process simply on the ground that arguments to this effect are implicitly based on outcome-oriented considerations. Any plausible conception of democracy that aims to justify the view that democracy has legitimising powers will have to make room for outcome-oriented considerations of a weak and modest kind. Ultimately, this is a straightforward consequence of the fact that no political system that is oppressive, not even a democracy that offers formally equal participation in the legislative process, can have authority over those it oppresses. Of course, to employ this insight in constitutional argument is to assume that we can recognise oppression when we see it (or at least when we are forced to see it by provisions that allow the oppressed to voice their concerns). But if the argument from disagreement were to undermine our confidence in this capacity, it would also undermine the possibility of the kind of constitutional theorising Bellamy takes himself to be engaged in.

Bellamy is right to emphasise that one of the major attractions of democracy consists in its capability to allow us to take legitimate collective decisions in the face of reasonable disagreement about what outcomes of the legislative process are substantively correct or morally best. A theory of democratic legitimacy claims that democratic procedure confers legitimacy on its outcomes, irrespective of the content of those outcomes. In other words, democratic laws have normative authority because they were created in a certain way, and this entails that a citizen ought to respect them even in cases in which he thinks that the law in question is substantively incorrect.

Bellamy fears that the theory of democratic legitimacy will fall into incoherence if it includes any form of output-orientation, however modest. If we are interested in democratic legitimacy, we are committed to a purely input-oriented perspective. This assumption draws its undeniable plausibility from the fact that certain strong forms of outcome-orientation would indeed undermine a theory of democratic legitimacy. Let us assume we are in possession of a complete theory of correct outcomes, and take ourselves to be entitled to rely on it to answer questions of institutional design. In such a case, we would choose our procedure with a view to its capacity reliably to produce the outcomes we take to be substantively correct. The best

procedure would then be the procedure, of all possible or practically feasible procedures, most likely to produce those outcomes.

According to a view of this sort, procedures can only have a very limited power to confer legitimacy or normative authority on their outcomes. Whenever a procedure produces a substantively mistaken outcome, this will give us a reason to change our procedure so as to make it more reliable at bringing about correct results (as opposed to the procedure giving us a reason to attribute legitimacy to the outcome in virtue of its procedural pedigree), at least if it is still possible to enhance the reliability of our procedure through amending it. Strong outcome-orientation of this kind would of course reduce a theory of democratic legitimacy to near pointlessness, while telling us little about how to go on under conditions where we lack a complete and uncontroversial theory of correct outcomes.

But as should be clear by now, I believe it is mistaken to assume that strong outcome-orientation is the only interesting or relevant form of outcome-orientation in the evaluation of procedure, and that our only other option is to adopt a purely input-oriented account of democratic legitimacy committed to the wildly implausible claim that all decisions taken by all forms of democracy in the permissive sense must, by definition, be legitimate. The reasonable expectation that the institution of constitutional review will have an oppression-inhibiting or oppression-remedying effect is an outcome-oriented consideration for integrating it into our democratic procedures. But it remains valid in the absence of an uncontroversial comprehensive theory of correct outcomes. What is more, it does not undermine the view that the democratic credentials of decisions confer legitimacy on those decisions, in the face of reasonable disagreement over correctness, as long as the decisions in question are not manifestly oppressive.

A plausible theory of democratic legitimacy has to make room for a weak form of outcome-orientation that acknowledges the limits of majoritarianism's moral authority without undermining that authority. The real work of democratic constitutional theory is in determining the right balance between output-oriented and input oriented-considerations, and preferably to do so in a way that provides at least some guidance to those who actually have to take judicial decisions and that allows concerned citizens to criticise them

if they go astray. Views that are built on a hard and fast distinction between output-oriented and input-oriented considerations and that privilege one of these perspectives to the exclusion of the other are unlikely to be of much help in the defence of democratic constitutionality.

Waldron and the qualified argument from disagreement

The argument from disagreement was first popularised by Jeremy Waldron.³¹ While some of Waldron's earlier work on the topic may have been vulnerable to the objections I have levelled against Bellamy's version of the argument, the same cannot be said of Waldron's more recent restatement of the argument from disagreement.³² This restatement carefully avoids the most serious problems of the simple argument from disagreement. However, this insulation comes at a cost. Waldron has qualified his argument in such a way that it no longer amounts to a general challenge against the practice of constitutional review. In its current form, Waldron's version of the argument from disagreement shows little more than that we can coherently imagine an ideal society with a purely majoritarian democracy whose democratic functioning would not be improved by the introduction of formal constitutionalism and constitutional review. This result is too weak to establish that constitutional review ought not to form part of the constitutional practice of most real democracies.

In his recent essay 'The Core of the Case Against Judicial Review' Waldron admits that the argument from disagreement against judicial review applies only to political systems that live up to a number of background conditions: The existence of well-functioning democratic institutions, the existence of a well-functioning system of courts, the existence of a social commitment to individual and

³¹ See Waldron, *Law and Disagreement*, *supra* note 2.

³² My discussion in this section is based on Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, and *id.*, 'Do Judges Reason Morally?' in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008), 38-64. For an important and stimulating critique of Waldron's argument see R. H. Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review*, 1693.

minority rights, and the existence of persistent disagreement as to how to interpret individual and minority rights.³³ Satisfaction of these four conditions, Waldron believes characterises the 'core cases' of democracy to which the argument against review applies. For the purposes of our discussion, the first and the third condition are most relevant, since they are introduced precisely to deal with the problems of the simple argument from disagreement that we discussed previously.

According to the first condition, the argument from disagreement will apply only to political systems that have democratic 'legislative institutions in reasonably good working order' and these institutions, in turn, must be embedded in a democratic political culture. The institutional part of the assumption requires 'a broadly democratic political system with universal adult suffrage' and a 'representative legislature to which elections are held on a fair and regular basis.' The legislature is assumed to be a 'large deliberative body, accustomed to dealing with difficult issues [...] of justice and social policy.' The legislative process has to be 'elaborate and responsible' and to include several stages of debate which are embedded in a wider context of public debate. The second, cultural component of the condition requires that political debate is 'informed by a culture of democracy, valuing responsible deliberation and political equality.'³⁴ The presence of an egalitarian political culture is assumed to ensure that the procedures of legislation and the political institutions are subject to constant public scrutiny on the basis of the ideal of equality and that the legislature will take the initiative to reform procedure and institutions if fall short of the ideal of political equality.

The third condition that must be satisfied for the argument from disagreement to apply is a further characteristic of political culture. The society in question is assumed to have a strong commitment to the 'idea of individual and minority rights.' This commitment to rights, according to Waldron, entails that people believe that 'individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more

³³ See Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1359-69.

³⁴ *Ibid.* at 1361-2.

convenient for most people to deny them.’ Furthermore, it implies that people believe that ‘minorities are entitled to a degree of support, recognition, an insulation that is not necessarily guaranteed by their numbers or political weight.’³⁵ Finally, respect for individual and minority rights is assumed to be more than a matter of mere belief. The conviction of the importance of rights must have the motivational power to ensure that voters and legislators will respect rights even if doing so comes at a certain cost to their own interests.

Even a society that lives up to these conditions, Waldron argues, will still experience ‘substantial dissensus as to what rights there are and what they amount to.’ Such dissensus is neither merely interpretive nor is it restricted to marginal questions of application that do not affect the core understanding of rights. People disagree about what rights there are and they disagree fundamentally about how they are to be understood. Such disagreement comes to the fore most conspicuously, Waldron claims, in ‘watershed-issues’ of political morality, that ‘define major choices that any modern society must face.’³⁶ Waldron lists as typical examples of watershed-issues the abortion, affirmative action, the legitimacy of government redistribution, the extent of free speech, or the precise meaning of religious toleration.

If these conditions are satisfied the argument from disagreement can proceed in the familiar way. However, the argument is now self-consciously restricted to so-called ‘core cases’ of democracy. It applies only to societies that possess well-functioning democratic institutions and procedures, that are endowed with an egalitarian political culture that secures equal access to and fairness of the political process (and we should add: that is publicly seen to do so), and that exhibit a commitment to rights capable of motivating legislators and citizens to respect other people’s rights even where this hurts their self-interest. In these circumstances, Waldron argues, the institution of judicial review is an unnecessary and illegitimate way of dissolving disagreement about watershed-issues of political morality. This result does not rule out the possibility that constitutional review may be justified in some formally democratic countries ‘in which

³⁵ Ibid. at 1364-6.

³⁶ Ibid. at 1366-8.

peculiar legislative pathologies have developed.’ However, those who put forward such justifications for their own country, Waldron demands, ‘should confine their non-core argument for judicial review to their own exceptional circumstances.’³⁷ In other words, judicial review is an appropriate institution for morally corrupt societies that lack the necessary virtue to practice true democracy.

In what follows, I want to offer two criticisms of Waldron’s restatement of the argument from disagreement. The first derives from my earlier claim that it is wrong to draw a hard and fast distinction between input-oriented and output-oriented perspectives of evaluation, for the reason that the authority of majoritarianism itself depends on a modest outcome-orientation. On the surface, Waldron’s restatement still operates with a hard and fast distinction between the two perspectives,³⁸ but his introduction of the restrictive conditions in effect amounts to an admission of the claim that majoritarianism will lack authority if it fails to block oppressive outcomes. The first and the third condition are clearly supposed to enforce precisely the kind of limits of democratic authority that Ely was concerned with.

If Waldron admits that a majoritarian democracy would lack normative authority if it failed to prevent oppressive outcome, why does he continue to reject the justifiability of constitutional review that enforces the integrity of the democratic process? Granted, we can imagine a society in which judicial enforcement of the integrity of the democratic process is unnecessary. But Waldron needs to argue something stronger, namely that it would be a violation of the principle of democratic equality for the integrity of the democratic process to be enforced by a court. It seems difficult to make sense of that stronger claim, given the admission that the normative authority of majoritarian democracy is inherently limited. If a constitutional court strikes down a piece of legislation that lacks authority since it is oppressive and thus oversteps the limits of democratic legitimacy, it will no longer make sense to claim that the court is violating the principle of democratic equality, since that principle, as Waldron seems implicitly to admit, cannot be invoked to license oppression. It

³⁷ *Ibid.* at 1386.

³⁸ See *ibid.* at 1372-6.

is hard to see, therefore, what harm it would do to democracy to introduce a system of constitutional review designed to defend the conditions on which democracy's authority depends.

Waldron's answer to this query, I suspect, is that a well-functioning democracy without constitutional review is a better democracy than a democracy that relies on constitutional review to function well and that it would therefore be wrong to introduce judicial review where it is not necessary to make democracy function well. For a people to enforce the limits of democratic legitimacy without the help of a court best expresses the ideal of democracy: A society capable of such self-restriction is a society in which the values of freedom and equality that ought to be realised by a society as a whole are realised in a special way, namely through voluntary decisions flowing from shared fraternal attitudes, and not merely through a clever system of constitutional mechanisms of enforcement that allows even a confederacy of knaves to govern itself reasonably well.³⁹ The point, then, is not so much that a system of review would necessarily violate the principle of democratic equality. Rather, the point is that a system that relies on the institution of review fails to realise the highest and most valuable form of collective self-determination. Where such excellence is realised, or where it could be realised, the institution of a constitutional court is not just unnecessary but harmful, as it prevents the full realisation of the ideal of democracy.

I do not want to argue for a wholesale denial of the attractiveness of Waldron's apparent ideal of democracy. But I think that its relevance to any general assessment of constitutional review is fairly limited, for both factual and moral reasons. This brings me to my second criticism of Waldron's restatement: To what extent, I now want to ask, do the restrictions on the argument from disagreement introduced by Waldron's conditions undercut the argument's force as a general case against constitutional review?⁴⁰

³⁹ An analogous idea drives G. A. Cohen's criticism of Rawls's theory of justice. See G. A. Cohen, *Rescuing Justice and Equality* (Harvard University Press, 2008), at 27-86.

⁴⁰ Waldron's argument is subject to further limitations which I will not discuss, in particular the focus on 'watershed-cases' and the distinction between weak and strong judicial review. For a critical discussion see D. Dyzenhaus, 'The Incoherence of Constitutional Positivism', in *Expounding the Constitution*, *supra* note 32, 138-60, at 140-54.

Waldron himself provides two slightly different answers to this question. At times, he claims that the conditions are best interpreted in a rather non-demanding way and that we should think of them as being fulfilled by most, though perhaps not by all, formally democratic political systems. Under this reading, the term 'core case of democracy' would refer to typical or average instantiations of democracy while formally democratic systems that fail to satisfy the assumptions would have to be considered as untypical and exceptional.⁴¹ At other times, however, Waldron appears to imply that the term 'core cases of democracy' should be given a rather more restricted reference. Waldron suggests, for instance, that the US is one of the political systems afflicted with legislative pathologies that might justify constitutional review and thus not a core case of democracy.⁴² However, if the US does not qualify as a core case of democracy, questions could without a doubt be raised about many other democracies. Under this more restricted reading, then, the idea of a core case of democracy does not designate the average instantiation of democracy but an ideal to which formal democracies ought to aspire, even while many formal democracies fail to realise that ideal.

The best way to understand this vacillation on Waldron's part, I suspect, is to treat the narrow understanding of core cases as a kind of fallback position. It seems plausible to assume that the argument from disagreement will turn out not to be directly applicable to a considerable number of actually existing formally democratic political systems, for the reason that many actually existing democracies fail to satisfy Waldron's conditions. In that case, judicial review would be justifiable in a considerable number of actually existing democratic constitutions. But the argument from disagreement would still provide us with an important insight into the nature of democracy, namely the insight that the institution of constitutional review is alien to political systems that fully instantiate the ideal of democracy. If a democratic constitution contains the implicitly autocratic institution of constitutional review, it has not yet

⁴¹ See Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1366, where the argument is described as being applicable to 'countries like the United States, Britain, or Canada'. This seems to me to suggest that the argument is taken to apply to most states that we would normally consider to be fully established democracies.

⁴² See Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1386.

fully realised its own nature, since it does not yet allow free and equal citizens to exercise full collective self-determination. In order to make the democracy in question what it ought to be, the institution of constitutional review should in principle be abolished, though existing pathologies may justify the institution for the time being.

In order for this fallback position to make sense, however, the argument from disagreement must at least be indirectly applicable to systems that Waldron classifies as non-core cases. In other words: the status of a Waldronian core case of democracy must at least be practically attainable for typical or average democracies that as yet fall short of that status. It must normally be possible, in societies whose political system as yet falls short of the full realisation of Waldron's ideal of democracy, to take effective action towards a social condition that satisfies Waldron's assumptions and gives them their intended effect; be it through economic development, redistribution of wealth and opportunities, political education, institutional reform, or perhaps, if nothing else helps, a redrawing of boundaries. If a democratic system were, for some reason, not open to effective reform towards a social condition that satisfies Waldron's assumptions and gives them their intended effect, it would appear to be wrong to devalue and condemn the system in question for a failure to live up to the Waldronian ideal of democracy or to continue to claim that it ought to be committed to the realisation of that ideal in virtue of being committed to (some form of) democracy. And if something like this were true of a significant number of democratic systems that presently do not realise Waldron's ideal of democracy, the argument from disagreement would no longer support general claims about how democracies ought to be organised.

What is more, even if the kind of social change that is needed to achieve satisfaction of Waldron's assumptions and give them their intended effect could be brought about in some society, we have to be attentive to the possibility that there might be moral costs to the necessary reforms that may not be worth incurring, especially if a version of constitutional democracy with judicial review (and perhaps other power-sharing, anti-majoritarian features) is also available for the society in question. This possibility is not as remote as it seems. As I will argue below, Waldron's first and third assumption are quite obviously more likely to be satisfied and to have their

intended effect in socially and ethnically homogenous societies. Hence, there may be perfectly respectable reasons for members of a society to decide that they do not want to be the kind of society that could function without constitutionalism and judicial review.

So what are the reasons for thinking that Waldron's ideal may fail to be indirectly applicable to a large number of democratic polities? The point of Waldron's first and third assumption is that their joint satisfaction is taken to entail that everyone has reasonably fair access to the political process, that the process is genuinely representative and adequately deliberative, and that it will not lead to outcomes that are patently oppressive. This, in turn, is meant to sustain the view that outcomes of that process have authority irrespective of their substantive content. The satisfaction of the narrowly institutional aspect of the first assumption is probably always to be considered feasible. Formally democratic procedures, I will assume, can always be deliberately introduced. But of course, formally democratic procedures alone do not necessarily possess the oppression-inhibiting force that is required for democracy to maintain its normative authority. They do not protect against a majority that is bent on using its formal power in abusive ways or that is too insensitive to exhibit sufficient concern and respect to minority-interests.

The weight of Waldron's case, then, rests on the assumptions about political culture: the egalitarian ethos, the commitment to rights, as well as the motivational force of both. Whether a society satisfies the requirements of political culture that are needed to make sure that pure majoritarianism will not become oppressive, it would seem, must ultimately be a matter of civic virtue. The argument from disagreement, then, would be relevant to all democracies on the assumption that a lack of civic virtue is always in principle remediable.

In order to assess whether a lack of civic virtue is always in principle remediable, it will be necessary to give a brief description of the kind of civic virtue that is needed to make judicial review dispensable. The crucial thing to keep in mind here is that Waldron needs a form of civic virtue that consists in more than just a shared abstract belief that one ought to treat one's fellow citizens as equals and to respect their basic rights. For one thing, citizens need to be able to trust one

another not to exploit majoritarian power for sectional purposes. A momentary minority needs to be able to count on a momentary majority to make a continuing good faith-effort to pursue the common interest, to try to respect everyone's rights, and to abide by norms of procedural fairness. If citizens cannot have this trust, they cannot reasonably be expected to attribute normative authority to democratic procedure, and are likely to behave in ways that defeat democratic legitimacy. This requirement of trust does not rule out deep disagreement in particular cases over what it means to respect people's rights or to pursue the common good. But trust can only be maintained if there are publicly acknowledged paradigms of what it means to treat people with equal respect or to observe the norms of procedural fairness, and it will be easier to maintain the more such paradigms there are.

A second important aspect of a Waldronian conception of civic virtue is that it requires a high degree of social solidarity. Waldron assumes that citizens will not just abstractly acknowledge that other individuals and groups have a (yet to be determined) number of basic rights. They are assumed to be willing to sacrifice their private interest in honouring those rights. What is more, they are assumed to be willing to sacrifice their private interest in honouring those rights under conditions of association characterized by the absence of a prior agreement even on what basic rights there are and in which those rights may well be defined by the majority in a way that strikes them as wrongheaded or even unjust. Such willingness is unlikely to obtain unless citizens have a strong tendency to see their own well-being as being connected to that of all of their fellow citizens and to adopt a strongly fraternal attitude towards all of their fellow citizens (as well as to count on other citizens to be doing the same).

If Waldronian civic virtue requires trust and solidarity of this kind, it cannot possibly be understood as a simple function of the individual moral virtue of a society's members. It clearly requires a shared history or tradition which furnishes collective habits and conventions that form adequate paradigms of trust and that provides an emotional basis for a strong identification with the community. Other things being equal, Waldronian civic virtue will be aided by factors like shared culture, ethnicity, language, and it is likely to suffer where such forms of homogeneity do not exist. People can only agree to

disagree and subject themselves without any reservations to the unbridled verdict of the majority if it is publicly understood that they share a way of life and a strong concern for each other.

Waldronian civic virtue might well turn out to be a good thing where it exists. But there is reason to think that its absence in a society will often not be easily remediable. If we look at cases where it might now be taken to exist, we will find that there is no standard way in which it comes to exist. The way in which it came to exist in this or that society typically does not provide a blueprint for creating it in other societies. We will also find in some cases that civic virtue came to exist through homogenising policies that we would now find morally problematic and that in some cases did more harm than good. Moreover, there is no reason to think that a society's members must necessarily be wrong if they decide that they prefer to live under different conditions of association that put stronger limits on the power of the political community over individuals and groups than a Waldronian conception of civic virtue seems to allow for, especially if a society lacks the cultural unity implicitly presupposed by Waldron. There are social ideals that might well be considered more attractive, under conditions of great cultural diversity, than the strongly fraternal society Waldron seems to long for.

What is more, even if Waldronian civic virtue did exist in a society, its presence might not guarantee that all democratic outcomes will stay within the limits of democratic legitimacy. As Thomas Christiano has convincingly argued, even a majority whose members are willing to act on a *bona fide* conception of the common good and to make individual sacrifices for the realisation of that conception may come to act oppressively through insensitivity to the interests of discrete and insular minorities. Such insensitivity is likely to result from a number of unalterable features of human nature that make it difficult for us to cognitively and emotionally appreciate and to give proper weight to the interests of those who are different from us.⁴³ And this problem, needless to say, may well be worse in an otherwise rather homogenous society.

⁴³ See Christiano, *supra* note 4, at 56-63.

Finally, Waldron's discussion, much like Bellamy's, is heavily biased towards the American and British constitutional experience, and it runs the danger of elevating historical contingencies into timeless truths about the workings of political institutions. Waldron confronts an idealised reading of the classical Westminster-model with what he evidently sees as pathologies of an unduly legalistic American constitutionalism. It is therefore none too surprising that formal constitutionalism and judicial review appear to Waldron as implicitly anti-democratic institutions. After all, the constraints on simple majority rule in the American constitution, of which the system of judicial review is only one, indeed seem to have been designed to ward off a perceived danger of excessive populism,⁴⁴ while the democratisation of the British constitution indeed took the form of reform through parliamentary legislation. Someone who focused exclusively on America and Britain might well be inclined to think that democratisation and constitutionalisation are different and potentially conflicting processes.

But it is unclear, to say the least, whether the British and American examples ought to be recognised as paradigmatic. In many European political traditions, the processes of democratisation and of formal constitutionalisation were rather intimately connected, since the fight for constitutional protection against the vestiges of absolutism tended to overlap with the fight for political participation and an extension of the franchise. Hans Kelsen's influential argument for judicial review, for instance, which regards the introduction of judicial review as the completion and fulfilment of a democratic constitutionalism, is a clear expression of this perspective.⁴⁵ The claim that formal constitutionalism and democracy are potentially opposed to each other would, I suspect, strike many Europeans as rather odd.⁴⁶

⁴⁴ See A. Hamilton, J. Madison, and J. Jay, *The Federalist with Letters of Brutus*, Cambridge Texts in the History of Political Thought (Cambridge University Press, 2003), at 305-12.

⁴⁵ See Vinx, *supra* note 4, at 145-75.

⁴⁶ The German *Bundesverfassungsgericht*, for example, is an exceptionally strong constitutional court. And yet, there is no real debate about the legitimacy of constitutional review. One would think that examples like this are rather embarrassing to Waldron: His argument seems to imply either that Germany doesn't qualify as a 'core case' of democracy or that he must be wrong to argue that the ideal of democracy excludes formal constitutionalism and judicial review.

Waldron's implicit focus on the US and Britain also tends to veil the fact that judicial review can be organised in many different ways, some of which may be better than others at making sure that those who exercise judicial review exercise their powers with a view to the protection of the integrity of the democratic process. The *Canadian Charter of Rights and Freedoms*, for instance, provides for the possibility of a 'constitutional dialogue' between parliament and the Supreme Court, by authorising parliament explicitly to override a judicial invalidation of a law enacted by parliament. So far, the results seem to have been positive: The need to deal with increased public attention and to meet a higher threshold of public justification has proven to be a very effective deterrence against parliamentary overrides of judicial decisions and has frequently forced parliament to find legislative solutions that better protect equality. But the court, likewise, has to tread carefully, given the possibility that the public may approve of a parliamentary rebuke to the judges.⁴⁷

Let me conclude: There is good reason to think that there are many societies in which the realisation of the Waldronian ideal of purely majoritarian democracy is either practically infeasible or undesirable, for reasons that needn't signal civic corruption or political pathology. And if we shouldn't hold the democratic practices of such societies to Waldron's ideal, we shouldn't confuse that ideal with *the* ideal of democracy. It follows that we should also reject the view that constitutional review is inherently undemocratic since it doesn't figure in Waldron's ideal.⁴⁸

The bottom line of my criticism of Waldron's current version of the argument from disagreement, then, comes to this: Waldron is right to claim that there can be well-functioning democracies without

⁴⁷ See P. W. Hogg and A. A. Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal*, 75.

⁴⁸ To accept Waldron's ideal of democracy, I'm inclined to add, will put us on the slippery slope to something like Carl Schmitt's view of democracy. Schmitt essentially claims that the 19th century ideal of parliamentary democracy (that, in Schmitt's portrayal, bears a striking resemblance to Waldron's ideal) presupposes an ethnic and social homogeneity that should, if necessary, be re-constituted through extra-legal sovereign violence. If one holds on to a Waldronian ideal, despite the fact that it's based on bad political sociology, one runs the danger of inviting the thought that such violence might be democratic.

constitutionalism and judicial review, and that some democratic systems would arguably not be improved but worsened by the introduction of constitutionalism and review. But such cases are neither typical nor are they normatively paradigmatic. Rightly understood, the qualifications that Waldron recently made to the argument from disagreement therefore imply that the argument no longer amounts to an interesting general challenge to the practice of constitutionalism and judicial review.

By way of conclusion: a tentative remark on Europe

I have argued that the argument from disagreement fails to establish that the institution of constitutional review necessarily violates the principle of democratic equality and is therefore always undemocratic. In its unqualified form, which focuses exclusively on the input into the legislative process, the argument undercuts the authority of majoritarian democracy itself. In its qualified form, on the other hand, the argument, while in principle sound, fails to amount to an interesting general challenge to the institution of constitutional review. It is applicable only to a limited number of cases that do not express a universal ideal of democracy. It would seem to follow that there is nothing inherently undemocratic about constitutionalism and constitutional review. This result should not occasion surprise. After all, constitutional review forms part of a large number of seemingly well-functioning democratic systems. In the absence of a convincing argument to the contrary, we should therefore assume that constitutional review is in principle compatible with democracy.

The argument of this chapter does not establish that all possible forms of constitutional review would be compatible with the principle of democratic equality. My criticism of the argument from disagreement is meant to leave room for the view that legislative decisions are entitled to judicial deference as long as they do not overstep the limits of democratic legitimacy. I have argued above that a purely instrumentalist conception of democracy characterised by a strongly output-oriented evaluative perspective would undermine the idea of democratic legitimacy, as would a constitutional court that is taken to have the power to enforce a particular comprehensive conception of the substantive moral correctness of legislative

outcomes. I think we should avoid such undermining, for the reason that a non-democratic mechanism of decision-taking will indeed fail to respect disagreeing citizens as equals if it is employed to settle questions that democratic procedure can legitimately settle in one way or another. In order to be compatible with democracy, in order to provide a defence of *democratic* constitutionality, constitutional review will have to be restricted to enforcing the limits of the normative authority of democracy.⁴⁹

Of course, this defence of judicial review raises a problem. Where, exactly, is the boundary between legitimate judicial review that protects or enhances the integrity of the democratic process on the one hand and undemocratic judicial meddling in legislative affairs on the other? In order to answer this question, we need a fully developed constitutional theory for democratic states, including an account of the separation of powers, and we need to be able to apply that account to particular constitutional traditions with sufficient sensitivity.⁵⁰ There are many open questions here that I have not even tried to address. But they are questions that we cannot and should not avoid by relying on the argument from disagreement or on a purely instrumental account of the value of democracy. It would be fruitful, it seems to me, for debate about judicial review to concentrate less on abstract attempts to prove that the institution is always illegitimate (or that it is always a good thing) and more on the question of how review can be made to work well and to support democracy in specific constitutional contexts.

Let me close by offering a brief and tentative reflection on how the results of this chapter might bear on the constitutional framework of the EU and the legitimacy of the activity of the ECJ. These reflections will start out from the assumption that the ECJ is clearly a constitutional court, in the sense that is relevant to debates about the legitimacy of constitutional review: it is the final interpreter of a body of legal norms that have constitutional character.

⁴⁹ A full defense of this view in Christiano, *supra* note 4 and Vinx, *supra* note 4.

⁵⁰ For an impressive example see A. Brudner, *Constitutional Goods* (Oxford University Press, 2004).

The central observation I would like to make is that we ought to dismiss criticisms of EU-constitutionalism that are based on nothing more than the view that formal constitutionalism and judicial review are inherently undemocratic. As I have tried to show, the strongest argument for that view is a failure. To establish that judicial review exercised by the ECJ is democratically illegitimate (or to defend it), one would therefore have to offer an argument that engages with the specifics of the European constitutional framework and with the ECJ's role in that framework. To do so is beyond the scope of this chapter and also beyond my competence as a philosopher. However, two general observations might nevertheless be appropriate.

I have claimed that judicial review will be democratically legitimate as long as it protects the integrity, and thus the legitimating force, of the democratic process. Judicial review can help safeguard the integrity of the democratic process by protecting those from oppression who either do not have a voice in taking decisions by which they are affected or whose voice tends to be overheard. In the European context, political decisions taken on a national level will often affect people who are not members of the national political community in question. Judicial review on the European level would therefore appear to be well-suited, at least in principle, to serve the purpose of making sure that such exclusion does not lead to oppressive results. What is more, at least for the time being, legislative decisions taken on the European level are subject to less stringent control by a democratic public than decisions taken by national legislators. The European arena seems to be an example of a polity, in other words, that does not fulfil the conditions that could make judicial review dispensable. The case for judicial review on the European level may thus be even stronger than the case for judicial review on the national level.⁵¹

However, the argument offered here also suggests that judicial review will not be democratically legitimate if it starts to do more than to protect the integrity of the democratic process. In particular, there are problems of democratic legitimacy once a reviewing court,

⁵¹ I adopt this suggestion from Agustín José Menéndez, 'The European Democratic Challenge: The Forging of a Supranational *Volonté Générale*' (2009) 15 *European Law Journal*, 277.

perhaps against the will of the majority of those who are affected by its rulings, starts to enforce a particular comprehensive conception of a well-ordered society. If it is true, as some observers have argued, that the ECJ's interpretation of economic freedoms is open to that challenge, we would have to conclude that some of the ECJ's recent decisions do raise a problem of democratic legitimacy.⁵²

⁵² See *ibid.* at 301-2.

Chapter 2

Court-induced political arenas and their impact on policy outcomes

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Introduction

Legal disputes between Community institutions, or between a Community institution and member states regarding the correct legal basis of a European decision-making process, are normally analysed from the point of view of the European Court of Justice's (ECJ) constitutional role and resulting balance of powers among institutions. Little attention, however, has been paid to the way in which these conflicts and resulting court decisions shape policy choices. In this article we argue that when solving inter-institutional legal disputes, the Court induces a particular political arena structure and thereby particular policy outcomes, by (i) determining the decision-making rule to be followed; (ii) by determining the decision-making procedure to be followed, and therefore the implicated institutions; and (iii) by establishing the scope of a particular legal basis, and therefore, the extent of validity of the decision-making rule and procedure. Formal decision-making rules and decision-making roles to be observed, constitute opportunities and restrictions to the involved actors with their specific preferences, and, therefore, - we claim - have an impact upon policy outcomes.

In order to answer the question regarding the impact of the ECJ's institutional prescriptions in terms of policy outcomes, the argument proceeds as follows: in a first step we present the development in the Treaties which led to disputes about the legal basis of decision-making and the approach of the ECJ in solving these disputes. We then seek to explain why a change of decision-making rules and procedures imposed by a court is likely to make a difference with respect to policy outcomes. In a third step, the claims put forward will be assessed against all cases since the Single European Act (SEA) and before the Treaty of Lisbon in which the legal basis of a Regulation or a Directive was challenged before the ECJ, and the Court indeed changed the legal basis.¹ By comparing the policy outcomes of the political processes before and after the ruling of the Court, insights will be gained as to whether imposing a different legal basis creates a new dynamic in the political arena and thereby different policy outcomes as compared to the phase preceding the Court ruling. In a concluding section the explanation will be discussed in the light of the empirical insights.

The genesis of legal basis disputes

Horizontal disputes – disputes involving European institutions – related to legal basis arose after the SEA and the Treaty of the European Union (TEU). Indeed, whereas prior to the SEA, the choice of legal basis was only of academic interest² because Community legislation was adopted by consensus, and member states rarely proposed a formal vote in the Council, the SEA and the TEU opened a number of decision-making avenues involving different actors and different voting requirements. The possibility to choose different avenues of decision-making sparked off a new type of legal disputes, namely, disputes on the legal basis which is of inter-institutional nature. The post-Maastricht institutional environment, in particular due to the establishing of the co-decision procedure, and the

¹ Since cases selected as empirical data took place before the approval of the Treaty of Lisbon, we refer to the Treaty provisions of the European Community Treaty (EC), rather than to their equivalent at the Treaty of Lisbon.

² R. Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan, 1998), at 155; N. Emiliou, 'Opening Pandora's Box: The Legal Basis of Community Measures before the Court of Justice', (1994) 19 *European Law Review*, 488, at 490.

replacement of unanimity by qualified majority voting strengthened this tendency.

Vertical disputes, that is, disputes confronting member states against European institutions, are of constitutional nature because they set the limits between member states' and Community's powers. They arose with the completion of internal market and the increasing number of Community express powers attributed by the SEA. These circumstances led to the necessary revision of the scope of Arts 95 and 308 EC. These legal basis enshrine functional competences,³ that is, they define Union's competence not by reference to a particular sector, but by the objective the Union should achieve, namely, the establishment and functioning of the internal market. Art. 95 EC was crucial to the development of internal market and was extensively used during the years following the SEA; the same applies to Art. 308 EC which provides a residual power entitlement to fill a particular kind of gap in the system of attributed powers. This proviso was necessary for attaining the objectives of the Treaty when no particular legal basis was provided. However, the completion of the internal market and the current degree of express powers attributed to the Union raises many disputes concerning the use of Arts. 95 and 308 EC as correct legal basis. Indeed, since the core of the internal market construction and regulation has been achieved, article 95 has been used in other less technical and more contentious areas, such as those in the tobacco advertising and biotechnology cases.⁴ As to article 308 EC, the existence of a large number of express legal basis excludes the use of this legal proviso.

Since the emergence of institutional disputes concerning the legal basis of Community legislation, the Court has developed a doctrine to appraise this sensitive issue. In the first dispute on legal basis, the *Generalised tariff preferences* case,⁵ the Court stated that 'failure to refer

³ G. De Búrca and B. De Witte, 'The Delimitation of Powers between the EU and its Member States', in A. Arnall and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002), 201-222.

⁴ *Ibid.*

⁵ Case 45/86 *Commission v. Council* [1987] ECR 1493. In this case, the disputed regulation departed from the Commission's proposal to base it on Common Commercial Policy competence (Art. 113 EEC, new Art. 133 EC); the Council

to a precise provision of the Treaty need not necessarily constitute an infringement of essential procedural requirements when the legal basis for the measure may be determined from other parts of the measure. However, such explicit reference is indispensable where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis' (para. 9). To the Court, 'the choice of legal basis may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review' (para. 11). Those aspects include the aim and content of the measure. The aim of Community measures is spelled out in their preamble and in the opening articles. As to the content of the measures, this can be appraised by the Court according to obligations established by the disputed measure.

The *Protection of forest* cases⁶ summarises the Court's doctrine as to how to determine the correct legal basis in horizontal disputes. It is necessary, first of all, to consider whether the measure in question relates principally to a particular field of action, having only incidental effects on other policies, or whether both aspects are equally essential. Hence the Court differentiates two situations:

1) From the aim and content of the Community measure, only one legal basis is correct since the measure relates principally to a field of action and incidentally to others. The 'center of gravity' doctrine is especially important to assess the legality of functional competence clauses such as article 95 EC.⁷ In this sense, the Court has constantly held that the mere fact that the establishment or functioning of the internal market is involved, is not enough to render Article 95 EC the applicable proviso, and recourse to it is not justified where the act has

considered that the measure also had major development policy aims, and, therefore, should be based on the residual power clause (Art. 235 EEC, new Art. 308 EC). However, this was not stated in the justification of the disputed regulation.

⁶ Joined cases C-164/97 and C-165/97, *European Parliament v. Council* [1999] ECR I-1139.

⁷ If, for example, Regulation on shipments of waste's principal effect is the management of waste, hence, it falls within the framework of the environmental policy of the Community and cannot be regarded as seeking to implement free movement of goods (free movement of waste) despite of the fact that it regulates the internal market on waste (Case C-187/93, *European Parliament v. Council* [1994] ECR I-2857, 23).

only the ancillary effect of harmonising market conditions within the Community.⁸ With the exception of the *Titanium Dioxide* case⁹ which represents a turn in the Court's jurisprudence, the application of the centre of gravity doctrine suggests that the Court applies this doctrine in favour of the specific legal base and therefore, it hinders the expansion of specific powers based on general and functional competence clauses such as article 95 EC.¹⁰

2) The Court could reach the conclusion that, according to the aim and content of the measure, it pursues equally essential objectives. For example, the measure's content is the regulation of the internal market and environmental protection; agricultural policy and consumer protection. In these cases, the decision as to which legal basis is to be applied is more complicated. Two situations have to be differentiated:

- a) The Union's institution should base the legal measure on both legal basis from which its competence derives (*Generalised tariff preference* case). The dual legal basis doctrine, however, has been weakened since the Case on promotion of linguistic diversity¹¹ where the Court refers to the 'center of gravity' of the measure. The requirement for a component to be essential widens the concept of incidental effects – these which are not essential – and reduces the scope of dual legal basis doctrine.
- b) In some cases, a Union's measure pursues two policies which legal basis describes two incompatible decision-

⁸ Case C-155/91 *Commission v. Council* [1993] ECR 939, 19.

⁹ Case C-300/89 *Commission v. Council* [1991] ECR I-2867. Barents interpreted the impact of this case in the sense that internal market (Art. 100a EEC) will unlimitedly enhance Community competences. R. Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation', (1993) 30 *Common Market Law Review*, 85.

¹⁰ K. Bradley, 'The European Court and the Legal Basis of Community Legislation', (1988) 13 *European Law Review*, 379; H. Cullen and A. Charlesworth, 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States', (1999) 36 *Common Market Law Review*, 1243, at 1248.

¹¹ Case C-42/97 *Parliament v. Council* [1999] ECR I-869).

making procedures. Here, the Court neither applies the centre of gravity doctrine, nor establishes a hierarchy among legal basis; rather the priority of a policy over another is going to be appraised on a case by case basis, and breach of an institution's prerogative is going to be appraised. Needless to say that this judicial doctrine has led to a large confusion in the legal basis litigation.¹²

As to vertical competence disputes the Court's case-law is as follows:

1) When the Court created the doctrine of implied competences in the *ERTA* case¹³, it extended the competence of the Union to external relations in those fields where the Treaty had assigned concurrent competences. In the joined cases 281, 283-285, 287/85, *Germany v. Commission* [1987] ECR 3203, the Court elaborated further this doctrine. It held that where a legal proviso confers a specific task to the Commission, 'it must be accepted, if that proviso is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out the task'. One of the consequences of the doctrine of the implied powers is that 'negative competence' is foreign to EU Law: there is no area which can be sealed to the Union's intervention if the Union can exercise its influence through measures based on recognised Union's competences.¹⁴

2) The Court does not limit powers broadly worded. The contrary applies: the Court has justified an expansive interpretation of enabling rules. This specially applies to functional competences assigned by articles 95 and 308 EC. However, the SEA influenced the

¹² G. De Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', (1999) *Harvard Jean Monnet Working Paper* 07/99, at 66. For example, whereas in the *Titanium Dioxide* case the Court established the priority of the internal market avenue over environmental protection, in the other similar cases (Case C-155/91 *Commission v. Council* [1993] ECR I-939, Case C-187/93 *European Parliament v. Council* [1994] ECR I-2857) it applied the criterion of the principal/ancillary effect of the Community measure which led to the opposite outcome.

¹³ Case 22/70 *Commission v. Council* [1971] ECR 263.

¹⁴ A. Von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', (2002) 39 *Common Market Law Review*, 227, at 238.

Court's jurisprudence in this sense, for the introduction of more specific legal basis reduced the scope of articles 95 and 308 EC.

3) Indeed, article 308 EC can be referred as legal basis only if other resources are not possible. Determining whether the Treaty attributes powers elsewhere, it is of particular significance in two cases:¹⁵

- a) When the role played by the Parliament is undermined as a consequence of selecting article 308 EC as legal basis. This proviso requires mere consultation of the EP, whereas other specific provisos require co-decision.
- b) When the voting system is different if a more specific legal basis were chosen. Article 308 EC requires unanimity, whereas majority voting is the most common voting system.

4) Member states prefer recourse to article 308 EC rather than specific enabling rules because this legal basis requires unanimity and, therefore, it provides veto power to member states. The shrinking scope of application of article 308 EC since the SEA has undermined member states' voices, which cannot be heard in decision making procedures requiring qualified majority voting (QMV).

5) During the last years, most disputes on vertical competence concern the way in which the Union's powers have been exercised, rather than the total absence of them. In this sense, at the judicial arena, attention is paid to standard-establishing norms such as subsidiarity and proportionality. However, while accepting in principle the justifiability of subsidiarity, the Court has provided little hope that it can be used to restrict Union's legislative action.¹⁶

Legal basis case law matters for the horizontal and vertical distribution of competences. But not only. The Court has stated that the choice of the legal basis is not only a formal question because it could affect the determination of the content of the contested measures. For example, in the *Generalised Tariff Preference* case, the

¹⁵ G. De Búrca and P. Craig, *EU Law* (Oxford University Press, 2003), at 126.

¹⁶ Cullen and Charlesworth, *supra* note 10, at 1264.

Court held that ‘the argument with regard to the correct legal basis was not a purely formal one, since Arts. 113 and 235 EEC (new Arts 133 and 308 EC) entail different rules regarding the manner in which the council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested regulations’. More recently, in Case C-211/01 *Commission v. Council* [2003], the Court stated that

[I]n principle, the incorrect use of a Treaty article as a legal basis which results in the substitution of unanimity for qualified majority voting in the Council cannot be considered a purely formal defect since a change in voting method may affect the content of the act adopted.

If selecting the voting rule is not only a formal issue, what difference does a Court-imposed change of legal basis make in terms of policy outcomes?¹⁷

The explanation

Why would the Court’s decisions on legal basis have an impact upon policy outcomes of the political contest subsequent to the ruling? The reasons for this are basically developed in institutional analysis. It argues that decision-making rules and procedures matter because they define how decisions are taken and which actors participate in which function in this process. These institutional rules, in interaction with the involved actors’ preferences, make a difference with respect to policy choices.¹⁸ Decision-making *rules* define the mode in which decisions are made, i.e. on the basis of unanimity, qualified majority, simple majority, or hierarchical imposition. A particular voting rule, be it unanimity or qualified majority voting, in a decision-making body gives the individual actors which are formally involved in decision-making a specific amount of power as measured by a

¹⁷ Policy outcomes, as defined by policy analysis, are the results of a legislative decision-making process.

¹⁸ D. Diermeier and K. Krehbiel, ‘Institutionalism as a Methodology’, (2003) 15 *Journal of Theoretical Politics*, 123.

(mathematical) voting power index.¹⁹ Decision-making rules also specify the function the participants fulfill, such as an actor having only a consultative role as opposed to a co-decision role, or of an actor having a right of legislative initiative, or a right of resubmission of a legislative proposal etc. Decision-making *procedures* define which actors and how many actors play a formal role in the decision-making process, and by implication which formal actors are excluded. Thus democratic political systems vary according to the precise distribution of formal roles in the political decision-making process between the executive, and one or two chambers of parliament and the people; between parliament and independent regulatory authorities; and between democratic bodies between different levels of government. Or, referring to the European context decision-making procedures vary according to whether only the Council of Ministers, or the Parliament and Council of Ministers, or the Commission exclusively, are involved in a decision-making procedure. In practice, formal institutional decision-making rules and institutional procedures are often linked. We focus here on the possibilities of the EP being involved in the form of consultation, co-operation and co-decision with respect to the Council. The Council, for its part, can take decisions unanimously, by a qualified majority of weighted member state votes, or by a simple majority of member states.

In theoretical terms the relative easiness or difficulty of coming to decisions in view of the applied procedure and rule, have been explained in terms of veto players, i.e. the number of formal actors with diverse preferences involved in decision-making and the decision-making rules applied.²⁰ The more numerous the formal veto-players with different preferences who have a say and a veto-right in a political decision-making process, the more cumbersome and slow the decision-making process will be, and the less likely are the actors

¹⁹ L. S. Shapley and S. Shubik, 'A Method of Evaluating the Distribution of Power in a Committee System', (1954) 18 *American Political Science Review*, 787; W. H. Riker and L. S. Shapley, 'Weighted Voting: A Mathematical Analysis for Instrumental Judgments', in J. R. Pennock and J. W. Chapman (eds), *Representation* (Nomos, 1968), 199-216.

²⁰ G. Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press, 2002).

to agree on a change of the status quo, i.e. the more incremental the policy outcome. And vice versa: The less formal veto-players are involved, the higher the potential difference between a decision-making outcome and the status quo is expected to be.

In developing our argument, we assume that, given that institutional rules and procedures distribute formal power, all political actors taking part in a policy contest prefer rules and procedures that are most likely to favour their own policy preferences. We argue, following Jupille²¹, that the strategic use of procedural and decision-making rules responds to opportunities i.e. the existence of institutional alternatives, and incentives, i.e. the existence of potential influence gains from alternative institutions allowing to wield more influence over policy contents. The institutional higher order rules (constitutional rules) define a menu of lower order procedural and decision-making alternatives and set forth conditions or criteria for selecting among them. The existing criteria constrain actors in selecting among them, e.g. choosing an incorrect rule may entail sanctions. However, these criteria are by no means always clear-cut; rather they are ambiguous and open to strategic use. We argue that actors as influence maximisers over policy contents will seek to press for the usage of institutional rules giving them the most power in the legislative process. Where there is rule ambiguity or conflict about the application of the correct rule, actors tend to turn to a third party or arbitrator, e.g. the ECJ, in order to control the application of the 'correct' institutional rule.

It is further assumed that empowering particular formal political actors tends to favour particular policy outcomes. Substantive policy preferences are attributed to particular formal actors according to their past voting records in different policy areas. Thus, preferences for market correcting policies (environmental policy, social policy, consumer protection, development policy etc.) are attributed to the Parliament whose members depend on a constituency that in its majority is likely to favour such policies. The Commission, as a collegiate body, by contrast, in the past has clearly promoted market

²¹ J. Jupille, *Procedural Politics: Issues, Influence, and Institutional Choice in the European Union* (Cambridge University Press, 2004).

liberalisation goals. As to the Council, the overall attribution of policy preferences is more difficult and varies according to individual member states and the coalitions formed among member states, and these in turn depend on the policy issue at hand. Thus, to give an example, consistent preferences for strict environmental policies or a policy of transparency may be attributed to the Nordic countries, or consistent preferences for the liberalisation of state-regulated utilities to the UK.

When formal actors press for specific decision-making *rules*, they assume that – given diverse preferences of the actors involved – unanimity rules produce pareto-optimal outcomes, for no actor would accept a policy decision that is not improving his or her own status-quo-situation; since each actor is able to block a decision, policy outcomes will favour the status quo or allow for only incremental changes. Unanimity rules favour decision-making by consensus, under which no actor involved in the decision-making process formally objects to the proposed decision. If a qualified majority rule is prescribed, negotiations have to take place to build a supportive majority, more than incremental changes may be achieved. If in contrast a simple majority rule is applied, even a narrow majority can impose changes upon a sizeable minority, hence more significant policy changes may be expected. If an actor can impose a decision (such as a regulatory authority or the Commission with its legislative rights in the case of public undertakings), extensive policy changes may be expected.

Given these assumptions and general reasoning, we argue that if a formal political actor is faced with a policy-making deadlock or has been defeated in a policy contest, she will turn to a court in order to achieve a change in decision-making rules and procedures in order to achieve a different policy outcome.

On the basis of these considerations we claim that

H1: If a court imposes a change in decision-making rule or procedure, the policy outcome of the political process at t2 will be different from the outcome of the political process at t1.

And more specifically,

H1.1: *If a court prescribes a change in procedure providing for the inclusion of one or more formal actor(s) with divergent preferences in the decision-making process, the policy outcome of t2 will be more incremental than the policy outcome of t1.*

H1.2: *If a court prescribes the application of a qualified majority rule instead of a unanimity rule, the policy outcome at t2 will be less incremental than policy outcomes at t1 and vice versa.*

Specifying the hypotheses for our research context we submit that

H1.1.1: *If the ECJ provides for the application of the cooperation procedure instead of the consultation procedure, and even more so, of the co-decision procedure instead of the cooperation procedure, the strengthened role of the EP, will be reflected in the policy outcomes' stronger market-correcting contents.*

H1.1.2: *If the ECJ limits the scope of the legal basis requiring a cooperation or co-decision procedure involving the Parliament, this will be reflected in less market-correcting outcomes at t2.*

H1.1.3: *If the ECJ provides for the Council to apply the QMV instead of the unanimity rule, policy outcomes at t2 will be less incremental than at t1.*

Operationalisation, data collection, cases

In order to empirically explore the above hypotheses we make a comparison of the political decision-making processes and their policy outcomes before and after the ruling of the court (t1 and t2). The logic of comparison is applied along a longitudinal axis. It is claimed that, *ceteris paribus*, it is the ruling of the Court on legal basis which changes the decision-making and procedural rules, that accounts for a difference in policy outcome. This comparison in time is replicated literally, i.e. without variation in the independent variable, across all eight cases of Regulations and Directives, in which the ECJ has changed the legal basis.

The independent variable is a court-imposed change of decision-making rule or decision-making procedure. It is operationalised as

the shift from one available decision-making rule or procedure in European policy-making to another, e.g. from intergovernmental decision-making among member-state governments to the cooperation procedure, under which the Parliament must be consulted; or from the co-operation procedure to the co-decision procedure under which the Parliament is a full co-legislator with the Council. The shift in decision-making rules is operationalised in terms of a shift from unanimity to qualified majority rule.

The dependent variable, the expected shift in policy outcomes is measured in terms of a shift from market-creating to market-correcting policies and vice versa; the indicators used are the increase or decrease of pro-environment or pro social policy elements in legislation. The assessment of the degree of change brought about between t1 and t2 is made in terms of an assessment of the latter on a continuum between incremental, medium and substantial.

The data used are the legislative texts and reports of the decision-making processes in the Legislative Observatory Procedure Review. They are studied on the basis of a qualitative content analysis. In some of the older and politically less salient cases, i.e. the Temporary Importation of Containers Regulation,²² the Trade in Animal Glands and Organs Regulation,²³ and the Undesirable Substances in Animal Nutrition Regulation,²⁴ no information was available on the political decision-making process at t1 and t2. Hence we restricted ourselves to the comparison of the content of the Regulations/directives before and after the Court ruling in order to see whether the changed legal basis has caused a change in policy outcomes.

As regards the determinacy of explanation, there is one explanatory variable, decision-making rules and decision-making procedures (= institutional rules) which in interaction with the above described assumed preferences of the actors involved are expected to produce a particular policy outcome. With one explanatory variable and two cases divided up on a longitudinal basis (case 1: political decision-

²² Case C-275/87, *Commission v. Council*, [1989] ECR I-259.

²³ Case C-131/87, *Commission v. Council*, [1989] ECR I-3743.

²⁴ Case C-11/88, *Commission v. Council*, [1989] ECR I-3799.

making before the court ruling in phase 1 and case 2: political decision-making after the court ruling in phase 2). There is no indeterminacy in explanation.

The hypotheses in the light of the empirical data

Case 1: Generalised Tariff Preferences Regulation (GTPR)

The political decision-making process and its policy outcome at t1: In 1985 the Council adopted two Regulations (3599/85 and 3600/85) on the application of general tariff preferences for products of developing countries for the year 1986. These Regulations make provisions for a differentiation in the granting of advantages according to the competitive capacity of the beneficiary countries. They were based on the residual competences clause (Art. 235 EEC, now Art. 308 EC), because, as the Council argued, although the measures are related to the commercial policy of the Community (Art. 113 EEC, now Art. 133 EC), they also had an impact on development policy. The two legal bases, common commercial policy and residual competence, entail different decision-making rules: unanimity in the Council under the residual competence clause (Art. 235 EEC), and Commission negotiation plus qualified majority voting in the Council under common commercial policy (Art. 113 EEC). The Commission brought judicial actions against both Regulations. It contended that common commercial policy based on QMV should be used as the sole legal basis.

The first Court ruling: In the GTP judgment The Court considered that the contested Regulations were void due to their wrong legal basis because of two reasons. First, recourse to the residual competence clause (Art. 235 EEC) is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure; and, second, the existence of a link to development problems does not imply that the measure is excluded from the sphere of the common commercial policy.

The political decision-making process and its policy outcome at t2: The Council Regulations for the year 1987, on textile products (3925/86) and on industrial products (3924/86), followed the Court's ruling and were founded on the specific common commercial policy (Art. 113 EEC). However, the Commission proposed a centralised administra-

tion of the quotas. For 15 years, the Council had maintained an apportionment of the Community tariff quotas into fixed national shares. This decentralised system guarantees member states leeway in the management of Community tariff quotas. Hence, the Council rejected the Commission's proposal and adopted a decentralised administration of tariff quotas. In response to this measure the Commission challenged the Council Regulations in Court.

The second Court ruling: For the second time in two years a judgment had to solve a conflict on GTP (Case 51/87 *Commission v Council*)²⁵. To the Court, the system approved by the Council – i.e. the apportionment of the Community tariff quotas into fixed national shares – is a typically intergovernmental scheme which leads to distortions of trade. However, the Court argued that it is compatible with the Treaty, and in particular, with free movement of goods (Art. 9 EEC, now Art. 23 EC) and common agricultural policy (Art. 113 EEC) under the condition that two requirements are satisfied. First, the apportionment into national quotas must be justified by administrative, technical or economic constraints, which preclude the administration of the quota on a Community basis. Second, the apportionment scheme must ensure that, until the overall Community quota is exhausted, goods may be imported into a member state even if it has exhausted its share without having to bear customs duties at the full rate. Thereby, the Court favoured a Community imprint in the common customs tariffs policy, and subjected the previous Council intergovernmental system to requirements which imposed centralised administrative features.

The political decision-making process and its policy outcome at t3: The political decision after the second Court ruling, while basically accepting the decentralised management by member states, provides that the Commission, too, will keep account of the quantities drawn by the member states.

Conclusion GTP: In the first GTP case, the Court imposed a new legal basis, namely common commercial policy, and limited the use of the residual competence clause. Hence it imposed a shift from unanimity

²⁵ Case 51/87, *Commission v. Council* [1988] ECR 5459.

(under the residual competences clause) to QMV (under commercial policy). We argued that a shift from unanimity to QMV should make a change in policy content easier since the individual actors do not have a veto power. However, in spite of the changed decision-making rule, the decision at t2 lacked the non-incremental communitarian imprint which one could expect of a measure adopted by QMV; instead a decentralised administration of tariffs was opted for. This amounts to a disconfirmation of our hypothesis (H1.1.3). As in coming cases, the pursuing of institutional interests seems to have been the prevailing motive: securing the latitude of member states in administering the tariff quotas was the most important policy goal for each member state.

Case 2: Temporary Importation of Containers Regulation (TICR)

The political decision-making process and its policy outcome at t1: Council Regulation 2096/87 on the temporary importation of containers was approved according to the decision-making rule established in the residual competences clause (Art. 235 EEC, new Art. 308 EC), namely unanimity. It provides for the conditions for the import and use of containers, loaded with goods or not, which are intended to be subsequently re-exported. The Commission disagreed with the legal basis and brought a judicial action.

The Court ruling: To the Court,²⁶ recourse to the residual competence cause was not justified since the aim of the measure was the introduction of temporary importation arrangements for containers, and the Council should have adopted the Regulation on the basis of the customs union (Art. 28 EEC, now Art. 26 EC) which requires QMV in the Council, and common commercial policy (Art. 113 EEC).

The political decision-making process and its policy outcome at t2: In compliance with the Court's ruling, the TICR 3312/89 was founded on the common commercial policy (Art. 113 EC) The comparison of the texts of the Directives of 1987 and 1989 reveals no difference in the substantive requirements.

²⁶ Case 275/87, *Commission v. Council* [1989] ECR 259.

Conclusion T1CR: Although the decision-making rule was changed from unanimity to QMV, no difference in the requirements of the policy outcome of t1 and t2 can be identified. Hence our hypothesis (H1.1.3) is disconfirmed.

Case 3: Undesirable Substances and Products in Animal Nutrition Directive (USPAND)

The political decision-making process and its policy-outcome at t1: The Commission proposed legislation on undesirable substances and products in animal nutrition which seeks to achieve an approximation of member states' provisions regarding the permitted level of pesticides residues in feeding-stuffs. The legal basis chosen by the Commission was common agricultural policy which is based on QMV in the Council. The Council adopted the Directive (87/519), however, on the basis of the common market (Art. 100 EEC, now Art. 94 EC) which entails unanimity voting in the Council. In consequence, the Commission brought a judicial action challenging the legal basis.

The Court ruling: The Court upheld the Commission's application and annulled Directive 87/519.²⁷ It considered that the aim of the Directive contributes to the achievement of the common agricultural policy objectives (Art. 39 EEC, now Art. 33 EC) and therefore, should have been based on it. Moreover, when a measure such as USPAND pursues an objective of common agricultural policy and other objectives of the common market, and this measure involves the harmonisation of national laws, there is no need to make recourse to common market policy. Finally, the Court argued that common agricultural policy is a special case of common market policy, and that, therefore, the former takes precedence over the latter.

The political decision-making process and its policy outcome at t2: The Council adopted the new Directive in 1991. The comparison of the two texts shows that the contents of the old and the new Directive are identical.

²⁷ Case C-11/88, *Commission v. Council* [1989] ECR I-3799.

Conclusion UDSPAND: Our claim (H.1.1.3) that a shift in decision-making rule from unanimity to QMV will lead to changed policy outcomes is disconfirmed.

Case 4: Trade in Animal Glands and Organs Directive (TAGOD)

The political decision-making process and its policy outcome at t1: In 1987 the Commission brought a proposal amending previous Directives on health problems affecting intra-Community trade of fresh meat. It founded its proposal on common agricultural policy (Art. 43 EEC, now Art. 37 EC) which requires QMV in the Council. The Directive lays down health and veterinary inspection requirements for the importation of bovine animals, swine and fresh meat from third countries, as well as glands and organs, including blood, required in large quantity by the pharmaceutical industries to ensure the availability of extracts and enzymes for human and veterinary medicine. It also provides that member states can get derogations from the Directive's provisions subject to an authorisation of their veterinarian authorities. The Council adopted the Directive but changed the legal basis to common market (Art. 100 EEC, now Art. 94 EC), requiring unanimity in the Council, and to common commercial policy (Art. 113 EC). In response, the Commission brought a judicial action before the Court contesting the legal basis.

The Court ruling: The Court declared the Directive void. It argued that the aim of the measure is to guarantee the supply of fresh meat at reasonable prices. This falls under the scope of common agricultural policy (Art. 43 EEC). Moreover, agricultural policy may include other related policies such as health. Finally, common commercial policy (Art. 113 EC) can only be used if products are exported to third countries. Through its ruling, the Court changed the decision-making rule from unanimity back to QMV. According to our general reasoning we would expect that this change of decision-making rule should be reflected in a less incremental nature of the policy decision.

The political decision-making process and its policy outcome at t2: The comparison of the texts of the Directives of 1987 and 1991 does not reveal any differences in terms of requirements addressed to member states.

Conclusion TAGOD: The change of decision-making rules imposed by the Court did not ensue in a change of policy content. Therefore, our claim (H1.1.3) that a change from unanimity to QMV will be reflected in the decision-making outcome is not confirmed.

Case 5: The Titanium Dioxide Waste Directive (TDWD)

The political decision-making process and its policy outcome at t1: In 1978 the Council adopted Directive 78/176 on waste from the titanium dioxide industry²⁸ which aimed at the progressive reduction of pollution caused by this industry. It has a twofold legal basis: Art. 100 EEC (now Art. 94 EC), for the measure aimed at harmonising the functioning of the common market requiring a qualified majority vote in the Council, and the residual competence clause (Art. 235 EEC), requiring unanimity, for the measure pursuing the protection of the environment. Art. 235 EEC was invoked because in the pre-SEA era, the powers required for Community legislation in the case of environmental protection have not been provided for by the Treaty. The TDWD requested the Commission to submit a proposal for harmonising the targets fixed in national waste reduction programs. The Commission put forward a proposal on the basis of the harmonisation of the common market and the residual competence clause. This proposal was rejected by the United Kingdom. Since unanimity was required under the residual competence clause, it was able to veto the measure in the Council. Thus, this first round of the decision-making process ended in a failure.

Nine years later, in 1987, after the adoption of the SEA, the Commission resubmitted the proposal now solely based on the harmonisation of the internal market (Art. 100a EEC, now Art. 95 EC) requiring QMV, and the inclusion of the Parliament under a cooperation procedure, at the time. This means that the Council can decide on the basis of QMV when accepting the amendments to its common position proposed by the Parliament and included by the Commission. However, it has to decide on the basis of unanimity when it intends to take a decision after its common position has been rejected by the Parliament or if it wants to modify the Commission's re-examined proposal. Hence, internal market policy strengthens the

²⁸ Directive 78/176 [1978] OJ L54/19.

institutional role of the Commission and the Parliament vis-à-vis the Council, whilst environmental protection reduces the intervention of the Parliament to consultation. Therefore, with the legal basis chosen by the Commission, the decision-making procedure included an additional actor with well-known preferences for strict environmental protection, albeit without veto-power. The Council, however, changed the legal basis and adopted the TDWD (89/428)²⁹ under Art. 130s EEC (now Art. 175 EC) concerning environmental protection which, at that time, required unanimity. This time, the United Kingdom did not oppose the proposal. However, although it had obtained the *policy* results it had sought to achieve, the Commission, supported by the Parliament, challenged the legality of the new TDWD before the Court, arguing that it should have been based on internal market (Art. 100a EEC).

The Court ruling: In the *Titanium Dioxide* case, the Court upheld the argument of the Commission and declared the Directive void. It argued that the objectives of environmental protection referred to in Art. 130s EEC may be pursued by harmonising measures adopted on the basis of Art. 100a EEC; moreover, it held that the involvement of the Parliament should not be jeopardised. Although, in previous cases, the Court had held that a policy measure can be based on two provisions, if it aims at two policy objectives, in the *Titanium Dioxide* case, the Court argued that there are substantive and procedural differences which prevent their combining. Substantively, the Court ruled that whereas Community's efforts in environmental protection based on Art. 130s EEC merely granted subsidiary powers to the Community and was inspired by a philosophy of minimum level of protection, harmonisation of the internal market (Art. 100a EEC) is based on powers which are not subsidiary and are directed towards a high level of protection. Therefore, harmonisation of the internal market rather than environmental protection is the appropriate legal basis for the TDWD.

Procedurally, the Court pointed at a contextual argument, i.e. the fact that the Directive was adopted after the SEA. The appropriate decision-making procedure, and therefore, the role that different

²⁹ Directive 89/428[1989] OJ L201/56.

European institutions play in the overall decision-making process were at the core of the judicial litigation. The Court stated that:

An essential element of the cooperation procedure would be undermined if, as result of a simultaneous reference to Art. 100a and 130s, the Council were required [...] to act unanimously.

However, the Court forgot that part of this post-SEA scenario is the introduction of new express legal basis which undermine the scope of application of general and functional competence clauses.

The political decision-making process and its policy outcome at t2: In response to the Court's ruling, the Commission submitted a new text which was adopted under the internal market proviso.³⁰ According to our hypothesis (H1.1.1) a Directive adopted the cooperation procedure including the Parliament, as with an internal market measure, should be reflected in more market-correcting policy elements, i.e. of environmental protection at t2, since the actor with strong environmental preferences has more weight in the decision-making process. A comparison of the texts of the Directives of 1989 and 1992, however, does not substantiate this claim. The requirements for the programs for the reduction of pollution caused by waste from the titanium dioxide industry are identical in the two texts.

Conclusion TDWD: The empirical story of TDWD points to two findings. Firstly, in spite of the altering of the institutional rules, from an intergovernmental process with unanimity rule to a cooperation procedure including the Parliament and with QMV in the Council, policy outcomes remain unchanged. Hence, our hypothesis (H1.1.1) is disconfirmed. Secondly, although the institutions had agreed on the policy content of the Directive at t1, and the Council had accepted the proposal of the Commission (albeit under a different legal basis), the Commission, jointly with the Parliament, launched a judicial procedure. This suggests that, rather than *policy* concerns, it was the *institutional* interest that led governments to adopt the Directive on a legal basis preserving their prerogatives rather than the basis

³⁰ OJ 1992 L409/11.

proposed by the Commission. And again rather than *policy* concerns, it was the institutional interest of the Commission and the Parliament to go to Court questioning the legal basis chosen by the Council although they agreed with the contents of the adopted Directive.

Case 6: Residence of Students Directive (RSD)

The political decision-making process and its policy outcome at t1: In 1990 the Council adopted a Directive (90/366) on the right of residence of students of EC nationals admitted for vocational training in other member states. The Directive provides that member states shall, in order to facilitate access to vocational training, grant the right of residence to any student who is enrolled in such a scheme and is a national of a member state, provided that she has sufficient resources. It was adopted on the residual competence clause of Art. 235 EEC (now Art. 308 EC) implying unanimity in the Council. The Parliament challenged the legal basis, arguing that recourse to the residual competences clause is only justified where no other provision of the Treaty is available to adopt the measure. In this case non-discrimination (Art. 7 EEC) and common cultural policy (Art. 128 EEC) could have been used. Both guarantee the participation of the Parliament in the decision-making process.

The Court ruling: The Court upheld the Parliament's pleas and declared the Directive void.³¹ It considered that the Directive did not concern the free movement of workers as the Council stated, but rather, as the Directive spells out, seeks to ensure the non-discrimination of nationals. Hence the Court changed the decision-making procedure and voting rule. It ordered the inclusion of the Parliament as a decision-maker and prescribed QMV for the Council.

The political decision-making process and its policy outcome at t2: The replacing Directive 93/96/EEC is founded on the co-decision procedure. According to our general argument we should expect a difference in policy outcome because the Parliament is involved in the decision-making process and QMV may be used in the Council. Indeed, the Parliament proposed a range of further activities, among others, to include researchers and to remove legal, administrative,

³¹ Case C295/90, *European Parliament v. Council* [1992] ECR I-4193.

language, cultural and financial barriers to mobility as well as the mutual recognition of qualifications (Legislative Observatory Procedure View 2003). Most of the amendments were accepted by the Commission. The Council in its common position adopted in full, in part or in essence 37 of those of the 56 amendments proposed by the Parliament. In its second reading the Parliament accepted the Council's common position and the Commission's view that researchers should not be included in the recommendations (Legislative Observatory Procedure View, 2003).

Conclusion RSD: A comparison of the texts of the 1990 and 1993 Directives reveals that there is no difference in the contents of the Directives. The modification of the decision-making rule and procedure by the Court, did not affect the outcome of the decision-making process. This amounts to a disconfirmation of our hypothesis (H1.1.1 and H1.1.3).

Case 7: The Protection of the Forest Regulations (PFR)

The political decision-making process and its policy outcome at t1: In 1997 the Council adopted two PFRs, namely on the protection of the forest against atmospheric pollution (Regulation 307/97)³² and on the protection of forest against fire (Regulation 308/97).³³ Both Regulations were adopted on the basis of the common agricultural policy of Art. 43 EEC (now Art. 37 EC) which requires that the Parliament be consulted and that the Council decides by a qualified majority vote. The Regulations provide for setting up a forest observation network, periodic inventories of damage caused to forests, the monitoring of forests and the devising of methods of restoring damaged forests, as well as preventing damage in fire-risk zones and a funding of 70 million ecus (1997 -2001) (Reg. 308/1997) and 40 million ecus (Reg. 307/1997). The Parliament challenged the legal basis of both Regulations adopted by the Council, arguing that the chosen legal basis undermined its participation in the decision-making process, because it reduced its role to consultation. It also argued that environmental protection policy (Art. 130s EEC), implying the cooperation procedure, was the correct legal basis

³² OJ 1997 L51, 9.

³³ OJ 1997 L51, 11.

because the maintaining of an ecological balance was the aim of the Regulations.

The Court ruling: The Court ruled that the Council should have taken Art. 130s (now Art. 175 EC) as the sole legal basis and that, consequently, the Regulations were to be annulled. It argued that although the measures may have implications for agricultural policy,

those indirect consequences are incidental to the primary aim of [...] the protection of forests [...] intended to ensure that the natural heritage represented by forest ecosystems is conserved, and [...] not merely [...] their utility to agriculture.

The Court rejected the argument developed in the *Titanium Dioxide* case, namely that priority has to be given to the legal basis guaranteeing the participation of the Parliament, arguing that in the post-Maastricht institutional environment, where co-operation and co-decision of the Parliament had been substantially extended, this was no longer necessary.

The political decision-making process and policy outcomes at t2: Although there was no shift of decision-making rule of the Council, QMV is required under common agricultural policy and environmental policy, there was a shift in the applied procedure from consultation to co-decision strengthening the role of the Parliament. According to our general argument this should be reflected in stricter requirements in environmental protection. In 1999 the Commission submitted new proposals for the Regulation on the protection of Community forests against atmospheric pollution, proposing to extend Regulation 3528/86 by prolonging the period of application to 15 years from 1997. It also provided for an increase of funding for the implementation of the monitoring scheme by 35 million from 1997 to 2001. The Parliament brought 12 amendments to the Commission proposal. The most important among them aimed for a more extensive and intensive monitoring of the forests by raising the proposed budget allocation to 44 million for the same period. The Commission incorporated eight of the Parliament's amendments, such as the increase in financial allocation and the recommendation of committee procedure. The Council made a number of changes

based on the Parliament' amendments, but rejected the proposed budget allocation.³⁴

Conclusion Protection of the Forest: The empirical story of the case shows that indeed the Court-imposed inclusion of the Parliament in the decision-making process did introduce environmentally more demanding provisions, therefore confirms our hypothesis that an imposed change in decision-making procedure by including an actor with corresponding policy preferences makes a difference in terms of policy outcomes. A range of amendments of the Parliament were incorporated into the Regulations, however, not its most demanding provision, the substantial increase in budget allocation for the monitoring scheme. Nevertheless, it also emerges that the EP launched the Court procedure not only because of the substantive policy goals that it sought to achieve, but in order to strengthen its own institutional position in the decision-making process. This claim was granted by the Court.

Case 8: The Tobacco Advertisement Directive (TAD)

The political decision-making process and its policy outcome at t1: In 1989 the Community prohibited the advertising of cigarettes and other tobacco products on television. This was the content of the Television without Frontiers Directive 89/552/EEC³⁵ which was founded on freedom to supply and receive services (Art. 57.2 EEC, and 66 EEC, now after amendment, Arts. 47 and 55 EC). In 1989 the Commission proposed a Council Directive under the cooperation procedure concerning the advertising of tobacco products in the press, bills and posters providing for partial harmonisation based on the most advanced system of governing authorised advertising, the Irish one. Member states would have the right to introduce stricter provisions than those contained in the Directive.

The Parliament in 1990 in its first reading called for a number of amendments which made the proposal more stringent. Among other things it asked for member states to be allowed to take stricter measures, a definition of advertising so as to prevent the ban from

³⁴ The Observatory Procedure View 2003.

³⁵ [1989] OJ L298/23.

being circumvented, to allow consumer organisations to be recognised as having a legitimate interest in taking action against tobacco products.³⁶ But the Parliament also recognised that advertising contributes to consumer information. In its opinion under the cooperation procedure, it called for a total ban on advertising for tobacco products. The Council subsequently failed to achieve a qualified majority because some member states were in favour of a total harmonisation instead of a partial harmonisation of authorised advertising.

In consequence, the Commission submitted a new proposal under Art. 95 EC implying the cooperation procedure. It proposed a complete harmonisation based on the complete prohibition of advertising. Again, the Parliament in its first reading in 1992 asked for stricter requirements, such as the specification of the notion of advertising, the exclusion of vending machines from selling outlets and defended the rights of anti-tobacco groups. It also demanded derogation for companies' advertisements for other than tobacco products under the same brand name. Only the last amendment of the Parliament was incorporated into the revised proposal by the Commission. In 1995, the Council Presidency, noting that there was no qualified majority support for the Commission proposal, put forward an alternative based on Art. 95 EC. Only in 1998 did the Council issue its common position which provided for the ban of all forms of advertising and sponsorship of tobacco products to be phased in under certain conditions.³⁷ The Commission considered the Council common position, obtained after six years of negotiation, as an acceptable compromise and so did the Parliament which accepted it in 1998 (Legislative Observatory Procedure View 2003). However, after the adoption of the Directive, Germany which had been outvoted in the Council brought action for annulment before the Court, claiming that harmonisation of internal market (Art. 95 EC) was not the proper legal basis.

³⁶ The Parliament also demanded that automatic vending machines were not to be included under tobacco sales outlet allowed for advertising in a closed setting.

³⁷ It also accepted the derogation proposed by the Commission and the Parliament for brand names already used for tobacco products and other goods.

The Court ruling: In the *Tobacco* case³⁸ the Court upheld the German government's pleas and declared the Directive void. The main plea of the applicant was that the harmonisation of internal market (Art. 95 EC) was not the proper legal basis for the TAD because, if the principal/ancillary effects doctrine is applied, recourse to internal market (Art. 95 EC) is not possible when the measure focuses on the protection of public health. The Court argued that the dispute did not concern the choice of alternative legal basis, but rather the *scope* of the chosen legal basis (Art. 95 EC). Indeed, in the framework of vertical legal basis disputes, the Court tries to clarify the scope of functional competence clauses, and by so doing, it delimits member states' competences and the Union's powers.³⁹ In the TAD, the Court stated that the competence to harmonise the internal market cannot be used as a general power to regulate all aspects relating to the internal market. Hence the aim of the TAD exceeds the scope of the chosen legal basis. The Court also argued that the effects of the TAD were incompatible with the free movement of goods and undistorted competition. Since products related to the advertising of tobacco cannot move freely in other member states.

The political decision-making process and its policy outcome at time t2: In compliance with the Court ruling, the Commission in 2001 proposed a new draft Directive of a more limited scope, restricting itself to certain types of advertising with cross-border effects based on freedom of services and harmonisation of internal market. The Parliament in its decision did not insert stricter requirements of health protection⁴⁰ and the Council approved the proposal at the end of 2002.

Conclusion TAD: The Court prescribed a limitation in the scope of the legal basis of internal market harmonisation. This meant that the rather stringent requirements introduced by the Commission, the Parliament and the Council under the first Directive were *de facto* reduced. Thus, limiting the scope of a legal basis, did translate into a

³⁸ Case C-376/98, *Germany v. European Parliament and Council* [2000] I-8419.

³⁹ Von Bogdandy and Bast, *supra* note 14, at 244.

⁴⁰ The Legislative Observatory Procedure View 2003.

change in stringency in policy outcomes, and thus lends some support to hypothesis H1.1.1.

Case 9: Energy Star Agreement (ESA)⁴¹

The political decision-making process and its policy outcome at t1: The Energy Star Agreement between the USA and Europe is designed to coordinate energy-efficient labeling programs for office equipment. Since this coordination constitutes, to the Commission, a commercial-policy measure, on July 1999 the Commission submitted to the Council, for the purpose of concluding the Energy Star Agreement, a proposal for a decision based on Article 133 EC, in conjunction with Article 300.2 EC. These provisos require QMV in the Council and no participation of the Parliament. The Council, however, unanimously changed the legal basis and adopted the Decision to authorise the signature of the Energy Star Agreement under Article 175.1 in conjunction with Article 300.2 EC (this rule grants information to the Parliament). Following a favourable opinion from the Parliament, the Council approved the Energy Star Agreement by Decision 2001/469, on the basis of Article 175.1, in conjunction with the first sentence of the first subparagraph of Article 300.2, the first subparagraph of Article 300.3 and Article 300.4 EC.

The Court ruling: To the Court, The Energy Star Agreement simultaneously pursues common-commercial policy and environmental-protection objectives. The environmental effect of the Energy Star Agreement is only ancillary, since the reduction in energy consumption is an indirect effect in contrast to the effect on trade in office equipment which is direct and immediate. The correct legal basis should be article 133 EC in conjunction with Article 300(3) EC. This decision challenges the policy arena in which the Energy Star Agreement ought to be signed (from environmental protection to common-commercial policy); however, the decision-making rule and the decision making procedure remain unchallenged as QMV and Parliament's consultations apply to the new decision.

The political decision-making and its policy outcome at t2: The change of policy arena had no effect on the content of the new Decision

⁴¹ Case C-281/01, *Commission v. Council*, 12 December 2002.

concerning the conclusion on behalf of the European Community of the Energy Star Agreement. This new Decision is identical to the declared void by the Court.

Conclusion Energy Start Agreement: The change in policy arena may have consequences for member states, as the amount of discretionary powers varies depending on the legal basis of Community action. However, this assumption is disconfirmed by the fact that member states did not support the Council on this case.

Case 10: Protection of the environment through criminal law⁴²

The political decision-making process and its policy outcome at t1: On January 2003, on the initiative of Denmark, the Council adopted the Framework Decision 2003/80/JHA, on the protection of the environment through criminal law. It was based on Title VI of the TEU, in particular Articles 29, 31.1.e) and 34.2.b EU. This framework decision lays down a number of environmental offences, in respect of which the member states are required to prescribe criminal penalties. The Commission objected the measures and submitted a legislative initiative based on Article 175 EC, namely a directive of the Parliament and the Council on the protection of the environment through criminal law. However, although the Council considered this proposal, it came to the conclusion that the majority required for its adoption could not be obtained. To the majority of the Council, the proposal made by the Commission went beyond the powers attributed to the Community by the Treaty establishing the EC. The position of the Council is better understood if one takes into account that Article 34 EU establishes unanimity in the Council (and, therefore, veto-power to member states), excludes the participation of the Parliament, and excludes direct effect of adopted measures. A truly intergovernmental approach to environmental protection through criminal law was logically preferred to a supranational one.

⁴² Case C-176/03, *Commission v. Council*, 13 September 2005. The Commission was supported by the Parliament, and the Council by Denmark, Germany, Greece, Spain, France, Ireland, The Netherlands, Portugal, Finland, Sweden, and UK.

The Court ruling: To the Court, the Framework Directive aims the protection of the environment; as to the content, article 2 establishes a particular list of serious environmental offences, in respect of which member states must impose criminal penalties, and articles 2 to 7 entail a partial harmonisation of criminal laws of member states. Neither criminal law nor the rules of criminal procedure fall within the scope of Community's competence. However, Community legislature can adopt measures which relate to the criminal law of the member states which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. In this sense, the Framework Directive infringes Article 47 EU (it provides that nothing in the Treaty on EU is to affect the EC Treaty) as it encroaches on the powers which Article 175 EC confers on the Community.

The political decision-making and its policy outcome at t2: Since protection of the environment through criminal law falls under the scope of the Community Treaty, the new Directive was based on article 175 EC and adopted following the co-decision procedure and applying QMV at the Council. There are differences between the annulled Framework Directive and the new Directive: provisos concerning extradition and prosecution of offenders issues which belongs to the Third Pillar falls down in the new measure; a more detailed description of criminal offences is included; the catalogue of sanctions disappears in the new Directive and a general reference to effective, proportionate and dissuasive penalties is included.

Conclusion Protection of the environment through criminal law: The participation of the Parliament in the decision-making process under the form of co-decision entail, according to our hypothesis H1.1.1, a stronger market-correcting contents; the substitution of unanimity voting by QMV, according to our hypothesis H.1.1.3, leads to a less incremental policy outcome than in t1. These hypotheses are disconfirmed for there is no substantial change in environmental protection policy trough criminal law. Although the new directive issued after the Court ruling contains a more detailed description of criminal offences, this is due to normative technique reasons, namely, the direct effect doctrine is applicable to Community law, whereas it is expressly excluded from measures adopted under the Third Pillar (Article 34 TEU). The shift from EU to EC also explains the

withdrawal of a catalogue of sanctions and regulation on extradition and prosecution of offenders.

Conclusion

We claimed that the change of institutional rules by the European Court of Justice alters the decision-making conditions in the European political arena in such a way as to have an impact on policy outcomes. More specifically, we argued that the Court-imposed inclusion of the European Parliament in the decision-making process on the basis of the cooperation and co-decision procedure would increase market-correcting policies, and usage of QMV instead of unanimity in the Council would lead to less incremental policy changes. These claims are only partially borne out by the evidence of the eight empirical cases in which the Court changed the legal basis after the SEA. In only three cases, the *Residence of Students*, the *Protection of the Forest*, and the *Tobacco Advertisement*, there is some evidence that the inclusion of the Parliament did give rise to stricter market-correcting legislative requirements. In the *General Tariff Preferences*, *Importation of Containers*, *Undesirable Substances and Products in Animal Nutrition*, *Importation of Animal Glands and Organs*, *Titanium Dioxide*, *Energy Star Agreement* and *Protection of the environment through criminal law* cases, in contrast, neither the changed decision-making rule from unanimity to qualified majority voting (QMV) nor the inclusion of the Parliament made a difference with respect to policy outcomes. This is shown by the identical contents of the legislation before *and* after the Court ruling.

What the analysis of the political processes and the Court rulings, suggest, instead, is that it is the institutional interests of the involved formal actors which prevail. The Parliament favours decision-making procedures in which it is involved, i.e. the co-decision procedure over the cooperation procedure, and the cooperation procedure over the consultation procedure or a pure intergovernmental approach. The Council regularly changes the legal basis proposed by the Commission to a legal basis involving unanimity instead of QMV.⁴³ The Commission, on its part, always launches a Court procedure

⁴³ See also Dehousse, *supra* note 2.

when the Council has changed the legal basis proposed by the Commission. Thus, although the substance of its proposal had been accepted by the Council in the *Titanium Dioxide* case, the Commission challenged the legal basis because member states had changed it from QMV to unanimity. Similarly in the *General Tariff Preferences* case, where the Commission contested the Council's change of legal basis for institutional reasons and, additionally, sought to shift implementing powers from member states to itself. The Parliament, in the *Protection of the Forest* and the *Students Residence* cases, explicitly challenged the legal basis applied by the Council on institutional grounds, arguing that it saw its role in the decision-making process undermined. The Court, for its part, in its ruling in the *Titanium Dioxide* case invokes the overall-distribution of decision-making power when giving reasons for its decision to impose the cooperation procedure, namely that the Parliament's rights should not be jeopardised.

Hence, the empirical result suggests a reconsideration of our general argument. The assumption that actors are motivated by the wish to maximise their policy goals when challenging the existing legal basis, is challenged since our findings show that actors are prevalingly driven by the desire to increase their institutional influence. At the same time, there can be no doubt, that actors may also be motivated by policy goals, when seeking to obtain a court-imposed change of legal basis. So, how could one systematically explain when one or the other motive prevails? One answer may be sought in the nature of the applicant: if an entire formal institution brings legal action, it is likely that institutional motives are dominating. If, by contrast, a state actor brings action, it is more likely that she is driven by substantive policy goals.

Beyond indicating the need of reconsidering and differentiating behavioral postulates, the analysis shows that there is a complex intertwinement between policy preferences and institutional preferences. The link between policy outcomes and institutional rules is not a direct relationship. While it is likely that a particular decision-making rule, such as a unanimity as opposed to a simple majority rule, decreases/ increases the likeliness of realising market correcting policies (or even more so, redistributive policies as opposed to distributive policies), or incremental as opposed to innovative policy

changes, the link is not a direct one. Institutions do not determine, but constitute an important factor in producing policy outcomes through actors' behavior. By contrast, there is a direct link between stated actors' substantive policy goals and their being achieved in the political process. However, the direct attempt to realise policy preferences in a policy contest is in turn subject to the existing institutional rules of a decision-making process, thus actors have a stake in choosing the ones maximising their influence.

Chapter 3

The emancipation of legal dissonance

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The core idea

Until recently, the range of normative responses to the jurisprudence of the European Court of Justice (ECJ) had been circumscribed by two opposing positions.¹

According to the *attitude of celebration*, the Court, in drawing out implications of European 'law'² arrived at methodologically sound, even if at times audacious, constructions of Treaty law. The resulting novel doctrines were indispensable, at any rate in hindsight, for advancing the good cause of integration. The Court was thus cast into the role of the heroic architect of the European *Rechtsgemeinschaft*.³ It was usually taken for granted, in this context, that even seemingly

¹ For a far more nuanced account, see J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, 1999), at 203-7.

² For a discussion of the claim that the noun 'law' in Art. 220 EC Treaty (now Art. 19 EU Treaty) permits the ECJ to deploy legal standards beyond the scope of the treaties proper, see H. Rasmussen, *The European Court of Justice* (GadJura, 1998), at 359.

³ On the latter, see W. Hallstein, *Der unvollendete Bundesstaat: Europäische Erfahrungen und Erkenntnisse* (Econ, 1969).

surprising interpretative moves were ultimately countenanced by the teleology of Treaty itself.⁴

The attitude of celebration was probably most clearly articulated in complacent writings of members of the Court, for example, by its former President Lecourt.⁵ For reasons of convenience the soundness of the ECJ's jurisprudence was also taken for granted by those who were interested merely in going about their legal business, thereby treating Court decisions as though they had holdings and as though these holdings were undisputable social facts.⁶ The expedience of legal expertise thus lent indirect support to the attitude of celebration. Not infrequently, the celebration of the Court's achievements was underpinned by a sense that the ECJ is a quite exceptional institution acting in a quite exceptional setting and resorting to quite exceptional means, in particular, during the period when integration was perceived to have been in the doldrums.⁷

By contrast, the *attitude of censure* implicated the belief that the Court had repeatedly overstepped the bounds of legal interpretation and hence usurped the space reserved either to the political branches of the Community or to member state governments.⁸ The activism of the Court was not seen to be justified by the need, on the part of the Court, to compensate for political or legislative inaction, for none of the major juridical innovations, such as direct effect and supremacy, would have been for the political branches to procure.⁹ Also, the Court's activism was not regarded as particularly healthy. In fact, the price exacted for activism was perceived to be high, namely, an expected future loss of judicial authority.¹⁰

⁴ Art. 7 EC Treaty says that the tasks of the Community are also to be accomplished by the Court. See *ibid.*, at 358.

⁵ See R. Lecourt, *L'Europe des Judges* (Bruylant, 1976).

⁶ See the perceptive remarks by Weiler, *supra* note 1, at 206, on the absence of a strong critical tradition of scholarship in this fairly recent field of law.

⁷ See Weiler, *supra* note 1, at 32-3.

⁸ See, most famously, H. Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff, 1986); see also D. R. Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell, 1997).

⁹ See Rasmussen, *supra* note 2, at 360-1.

¹⁰ See *ibid.*, at 297.

It should not go unnoticed in this connection that the line between theoretical observation and European politics has always been next to impossible to draw. Espousing the attitude of celebration was clearly tantamount to signaling a favorable view of European integration. Conversely, those who dared to reveal misgivings about the genius of the Court were likely to be shunned by their peers.¹¹

I sense that today both attitudes have lost their appeal. It is difficult to say when the relevant shift occurred, but I speculate that it must have happened at some point between the Maastricht decision and the emergence of the Court's post-enlargement jurisprudence. Nevertheless, I, for one, sense that we no longer believe the attitude of celebration to be based on a sensible account of judicial reasoning. It has rather come to smack of rationalisation. Indeed, it may have always smacked of rationalisation, but owing to its fusion with the pro-Europe attitude it was purveyed with a wink of an eye. It played the role of a useful political fiction. Its usefulness is far from evident today, in particular, in the face of the regulatory competition that has been most recently forced by the Court onto the member states in the field of industrial relations.¹²

More disturbingly, we seem to have lost confidence that a methodological critique is capable of achieving something. Paradoxically, at a moment at which the attitude of censure might finally prevail over its counterpart, we come to realise that methodological analysis may have had its day, too. We sense that it is no longer taken really seriously by anyone. It is useless. Nobody listens, least of all courts.¹³ While celebration is perceived as mere rationalisation, critical analysis becomes suspect of being based on the naïve hope

¹¹ See Weiler, *supra* note 1, at 205.

¹² See, for example, Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP* [2007] ECR I-10779.

¹³ Striking proof for this phenomenon – and for the emancipation of legal dissonance – has been provided recently by the German Federal Constitutional Court in its decision on the Lisbon Treaty. See BVerfG 2 BvE 2/08. The conclusion reached by the Court that the Treaty passes constitutional muster is nowhere supported in the opinion. If one were to read the reasoning alone one would conclude that membership to the Union is prohibited by the German constitution. See C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea' (2009) 10 *German Law Journal*, 1201.

that method matters. The pursuit of censure is likened to an act of regression. Celebration and censure disappear in tandem.

Which raises the question: what remains of legal knowledge in Europe?

If my observations regarding the demise of both attitudes capture an existing social reality (i.e., a situation that legal knowledge is in), a fresh account needs to be given of legality. In what follows, I would like to reconstruct this quite remarkable situation by drawing on a category that I borrow from the history of music. I use the emancipation of dissonance as a general marker for the experience that the performance of 'bold moves' no longer seems to call for resolutions or more extensive elaboration. The experience of getting accustomed to new ways is a historical one, not only because it involves a transition in time but also because normative expectations change through repeated disturbance alone.

Remarkably, the historicity of experience is notoriously an anathema in the European Union's Europe where the social world is generally accounted for from the perspective of purportedly timeless bureaucratic rationality. It should not surprise us, then, to realise that the legal emancipation of dissonance may have been latently with us for quite some time. Indeed, the two opposing attitudes sketched out above may in truth have been the disguise under which the experience has been made without having been reflectively accounted for.

Per my observations below, I am drawing on an example from musical history, not in a desperate attempt to show off *mittel-europäisches Bildungsbürgertum* when it is already about to suffer final defeat, but for the very reason that both situations are indeed structurally homologous. In the case of music, under the condition of the emancipation of dissonance one can no longer say in which direction music ought to move or develop. Similarly, we cannot say whether or not a court is right or wrong in stretching methodological bounds. We cannot, in particular, react to its doings or forbearances by charging it with 'activism', for this would amount to an act of intellectual regression. Hence, I have no intention whatsoever to contribute to one of these forlorn juristic 'law and ...' genres of which

the 'law and music' variety appears to be a particularly miserable instance.¹⁴ I also do not want to contribute to the intellectual ghetto of what some fancy to be the 'cultural study' of the law. What I am interested in, rather, is a momentous transformation of normativity. The freedom gained by the composer of atonal music is inherited from tonality's loss of authority. It is freedom in negative form, pure and simple. This explains also why it was so difficult to sustain.¹⁵ An indeterminate range of possibilities systematically undercuts any resolve to settle for a determinate course of action.¹⁶ What a *ni dieu ni maître* situation of this type means for legality is the subject of the observations below.

In what follows I would like to explain the concept of legal dissonance in greater detail and pinpoint its consequence. It gives rise to the strange fact that in its real operation legality begins to incorporate its own negation. Rationalisation (plus indifference) and regression have to be seen as modes of denial which are concomitant to its occurrence. I then turn to three different attempts at resolving the contradiction: unhappy consciousness, kitsch and pragmatism. I speculate, however, that these are either prone to repeating regression or to succumbing to premature idealisations of judicial capacities. The latter is to be observed, in particular, for common law sensibilities and for legal pragmatism. I would like to conclude, finally, with explaining how what is done on these pages provides an example of self-reflexive legal analysis.

I shall commence, below, with a characterisation of the situation in which the attitudes of celebration and censure have lost their force and hence come to be perceived as rationalisation and regression, respectively.

Ernst Rabel

Since the days of Roman law, the European legal tradition has recognised the transformation of legal rules that were once supposed

¹⁴ For one example, see D. Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000).

¹⁵ For a discussion, see T. W. Adorno, *Philosophie der neuen Musik* (Suhrkamp, 1976).

¹⁶ See G. W. F. Hegel, *Elements of the Philosophy of Right* (trans. H. B. Nisbet, Cambridge University Press, 1991), at 50 (§16).

to constrain into means for the expression of new legal ideas. The classical case of such a transformation is the *mancipatio*, which simulates an ancient formal procedure in order to facilitate the acquisition of movable property. A similar observation can be made for *emancipatio* with regard to *mancipatio*. Ernst Rabel, the renowned comparativist and legal historian, characterised the use of inherited legal form for the pursuit of different ends as 'imitated legal transactions' (*nachgeformte Rechtsgeschäfte*).¹⁷ Even though the aim is different, the point of imitation is to avail oneself of the legal effects of the imitated form.¹⁸

Twentieth century adjudication has done something similar with regard to the techniques of legal reasoning. The emulation affects, in this case, what is called, in mainland Europe, 'methods' of legal reasoning.

Such methods, above all the techniques comprising the canon of interpretation,¹⁹ were originally supposed to anchor what we claim to know about law in sources of law. In fact, the notorious difficulty of according one method of interpretation superior authority over others can be resolved only by specifying the source. For example, textual interpretation can be claimed to be superior to purposive statutory construction if the legislature is thought to be a corporate body. Arguably, a body of this kind can form an intention and speak *uno voce* only by expressing itself in a text. Alternatively, a more speculative and holistic mode of purposive interpretation commends itself when it is taken for granted that the legislature does no more than lend its voice to the spirit of the people of which the adjudicating body is a particularly articulate part.

The twentieth century has been witness to the disintegration of such foundational juxtapositions. The story does not need to be recounted

¹⁷ See E. Rabel, 'Nachgeformte Rechtsgeschäfte' (1906) 27 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte – Romanistische Abteilung*, 290; (1907) 28, 311.

¹⁸ See *ibid.*, at 299.

¹⁹ For a list of arguments regularly used by the ECJ, the range of which exceeds the canon of interpretation, see J. Bengoetxea, N. MacCormick and L. Moral Soriano, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice', in G. de Búrca and J. H. H. Weiler (eds), *The European Court of Justice* (Oxford University Press, 2002), 43-85, at 46.

here. The juxtapositions are either in themselves not fully convincing – why, for example, should one ignore legislative history in determining the will of a corporate body? – or possibly based on a completely wrongheaded presupposition, namely, the very idea that the law springs from sources of legal authority.

Of equal importance for the demise of foundational methodology has been the increasing *commodification* of legal knowledge. When it comes to the ordinary reproduction of the legal system, methodological inquiries do not seem to matter much. What is key, rather, is to generate input into legal systems by means of legal expertise that can be bought and sold on markets. The exchange value of expertise depends, in turn, on the extent to which it is capable of influencing the divinations of those wielding the power to say what the law is. It can do so only as long as the power of the powerful remains theoretically undisputed and socially unchallenged. Marketable is that legal expertise which sticks closely to rhetorical markers of legal reasoning that happen to be set out in certain jurisdictions.²⁰ The intellectual merit of conventions is neither further explored nor debated. They become self-validating owing to the lip-service that is paid to them by the end-users of the legal system (i.e., the ‘bad men’²¹ represented by their respective legal counsel).

More precisely, we no longer expect these conventions to point us to anything real or to unearth the law’s essence.²² Rather, we are by default disposed to treat them as ‘tools’.²³ It has become our default disposition to approach them in the spirit in which Rabel perceived imitated legal transactions. We regard them as means for attaining legal effects. They are the idioms used for claiming what the law is.

²⁰ For a reconstruction, see the first chapter of my *Rechtliches Wissen* (Suhrkamp, 2006).

²¹ See O. Wendell Holmes, ‘The Path of the Law’, reprinted in (1997) 110 *Harvard Law Review*, 991 (first published in 1897).

²² For decisive works pointing into this direction, see J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgarantien der richterlichen Entscheidungspraxis* (Athenäum, 1970); G. Haverkate, *Gewissheitsverluste im juristischen Denken: Zur politischen Funktion der juristischen Methode* (Duncker & Humblot, 1977).

²³ See, for example, advocating a traditional doctrinal and a consequentialist perspective on the ECJ, R. Dehousse, *The European Court of Justice* (St. Martin’s Press, 1998), at 178-9.

The language of legal analysis and its method is used in order to express preferences. Legalese is a style of presentation, an art of saying things²⁴ in a certain way, which removes discourse from the ordinary bickering of moral or political conflict. We surmise that statutes become construed with an eye to 'the literal meaning of the words' only when courts deem such a construction to be also socially desirable. In a most profound sense we are all legal realists now. We are inclined to profess faith in the functionalist gospel according to which law is a function of judicial behavior.²⁵ We regard it as immature, to say the least, to believe that methods of interpretation give us anything against which we could actually check this behavior. Judicial responses to certain situations determine the outcomes of cases.²⁶ It would be utterly naïve, for us, to take them at face value, for 'the study of the statutes fails to provide a realistic picture of functioning law'.²⁷

We are realists, arguably, but we are also tamed at that. We understand that courts emulate legal methodology in order to attain what they intuit to be good things; but we do not undertake, ordinarily, to educate courts that what they present as legal reason is nothing short of the rationalisation of more or less consciously held class bias, prejudice or political preference.²⁸ We understand that we are dealing with simulacra. But we are smart, too. We sense that communicating methodological observations might backfire. Courts could take an offence. Making pragmatism explicit does not help clients. In any event, it is harmful for the career.

Arnold Schönberg

Methods have become expository devices for the presentation of pleasing ideas. No longer are they tied to what was once supposed to be stable legal meanings. They are what you can do with them,

²⁴ See, again, Weiler, *supra* note 1, at 195, on legal language as a formal means of communication.

²⁵ See F. Cohen, 'The Problems of a Functional Jurisprudence' (1937) 1 *Modern Law Review*, 5, at 7-8.

²⁶ See F. Cohen, 'Transcendental Non-Sense and the Functional Approach' (1935) 35 *Columbia Law Review*, 809, at 835.

²⁷ Cohen, *supra* note 25, at 9.

²⁸ See *ibid.*

namely, state your point, take a stand, move ahead or make a difference.

Such an embrace of functionalism in law is strikingly similar to the development of atonality in music.²⁹ Before the advent of atonality, key was what governed the productions of sonorities and their succession. The key, in turn, points to the tonic. Wherever music was moving to it is that to which it is bound to return. If it had not been for key dissonance it could not have been perceived for what it was, namely, a disturbance and disruption of the harmonic flow. Not by accident, then, the appearance of dissonance has always been associated with the articulation of inner conflict, suffering and pain.³⁰

Until to the early twentieth century it had been taken for granted that music, qua movement in time,³¹ needs firstly, to prepare the appearance of dissonance and, secondly, take appropriate steps towards its resolution. In 1908, when Schönberg wholeheartedly embraced the emancipation of dissonance he was overly confident that listeners would no longer perceive dissonance to be inherently harsh. What is more, he believed that from the perspective of musical analysis the distinction between consonance and dissonance had already become a matter of degree and was about to disappear forever.³² The next step that had to be taken, in his view, was to treat consonances and dissonances as equivalent means of expression. Consequently, music no longer had to be tied by key to a tonic centre.³³ Severing this link marked the advent of free tonality. Dissonance was not thought to require a resolution. It had become a chord that could stand of itself, just as consonance. In other words, it was no longer supposed to lead anywhere³⁴ and had outgrown its limited role of a merely transitional stage in the movement of music.

²⁹ 'Atonality' is a term that Schönberg abhorred, and he did so for good reasons. See B. R. Simms, *The Atonal Music of Arnold Schoenberg 1908-1923* (Oxford University Press, 2000), at 8-9.

³⁰ See T. W. Adorno, *Gesammelte Schriften*, vol. 18 (Suhrkamp, 1984), at 73-4.

³¹ On music qua '*energeia*', see C. Dahlhaus, *Aesthetics of Music* (trans. W. Austin, Cambridge University Press, 1982), at 9-10.

³² See C. Dahlhaus, *Schönberg and the New Music* (trans. D. Puffett and A. Clayton, Cambridge University Press, 1987), at 121.

³³ See Simms, *supra* note 29, at 15.

³⁴ See Dahlhaus, *supra* note 32, at 121, 123.

When dissonance does not necessitate steps towards its resolution there is no more normative structure constraining the composer. Received tonality is superseded by *free* tonality.

Originally, the demise of tonality was associated with a specific effect. Atonal music promised to retrieve repressed emotions by stripping their expression from conventional form.³⁵ Indeed, socially repressed emotions of loneliness or anxiety were thus supposedly susceptible to retrieval in sublimated form. Music that embraces dissonance was considered to be capable of exposing something about the human condition that is usually associated with profound existential angst.³⁶

This brief sketch of musical history should suffice in order to introduce the homology that I would like to explore here. Let a method of legal reasoning be musical composition governed by key; let the method be tied to a preferred abstract object (e.g., the statutory text) in the manner similar to how tonal music is linked to the tonic; and let, finally, retrieval of emotions in the context of law be the open assessment of consequences that is stripped of the 'pious frauds'³⁷ of traditional legal thought. Realism – or, more precisely, functionalism – commends itself as a liberating act. No longer is the pursuit of policy burdened with traditional constraints. The vestiges of legality, such as statutory construction or the isolation of holdings from their surrounding dicta, become material for the communication of great things.

The emancipation of dissonance serves as a useful reference point to what has happened to law in the twentieth century. In my opinion, the ECJ is the ultimate epitome of this development.

The absence of a resolution

It behoves me, of course, to explain more precisely how *legal* dissonance works.

First, a court arrives at a conclusion that appears to be difficult to support on the basis of traditional methodological standards.

³⁵ See Adorno, *supra* note 15, at 46-7.

³⁶ See Simms, *supra* note 29, at 4.

³⁷ Cohen, *supra* note 25, at 9.

Dissonance is 'what sounds apart'.³⁸ The one does not go together easily with the other.

Second, the conclusion involves a somewhat remarkable legal or social effect. For example, directives can be directly effective even before the transposition period has expired.³⁹ On its face, this is quite an extraordinary finding.

Third, the interpretative community responds to the discordant conclusion with keen interest, awe, admiration or, most commonly, with extensive commentary as to how it might fit into the received body of law. I take it that the latter is the attitude with which the greater number of EU law scholars have been reporting and discussing divinations by the ECJ.

Here is an example for a *resolved* dissonance. In the well-known Advisory Opinion on the European Economic Area (EEA), the ECJ, in the context of contrasting the EEA Agreement with the E(E)C Treaty, makes the following famous statement: 'In contrast, 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.'⁴⁰

On its face, the statement creates dissonance. The coincidence of a treaty and a constitution is neither immediately nor intuitively comprehensible. In the sentences that follow, however, the Court resolves the dissonance by pointing to features that liken the EEC Treaty more to a constitution than to an international agreement:

The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in

³⁸ See Dahlhaus, *supra* note 32, at 123.

³⁹ See Case C-144/04, *Werner Mangold v. Rüdiger Helm*, para. 67.

⁴⁰ Opinion of the Court of 14 December 1991 [1991] ECR I-06079, para. 1.

particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.⁴¹

The dissonance disappears only on the surface, for the special characteristics that the Court attributes to the Treaties result from the Court's very own inventive interpretation of these instruments.⁴²

In order to establish the relevant contrast, I would like to offer an example of *unresolved* dissonance. I take it from the *Centros* decision. Here is the dissonant paragraph:

[T]he fact that a national of a Member State who wishes to set up a company chooses to form it in a Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of the Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed in the Treaty.⁴³

The dissonance resides in the claim that the right to form a company in another member state in order to conduct business at home is 'inherent' in the exercise of freedom of establishment. If anything, in this context, is inherent in the freedom of establishment as envisaged by the Treaty then it is the principle that companies that want to establish branch offices in another member state shall be treated like natural persons exercising a profession there (Art. 54(1) FEU Treaty). But the dissonance is not even produced by the substance of the claim, which might be underpinned by a certain normative conception of what the single market has to offer to its clients. What creates dissonance, rather, is the *apodictic* manner in which the claim

⁴¹ Ibid. The language echoes clearly the *van Gend en Loos* case ('the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'). See Case 26/62 NV *Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁴² See *van Gend en Loos*, *supra* note 41.

⁴³ C-212/97, *Centros Ltd. V. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459, para. 27.

is being made. What might strike one, from the perspective of the Treaty, as a quite unusual case – namely the incorporation of a company in another member state merely in order to conduct business in the country of residence – is presented as though it were in no need for further elaboration. It is alleged to be ‘inherent’ in the Treaty, as though it could be read off its face. Dissonance concerns the *pragmatics* of judicial speaking.

In the context of music, unresolved dissonance gives rise to two different reactions. Either the listeners fill in the blanks and resolve it themselves (a matter that music often anticipates); or they no longer find it disturbing once exposure has become more frequent and unrelenting.

As I hinted at in my introductory remarks, in the legal context the acquiescent reactions to divinations by the ECJ come neatly in the analogous forms of *rationalisation* and *indifference*.

First, by far the most ink has been spilled in EU law in attempts to create a broader context from within which the Court’s intuitions attain greater plausibility. This reaction is consistent with legal knowledge in its *de-commodified* form. It does not rest content with treating legal claims as puppets on the strings of money and power. The resolution of dissonance may in some instances require elaboration of a full-blown theory of legality. Theoretical accounts of this type would have to explain, ultimately, what it takes to reach present decisions by keeping faith with whatever authoritative standard has been laid down in the past.⁴⁴ Usually, courts do not come up with any such grand theory but rather settle for compromise formulations,⁴⁵ which are, taken by themselves, ‘incompletely theorised’⁴⁶ or explicable in terms of something more profound when approached from different perspectives.

⁴⁴ See R. Dworkin, *Justice in Robes* (Harvard University Press, 2006), at 169: ‘Legality insists that [state] power be exercised only in accordance with standards established in the right way before that exercise.’

⁴⁵ In fact, spinning the dissonance analogy further such compromise formulations could be referred to as vagrant chords that can be resolved pursuant to different keys. See Simms, *supra* note 29, at 11.

⁴⁶ See C. R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press, 1996).

Second, *commodified* legal knowledge ('legal expertise') treats dissonant decisions as data. In fact, the mere existence of strongly commodified legal scholarship, which considers itself to be relevant to practice, fosters the emancipation of legal dissonance. The more professionalised the legal profession and the less theorised legal science, the more likely are legal systems to operate in a dissonant mode. Law is then approached exclusively from the perspective of the bad man. Lawsuits are considered to be gambles. Whoever has the power to say what the law is has the power to force others to accept his choices as though these were expositions of law.

More examples

It is a truism that the jurisprudence of the ECJ presents its students with a number of surprises. For purposes of illustration, I should like to refer to merely three more examples, each of which has played a central role in the Court's development of EU law.⁴⁷

My first example affects what is to be regarded as maybe the most foundational case, namely, *van Gend en Loos*.⁴⁸ The most remarkable feature about this opinion is, above all, that the Court sets out to determine the legal effect of an international agreement by examining the purported *telos* of parts of agreement itself rather than sounding a note of caution with regard to the intervening authority of national constitutional law. The Court introduces the main reason for attributing direct effect to the Treaty as follows:

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

The sentences that follow merely qualify the basic contention that the Treaty is of direct interest to 'parties in the Community' by pointing to the preamble and mentioning the 'peoples' representation in the

⁴⁷ I shall leave aside, however, the prime candidate, namely the *Mangold* case (*supra* note 39), for I want to avoid the objection that I am working with what needs to be regarded as a clear outlier.

⁴⁸ See *supra* note 41.

assembly. It is somewhat farfetched, to say the least, that these factors support a reading of the Treaty that, first, extracts individual rights from certain provisions and, second, regards internal effect of those rights as the agreed upon remedy.⁴⁹ The major justification can only lie in what is to be regarded the objective of the Treaty. Remarkably, the *substance* of the Treaty appears to be strong enough to exceed the legal effect that would have obtained on the ground of its *form*. Indeed, the ECJ says that this follows logically ('implies'). Substance implies the internal transgression of form. If constitutional discipline requires, most elementarily, to be heeded of form, a remarkably anti-constitutional way of thinking paved the way of 'constitutionalisation'. The finding of direct effect is made even though neither the High Contracting Parties nor the language of the Treaty would in and of themselves have supported the conclusion that the respective provision was either supposed to confer a right on individuals or to have internal effect.⁵⁰

This is a remarkable dialectical departure from general public international law, for the same 'teleological'⁵¹ argument could be made with even greater force for any human rights treaty or the World Postal Agreement. Indeed, it could have been made with even greater plausibility for those treaties. Nowhere, for example, could the direct concern for the parties be more obvious than for a human rights compact.

The principle that substance trumps form could also have even more far-reaching implications.⁵² The fact that I promise myself not to eat

⁴⁹ Conversely, it could have been conceded even that the relevant Treaty provision (then Art. 12) has internal effect; this would not have settled the question whether it also has direct effect in the sense of conferring a right. See E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 1, at 7.

⁵⁰ The Court's invocation of the preliminary reference procedure in support of its conclusion was, of course bogus. It is one thing to answer interpretative question and another to provide remedies.

⁵¹ For a more sympathetic view of the Court's 'teleological' reasoning in cases like these, see J. H. H. Weiler, 'The Court of Justice on Trial (Review of Haltje Rasmussen: On Law and Policy in the European Court of Justice)', (1987) 24 *Common Market Law Review*, 555, at 573.

⁵² But see Weiler, *ibid.*, at 571, suggesting that the reasoning was not legally aberrational.

meat is of direct concern for the pigs that might end up being eaten by me. In fact, the substance of my promise is so important to them that they have to have a right not to be slaughtered in order to be eaten.

The new legal order of international law is created in one magnificent dissonant chord. The life of supranational law has not been logic; it has also not been experience. Supranationality has always been driven by what were *imagined* to be good consequences.

Here is another classic. Art. 34 FEU Treaty (formerly Art. 28 EC Treaty, and before that Art. 30 EEC Treaty) reads as follows: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.' In the often quoted and celebrated *Dassonville*⁵³ decision, the ECJ arrives at the following account of what 'measures having equivalent effect' come to: '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 measures having an effect equivalent to quantitative restrictions.'

There is no reasoning leading up to this interpretation.⁵⁴ The interpretation sweeps broadly. It covers not only, as will be made clear subsequently in *Cassis de Dijon*, non-discriminatory rules; it also assimilates all obstacles categorically to quantitative restriction. A Sunday trading rule, accordingly, is alleged to have an effect equivalent to a quantitative restriction. But this is patently false.⁵⁵ A quantitative restriction cuts off sharply at a certain point any market access for goods while mere obstacles that arise from equal trading rules may affect the volume of sales differently, but not in the absolute manner characteristic of a quantitative restriction. I do not

⁵³ Case C-8/74, *Procureur du Roi v. Dassonville* [1974] ECR 837.

⁵⁴ Of course, the Court may have taken its cue from the examples provided in Art. 2(3) of Commission Directive 70/50 [1970] OJ L13/29. This is suggested by P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (4th ed., Oxford University Press, 2008), at 668.

⁵⁵ For a milder conclusion of a highly perceptive analysis, see J. H. H. Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods', in P. Craig and G. de Burca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999), 349-76, at 360.

even want to mention that the Court ignored that, in contrast to other trading rules, quotas differentiate between domestic and imported goods.

Such a liberal use of legal reasoning can also be observed when the Court draws on its own case law. In *Tobacco Advertisement I* the Court says that the Union has the power to intervene and to regulate the internal market if and when 'the distortion of competition which the measure purports to eliminate is appreciable'.⁵⁶ In brackets, the Court refers to paragraph 23 of the *Titanium Dioxide* case⁵⁷ as if the latter had said the same. What, however, *Titanium Dioxide* actually said at this point is the following:

[P]rovisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and, if there is not harmonisation of national provisions on the matter, competition may be appreciably distorted. It follows that action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and this falls within the scope of Article 100a [now 114 FEU Treaty], a provision which is particularly appropriate to the attainment of the internal market.

This paragraph is the source for the extension of the Union's legislative competence to cases in which legislation is aimed at removing distortions of competition. Evidently, this extension was itself brought about by judicial fiat. Mind what this paragraph accomplished without offering reasons. It says that the Union has the power to enact approximating legislation on the basis of Art. 114 when differences among national rules concerning production conditions give rise to distortions of competition. The distortion of competition, thus understood, has to originate from different

⁵⁶ See Case C-376/98, *Germany v. Parliament and Council of the European Union*, 5 October 2000, [2000] ECR I-8419 (*Tobacco Advertisement I*), para. 106.

⁵⁷ See Case C-300/89, *Commission of the European Communities v. Council of the European Communities* [1991] ECR I-2867.

regulations of production. For this type of case the Court amended the regulatory power under Art. 114. What the Court did not say, however, was that any other distortion of competition would also trigger Union competence. Nor did the Court say that only *appreciable* distortions of competition are to effectuate such competence.⁵⁸ The Court restricted itself to saying that national rules concerning production conditions may be harmonised if and only if they give rise to a distortion of competition. It did not say, however, what *Tobacco Advertisement I* attribute to the Court to have said in *Titanium Dioxide*, namely, that *any* appreciable distortion of competition is within the power of the Union to remove. All the Court said in *Titanium Dioxide* was that regulations adopted with the aim of protecting the environment or health may be a burden on undertakings and thus, absent approximation of laws, lead to conditions of competitions that are ‘appreciably distorted’. It did not say, however, that an appreciable distortion of competition is a necessary condition for Union competence to originate.

If the above observations are correct we cannot but conclude that the ECJ decided major cases without closing the gap that arises in the relation of the claim made and its potential underpinning. This should not come as a surprise. There would have been no ‘tonal’ way to arrive at what was taken to be great results.

Legality divided against itself

I would now like to return to exploring what the progress of dissonance means for the European legal system.

A fully dissonant legal system would indeed embrace *Freirecht*. This would be the fulfillment of Kantorowicz’ dream⁵⁹ where intrepid jurists are at liberty do what they believe to be just in any case.

⁵⁸ The Court avoided addressing the issue, again, in Case C-380/03, *Germany v. Parliament and Council* [2006] [ECR] I-11573 (*Tobacco Advertisement II*), paras 65-67, where after having identified distortions that do not originate from obstacles (different regulations of sponsoring by tobacco companies) it merely concluded that ‘it is not necessary also to prove distortions of competition in order to justify recourse to Article 95 EC’ when the existence of obstacles has already been established (para. 67).

⁵⁹ See H. U. Kantorowicz (Gnaeus Flavius), ‘Der Kampf um die Rechtswissenschaft’, reprinted in *id.*, *Rechtswissenschaft und Soziologie* (ed. T. Würtenberger, C. F. Müller, 1964), 14-40.

More remarkably even, the emancipation of legal dissonance involves a dual loss of normative guidance. First, no traditional method of legal reasoning has the authority to necessitate a resolution. Second, the loss of authority is not compensated with the systematic pursuit of good effects. The latter are not integrated into one coherent whole, for otherwise trust in intuition would be absorbed by some consequentialist meganorm (such as the meganorm of efficiency underpinning much of law and economics). Consequently, even though dubious reasoning is treated as excusable owing to its good effects there is no link between one and the other. All methods are equal. Full dissonance means even that either method or consequences can be made to matter. What remains for truly dissonant legal scholarship is what American legal realists identified as 'situation sense'. It is the equivalent of genius in art.⁶⁰

I return to where I began. The attitude of celebration defended the doings of the Court qua expositions of law, however risky they may have appeared. The attitude of censure, by contrast, indicted the Court for ostensibly ignoring standards of sound legal exposition. We are now in a position to understand that both attitudes were *concomitant* to the emancipation of legal dissonance. They represented two different coping strategies. Their presence shielded an uncomfortable truth from us. Whereas the attitude of celebration chose the path of rationalisation, the attitude of censure straightforwardly opted for regression and invoked the lost authority of legal reasoning. Both attitudes helped to sustain confidence that legality itself has remained *undamaged*. The belief was upheld through the idealisation either of practice (celebration) or of standards governing its critique (regression). Rationalisation and regression were two sides of the same coin. As long as this coin was in circulation nobody had to confront the daunting question of whether in the course of creating Europe's legal community nothing short of law itself was eroding.

⁶⁰ According to Dahlhaus, *supra* note 32, at 127, the ultimate law-giving authority for Schönberg was the 'formal instinct of the genius'.

At stake is not a conflict of the moral type popularised by so-called critical legal scholars.⁶¹ Their story is the story about how legal reasoning is constantly drawn to endorse one or the other conflicting moral principles.⁶² By contrast, the emancipation of legal dissonance confronts us with an enigmatic situation where, as a practical matter, legality has come to incorporate its opposite. Dissonant law is law that contains its own negation, law without legality. Law can be created in the situation without methodically linking one situation to the next.⁶³

I hasten to add that the phenomenon would be mischaracterised if it were conceived of as illegality. Rather, standards of legality are as such suspended. The phenomenon can be therefore characterised with the following pair of propositions. Law is created pursuant to methods of interpretation or in view of good consequences. It does not matter which methods are chosen and how they are used or what the consequences really are consequences of. Dissonant law is 'based upon' suspended legality. It is therefore constantly haunted by the question: is it still law?

Beyond rationalisation and regression

My observations must not be mistaken for aesthetic praise of the doings of the Court. Dissonance has (had) its proper place in music, but I am not sure how law can realise itself by turning on its opposite. This mode of realisation would be acceptable only if it we believed that the adjudicating body may legitimately posit law in a manner equivalent to how genius manifests itself in art.⁶⁴ Beliefs as to the legitimacy of the artistic moulding of society are notoriously harboured by futuristic fascists.⁶⁵ Intimations of the European

⁶¹ See J. Balkin, 'Deconstructive Practice and Legal Theory', (1987) 96 *Yale Law Journal*, 743.

⁶² For a mature statement, see D. Kennedy, 'A Semiotics of Legal Argument', (1991) 42 *Syracuse Law Review*, 75.

⁶³ In reply to Carl Schmitt it should be noted that decisionism is not a conception of legality. See C. Schmitt, *On the Three Types of Juristic Thought* (trans. J. Bendersky, Praeger, 2004), at 43-99 [The translation has its problems].

⁶⁴ Genius, according to Kant, is the creative person who sets the standard for art. See I. Kant, *Kritik der Urteilskraft* B 181 (ed. H. F. Klemme, Meiner, 2006), at 193.

⁶⁵ See P. Vogt, *Pragmatismus und Faschismus: Kreativität und Kontingenz in der Moderne* (Velbrück Wissenschaft, 2002), at 140-1.

Union's authoritarian constitutionalism aside,⁶⁶ the emancipation of dissonance can in no manner be linked to it.

One is inclined to conclude, therefore, that dissonant adjudication is merely a technique of social engineering. However, even a self-proclaimed supporter of the view that such engineering ought to be the ultimate reference point of all rational social control, including adjudication,⁶⁷ counseled strongly against an unreserved embrace of consequentialism. Roscoe Pound envisaged social engineering to be a set of processes whose aim is 'to satisfy a maximum of human wants with a minimum of sacrifice of other wants'.⁶⁸ Before the forum of social engineering legislation and adjudication were seen to be on an equal footing, for each was supposed to be governed by the same principle of social utility:

Each should be guided by a picture of the completest [sic] satisfaction of human claims or wants or desires that is compatible with the least sacrifice of the totality of such claims or wants or desires.

Nevertheless, Pound underscored that a chief contribution to human well-being was to be made by adhering to the received distinction between forward-looking legislation and backward-looking adjudication. Thus understood, he formulated, unwittingly, a variety of rule utilitarianism. Since 'general security' or 'predictability' are of chief value to society, courts, even though undoubtedly acting in a law-making capacity, were supposed to rest their engineering efforts 'upon traditional premises' and to develop new results from 'traditional technique'.⁶⁹ Pound, however, did not choose regression. Rather, he reintroduced traditional legal reasoning techniques as means of ensuring predictability. *Any* method might be as good as

⁶⁶ See my 'Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and Its Legacy', in C. Joerges and N. Singh Ghaleigh (eds), *The Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing, 2003), 361-88.

⁶⁷ See R. Pound, 'The Theory of Judicial Decision, Part III: A Theory of Judicial Decision for Today' (1923) 36 *Harvard Law Review*, 940, at 953-4.

⁶⁸ *Ibid.*, at 954.

⁶⁹ *Ibid.*, at 956.

any other. If it turned out that none were good enough to attain this objective then Pounds solution would clearly beg the question.

Pounds example teaches, regardless of whether it is indeed convincing, that resolutions of legality's internal conflict may be able to avoid the naïve alternative of rationalisation and regression. Maybe even a synthesis of thesis and antithesis⁷⁰ can be found either by negating legality's negation or by reaffirming legality in a more consequentialist format. I would like to examine attempts at a synthesis below. Whereas the first, involving double negation comes perilously close to regression, the other mode tries to re-establish harmony by embracing situation sense and consequentialism.

Unhappy consciousness

Double negation implicitly reasserts traditional methodological standards without engaging in any defence. Their relevance is instrumentally presupposed. The approach is epitomised in a recent article, co-authored by no less a figure than Roman Herzog, not only the former President of Germany but also, and maybe more importantly, the former President of the German Constitutional Court. In this article, Herzog and Lüder Gerken discuss the 'increasingly remarkable reasonings' (the '*immer erstaunlicheren Begründungen*') with which the ECJ seeks to justify inroads into member state jurisdiction.⁷¹

One very apt example adduced by them is the *Mangold* case, in which the ECJ supplants the lack of direct effect of a Directive with speculations regarding directly effective primary EU law.⁷² The Court invokes a general principle of EU law – in this case, the protection from discrimination on the ground of age – where assuming its

⁷⁰ I know that I am guilty of following a crassly simplified rendering of Hegel's dialectic, which was popularised in the nineteenth century by Heinrich Moritz Chalybäus and lead to a completely inaccurate perception of Hegel's philosophy. Nevertheless, simplicity helps in this context.

⁷¹ See R. Herzog and L. Gerken, 'Stoppt den Europäischen Gerichtshof', *Frankfurter Allgemeine Zeitung*, 8 September 2008. I used a printable version which is online at the Centrum für Europäische Politik: http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf.

⁷² See *Mangold*, *supra* note 39.

existence, putting it mildly, required a bit of a stretch. It also made reference to international standards whose existence appears doubtful.⁷³ I fully agree with the authors' critique. The *Mangold* case is an egregious instance of judicial decision-making that blatantly rides roughshod over traditional standards of legality. What is, in fact, particularly off-putting is the unabashed manner with which the ECJ asserts a common constitutional tradition of the member states whereas in fact only two member states recognise the relevant standard. With an eye to various other examples Herzog and Gerken conclude:

The cases discussed reveal that the ECJ consciously and systematically ignores central principles of judicial legal interpretation, sloppily underpins decisions, overrides the will of the legislator, or even turns the latter upside down, and invents legal principles, on which it can in turn base later decisions.⁷⁴

But double negation is not tantamount to simply regression. I surmise that under the condition of the emancipation of dissonance critics are inclined to tolerate reasoning flaws so long as policy results are to their liking. Such a consequentialist proviso is indirectly revealed in the political selectiveness with which Herzog and Gerken go about criticising the Court. At a time when much of the legal academe in Europe is inflamed about how rulings in *Viking* and *Laval* might stifle trade union action⁷⁵ the authors focus on cases whose outcome is onerous for businesses and, in their view, an exemplar of bad economic policy. I sense that double negation reasserts traditional methodological rigor, however, without expressing faith in its authority. In this respect it resembles what Hegel characterised as 'unhappy consciousness'.⁷⁶ Whoever sustains practices that were once based on a certain faith even after this faith turned out to be

⁷³ See *ibid.*, para. 74.

⁷⁴ See Herzog and Gerken, *supra* note 71, at 5.

⁷⁵ See, for example, F. Rödl, 'Transnationale Lohnkonkurrenz: Ein neuer Eckpfeiler der "sozialen" Union?', in A. Fischer-Lescano, F. Rödl and C. Schmid (eds), *Europäische Gesellschaftsverfassung: Zur Konstitutionalisierung sozialer Demokratie in Europa* (Nomos, 2009), 145-60.

⁷⁶ For a very accessible reconstruction, see T. Pinkard, *Hegel's Phenomenology: The Sociality of Reason* (Cambridge University Press, 1996), at 69-73.

delusional simply because there is nothing else to believe in suffers from this type of consciousness. Double negation is a form of unhappy consciousness, if not outright hypocrisy, for it indirectly endorses methodological standards even though it no longer is really committed to them. But what else would there be to believe in?

A different solution could be found if one were to say, plainly and simply, that good consequences are all that matters. This marks the move to pragmatism, to which I shall return below.

Kitsch

Before turning to pragmatism, however, I should like to address briefly one potential reply, for which I cannot name an author but which I nonetheless believe to be an always welcome panacea for the ills of judicial reasoning. Judicial bodies are the producers of dissonance. But shouldn't they be entitled to it? They are, after all, also more or less a recognised source of law.

Courts deciding at last instance may err. But they are legally empowered to err. This is what it means to have the final word. Moreover, there are good reasons to attribute the authority of precedent to doubtful conclusions arrived at in hard cases. Otherwise, the legal system could not make progress.

This argument presupposes, of course, that courts act within the confines of their power. This power cannot merely be defined by the rules establishing the jurisdiction of the decision-making body and determining its place in a hierarchical system. It is also conditioned by the legal norms which it is bound to apply. The grant of power, in other words, cannot be a blank cheque to decide as it sees fit. This constraint appears to be recognised in Art. 19(1) EU Treaty (the former Art. 220 EC Treaty): 'The Court of Justice [...] shall ensure that in the interpretation and application of this Treaty the law is observed.'

The law in question is definitely, whatever else it might be, the law of the Treaties. Hence, the Federal Constitutional Court and other courts established in the member states were right in assuming that the ECJ acts *ultra vires* and, hence, fails to produce any law if no plausible

methodological link can be made out between the decisions of the ECJ and the legal norms that it purports to apply.

But the difficulty merely begins here, for it is not clear how much leeway ought to be conceded to a high court before alarm bells are to be set off signaling an excess of authority. Common law sensibilities are clearly disposed to maximise deference. This represents an alternative synthesis. Legality and its negation still come in tandem; but common law sensibilities produce comforting ideas as to how the former triumphs over the latter even in its guise. The common law mindset, in other words, would have us believe that law that is dissonant in its appearance is fully concordant in its essence.

The allure of this synthesis is very nearly irresistible.⁷⁷ If law is understood to be common law then it does not have to have a source. It emerges from a process of conversation to which all sages contribute.⁷⁸ All relevant arguments are admitted. Law is not even made. It is cases that trigger the production of fine-grained differentiation. The rhizome of differentiation does not admit of a general articulation. The wisdom of the law resides in the particulars. Its binding force stems from being a tightly knit web of rules and principles whose reasonableness is put to the test in every case. New developments may remain imperceptible until new principles become ascertained in subsequent cases.

Of course, the creation of artificial reason requires time and cannot be the work of deduction. Certain reasoning may at times appear to be discordant, and they may do so pending resolution in future cases. Developing the law is an experimental process. Judges may be even mistaken in some instances, and no formulation of principles can ever be final. But this is owing to the fact that the law is constantly evolving and growing in reasonableness owing to increasing its internal differentiation as situations arise.

⁷⁷ In what follows I draw on the excellent reconstruction of the common law mentality which is to be found in G. J. Postema, *Bentham and the Common Law Tradition* (Oxford University Press, 1986).

⁷⁸ See the relevant remarks by S. Breyer, in S. Breyer and A. Scalia, 'A Conversation between U.S. Supreme Court Justices', (2005) 3 *International Journal of Constitutional Law*, 519.

No synthesis of legality and its opposite could be more beautiful. In fact, it could not get any more convenient for the judicial department. Common law sensibilities offer exactly the blank cheque that the empowerment perspective discussed above failed to provide. Whatever a court decides is the law. If a decision is censured for want of a foundation the common law mind replies that such an episode is part of a larger scheme. From the common law's temporal perspective, one cannot even say, here and now, whether a decision is right or wrong. Dissonant developments are either retrospectively discovered to have been mistaken and subsequently eliminated or taken as a basis for new additions to the always evolving edifice. What matters is experience, not logic. Those who participate in the practice and who are trained in the 'artificial' reason of law are capable of contributing to the deliberative processes in which the relevant determinations will be made. There can be no valid external critique.

This is too good to be true, for in lieu of reconstructing the normative force of legality this synthesis merely retrenches judicial authority. This authority comes out as completely unconstrained by external bounds. Whatever highest courts do is given the semblance of reasonableness. The result is kitsch, a monstrous vision of a simple world in which the law emerges slowly and in constant exchange with the moral sentiments woven into the moral fabric of a common form of life.

If the vision were to formulate more than legal kitsch it would have to carry all the metaphysical baggage involved in justifying the authority of law qua common law. It would have to defend bold claims about the rationality of tradition, the artificial reason of law or how common practices can be constitutive of such a specialised exemplar of practical reason.⁷⁹ Ever since Hobbes' incisive critique of the English common law mentality,⁸⁰ this metaphysics has come under attack and it is difficult to see how it could ever be resuscitated in a fast-moving technocratic age. There is danger, however, that the

⁷⁹ For a more recent critique, see A. Vermeule, *Law and the Limits of Reason* (Oxford University Press, 2008), at 27-36, 57-96.

⁸⁰ See T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (ed. J. Cropsey, University of Chicago Press, 1971).

presence of legal dissonance motivates the return to the professional ideology of the past.

Pragmatism

The other attempt at a synthesis that I would like to discuss briefly is pragmatism. I take the term 'pragmatism' from Ronald Dworkin who actually uses it in order to capture the essence of American legal realism.⁸¹ I think, indeed, that a strong case can be made that a more radical form of pragmatism explains much of the practice of the ECJ.

From the perspective of pragmatism, legal decision-making ought to be based on forward-looking considerations. At first glance, pragmatism clearly formulates an antithesis to legality, which requires that legal acts be adopted pursuant to standards that have been laid down in advance. But pragmatism can accommodate the demand made by legality. It can treat legal rules and other results of prior decisions as valuable – or 'valid' – inasmuch as they either render government action predictable or serve any other good end. It may make much sense, for example, for courts to abide by acts of the legislature if these acts represent aggregate voter preferences or incorporate social research that courts are notoriously unable to provide.⁸² But the respect for the legislature is clearly conditional in these cases. When there is reason to believe that the legislature was prey to interest-group capture courts should be free to ignore it. The value of predictability is not absolute either. It can be overridden by other forward-looking considerations of public policy, in particular when modified rules promise to serve a certain end better than the rules that are already in place.

As an approach to adjudication and regulation, pragmatism is defensible on its own terms as long as the social engineering agency, be it a Commission or a Court, pursues good objectives by rational means. Since pragmatism does not espouse faith in formal values, such as the pedigree of legal enactments, its claim to legitimacy depends entirely on the substance of its policies.

⁸¹ See R. Dworkin, *Law's Empire* (Harvard University Press, 1986), at 151-64. For an implicit recognition of pragmatism as lying at the heart of the Court's jurisprudence, see Weiler, *supra* note 51, at 581.

⁸² See Dworkin, *supra* note 44, at 22. See, in particular, Vermeule, *supra* note 79, at 93-6.

In spite of all its methodologically doubtful twist and turns, the consequentialist jurisprudence of the ECJ has become patterned. It is possible to anticipate on which side the innovation is going to fall. The Court is predictable with regard to the overall centralising and neoliberal drift of its jurisprudence. When it comes to establishing Community competence, the Court appears to be disposed to construe the power contained in Art. 114 FEU Treaty (ex. Art. 95 EC Treaty) broadly. The Community legislature is thus brought into the position to legislate even where competence seems to be explicitly withheld by the treaty. The ECJ is also not likely to respect state sovereignty unless the cases affect their inner core, such as the organisation of military forces. The Court continues to be predisposed to attribute direct effect where there has been none – in particular to the opening articles where this helps to boost daring interpretation of other provisions – and to expand the application of the horizontal effect of fundamental freedoms. The Court may ever more frequently supplant the lack of direct effect of Directives with directly effective Treaty law. The Court appears to be also favourably inclined to transmute fundamental freedoms into guarantees of substantive economic due process. It may take anti-discrimination law very seriously, for it represents the Community's most cherished vintage social legislation. It is also likely do its utmost to use Union citizenship as a substitute for the Union's lack of a social welfare system in order to provide access for Union citizens to the respective systems of the member states where citizens choose to reside.

From this emerges an interesting mix of strategies, perhaps indeed something that is tantamount to a European social model. Its major pillars are a commitment to substantive economic due process and to eligibility for transfer payments without discrimination on the grounds of nationality. If one complements this picture with the stringent constraints that the Court imposes on trade unions it can be concluded the ECJ drives the member states of the European Union into a direction this is similar to the Anglo-Saxon model of capitalism.⁸³

⁸³ See M. Höpner, 'Usurpation statt Delegation: Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf', (2008) *MPIfG Discussion Paper* 08/12.

Internal critique

Pragmatist jurisprudence is, however, not without its problems. I would like to mention three such problems. Whereas the first two affect the approach in general, the third formulates an internal critique of the route taken by the ECJ.

First, consequentialism is an unreliable guide for the resolution of dissonance, for instead of vesting authority in consequences it vests this authority in the speculations of courts. Consequentialism is a *formal* criterion. Niklas Luhmann has been right about this. If it turns out that the Court was mistaken about consequences the decision is nonetheless treated as valid. This creates a situation in which courts can only win: 'Courts [...] have the power to bestow upon their conjectures legal validity. From the perspective of empirical social research, legal consequentialism is nothing but imagination with the force of law.'⁸⁴ Viewed from this angle, pragmatism is a functional equivalent to common law sensibilities.

Second, even though a theory of good consequences would no doubt resolve the contradiction at the heart of legality no such theory is available, at any rate not in the case of European integration.⁸⁵ Admittedly, normative law and economics may have come to play the role of such a theory in certain fields of law, but in these uses it represents clearly the most recent resuscitation of natural law. I cannot explore its pretensions here.

Third, even assuming, for the sake of the argument, that criteria for good consequences could be made out from the vantage point of the judicial department it is not clear whether the overall effects of the ECJ's most recent jurisprudence would be deserving of such a classification. Some of the most recent rulings carry profoundly adverse implications for distributive justice in Europe. They are far from uncontroversial.

⁸⁴ N. Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993), at 382 (my translation).

⁸⁵ Our not-knowing is nothing immediate. It is mediated by the absence of politics which substitutes our not-knowing with – I hate using this concept, but it is accurate in this context – experimentation.

The substantive economic due process⁸⁶ introduced in the cases of *Viking*⁸⁷ and *Laval*⁸⁸ may be alluring to the new member states, since it opens the door for them to benefit from comparative advantage.⁸⁹ Nonetheless, the respective leveling down ('social dumping'), which is to be expected from the disempowerment of trade unions, is of questionable political merit, to say the least. It signals a shift in the integration process in whose course 'organised economies no longer count as equally valid production regimes.'⁹⁰ Rather, the very existence of differences between and among systems of socially sustainable capitalism is taken to present obstacles to market integration. The Court pushes the member states towards reforming their economies along the lines of economic liberalisation. Even outside the Court's jurisprudence, institutional differences are increasingly perceived to be obstacles to competition.⁹¹ This is new. So long as neither the Commission nor the Court targeted the institutions of organised economies, such as an established system of industrial relations, the competition between and among member states may have reinforced the respective differences provided that those were giving rise to relative strengths. Now the desired consequence appears to be that of leveling those differences.

The shift *may* amount to commendable public policy. But who is to tell whether this is the case? *Pace* Adam Smith, there is no *legal* theory telling us which model of capitalism is preferable to others. Indeed, it is difficult to understand why there even ought to be one. If anything, determining how markets are to be embedded into society is a political choice. One may wonder whether a European government ought to affect such a choice; even if we concluded that it should, we would likely agree that a court should not try its hand at it.

⁸⁶ On the following see my article, 'Idealisation, De-politicisation and Economic Due Process: System Transition in the European Union', in B. Iancu (ed.), *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Eleven Publishing, 2009), 137-67.

⁸⁷ See *Viking*, *supra* note 12.

⁸⁸ See Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, of 18 December 2007.

⁸⁹ Accordingly, the member states were very much split in these cases along the 'old' and 'new' divide. See B. Bercusson, 'The Trade Union Movement and the European Union: Judgement Day', (2007) 13 *European Law Journal*, 279.

⁹⁰ See M. Höpner and A. Schäfer, 'A New Phase of European Integration: Organised Capitalism in Post-Ricardian Europe', (2007) *MPIfG Discussion Paper 07/4*, at 8.

⁹¹ See *ibid.*

Not even provisionally must the choice be one for the ECJ to make. Its decisions affecting Treaty interpretation are officially subject to reversal only through amendment. Owing to the heterogeneity of national interests, these amendments are extremely unlikely to come to pass.⁹² But even if their adoption were feasible it would remain unclear whether the Court would be responsive to signals originating from alterations of Treaty language. Lest we forget, the project that was supposed to lead up to the Constitution for Europe has significantly transformed the authority of constitutional law in the European Union. The use of constitutional symbolism for the purpose of *idealising* existing realities⁹³ turned constitutional amendments into a means to refurbish, rather than to constrain, relations of power. Moreover, the European political process does not offer an outlet for the peoples of Europe to debate and, consequently, to choose the economic and social model that is to govern their common future. The de-politicisation of decision-making renders such a debate impossible.⁹⁴ Rather, idealisation, de-politicisation, and substantive economic due process have given rise to a syndrome of disempowerment that may well become explosive in the long term,⁹⁵ at any rate should the European economy continue on a downward slope.

This is not to say that the most recent case law of the ECJ is wrong from the perspective of an authoritative conception of political and distributive justice. All that is claimed here is that there are no reasons to believe that a Court should have power to determine these issues.

⁹² The matter has been rightly pointed out by F. W. Scharpf, 'Reflections on Multilevel Legitimacy', (2007) *MPIfG Working Paper* 07/3, at 11-12. The alleviated amendment procedures of the new Art. 48 EU Treaty do not affect cases where an amendment may want to reply to a ruling by the ECJ.

⁹³ For a brief analysis, see my 'Post-Constitutional Treaty', (2008) 8 *German Law Journal*, 1121.

⁹⁴ See M. Kumm, 'Why Europeans Will Not Embrace Constitutional Patriotism', (2008) 6 *International Journal of Constitutional Law*, 117, at 128-33.

⁹⁵ On the unfeasibility of attempting to unify different aspirations and institutional models of Welfare capitalism in Europe, see F. W. Scharpf, 'Notes Towards a Theory of Multilevel Governing in Europe', (2000) *MPIfG Discussion Paper* 00/5, at 22.

The ersatz

Legal theory is incapable of judging the ECJ by its fruits. But it can work with a substitute of consequentialism that goes to the heart of the Union's self-understanding as a *legal community*. More precisely, the substitute concerns the *normativity* of European legal arrangements.

Legal validity – not in the sense of *what* is valid but what validity *means* when it is taken to obtain – is the product of a common commitment to norms that is sustained against the backdrop of an equilibrium of social forces. Admittedly, this may sound obscure, but really it is ordinary business. Ideally, interpretations of legal norms are arrived at by adopting the internal perspective of a community where people exchange arguments about the meaning of norms.⁹⁶ The arguments are believed to be constrained by a commitment to the significance of norms that accounts for the existence of legal *system* itself. Such an internal perspective, however, can be socially stabilised only if it is bolstered by external conditions. An equilibrium of forces must motivate participants to adopt, when engaging in arguments, the internal point of view. At the same time, this external constellation of forces must not matter internally unless it can be systematically accounted for. The law is what it is, for example, on account of the overall balance of reasons and not because judges anticipate resistance to their rulings by members of other departments. The relevance of this internal perspective is the legal equivalent of the *forum internum*. Law avails of a collective conscience. Ideally, it accounts for the meaning of legal constraints. All legal justification hinges upon the relevance of the internal point of view. It comes to the fore, for example, when we try to imagine the ECJ *arguing* that a certain interpretation of Union competence cannot be right, for it would likely encounter by the Italian constitutional law. We would not regard this as an exposition of law but rather treat it as proof of political sagacity.

This is not to deny that legal norms need to have external backing in order to motivate. While normative meaning is generated from within, as it were, the energy guaranteeing its realisation is fuelled by

⁹⁶ This is a concept that I clearly borrow from Hart. See H. L. A. Hart, *The Concept of Law* (2nd ed., Clarendon Press, 1994), at 88-90.

the emotions and interests prevailing in external background conditions. The adequate calibration of internal justification and external checks is essential to the realisation of constitutional normativity. Smart constitutional engineering pays heed to an equilibrium of forces that is adequate to the task of realising the ideal normative point of view through the acts by those who pursue their personal interest or the interest of their institution. If it is adequate – that is, when no participant easily perceives opportunities to opt out or to defect with impunity – internal normativity can emerge and be institutionalised in a shared discourse of justification.

The right equilibrium allows for the emergence of *de facto* normativity. This is the normativity one that one encounters when taking the internal point of view. It is possible, ideally, to sustain the common perspective of justification even long after a legal system has ceased to exist (Roman law is the obvious case in point). Even though the *effect* of the bindingness of law depends on an external equilibrium of forces its meaning is independent of it. Moreover, participants to legal discourse can leave open the question of what might constitute the legal system's ultimate normative foundation. The very point of legal systems – in contrast to systems of morality – is that they do not require an *actual* foundation. As Kelsen famously stated with regard to, and unnecessarily restricted to, the *Grundnorm*, legal norms are treated from within the perspective of the system *as if* they were valid (*Alsobigkeit* or 'asifness' is not a word, but maybe it should become one).⁹⁷ Conversely, legal systems can accommodate, necessarily, various *virtual* foundations, for no legal justification can remain forever entirely oblivious to the ultimate questions. That a multiplicity of justifications can be grafted onto the legal system reveals something about the nature of a legal community. It is essentially a community of strangers.⁹⁸

Expecting an equilibrium of forces to allow for the emergence of *de facto* normativity is intrinsic to the modern idea of constitutional legality. Constitutional law aspires to amount to more than the

⁹⁷ See H. Kelsen, *General Theory of Norms* (trans. M. Hartney, Clarendon Press, 1991), at 256.

⁹⁸ Legal systems, qua systems without foundations, are better than systems with foundations, which are systems of morality. The point cannot be proven here.

refraction of a balance of forces or the coincidence of the self-interest of the parties involved. Nevertheless, internal unconditionality does not translate into external independence. The normativity of the internal point of view should not incite disruptive responses from participants who consider themselves trapped in a fragile equilibrium of forces. Put differently, the categorical imperatives that arise from within the internal point of view are systematically vulnerable to subversion by the hypothetical imperatives reflecting the interest and ambition of participants.⁹⁹

I can now return to the point that I would like to make about ersatz consequentialism. The point is already well-known. It actually goes back to Håltje Rasmussen's perceptive critique of the Court. The idea is that if the Court persistently offends standards governing the sound exposition of law and produces indigestible consequences it is likely to provoke ill-will and revolt among countervailing powers, in particular, the member state courts or member state governments.¹⁰⁰ When internal normativity becomes compromised the integration goes into reverse. A systemic effect can be observed here. As long as internal normativity is perceived to be intact, the external forces are inclined to believe that what exists is congruent with a pre-established equilibrium among powers. They believe, in other words, that they are not taken advantage of, for they presume the operation of internal normativity to be consonant with the conditions of external stabilisation. When they perceive, however, the former to be undercut by bogus judicial reasoning they have reason, and maybe even incentive, to reassert their interest.

This is an adverse consequence for the Union as a legal community. It is not a consequence, however, that Europe could not accommodate. Before the emergence of modern constitutional law all constitutions of non-absolutist states were considered to be composites of potentially conflicting forces. An ECJ wholeheartedly embracing legal dissonance would successfully remit the European constitutional tradition to a pre-modern stage.

⁹⁹ Conversely, the self-interest of external forces can equally be 'corrupted' by internalisation. One should not be surprised to see systemic effects at work.

¹⁰⁰ See Rasmussen, *supra* note 8, at 73. Needless to say that Rasmussen has been proven right in several occasions.

In my opinion, this is the development we have to face up to. If de facto normativity is already in a state of collapse we should consider ceding our field of enquiry to political science or switching to the historiographic mode of *ius publicum* that had once been epitomised so abundantly in the scholarship of the *Reichspublizist* Johann Jacob Moser.¹⁰¹

Conclusion: The situation of European legal science

The discussion above may appear to have addressed a phenomenon that is distinct from itself – existing ‘out there’ as it were. There is the ECJ and here is legal science. One – the latter – is engaged in describing and analysing the doings of the other.

But this is not the case. In fact, the pages offer a self-reflection of legal science and how its failure to engage legal reason is involved in constituting the object of its study. The emancipation of legal dissonance reveals something about the intellectually servile state of legal thought that is spellbound by the mix of neo-liberal reformism and geopolitical ambition that has come to dominate the Union. The observations above tried to intervene, from an exile position, into this situation through engaging in self-reflection.¹⁰²

I understand, of course, that the emancipation of European legal science from the lure of well-rewarded contextual expertise is confronted with numerous obstacles.

First, the communication among scholars from various legal traditions depends heavily on commonly using the idioms of a compartment of law which is, no doubt, in many respects a rather special case. It is a special case in that its tradition of scholarship is a fairly recent one.¹⁰³ This is not necessarily disadvantageous. On the contrary, more interdisciplinary experimentation appears to be welcomed in British legal scholarship than in the context of any other European national tradition. At the same time, however, the common

¹⁰¹ Moser published in the eighteenth century two immense multi-volume treatises on German public law that contained essentially reports of state practice.

¹⁰² On the internal relation between self-reflection and emancipation, see J. Habermas, *Erkenntnis und Interesse* (2nd ed., Suhrkamp, 1973), at 244.

¹⁰³ See Weiler, *supra* note 1, at 203.

law mentality makes scholars predisposed to pay broad deference to courts. What this tradition lacks, in particular, is the self-confidence of a legal science that has made it its task to criticise pronouncements by the judicial department on the basis of systematic expositions of law.¹⁰⁴ The common law tradition is prone to seeing legal scholarship as part of the judicial process. In some instances, by contrast, the civil law tradition created the basis for viewing legal science as the public's sentinel vis-à-vis judicial acts of state.

Second, the pro-attitude toward European integration sometimes translates into a mind-numbing disposition to react to minor innovations by European bureaucracies or judicial bodies with excitement. New cases are treated as revelations, new procedures, such as the Open Method of Coordination,¹⁰⁵ viewed as innovations almost on the plane with the creation of, say, the modern state. The attitude of celebration has done much to make the European legal system appear intellectually more eminent than it really is.

Third, the agents of European integration have a legitimate interest in drawing on European legal expertise in the pursuit of their objectives. Law professors are notorious for their keen interest in leaving an imprint in legal history. Co-opted scholarship, however, does not bite.

Fourth, the legal profession in Europe is becoming increasingly professionalised (and exceedingly smug about this). This means that the training of lawyers is more and more restricted to producing the skills necessary to enable whoever happens to the bearer of these skills to succeed in a legal career. This limited horizon creates a real danger. For example, the ideal typical advocate, as revered by Max Weber, was a politically active person with broad knowledge of the historical background and philosophical underpinnings of the legal tradition.¹⁰⁶ I strongly surmise that it would have been difficult, for

¹⁰⁴ For a defence of this aspect of the Germanic legal tradition, see my 'The Indelible Science of Law', (2009) 7 *International Journal of Constitutional Law*, 424.

¹⁰⁵ See, for one example, D. M. Trubek and L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination', (2005) 11 *European Law Journal*, 343.

¹⁰⁶ See M. Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie* (5th ed., ed. J. Winkelmann, Mohr, 1976), at 828-9.

example, to sell off to the members of the Frankfurt Parliament of 1848 the European Constitutional Treaty as a constitution. By contrast, the professionalised legal profession, with all its well-trained ignorance, is increasingly disarmed vis-à-vis the idealising glitter produced by the chiefs of bureaucracies and the captains of industries.

The obstacles are many, but the task lying ahead is an important one. European integration goes to the heart of law. Legal science needs to address not only the tricky question of what it takes to adjudicate responsibly, but also to confront the question of what we actually mean by 'law' in the European Union. Do we think that the law is a means of social control? If we do we may have reason to distinguish law from other forms of control. Alternatively, the law might be conceived of as one method of social problem solving among others, which is continuous with other forms of human co-ordination.

Whichever option one chooses, the outcome will be different. I cannot address any of the questions here, but I believe that these are the questions that a future European legal science had rather apply itself to confront.

Chapter 4

European legality and jurisdictional justification

How the ECJ should determine the legality of legislation under Art. 114 TFEU¹

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Introduction

One of the blind spots of the reflection² on European constitutionalism in the past decades has been the transformation of the idea of legality as it is reflected in the reasoning of the European Court of Justice (ECJ) and many national constitutional courts. Whereas during much of the late nineteenth and twentieth century legal practice and legal scholarship was dominated by a positivist style, focused on sources and tying legal analysis to those sources by reference to established canons of construction, there are central features of current constitutional practice that do not fit that description. Furthermore it would be a mistake to believe that the positivist style has simply been replaced by a well-known alternative. The dominant conception of constitutional legality has relatively little in common either with the freewheeling approaches advocated by, say, the *Freirechtsschule* or American style Pragmatism. What has replaced it – call it the European conception of legality – is a concep-

¹ Treaty on the Functioning of the European Union. Art 114 TFEU is the old Art. 95 European Constitutional Treaty (ECT).

² An exception is Alexander Somek's contribution to this report (Chapter 3). See also A. Somek, *Rechtliches Wissen* (Suhrkamp, 2007).

tion that is characterised by three distinctive features. First, the idea of legality is tied to constitutional requirements that are subject to judicial review. Legality properly so called is judicially enforceable constitutional legality. Second, these constitutional requirements may or may not be embodied in a constitutional text. To a large extent constitutional requirements are derived and applied without reference to a constitutional text that is engaged using the usual canons of legal reasoning. Call this the detextualisation of European constitutional legality. Third, the basic principles of liberal democracy provide the foundations and teleology for a conception of law as institutionalised practical reason.³ The constitutional requirements are often articulated in the form of highly abstract principles – think of the four freedoms or the classic human rights guarantees. In light of these principles courts assess whether there is a plausible justification for acts undertaken by public authorities. This requires courts to engage in contextualised general practical reasoning. It follows that constitutional legality as it is understood in Europe provides courts with the power to assess whether law's claim to legitimate authority can be vindicated by way of assessing the plausibility of reasons underlying acts of European public authority.

Such a conception of legality incorporates pragmatic or 'natural law' elements, but cannot be reduced to that alone. The ubiquity and centrality of the principle of proportionality in European law is perhaps the clearest evidence for a conception of legality that opens itself up to general practical reason. Proportionality becomes the central tool that lawyers use as a formally disciplining, substantively radically indeterminate conceptual framework for the contextualised analysis of complex issues of policy. Whether a particular law makes good on law's claim to legitimate authority is not a question exclusively to be debated and negotiated in the context of political struggle or acts of individual resistance. Instead that practice of contestation becomes an integral element of litigation and legal critical self-reflection by the core institutions of legal reasoning – the law courts and the law faculties – for example by assessing the proportionality of a particular act of legislation. To some extent

³ For the idea of law as a special case of general practical reasoning see N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978) and R. Alexy, *A Theory of Legal Argumentation* (Oxford University Press, 1989).

political and legal deliberation and contestation occupy the same normative space. There is a qualification, however: Law's capacity to reflect on itself in terms of practical reason is constrained by a commitment to liberal democracy that, for the purpose of legal argument, has to be understood in a way that is roughly compatible with existing basic institutional arrangements and practices, to be legally plausible. These limitations have their basis in the limited institutional role of legal institutions. Courts and law-faculties do not have the clout or legitimacy associated with governments or political parties. Legal institutions do have an epistemic comparative advantage compared to other institutions that in part accounts for their legitimacy, but that advantage does not extend to foundational issues of political philosophy or concerning the requirements of justice. Instead the comparative advantage of legal institutions stems from their critical and constructive focus on the coherence of legal practice, across levels of abstraction, subject matter, areas and time. Courts, when they resolve disputes and scholars, when they reflect on doctrine, reflect upon the justification on decisions in order to help establish coherence between and fine-tune decisions made by others.

But there is an additional reason why the ideal of legality cannot be reduced to questions of justice. The European conception of legality integrates positivist elements: It is sensitive to 'sources' and provides the basis for a critical reconstruction of core elements of sources doctrine. Sources doctrine matters, because questions of procedure and jurisdiction matter in a world where the division of labor between different institutions to establish justice through law is an indispensable feature. The division of labor between different institutions is indispensable, because of: First, the centrality of participation and voice, given disagreement on issues of public policy even by reasonable and well-informed citizens, second, the importance of empirical expertise for the achievement of policy objectives and third, the institutionalisation of critical public reason to validate law's claim to legitimate authority. Different institutions have different comparative advantages in terms of voice, expertise and critical public reason, that a good legal system would want to

integrate for the benefit of the whole.⁴ That coordination function is performed by secondary norms relating to procedure, jurisdiction and sources doctrine. But even though sources doctrine has a role to play within the European conception of legality, the specific content of sources doctrine has to be susceptible to reasoned reconstruction in light of the relevant principles of liberal democracy. Sources doctrine does not provide the starting point and ultimate orientation for legal analysis. True, if a particular doctrine relating to sources is itself the result of a legislative act, the procedure underlying *that* decision on the relative authority of different institutions may well be a ground for a court to give deference to the assessments, but that deference will not be absolute, but itself circumscribed by principles of procedural legitimacy. I have argued elsewhere⁵ that the response of national courts to the ECJ's claim that EU law takes primacy over all national law has been neither to accept that claim (a new simple source based rule as the new rule of recognition), nor to simply maintain the supremacy of the national constitution (maintaining a traditional source based rule of recognition), deriving the relevant conflict rules from ordinary interpretation of the national constitution. Instead national courts have, for the most part, opted to craft conditional conflict rules that are best understood as striking a balance between potentially colliding liberal-democratic principles, relating to the effective and uniform implementation of EU Law on the one hand, and considerations relating to the effective protection of human rights and democratic self-government on the other. Conflict rules that determine the relative authority of different actors are tailored by constitutional courts to optimise the realisation of competing constitutional principles. This way of understanding not only constitutional conflict between European and national law, but the management of conflicts between different sources of law more generally, reveals the structure of the European conception of legality. It is neither positivist, nor simply a renaissance of free law thinking. Instead it ties the idea of legality to justification in terms of

⁴ See D. Halberstam, 'Local, Global and Plural Constitutionalism: Europe Meets the World', in G. de Burca and J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2011), 150-202.

⁵ See M. Kumm, 'The Jurisprudence of Constitutional Conflict: Supremacy Before and After the Constitutional Treaty', (2005) 11 *European Law Journal*, 299.

substantive, procedural and formal principles that are part and parcel of the liberal democratic tradition.

To claim that the practice of the ECJ and national constitutional courts embodies an original idea of legality is, to some extent, an idealising, apologetic exercise. It is apologetic in that it provides a justification for some of the basic structural features of European legal practice that would otherwise appear to be an anomaly or a phenomenon of decay or disintegration. It is idealising in that it ascribes to that practice a distinctly legal perspective, an internal norm-oriented point of view that is distinct from an analysis of *how* power has shifted, say, to judicial and away from electorally accountable institutions *or to what effect* power has been exercised, say, to further a political agenda of centralisation and neoliberal alignment. Both the idealising and the apologetic nature of the exercise is to some extent an integral element of legal scholarship properly so called.⁶ But that does not mean that it lacks critical edge. First, it does not imply the ECJ is in fact justified to have reached the concrete conclusions it has reached in any particular case. You can wholeheartedly embrace the European conception of legality, even if you disagree with *Viking*, *Laval*, or *Rüffert*.⁷ Second, it is possible to criticise the ECJ for failing to take seriously the implications of a particular conception of legality in the approach it takes to the analysis of certain questions. In the following I will critically analyse the practice of the ECJ as it relates to questions of competencies, in particular with regard to the common market. In that area, I will argue, the ECJ has failed to embrace an understanding of competencies that reflects the practical reason oriented conception of European legality that the ECJ has embraced in other areas. The point is not so much to mark points of disagreement on certain outcomes – e.g. whether the EU was competent to enact certain harmonising legislation concerning, for example, Tobacco or roaming charges – but to make sense of, criticise and suggest an alternative to the way that

⁶ See R. Dworkin, *Law's Empire* (Belknap Press, 1986) for a general jurisprudential defense of this claim. According to Dworkin this is a feature not just of legal interpretation, but of all interpretative activity. See *id.*, *Justice for Hedgehogs* (Belknap Press of Harvard University Press, 2011).

⁷ See ECJ C-438/05 (*Viking*), C-341/05 (*Laval*), C-346/06 (*Rüffert*).

the court approaches and justifies its decisions concerning jurisdictional issues in light of a particular conception of legality.

Justifying competencies

Subsidiarity, democracy and the internal market

The legitimate authority of European public law depends not only on whether the outcome produced can be plausibly justified, it also depends on the procedures used to generate it. The following provides a closer examination of the procedural principles of subsidiarity and democracy as they relate to questions of regulating the common market and the interpretation of Art. 115 TFEU (Art. 95 ECT old) in particular. If there is one insight that the debate about democratic legitimacy in the European Union has produced, it is the recognition of the fallacy of methodological nationalism⁸: That fallacy consists in the belief that the appropriate baseline for the discussion of legitimacy of public authority beyond the state is national institutional arrangements. It is generally recognised today that it is a mistake to think of national constitutional arrangements as the paradigm of legitimate government. It is not true that European institutions can only be legitimate, if they reproduce the kind of structures of accountability that are at the heart of domestic constitutional practice in liberal democracies. National constitutional arrangements cannot serve as the paradigm of legitimate government, because their legitimacy is itself a problem. Christian Joerges was among the first and most influential to have made and developed the argument in the European context:

The legitimacy of governance within constitutional states is flawed in so far as it remains inevitably one-sided and parochial and selfish. The taming of the nation-state through democratic constitutions has its limits. [...] democracies presuppose and represent collective identities [and] they have very few mechanisms ensuring that 'foreign' identities and

⁸ M. Zürn, *Regieren Jenseits des Nationalstaates: Globalisierung und Denationalisierung als Chance* (Suhrkamp, 1998). See also M. Maduro, 'Where to Look for Legitimacy?', in E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds), *Constitution Making and Democratic Legitimacy*, ARENA Report 02/5 (ARENA Centre for European Studies, 2002), 81-110.

their interests be taken into account within their decision-making processes.⁹

This has implications for the way supranational constitutionalism is conceptualised:

We must conceptualize supranational constitutionalism as an alternative to the model of the constitutional nation-state which respects that state's constitutional legitimacy but, at the same time, clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimized states and the supranational prerogatives that an institutionalization of this interdependence requires.¹⁰

The legitimacy of national constitutions depends in part on the extent to which they are open to and further supranational legal practices that provide adequate compensation for the structural deficiencies of national constitutional practice. Conversely, transnational institutions must be structured in a way that allows them to effectively address and compensate the structural deficiencies of national constitutionalism.

The following will analyse the jurisdictional principle of subsidiarity, both abstractly and more concretely in the context of regulating the internal market. In the first part I will argue that the principle of subsidiarity gives expression to and helps operationalise the compensatory function of supranational legal authority. Subsidiarity has replaced sovereignty as the starting point for thinking about jurisdiction.¹¹ In the Treaties the word sovereignty is not mentioned at all, whereas the principle of subsidiarity features prominently in legal texts and constitutional debate. Put in practical terms, the principle of subsidiarity establishes the presumption that an issue

⁹ C. Joerges and J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', (1997) 3 *European Law Journal*, 273, at 294.

¹⁰ C. Joerges, "'Deliberative Political Processes" Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making', (2006) 44 *Journal of Common Market Studies*, 779, at 790.

¹¹ See J. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', (2003) 97 *American Journal of International Law*, 782.

should be left for the member states to address, unless there are specific structural reasons related to collective action problems or coordination benefits that justify transnational involvement. Only if there is a structural problem with leaving an issue decided by member states – only if there is something to compensate for – may the EU intervene. In order to illustrate what this means in concrete contexts I will analyse the ECJ's doctrines governing the EU's competencies to enact legislation to ensure the functioning of the internal market – and the idea of 'distortion of competition' in particular – and analyse how these doctrines reflect a commitment to subsidiarity.

Furthermore, once there is a justification for the EU to get involved, the measures taken by the EU must meet the proportionality requirement: They must be suitable, necessary (narrowly tailored) and appropriate (not disproportionate) to address the structural problems that justify EU involvement in the first place. If an EU measure does not meet the subsidiarity and proportionality test (hereinafter: the S&P framework), it suffers from a legitimacy problem, no matter what the procedure that is being used to generate laws on the European level. For structural reasons national and lower levels of law-making generally provide citizens with more meaningful possibilities of political participation and allow legislators to draft legislation that is more sensitive to the legitimate preferences of constituents. Shifting up jurisdiction to the European level therefore always involves a *prima facie* loss. If, on the other hand, a European measure is justified within the S&P framework, this means that there are overriding structural concerns of greater weight. Questions of competencies or jurisdiction, then, are closely linked to questions of legitimacy. This second section will continue to critically discuss the ECJ's doctrines relating to the EU's powers under Art. 114 TFEU (old 95 ECT) and illustrate how the S&P framework operates within the internal market.

Finally, the institutional question whether and to what extent the European judiciary is an appropriate institution to address questions of competencies – using the open-ended S&P framework – will be addressed. I argue that the ECJ is institutionally in a position to assume a central role in reviewing whether European legislative acts meet the requirements established by the S&P framework. There are

generally good reasons to be skeptical about the role of centralised courts in policing the jurisdictional boundaries of the centralised community. The experience particularly in the US has shown that it is extremely difficult to formulate doctrinally manageable tests that would help courts to convincingly distinguish between legislation that falls under the Commerce Clause from legislation that does not. Furthermore there are doubts about the incentives and institutional culture of central courts that are part of and tend to share in the power and prestige of 'federal' institutions. These concerns are amplified in the EU, where the ECJ has historically played an important role as the 'motor of integration'. Yet, I will argue, the situation in the EU is different. There are interesting features of European constitutional practice that suggest that the ECJ is better positioned to play an important role in policing jurisdictional boundaries than centralised Courts in other federal systems.

Subsidiarity and legitimate purposes

It is not obvious that in a country such as the US, where there is a well established national democratic process and a comparatively strong national identity, a court ought to have much of a role to play to police the jurisdictional boundaries between the federal and state governments. But in Europe preoccupation with jurisdictional boundaries - or competences - are central for good reasons. The reasons generally favoring local over more centralised decision-making are well known and apply both to the EU and the US. They can be fleshed out in the language of efficiency, democracy or identity. Efficiency-wise the diversity of collective preferences across member states in conjunction with the benefits of lower costs of experimentation and greater potential for innovation establishes a general reason to decide policy questions on the lower, rather than a higher level. Democracy-wise the more local political process tends to produce more meaningful possibilities of political participation. Ranging from the relative weight of each individual vote, access to representatives, or publishing a letter in a newspaper of wide circulation in the constituency, local political processes tend to provide more opportunities to have a meaningful say in the political process than more centralised processes. Finally the identities of citizens of states, the result of a long history, shot through with national triumphs and tribulations, tend to be eroded as more and

more regulation takes place on the European level. Without revitalisation in an ongoing political process these identities become weak and give rise to little more than folklore. To some extent these reasons apply both to the US and the EU. But in Europe these concerns are of significantly greater weight than in the US, given the absence of meaningful democratic politics on the European level, the absence of a European public sphere, the absence of a cohesive European identity and the relative strength of national identities. In the US there are serious doubts whether 'federalism' arguments are little more than a cover for substantive political preferences. In the EU there are no doubts that concerns about national self-government have real independent weight.

Given the very limited protection provided by the idea of conferred powers in the context of a provision authorising the establishment of a common market, are there other legal devices beyond the political process that could effectively serve to delimitate jurisdictional boundaries between the federal and state level in a plausible way? In Europe the legal protection of jurisdictional boundaries is not limited to the principle of conferred powers. As will become clear, it is a remarkable and original feature of the European integrated market that both the reasons that justify federal intervention to regulate the internal market and the countervailing concerns are part of the constitutional equation that determines whether regulatory intervention by the European Union is justified on jurisdictional grounds, all things considered. In Europe the judicial task of policing the jurisdictional boundaries of the European Union is intimately connected with assessing the policy reasons that justify federal intervention.

The key for understanding the connection between competences and regulatory policy-analysis is Art. 5 Treaty on European Union (TEU). It establishes a commitment not just to the principle of conferred powers (para. 2), but also to subsidiarity (para. 3) and proportionality (para. 4). All three are interlinked and all are focused on issues of competencies, ultimately in the service of safeguarding member states autonomy. Yet there is a considerable degree of confusion about how the three are related. The following will try to spell out an integrative framework for assessing whether or not the EU acted within its jurisdiction when it enacts legislation on the grounds of the

establishment and functioning of a common market. I will call this integrative framework the subsidiarity and proportionality framework (S&P framework).

Ever since its introduction in the Treaty of Maastricht, a cottage industry has developed discussing issues surrounding the principle of subsidiarity.¹² But notwithstanding the in part infelicitous formulation in Art. 5 TEU and Protocol No. 2 concerning the Application of Subsidiarity and Proportionality, the basic idea the principle of subsidiarity establishes is simple. If there are no good reasons for a political issue to be shifted up to the European level, there are good reasons to leave the decision to member states. Shifting decision-making upwards requires a justification beyond the claim that the overall result is attractive as a matter of substantive policy. It is not enough, for example, to claim that there are good reasons related to public health that justify the prohibition of advertising for tobacco products. That claim may or may not be true. But before that question is addressed a prior question has to be answered: why should this policy question be addressed on the higher (European), rather than the lower (national) level. The principle establishes a default presumption in favor of the lower level in the weak sense that any ratcheting up of the level of decision-making requires a jurisdictional justification. The proportionality test, too, is something the ECJ is long familiar with from the context of human rights adjudication.¹³ Yet the Court has not succeeded in establishing a plausible conceptual framework that brings together these two ideas so that justice is done to the complex constitutional commitment of Art. 5 TEU. The following presents a reconstruction of what I take to be the best understanding of what the Court has been trying to do and what it ought to be doing in policing the

¹² Particularly helpful contributions include G. Berman, 'Taking Subsidiarity Seriously', (1994) 94 *Columbia Law Review*, 331; G. De Burca, 'Reappraising Subsidiarity's Significance After Amsterdam', (1999) *Harvard Jean Monnet Working Paper* No. 7/99; T. Schilling, 'Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously', (1995) *Jean Monnet Working Paper* No. 10/95. More recently see also N. W. Barber, 'The Limited Modesty of Subsidiarity', (2005) 11 *European Law Journal*, 308. For a general overview see A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002).

¹³ Art. II-112 para. 1 of the European Charter of Fundamental Rights specifically establishes the proportionality requirement as a standard to judicially determine the substantive limits of a right.

jurisdictional boundaries of the Community in the context of market regulation. The appropriate test that the Court would do well to apply consists of three prongs: Federal intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of member states regulatory autonomy.

According to Art. 5 para. 3 TEU, the principle of subsidiarity requires that 'the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by Member States [...] but rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.' There are considerable difficulties with this formulation, which have generated a considerable literature.¹⁴ When can member states not sufficiently achieve the relevant purpose? What is the relationship between member states not sufficiently achieving this objective and the EU being able to better achieve it by reason of the scale and effects? The best answer to these questions, I propose, is the following: The subsidiarity requirement, appropriately understood, establishes that the EU may act only, if the action of member states is structurally tainted by collective action problems. The only situations in which member states cannot sufficiently achieve the relevant objective are situations involving collective action problems. Within well-established liberal democracies it is unclear what other reasons there could be to justify intervention. This interpretation would also make sense of the relationship that the text establishes between member states not sufficiently achieving an objective and the EU being in a better position – in virtues of the scale and effects of the measure – to resolve it.

If the only legitimate purpose for the federal level to intervene in the internal market is to solve a collective action it follows that all other reasons are excluded as reasons relevant for justifying federal intervention. The principle of subsidiarity thus has significant exclusionary force. It excludes as beside the point, for example, arguments concerning what the Court calls the *effet utile* of furthering integration, used by the ECJ particularly in its early period to provide

¹⁴ For an overview see Estella, *supra* note 12.

for an expansive interpretation of EU law.¹⁵ The European Union legislator is also precluded from substituting its own substantive judgment of the wisdom of member states policy choices with regard to market regulation or even the fairness and justice of policy choices made by member states. The fact that some member states are adopting policies that the relevant majority on the European level disagrees with is not a reason for the EU to step in. And the idea of subsidiarity also precludes expressive reasons as reasons justifying European legislation. This means, for example, that a comprehensive common European civil code may not be enacted in Europe on the legal basis of Art. 114, if its purpose is to serve as a prestige project for a European legal science, and it cannot successfully be justified on other terms.

It follows that the jurisdictional heading 'establishment and functioning of the common market' is appropriately broken down to a number of more specific reasons related to collective action problems. This is exactly what the ECJ has done, as the discussion of the ECJ's jurisprudence in the context of Tobacco Regulation will illustrate.

Directive 98/43/EC regulated the advertising and sponsorship of Tobacco products. The core operative provision of the Directive established a general prohibition of advertising and sponsorship of Tobacco products. It also extended the prohibition to diversification products and carved out some exceptions concerning advertising in tobacco shops and similar venues.¹⁶ The main purpose for the prohibition of advertising and sponsorship of tobacco was related to public health. The relevant qualified majority in the Council of the EU along with the Commission and Parliament concluded that a general prohibition on the advertising and sponsorship of Tobacco was an effective part of an integral strategy to combat health risks related to smoking.

Yet the European institutions could not enact harmonising legislation on grounds of public health directly, because they do not have the

¹⁵ For a discussion of the Court's early jurisprudence see J. H. H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal*, 2403.

¹⁶ See Art. 3 of the Directive.

regulatory authority to do so. Art. 5 ECT establishes the general framework for the analysis of question of competencies. According to Art. 5 the European Union may regulate only in those areas in which the Treaties have conferred competencies to the EU. And, unless an issue falls under the EU's exclusive competence, which is very rarely the case¹⁷, they may do so only to the extent required by the principle of subsidiarity and proportionality. The Treaty Establishing the European Community (TEC) has a long list of titles enumerating the competencies of the Union, including one relating to public health. But the provision concerning public health specifically determines the nature of the measures that may be taken and generally excludes legislative harmonisation.¹⁸ On the grounds of public health the TEC merely authorises the Commission to make available its good offices to help foster coordination between member states and authorises legislative measures in only very specifically defined narrow circumstances.¹⁹

But even though the main purpose of the Directive was related to an objective that the Treaty specifically prohibited the EU to pursue by means of preemptive legislation, this did not end the inquiry. As the Court made clear, the fact that a harmonising measure impacts the protection of human health does not yet mean that adoption of harmonising measures adopted on the basis of other provisions is not possible.²⁰ In particular the Court held it does not exclude the possibility that the EU's Commerce Clause, Art. 95 TEC (now Art. 114 TFEU), could provide a legal basis.²¹

Art. 95 TEC permits EU legislation if it has the establishment and functioning of the internal market as its object. The internal market is defined as an area without internal frontiers in which the free

¹⁷ Exclusive competences exist only in the area of customs, competition rules, monetary policy for Eurozone members, aspects of the common fisheries policy and the common commercial policy, see Art. 3 TFEU.

¹⁸ Art. 152 ECT.

¹⁹ See Art. 152IV ECT. Harmonising measures may only be enacted to address specifically listed concerns, relating to the safety and quality of blood and human organs, for example.

²⁰ The Court thus no longer follows the 'center of gravity' approach.

²¹ The ECJ does not distinguish or even discuss the relationship between Arts 94, 95 and 96 ECT.

movement of goods, persons, services and capital is ensured.²² Harmonising legislation enacted under Art. 95 TEC may address issues the European Community may not have the authority to regulate, such as public health. But for as long as the measure can be justified as having the purpose of ensuring the establishment and functioning of the common market, it could nevertheless occur. Art. 95 (3) specifically states that 'a high level of health [...] protection should be taken as a basis' for deciding the content of harmonising legislation, where public health issues are effected', even though the Treaty explicitly determines that public health grounds by themselves do not justify the enactment of harmonising legislation. The question is how to assess whether a measure falls under Europe's Commerce Clause.

The ECJ recognises two distinct and specific concerns that are connected to the establishment and functioning of the internal market in such a way that any legislation effectively addressing them will qualify under the EC's Commerce Clause. Both reflect concerns related to structural deficiencies of the domestic regulatory process. The first is connected to the removal of 'obstacles' to trade and justifies intervention whenever national regulation imposes obstacles on interstate commerce. The second refers to what the Court calls 'distortion of competition'. Only when a legislative measure can be shown to serve either the removal of obstacles to trade or preventing distortion of competition will it pass muster under the EU's Commerce Clause. This raises a number of difficult questions. The following will ground these discussions using the example of Tobacco legislation.

Removal of obstacles

Is the prohibition of advertising of Tobacco products justified on the grounds that it removes obstacles to trade?

Divergent laws in different member states sometimes present obstacles to the free movement of goods, services or persons. In the context of tobacco advertising, absent a centralised law on the issue, jurisdiction A could, for example, permit advertising for tobacco products in newspapers or magazines while jurisdiction B could

²² Art. 14 ECT.

prohibit it. This raises the distinct possibility that a newspaper or magazine legally published and sold in A will not be permitted to be sold in B. For a product legally produced and sold in one jurisdiction the divergent regulation in another jurisdiction becomes an obstacle to the free movement of goods. In this respect a general rule addressing the permissibility of tobacco advertising concerning these print products would effectively remove any such obstacles. In this regard the Court agreed with the Commission's assessment that, even though there were no actual obstacles at this point (national laws prohibiting advertising in journals and periodicals generally excluded foreign products from its sphere of application), there was more than an abstract risk of obstacles arising in the near future. Obstacles were likely to arise given the increasing tendency to clamp down on tobacco in many European jurisdictions. The Court deemed this to be enough.

Yet the Court persuasively held that there are features of the Directive, which make it both straightforwardly unsuitable and insufficiently narrowly tailored for the purpose of removing obstacles to trade. First, the Directive is unsuitable in that it does not ensure free movement of products, which are in conformity with its provisions. Instead it explicitly establishes that member states retain the right to lay down stricter requirements concerning the advertising or sponsorship of tobacco products, not just on domestic, but also on imported products. The provisions of the Directive merely provide a floor, but not a ceiling on what is prohibited with regard to tobacco advertising. That may make sense if the purpose of the measure is to generally ensure a minimal standard of 'health protection', but it is unsuitable as a means to ensure the removal of obstacles to the internal market. Second, the directive is overbroad. It also encompasses a prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafés as well as advertising spots in cinemas. A general prohibition of these products does not remove obstacles to trade. Instead it straightforwardly prohibits trade with regard to these products.

This second argument resembles an argument the United States Supreme Court (hereinafter: US S. Ct.) used early last century addressing the constitutionality of a federal law prohibiting interstate

commerce in goods using child labor.²³ The Court struck down the federal law, insisting that prohibiting commerce is the opposite of regulating commerce. The ECJ would similarly have claimed that prohibiting trade is the opposite of removing obstacles to trade.²⁴ The reasons supporting legislation here are clearly the imposition of a common substantive policy, regarding the employment of children in the Child Labor Cases, and regarding public health concerning the prohibition of advertising for tobacco products. On the other hand the US S. Ct. in another series of early cases, which concerned federal laws prohibiting the selling and transporting of lottery tickets interstate, held that prohibition to be acceptable under the Commerce Clause, even though the reasons supporting the prohibition were exclusively morality related. The Court held that, whatever the reasons for the regulation may have been, the decisive question is whether it is commerce that is regulated. The classification of the regulated activity was deemed to be decisive. The ECJ, on the other hand, does not focus on the classification of the subject matter of regulation, but the reasons that support federal intervention.

Harmonising the costs of doing business

Distortion of competition?

Besides reasons relating to the removal of obstacles to trade, reasons related to addressing 'distortion of competition' can also justify federal legislation under Europe's Commerce Clause according to the ECJ. Textually that is not obvious: Art. 114 (old 95) refers to Art. 26 (old 14) according to which the internal market is defined with reference an area 'without internal frontiers' where problems relating to obstacles to free movement are adequately addressed. There is no mention of distortion of competition. There is Protocol 27, which states that the internal market, as mentioned in the general purposes of the EU in Art. 3 includes a system ensuring that competition is not distorted. But that Protocol specifically clarifies that the EU is empowered to take action under Art. 352 (old 308). The point of this provision is that it allows the EU to act when it is necessary to fulfill

²³ *Hammer v. Dagenhart*, 247 US 251 (1918).

²⁴ The ECJ would insist, however, that under some circumstances the federal prohibition of certain products can contribute to the removal of obstacles to trade with regard to a larger market, see ECJ Case C-210/03 of 14 December 2004, para. 34 and ECJ Case C-359/92 *Germany v. Council* [1994] ECR I-3681, paras 4 and 33.

one of its purposes, but there is no power specifically conferred for the EU to address an issue. This default clause only kicks in as a last resort, and it does so requiring unanimity, rather than actions under the ordinary legislative procedure. So the textual basis for including the distortion of competition as a grounds to legislate under Art. 114 TEU would not be obvious, were it not for Art. 116 TEU. Art. 116 TEU which specifically provides distortion of competition as a ground for regulatory intervention by Directive, 'if the distortions need to be eliminated' and the problem is not successfully addressed by consultations between member states. But what does the requirement that 'distortions need to be eliminated' mean? How can one make sense of this idea in light of the EU's commitment to subsidiarity?

The idea of distortion of competition is used differently by the Court in different contexts.²⁵ When determining the scope of the EC's jurisdiction to legislate to ensure the establishment and functioning of the internal market, it refers to a situation where different jurisdictions impose different costs or provide different opportunities with regard to business undertakings. These different costs and opportunities create an uneven playing field within an integrated market. In order to ensure the functioning of the internal market the federal legislator can step in to help establish an even playing field, so the argument goes. In *Titanium Dioxide* the ECJ held, for example, that a European Directive harmonising rules related to the reduction of pollution caused by waste from the titanium dioxide industry was justified on the grounds of preventing appreciable distortion of competition between undertakings competing in the same internal market but facing very different competitive conditions due to differences of regulatory burdens imposed on the industry in different jurisdictions.²⁶ In *Tobacco Advertising* the Court discussed the question whether the fact that undertakings established in jurisdictions which impose fewer restrictions on tobacco advertising have an unfair advantage in terms of economies of scale and increase

²⁵ For an overview of the use of 'distortion of competition' across several fields see E. Fox, 'State Aids Control and the Distortion of Competition - Unbundling "Distortion"', in B. Hawk (ed.), *International Antitrust Law and Policy* (Fordham Corporate Law Institute, 2001), at 91.

²⁶ Case C-300/89 *Commission v. Council* [1991] ECR I-2867 (*Titanium Dioxide*).

in profits. And even though the Court concluded that such distortions could amount to appreciable distortion of competition with regard to very specific and specialised service providers – the Court mentions specifically services connected to major sporting and cultural events which could easily relocate – generally, these considerations were not sufficient to justify the outright general prohibition of tobacco advertising, presumably because they did not generally rise to the level of making the distortion of competition ‘appreciable’.²⁷

The problem of drawing a line between appreciable and non-appreciable distortion of competition is one issue that will be revisited below. The more fundamental question is, however, whether it makes sense to think of ‘distortion of competition’ as ground for justifying federal intervention at all.²⁸

In integrated markets it is not convincing to address the fact that different regulatory regimes impose different costs and benefits on competing economic actors as a fairness issue involving ‘distortion’ of competition. In an effectively established internal market a company can move its production site into the jurisdiction of its choice. Given the mobility of capital and other production factors, the choice of jurisdiction is part of the strategy companies develop to compete. In that sense competition between companies is not distorted when different jurisdictions impose different conditions of doing business on undertakings. The existence of an internal market ensures that where an undertaking is located is appropriately interpreted as a strategic choice of the undertaking. In an internal market the idea of competition, appropriately conceived, includes the choice of location.

There may be an exception to that claim. ‘Distortion of competition’ may be said to exist, if standards in one jurisdiction are so low, that a moral problem arises. By relocating to a jurisdiction with morally

²⁷ Case C-376/98 *Germany v. Parliament and Council (Tobacco Advertising)*, recital 110-11.

²⁸ The idea is not alien to American jurisprudence either. In *US v. Darby* 312 US 100 (1941) which concerned the constitutionality of the Fair Labor Standards Act imposing minimum wages and maximum hours restrictions on employment was held to be constitutional, among other reasons on the grounds that the national market would otherwise give rise to unfair competition emanating from firms offering ‘substandard’ labor conditions.

hazardous standards for reasons of competitiveness, an undertaking may become complicit in morally abominable practices. In a well-regulated internal market the choice between bankruptcy and complicity in morally abominable practices, such as slave labor, is clearly not a choice an undertaking should have to make. But at least in the context of the EU and well established liberal democracies more generally there are reasons to think that arguments concerning minimal moral standards are more often than not merely a cover for rent-seeking. It is true that just because the invocation of 'minimal standards' confronts difficult line-drawing exercises, this does not discredit the very idea of 'minimal standards'. But in the absence of clear paradigm cases in Europe, the invocation of minimal standards raises the suspicion that established industries and their employees in high cost jurisdictions are enlisting the co-operation of self-aggrandising European institutions to engage in anti-competitive rent-seeking, thus precluding competitors and workers in lower cost jurisdictions from reaping the rewards of a legitimate competitive advantage. This general suspicion becomes a strong presumption when 'minimal standards' arguments are made with regard to practices that take place among members of a club of relatively rich European democracies. Whatever the regulatory standards happen to be in a particular European jurisdiction, they were presumably enacted by way of a reasonably fair and participatory democratic and administrative domestic process, in most cases considerably more democratic than comparative processes on the European level. In the absence of a more concrete argument about why the outcomes of this process is itself distorted either in specific cases or for reasons of a general structural nature, there is no good reason to believe that 'distortion of competition' is a reason for the federal legislator to intervene.

From 'distortion of competition' to 'race to the bottom'?

But perhaps the label 'distortion of competition' does not capture the concern that the ECJ seeks to address. And perhaps there is a reason to believe that the outcomes of the regulatory process affecting the costs of doing business of undertakings in member states, even if embedded in democratic institutional practices, are to be regarded with suspicion. The real issue could be the problem of strategic standard setting, giving rise to a regulatory race to the bottom. The

basic idea is well known²⁹: In order to attract mobile capital and undertakings there is a perverse incentive for regulators in different jurisdictions to engage in strategic standard setting.

There are significant doubts, however, whether the idea of a 'race to the bottom' is more successful than the idea of 'distortion of competition' to furnish a rationale for federal legislation in situations where different regulatory measures impose different costs on undertakings.³⁰ First, empirical evidence for the actual existence of a regulatory 'race' is thin. Second, arguments have been put forward that explain why this is the case and why whatever remains of the 'race to the bottom' problem is often not appropriately remedied by means of federal intervention. Here it must suffice to briefly mention some core arguments.

To begin with, a race to the bottom can easily be avoided by shifting costs. There may be an incentive for jurisdictions not to burden undertakings with costs and to attract capital, but that does not necessarily lead to lower regulatory standards. It is generally possible to achieve regulatory goals without imposing costs on economic operators. The cost of social regulation or compliance with environmental requirements can be offset and neutralised by, for example, corporate tax breaks or state subsidies of various kinds. Legal rules may, of course, preclude shifting costs in obvious ways. Whereas subsidies are reviewed very leniently under the Dormant Commerce Clause in the US,³¹ in the EU they are very likely to run afoul of the EU's state aid provisions.³² But there are many ways to reduce costs and confer benefits on undertakings. The significant cuts

²⁹ See R. Stewart, 'Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy', (1997) 86 *Yale Law Journal*, 1196 and R. Stewart, 'The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision-Making: Lessons from the Clean Air Act', (1977) 62 *Iowa Law Review*, 713.

³⁰ For a comprehensive critique of the 'race to the bottom' rationale in the context of US environmental regulation, see R. Revesz, 'Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation', (1992) 67 *New York University Law Review*, 1210.

³¹ For a justification of the US 'Market Participant Exception' see D. Regan, 'The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause', (1986) 84 *Michigan Law Review*, 1125.

³² See Arts 87-89 ECT.

in corporate taxes in many European jurisdictions following the latest round of EU enlargement or the recent German social security reforms that cuts the employers contribution to the employees social security insurance while increasing the burdens on the general state budget are a case in point.

The question is whether shifting costs is a solution or merely points to another problem. If an integrated market tends to shift the compliance costs, say of environmental regulations, from capitalists and consumers across jurisdictions to tax-paying citizens of a particular jurisdiction, this shifts the financial burdens from the polluter and the transnational consumer to local citizens. It is the citizens that now have to pay for clean air with their taxes, not corporate shareholders (earning reduced after-tax profits) or consumers of products (paying higher prices). If there is such a reallocation of burdens, it is not the result of democratic deliberations about what efficiency, fairness or justice requires in a liberal democracy. It is merely an adaptation to pressures created by the changing legal structure of transnationally established markets that impose constraints on local legislatures (limiting its ability to restrict the import and export of goods and capital, for example) while it empowers transnationally mobile capital and undertakings to produce and sell anywhere within a larger market.

These effects could be mitigated if jurisdictions competed not just for capital and industry, but also for citizens. If persons can move freely in integrated markets, persons choose jurisdictions that provide the best bundle of goods – the most attractive way of life. These are likely to include a good environment etc. and provide counterincentives to jurisdictions to impose costs of regulation squarely on the shoulders of citizens instead of corporations. Jurisdictions, then, have incentives to strike an adequate balance between competing concerns, because they compete not just for capital, but also for residents.³³

³³ According to the Tiebout model a Pareto-optimal outcome is produced by regulatory competition, provided certain parameters are met. See C. Tiebout, 'A Pure Theory of Local Expenditures', (1956) 64 *Journal of Political Economy*, 416. Those parameters, however, are never met in the real world. Much of the debate is over what follows from that for a theory of second-best solutions in the real world. For a review of the vast literature the Tiebout model has given rise to, see W. W. Bratton

In the EU the mobility of citizens is provided by the legal guarantee of free movement of workers. But this does little to mitigate the effects described above. There is no symmetry between the mobility of capital and the mobility of persons.³⁴ Capital is significantly more mobile than persons are. On the one hand ever more open capital markets foster capital mobility. Persons lives, on the other hand tend to be more intricately woven into the fabric of the communities they are part of. A dense network of relationships, connections and cultural affiliations reduce an individual's mobility. This remains particularly true for Europe, where language and other interjurisdictional cultural barriers remain significant and increases interjurisdictional relocation cost. A high level of geographic mobility exists only for the very privileged, whose networks tend to be less locally rooted and restricted and the very wretched, who lack significant support networks altogether.

But even if interjurisdictional competition tends to lead to a reallocation of burdens and opportunities, it does not follow that such a reallocation is socially undesirable.

First, if one believes that competition among sellers of goods is socially desirable, why is competition between jurisdictions that 'sell' locations to economic actors not desirable? As Revesz puts it:

[I]nterstate competition can be seen as competition among producers of a good – the right to locate within a jurisdiction. These producers compete to attract potential consumers of that good – firms interested in locating in the jurisdiction. Even though states might not have the legal authority to prevent firms from locating within their borders, such firms must comply with the fiscal and regulatory regime of the

and J. A. Mc Mahery, 'The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World', (1997) 86 *Georgetown Law Journal*, 201.

³⁴ It is widely believed that individuals unlike firms are not mobile. They express their preferences by voting rather than by changing location. See S. Rose-Ackerman, 'Does Federalism Matter? Political Choice in a Federal Republic', (1981) 89 *Journal of Political Economy*, 152; J. Buchanan and C. J. Goetz, 'Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model', (1972) 1 *Journal of Political Economy*, 25. See, more generally, A. O. Hirschmann, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organization and States* (Harvard University Press, 1970).

state; the resulting costs to the firm can be analogised to the sale price of a traditional good.³⁵

Second, even if locational competition were to raise concerns in some contexts, it does not follow that federal intervention is an effective remedy. There are often countervailing considerations that suggest that accepting locational competition is better than any alternative approach. A strong argument against recognising 'race to the bottom' as a good reason for federal intervention is that the supposed cure of federal intervention is often worse than the illness of strategic standard-setting. There are significant countervailing concerns whose implications need to be assessed in each context before federal intervention takes place.³⁶ Among them are the following: First, the beneficial effects of regulatory competition and in particular its role to foster innovation needs to be taken into account. Second, different patterns of preference-structures across jurisdictions, perhaps related to national traditions and identities, to which no central regulation can be sensitive, may lead to a result which is worse than leaving the issue regulated by the state. Third, ratcheting up the level of decision-making typically translates into fewer opportunities for meaningful participation of ordinary citizens in the legislative process. Finally, reducing the number of dimensions along which competition occurs may actually aggravate race to the bottom problems.³⁷ Problems of strategic standard setting are significantly mitigated by the fact that jurisdictions compete along a wide range of dimensions (skilled workers, general infrastructure, pleasant culturally attractive environment etc.). Competition is radicalised, once it focuses on an ever narrowing set of dimensions. Clearly, then, even if there are problems generated by interjurisdictional competition in specific contexts, that does not yet provide a conclusive reason all things considered for the federal legislator to intervene.

³⁵ Revesz, *supra* note 30, at 1234. Revesz discusses some distinctions between a state as a seller of location rights and a firm as a seller of widgets. But none of the differences he discusses suggest that, in principle, locational competition is less attractive than competition between producers of goods. See 1234-5.

³⁶ See Revesz, *supra* note 30, at 1244-7.

³⁷ *Ibid.*

From 'race to the bottom' to the 'structural bias of the democratic process'

The discussion so far suggests that there are no general 'distortion of competition' or 'race to the bottom' problems that generally justify federal intervention. Yet there are problems connected to locational competition that the ECJ may be right to be concerned about and that may provide good reasons for federal intervention. The core of the problem is neither adequately described by the label of 'distortion of competition' or 'race to the bottom'. But the problem is connected to locational competition in integrated markets.³⁸

First, locational competition in integrated markets creates a structural bias of the democratic process. This structural bias exists because locational competition creates incentives not to impose costs on mobile actors, be they businesses or highly skilled and well-paid mobile individuals. These incentives would not exist, if there were no locational competition. Locational competition thus improves the relative position of capital, undertakings and mobile individuals to more immobile citizens. This may sometimes lead to a lowering of regulatory standards. Or it can lead to a shift of burdens and costs of regulation to those parts of the population who do not have a meaningful exit option. The empirical evidences for the effects of locational competition are evident to any participant of political discourse in traditionally highly regulated, high social standard comparatively rich jurisdictions in Western Europe. The call for greater competitiveness is the standard argument for legislative reforms aimed at cutting the cost of doing business in the jurisdiction.³⁹

But what justifies calling the political process in a jurisdiction subject to locational competition structurally biased? Calling a democratic process structurally biased presupposes a baseline defining what a non-biased democratic process looks like. There is considerable disagreement on the necessary and sufficient features that

³⁸ For a general overview of the issues as they arise in Europe, see F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999), at 84-120. See also W. Schön, 'Playing Different Games? Regulatory Competition in Tax and Company Law Compared', (2005) 42 *Common Market Law Review*, 331.

³⁹ See E. Kamar, 'Beyond Competition for Incorporations', (2006) 94 *Georgetown Law Journal*, 1725.

institutional practices must fulfill to embody the ideals underlying constitutional democracy. But on a high level of abstraction it is possible to state a relatively uncontentious criterion: The structure, composition and practices of political institutions must reflect a commitment to free and equal citizenship.⁴⁰ It is clear that a process which entrenches structures that tend to privilege a particular class of actors in each jurisdiction does not fulfill this requirement.

Second, that does not yet mean that the federal legislator should intervene to preclude locational competition. Structural bias is not the same as structural corruption. Only structural biases that have the tendency to lead to overall results that are inefficient, unfair or unjust are structurally corrupt. Given countervailing concerns connected to the disadvantages of federal intervention structural biases resulting from locational competition may in many instances be socially desirable, all things considered. Even when there is a valid concern in play in situations involving jurisdictional competition – now conceived in terms of structural bias of the democratic process –, federal intervention may very often not provide an effective remedy to address it.

Third, whether or not this is the case is a question that needs to be determined in a political process that is not structurally biased in favor of a certain class of actors. In a legally integrated market, in which each local jurisdiction is preempted from opting out of the common market either with regard to specific regulatory aspects or wholesale, such a process can only exist on the level of the larger jurisdiction. This means that the federal jurisdiction must have the necessary competencies to consider whether it is appropriate for it to intervene. To put it another way: If member states regulation imposes costs or confers benefits on economic actors, such regulation structurally falls within a domain in which the state regulator is subject to locational competition. Where there is locational competition there is structural bias of the democratic process. The

⁴⁰ This formulation has much in common with Dworkin's claim that the defining aim of democracy is that 'collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community with equal respect and concern', R. Dworkin, *Freedom's Laws: The Moral Reading of the American Constitution* (Harvard University Press, 1996), at 17.

structural bias provides a reason – a weak *prima facie* case, not a conclusive reason – for the federal legislator to consider intervention. Intervention is justified all things considered, only if the counter-vailing concerns in fact outweigh the concerns justifying intervention.

Furthermore the issue is not only whether federal institutions should intervene, but also what kind of intervention should take place. There are some forms of minimally intrusive federal interventions which may improve the situation when compared to nonintervention, whereas more intrusive forms of intervention would be counter-productive, all things considered. Not surprisingly in Europe federal intervention has often consisted in resetting the parameters for interjurisdictional competition, rather than comprehensively harmonising legislation and preempting national regulation. The regulatory techniques typically used in common market legislation in the EU since the eighties, establishing certain minimum standards relating to product safety, consumer protection etc. while insisting on mutual recognition of products produced legally in another jurisdiction, exemplifies such an approach. It specifically allows for interjurisdictional competition for reasons relating to innovation and efficiency, while limiting the scope of competition by insisting on minimum standards.

This then leads to the difference between competition over locational rights and competition with regard to other goods. In order to understand the decisive difference between competition over locational rights and competition over other goods, it is helpful to first focus on important features both have in common.

First, both forms of competition are not unconditionally desirable. Concerning markets for goods, for example, there are good reasons why there is no competitive market for enriched uranium, heroin or babies. And even when a particular good is allocated through market mechanisms, the legal definition of the relevant property rights and the conditions of their transfer still requires making complex moral and empirical policy judgments relating to efficiency, fairness and justice. Laws concerning consumer protection, public health, the environment, for example, are the results of assessing and weighing these various concerns.

This leads to the second point, which also applies equally to locational competition and competition in goods. In a constitutional democracy the question whether a market is to be established with regard to a particular good and how that market is to be structured is made within the context of a democratic constitution that establishes a framework within which citizens collectively govern themselves as free and equal citizens. It is within this framework that arguments concerning the efficiency, fairness and justice of markets are assessed and weighed in order to determine the appropriate scope and structure of markets. *The idea of free and equal citizens governing themselves within the framework of democratic constitutions thus enjoys conceptual and normative priority over the idea of a competitive market for goods.* As a matter of normative justification it is the former idea that guides thinking about the role and appropriate structure of markets, not the other way around.

This now allows particular problems relating to locational competition to come into full view. The rules which structure the market for a particular good are established by a political process within the institutional framework of a constitutional democracy and are thus presumptively legitimate. This presumption becomes questionable, when the political process that generates these rules is structurally biased in favor of a particular class of actors. Yet this structural bias of the democratic process is a corollary to jurisdictional competition. Of course jurisdictional competition may itself provide benefits. But whether it does or not needs to be itself determined by a political process that does not suffer from such biases.

The locally unchangeable rules that structure the market for locational rights are generated by the political process on the federal level.⁴¹ These rules deserve the presumption of legitimacy only if

⁴¹ This is true at least in mature federal systems, where federal laws effectively preempt the law of constituent states and states have no realistic exit options. It applies to a lesser extent to locational competition created by the global trade system and rules of the WTO rules especially. The relevant differences to a mature federal system here are twofold. First, the rules affecting jurisdictional competition on the global scale are often established by way of negotiated specific provisions that are subject to consent of each state. Each of the subjects of jurisdictional competition created by these rules is also its author. Second, there are real exit options in the form

federal institutions have the jurisdiction to determine the desirable scope and structure for a market in 'locational rights'. The federal political process must be able to engage efficiency, fairness and justice concerns and assess and weigh them. This suggests that the federal level must have the jurisdiction to assess and monitor whether jurisdictional competition established by federal rules is in fact socially desirable in specific circumstances.

The ECJ may not have been right in framing the reason that justifies EU regulatory intervention in terms of preventing 'distortion of competition'. Nor does the idea of a 'race to the bottom' capture the core normative concern. But in every situation the Court is likely to recognise 'distortion of competition' there is effectively a concern in play that provides a *prima facie* reason for the federal level to consider intervention. According to the Court distortion of competition exists whenever different economic costs or opportunities result from regulatory choices in competing jurisdictions. Yet these are exactly the kind of regulatory choices that, with regard to which jurisdictions, have an incentive to regulate strategically in order to capture a competitive advantage or preclude another jurisdiction from gaining a competitive advantage, thus raising structural bias concerns. In so far the Court is right in its core point: In these situations there is a reason, albeit by no means a conclusive reason, to consider federal legislative intervention in order to secure the establishment and functioning of a fair and efficient internal market.

Economic effects

The *Tobacco Advertising* Case would not have presented any difficulties to the Supreme Court had it arisen under the US Constitution. As far as the jurisdictional issue is concerned, the Supreme Court would have given federal legislation concerning the prohibition of tobacco advertising a clean constitutional bill of health.

of a meaningful option not to comply. In specific circumstances a state may decide to ignore these rules and face the music internationally. There is no real equivalent to such an exit option within a federal system that has fully institutionalised and effectively enforces the supremacy of federal law. In the international context, then, it is more plausible to think of each of the *subjects* of jurisdictional competition – the states – as the *author of the rules governing jurisdictional competition*. In such a constellation bias concerns are less severe.

First, the fact that the legislation regulates economic behavior (the advertising of a product) would most likely have decided the issue in favor of federal legislative jurisdiction.⁴² Even if it did not constitute economic behavior, it would also have been plausible to argue that the legislation addresses a concern that substantially affects interstate commerce. Clearly interstate commerce is affected by tobacco related health problems of citizens, who may produce less and consume differently when unhealthy. One could plausibly argue that there would be a change in the patterns of interstate trade due to illness related changes in consumer patterns. For example there might be a greater market for cancer related medicines and health services, substituting what otherwise would have been spending on goods and services related to leisure activities. This would be the kind of argument made in the US context to establish a necessary 'jurisdictional hook'.

The ECJ, on the other hand focuses neither on the classification of an activity (does the regulation regulate a commercial/economic activity or not?), nor is it generally concerned about economic effects outside of the jurisdiction. EC institutions do not, as the ECJ points out explicitly⁴³, have a general power to regulate the internal market. Instead the ECJ asks whether it can plausibly be said that the object and purpose of the measure can be directly connected to the purpose of establishing a functioning internal market, that is a market without internal frontiers.

There is an interesting more recent development, however, that suggests that the ECJ and the US S. Ct., though wedded to different languages, share common sensibilities. In *Lopez* and *Morrison* the US S. Ct. has significantly tightened its 'substantial economic effects' jurisprudence with regard to non-economic behavior. In *Lopez* the issue was a federal law prohibiting the carrying of guns near schools. In *Morrison* it concerned the Violence Against Women Act, providing women with certain civil rights in cases where they have been subjected to violence.⁴⁴ Both were struck down on the grounds that the federal legislator lacked jurisdiction to act under the Commerce

⁴² *United States v. Morrison*, 529 US 598 (2000).

⁴³ See *Tobacco Advertising*, *supra* note 27, recital 83.

⁴⁴ *United States v. Morrison*, *supra* note 42.

Clause (or other grounds). Yet in *Morrison* in particular there were substantial Congressional findings that victims of violence were deterred from travelling interstate, engaging in employment in interstate business or from transacting with business and in places involved in interstate commerce. This, Congress found, diminished national productivity, increased medical and other costs and decreased supply and demand for interstate products. The majority, however, was not impressed by the array of Congressional data assembled. It criticised the but-for causal argument that established a chain from the initial occurrence of violent crime to every attenuated effect on interstate commerce. And, indeed, the question is: Why should it matter that there is such an effect? Why should the existence of a substantial effect suggest that the federal legislator is better placed to address the issue of violence against women than the state legislator? What is the collective action problem that federal intervention needs to address?

One interpretation of this line of cases is that in the case of non-economic activity the aggregate effect on interstate commerce is simply not sufficient to establish federal jurisdiction under the Commerce Clause. The fact that activities in one community affect a neighboring or a greater community does not in and of itself provide that community with a basis for intervention. Decisions reached by any community governing itself will have impacts on others. The question is, whether these impacts are such that they are connected to specific collective action problems. When regulations address economic activities, they are likely to impose burdens or benefits on economic actors. The imposition of costs and the conferral of benefits, however, in the context of an integrated market, occur in a world in which each jurisdiction has an incentive to engage in strategic competitive behavior and thus privilege mobile economic actors. This raises all the problems of structural bias discussed above. It follows that there is a stronger *prima facie* case for federal intervention in cases concerning the regulation of economic behavior than there is for other kinds of behavior, even if the immediate economic effects of member states regulation are the same. The distinction between the regulation of economic and non-economic activities characteristic of recent Commerce Clause decisions is thus linked to plausible consideration of policy and closely traces the sensibilities underlying the ECJ's concerns for 'distortion of competition'. If the argument

presented above is correct, these concerns are better understood as concerns of structural bias in favor of mobile economic actors, *prima facie* undermining the legitimacy of the local democratic process.

Safeguarding member states autonomy is a central concern in the European Union. The principle of enumerated or 'conferred powers' requiring a specific legal basis for EU intervention is believed to be one important element in the constitutional toolbox geared towards the protection of member states autonomy. Yet the results of the analysis so far suggests that Art. 114 TFEU has the potential to function and is beginning to function in fact much like the Commerce Clause did in the US: As a legal basis that can justify the regulation of just about anything. The ECJ does not make a distinction between the regulation of the common market under Art. 114 TFEU (requiring unanimous consent) and the regulation of the internal market under Art. 115 TFEU (requiring only a qualified majority). It does not apply a 'center of gravity' test that would preclude the enactment of regulations under Art. 114 TFEU, whose main purpose is to enforce substantive policy concerns, rather than ensuring the functioning of the internal market. And it understands the 'functioning of the internal market' to encompass concerns about 'distortion of competition' as a legitimate reason to intervene. Even if these concerns were reconceived as concerns about 'structural bias', it would not limit the scope of Europe's Commerce Clause. It would merely help provide a deeper understanding of the relevant jurisdictional concerns. The exclusive focus on a legitimate purpose as a necessary and sufficient condition for federal intervention comes dangerously close to undermine the idea of meaningful jurisdictional boundaries altogether.

Proportionality: integrating countervailing concerns

Legitimate purposes and subsidiarity

The first prong of the S&P framework requires the existence of a legitimate purpose for federal intervention. The discussion above has shown what this amounts to in the context of the common market. The principle of subsidiarity does not provide an additional criterion,⁴⁵ but it provides a deeper understanding of the way the idea

⁴⁵ This is something that the ECJ has explicitly recognised in case C-377/98 Judgment

of legitimate purposes is to be discussed in the context of establishing a functioning internal market. As was discussed above the reasons the ECJ considered are, on the one hand the removal of obstacles to trade, and on the other a concern with perverse effects of economic actors being subjected to different packages of burdens and benefits. The latter concern, unhelpfully framed as an issue of 'distortion of competition' by the Court, was shown to be better understood as a concern relating to structural biases of the democratic process. Both of these reasons connect jurisdiction to legislate to the existence of market related collective action problems that structurally taint regulation by member states.

When the EU legislator intervenes for reasons relating to removal of obstacles or structural bias of the local democratic process, it complies with the subsidiarity requirement. The subsidiarity requirement does not impose additional requirements on the legislator beyond acting to secure the functioning of the internal market. But it does require that the federal intervention to 'secure the functioning of the internal market' be interpreted as a legal basis only for measures that address collective action problems connected to the establishment of an integrated market.

Necessity: narrowly tailoring solutions to address the problem

The subsidiarity requirement focuses on the kind of purposes or reasons that prima facie justify federal intervention. But the fact that there is a legitimate purpose in play does not yet mean that federal intervention is justified on jurisdictional grounds. Instead the general proportionality requirement, the structure of which is well known to those familiar with the adjudication of human rights in the European Union and under the European Convention of Human Rights, imposes further restrictions.

Besides the question whether federal intervention furthers a legitimate purpose relating to a collective action problem, the specific

of 9 October 2001 (*Protection of Biotechnological Inventions*), recital 33: 'Compliance with the principle of subsidiarity is necessarily implicit in the [...] determination that absence of action on the Community level [...] the development laws and practices of the different Member States impede the proper functioning of the internal market.'

federal measure must be necessary to further that purpose. Necessity requires that the legislator must choose the least intrusive of all equally effective means. Member states regulatory autonomy should not be undermined to a greater extent than necessary to address the relevant collective action problem. Legislation must be narrowly tailored to address the problem that legislation was enacted to solve.

In *Tobacco Advertising* the Court found that the Directive prohibiting all Advertising of Tobacco did further the legitimate purpose of removing obstacles to trade (e.g. facilitating the free trade in journals and magazines) to some extent. But the Court held that the Directive was unnecessarily broad in that it contained prohibitions that clearly were unnecessary and even counterproductive with regard to the purpose of removing obstacles to trade. The general prohibition of products such as parasols and ashtrays that advertised tobacco products, for example, don't further that purpose. The Directive thus suffered from over-breadth. Its specific features did not fit the justification for intervention.

In *Working Time*⁴⁶, the only other case in which the ECJ struck down at least a part of European legislation as beyond the EU's jurisdiction, the Court similarly focused on necessity concerns as limiting the jurisdiction of the EU to regulate. The Directive on the Organisation of Working Time⁴⁷ established minimum periods of daily rest, weekly rest and annual leave. Such measures could arguably have been justified under Art. 95 TEC as addressing problems of structural bias of democratic processes in member states, given incentives to engage in strategic standard setting to attract undertakings who have an interest in cheap labor. With regard to the regulation of working time, however, the TEC in Art. 118a included a more specific authorisation to establish minimum standards concerning the working environment in order to secure the health and safety of workers. The Directive required a minimum uninterrupted rest period of twenty-four hours in each seven-day period. This uninterrupted rest period was in principle to include Sunday. The Court rightly pointed out that the determination of the specific day of the week on which workers were to be granted rest was unnecessary in that it was

⁴⁶ Case C-84/94 of 12 November 1996 (*Working Time*).

⁴⁷ Council Directive 89/391 EEC of 12 June 1989, OJ L183, 1.

unconnected to any reasons that justified European regulatory intervention and declared it invalid.⁴⁸

Proportionality in the narrow sense or balancing

Even if a federal measure furthers a legitimate purpose and is the least intrusive of all equally effective means, the intrusion of member states autonomy may not be disproportionate to the benefits achieved. It is at this point that countervailing considerations of the sort discussed above need to be assessed. Here the question is whether the loss of member states autonomy and all disadvantages associated with it taken together do not clearly outweigh the benefits achieved by federal intervention. This requires a rich contextual analysis of costs and benefits of federal intervention resulting in an all things considered context specific judgment.

The ECJ has so far not explicitly embraced any kind of jurisdictional balancing exercise in the context of its common market jurisprudence.⁴⁹ But the ECJ has distinguished between distortion of competition that is appreciable and distortion of competition that does not rise to that level. Thus in *Titanium Dioxide* the Court held that the compliance burdens relating to member states regulation of the environment or public health as they apply to the titanium dioxide industry result in appreciable distortion.⁵⁰ In *Tobacco Advertising*, on the other hand, the effects of member state regulation of tobacco advertising on the cost structure of advertising agencies was deemed generally not to rise to that level. The best understanding of that distinction is that the ECJ implicitly applies a balancing test. 'Distortion of competition' is deemed 'not appreciable', when on balance the beneficial effects of any federal intervention are clearly outweighed by the costs connected to the loss of member states regulatory autonomy. Conversely distortion of competition is deemed to be appreciable, when the benefits are not clearly outweighed by the costs of intervention.

⁴⁸ In this case the legal basis was not Art. 95 ECT, but Art. 118a ECT specifically authorising the EU to enact Directives regarding the health and safety of workers.

⁴⁹ The ECJ's confusion about the relationship between subsidiarity and proportionality is particularly apparent in Case C-210/03, *supra* note 24. In the Grand Chamber decision ultimately upholding Directive 2001/37/E, which prohibited the placing on the market of certain tobacco products for oral use.

⁵⁰ Case C-300/89, *supra* note 26, recital 10.

Even if the ECJ's position in *Tobacco Advertising* can be reconstructed in this way, there are indications that there remains a great deal of confusion over the relationship between the question whether a measure serves the legitimate purpose of securing the functioning of the internal market and the question whether it does so in a way that does not disproportionately burden member state autonomy. This confusion is particularly apparent in *Swedish Match*, a recent decision concerning an EC Directive which prohibited the placing on the market of a moistened smokeless tobacco product.⁵¹ The Grand Chamber judgment ultimately upheld the Directive. But it did so in a way that failed to understand the proportionality requirement within the context of Art. 5 TEC. First the Court established that the prohibition of certain tobacco products for oral use fulfills the purpose of preventing obstacles to trade from emerging, thus addressing a collective action problem. Even though under the circumstances the claim that the Directive served to remove potential obstacles to trade was itself questionable,⁵² the structurally more problematic move followed immediately afterwards. The Court did not test whether the Directive was a disproportionate violation of member states autonomy with regard to the legitimate purpose it pursued under Art. 95 TEC. It did not ask whether the infringement of member state autonomy – the preemption of member state legislation concerning the conditions under which oral tobacco products can be sold on the national market – is not disproportionate to the benefits achieved (whatever they may be here) relating to removing obstacles to trade. Instead the Court just concluded that in virtue of the existence of a legitimate purpose the Directive has an appropriate legal basis in Art. 95. Even though Art. 5 para. 3 specifically mentions the principle of proportionality in the context of

⁵¹ Case C-210/03, *supra* note 24.

⁵² There is a problem justifying product prohibitions on the grounds that they help remove obstacles to trade. Prohibitions of products do not ensure the functioning of an internal market with regard to these products, but prohibits it. The ECJ is right to point out that there are circumstances in which the prohibition of a product can contribute to the removal of obstacles to a more generally defined market (recital 34, see also Case C-359/92, *supra* note 24, recitals 4 and 33). But the arguments of the ECJ claiming that this was actually the case here, are not convincing (see recitals 37 and 38, pointing to the fact that two member states had already prohibited these products and that these prohibitions contributed to a heterogeneous development of that market).

the conferral of powers and the commitment to subsidiarity, the Court did not engage proportionality as part of the jurisdictional inquiry.

The Court realised, however, that Art. 5 required it to engage in some form of proportionality analysis and so it did. The problem is that it did not connect that analysis to the legitimate purpose of *federal* intervention. *It did not connect the proportionality analysis to the legitimate subsidiarity related purpose underlying EU intervention.* Instead the ECJ went on to analyse whether the measure was proportional with regard to the *substantive* objective to address certain public health dangers that the moistened smokeless tobacco products posed.⁵³ Furthermore the analysis remained peculiarly abstract and was not grounded in a legal provision that states what the regulatory means furthering the policy objective is supposed to be proportional to. Proportionality analysis requires such grounding to be meaningful. Proportionality plays an important role in European constitutional analysis in three different contexts. In the jurisdictional context the regulatory means must further a legitimate jurisdictional objective in a way that is not disproportionately intrusive to member state autonomy. The question is: Is the Directive a proportional means to further the removal of obstacles to trade when compared to the impact it has on member state regulatory autonomy? In the fundamental rights context the regulatory means to further a legitimate substantive policy objective must not be disproportionate to the infringement of a constitutionally protected interest. The question is: Is the Directive a proportional means to further public health when compared to the infringement of citizens constitutionally protected interests, for example, to freely pursue a trade or profession? In the context of the four freedoms the question is: Is the legitimate public purpose furthered by member states to such an extent that the resulting obstacles to trade are not a disproportionate burden on the common market? Without the reference to a specific legitimate purpose it remains completely unclear what the means/end relationship between the Directive and the objective should be proportional to. Not surprisingly the Court's proportionality analysis remained peculiarly abstract, with general invocations of the limits of judicial review and the political nature of

⁵³ Case C-210/03, *supra* note 24, recital 49.

social and economic choices substituting for any kind of analysis. There may be good reasons for the ECJ not to subject to too close a scrutiny answers given by the legislator to complex empirical and normative questions that arise when applying the proportionality standard in different contexts. But in *Swedish Match* the Court failed to understand the nature of the proportionality question that Art. 5 TEC constitutionally required it to ask.

As a whole the structure of the jurisdictional test proposed here will seem very familiar to those acquainted with the adjudication of human rights by the ECJ, the ECHR and most national constitutional courts in Europe. In particular the three prongs of the framework – legitimate purpose – necessity – balancing – will be familiar. The structural analogy should not be surprising. If the classical set of basic rights as restrictions on what public authorities may do are primarily about protecting the autonomy of the individual – the right of an individual to govern herself – the jurisdictional limitations on federal public authorities are concerned with the right of member states' citizens to collectively govern themselves within the institutional framework of their respective states. In both cases proportionality analysis is at the heart of a legal practice that is both principled and pragmatic.

But the structural analogy also points to important dissimilarities. The commitment to subsidiarity as it is understood in the European Union means that the European Union may not generally act on the same kind of policy reasons as member states. Instead the institutions of the EU only fulfill a subsidiary function. Their purpose is to step in as a subsidiary regulator to regulate where federal regulation helps to address collective action problems that render member states actions structurally deficient. Thus the idea of subsidiarity in the context of common market regulation serves to restrict the purposes that the EU may legitimately pursue to solving collective action problems. Within the proportionality framework the idea of subsidiarity operates as a principle restricting the range of legitimate purposes within the first prong of the three-prong proportionality test.

Proportionality analysis, then, has a very different purpose in the context of fundamental rights analysis when compared to jurisdictional analysis. In the context of fundamental rights, its purpose is

to assess the means/end relationship between European legislation and a substantive policy concern as it relates to citizens fundamental rights. In the jurisdictional context its purpose is to assess the means/end relationship between European legislation and a problem that member states cannot adequately address by themselves in relation to the principle of member state regulatory autonomy. This is proportionality analysis within the S&P framework required by Art. 5 TEC. The two need to be distinguished. They address different concerns. The ECJ has not yet understood the proportionality requirement as it relates to jurisdictional concerns.⁵⁴

Policing jurisdictional boundaries in Europe The requirement of reason-giving and the partnership model

But even if the three-prong S&P framework presented above articulates the right normative standard for guiding European Union institutions in determining whether or not they should regulate, is it reasonable to expect the ECJ to play a significant role in policing the jurisdictional boundaries of the Community? There are two weighty reasons that counsel against placing confidence in the judiciary as a major force in policing jurisdictional boundaries.

First, the S&P framework clearly does not establish simple and easy to apply rules that produce uncontentious, easy to derive conclusions in the great majority of cases. Instead, on application, the required analysis involves complex empirical and normative judgments. It is not clear what the comparative institutional advantage of the judiciary should be in second-guessing the Community legislator on these complex empirical and normative questions.⁵⁵ Under these circumstances it is not surprising that the ECJ tends to apply only a very deferential standard of scrutiny, assessing only whether the judgments reached by the legislator is 'manifestly inappropriate'.⁵⁶ If

⁵⁴ But see AG Maduro in C-58/08 *Vodafone*, bringing up this issue only to be ignored by the ECJ in the final decision.

⁵⁵ For scepticism about the judicial role grounded in these concerns see D. Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems', (2004) 90 *Virginia Law Review*, 731 or G. Berman, 'Taking Subsidiarity Seriously', (1994) 94 *Columbia Law Review*, 331.

⁵⁶ See e.g. Case C-210/03, *supra* note 24, recital 48.

the ECJ is to assume a significant role in policing the jurisdictional boundaries at all, the constitutional legislator has to establish more clear-cut rules, as it has, for example, with regard to the explicit exclusion of certain areas from the domain in which the EC may enact harmonising legislation.⁵⁷ Principled analysis of the kind required by the S&P framework, on the other hand, overstretches the institutional capacities of courts.

Second, even if the Court was better equipped to engage in the complex normative and empirical questions the S&P framework tends to bring up on application, it is doubtful that much faith should be put in a centralised court to play a role as arbiter of jurisdictional conflicts. Centralised 'federal' courts are part of the federal institutional arrangements and tend to share in their power and prestige. The ECJ may simply not have the right kind of incentives to be an effective policeman of the EU's jurisdictional boundaries. This argument receives further support by an analysis of the practice of the ECJ to date. The ECJ, perhaps more than any other institution, has long played the role of the 'motor of integration' in the history of the European Community. In its interpretation of the EU's competencies it has labored hard to produce doctrines that have allowed it to rubber stamp as jurisdictionally kosher practically every piece of legislation that Brussels has produced.⁵⁸ Even in *Tobacco Advertising*, the one major case where the Court actually struck down a piece of EU legislation as falling outside of the EC's jurisdictional boundaries, the Court was arguably responsive to highly visible political resistance by Germany, which was supported by the threat of noncompliance by its national constitutional court.⁵⁹

⁵⁷ With regard to Public Health see Art. 152 ECT. With regard to Education, Vocational Training and Youth see Art. 149, Sect. 4 ECT.

⁵⁸ See J. H. H. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal*, 2403.

⁵⁹ The German Federal Constitutional Court established in the Maastricht decision, that if EU Law enacted *ultra vires* would not be binding in Germany, and that it was ultimately the German court that would have to determine whether this was the case, if the ECJ failed to do its job. See *Bundesverfassungsgericht* 89, 155 (Maastricht).

Perhaps the best that can be expected of the ECJ is for it to play a role similar to that of the Supreme Court in the US.⁶⁰ The US S. Ct. in the last decade and a half has carved out for itself a role as a protector of federalism that, for better or for worse, is arguably more than just marginal. Yet the US Supreme Court does not openly engage the range of reasons for federal intervention the way the S&P framework requires. Instead the American experience suggests that the S. Ct. may have a significant indirect role to play, to help foster deliberation and engagement between other actors.⁶¹ First, the S. Ct. has established 'clear statement rules' effectively requiring the federal legislator to address and take a position on the extent to which federal law seeks to preempt state law.⁶² Second, the Court has devised rules excluding the federal government from enlisting ('commandeering') state institutions in the service of the federal government for the enforcement of federal laws, using arguments grounded in state sovereignty.⁶³ Third, it has used the idea of sovereign immunity to create doctrinal space for state's resistance to federal law by making it more difficult for the federal judiciary to enforce federal law against the states. If states are sued for noncompliance with a federal law by private individuals in state⁶⁴ or federal⁶⁵ courts, such claims will often fail in the US on grounds of sovereign immunity.⁶⁶ Some argue that this creates avenues for political resistance by states refusing the enforcement of federal law, thereby requiring the federal government to be more closely attuned to state sensibilities.⁶⁷

⁶⁰ For a general discussion of the institutionalisation of a mechanisms relating to devolution and subsidiarity in the US and the EU, see D. Lazar and V. Mayer-Schoenberger, 'Blueprint for Change: Devolution and Subsidiarity in the United States and the European Union', in K. Nicolaïdis and R. Howse, *The Federal Vision*, (Oxford University Press, 2001), at 118.

⁶¹ B. Friedman, *The Will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009).

⁶² See for example *Gregory v. Ashcroft*, 501 US 452, 460 (1991).

⁶³ *New York v. US* 505 US 144 (1992) and *Printz v. US*, 521 US 898 (1997).

⁶⁴ *Alden v. Maine*, 527 US 706 (1999).

⁶⁵ *Seminole Tribe*, 517 US 44 (1996).

⁶⁶ *Hans v. Louisiana*, 134 US 1 (1890) is the seminal case that held that the principle of sovereign immunity protects states from suits in federal courts even when the suit concerns questions of federal law.

⁶⁷ E. Young, 'Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism', (2002) 77 *New York University Law Review*, 1612.

Yet there are conditions in the EU that suggest there is a distinct and realistic case to be made that the ECJ should play a different, more direct role in policing the jurisdictional boundaries of the EU.

First, the federalism stakes are simply higher in Europe than in the US. The United States is a well-established democratic nation with strong federal democratic institutions, a well-established public sphere and a strong collective identity. There is generally no comparatively strong identity shared by the inhabitants of the several states in the US. In the European Union the situation is the inverse. Whereas there are strong identities connected to most member states, many of whom are old European nations, European democratic institutions, as well as the sociological underpinnings that make democracy meaningful – a European public sphere and a European identity – are underdeveloped. More is lost when decision-making is ratcheted upwards from member states to the European level. At the same time member state governments, who remain the agenda setters on the European level, have the tendency to enact legislation on the European level that would be difficult to enact on the national level. Given the complex decision-making procedure on the European level it is easy for governments to avoid being held accountable for European legislative decisions and to engage in blame-shifting, when it suits them.

Pointing to these features of European political practice does not yet suggest that the ECJ can play an effective role in policing the jurisdictional boundaries, but it does suggest that generally there are good reasons in the EU to invest more institutional resources, including scarce judicial resources, in protecting member states from federal overreach than in the US. Not surprisingly one of the core purposes of the Treaty Establishing a Constitution for Europe and the Treaty of Lisbon that ultimately entered into force late last year was to more effectively and clearly define and safeguard the jurisdictional boundaries of the EU.⁶⁸

⁶⁸ In the words of the Laeken Declaration on the Future of the European Union (15 December 2001): ‘Citizens often hold expectations of the European Union that are not always fulfilled. And vice-versa – they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing

Second, there are innovations in the Lisbon Treaty that also provide counterarguments against the arguments concerning the limited institutional capacity of courts to engage in the kind of inquiries that the S&P framework requires. There is a problem with the current law that the Lisbon Treaty suggests an innovative solution to: Under the current arrangement there is a wide spread skepticism about the extent to which the EU's political institutions take the commitment to subsidiarity and proportionality seriously. The perception is that the EU does what it can get the relevant majorities for, with no one taking a keen interest in subsidiarity/proportionality concerns as a distinct set of considerations. There is no political culture focused on subsidiarity concerns in Europe. Furthermore, there is a widespread belief that the assessment of the relevant normative and empirical questions that the application of the subsidiarity and proportionality test requires is best left to political actors. The ECJ as a judicial guardian of the EU's constitutional order is believed to be institutionally ill-equipped to play a significant role in policing the jurisdictional boundaries between the EU and MS.

That should not be obvious. The proportionality structure, triggering a highly open-ended empirical and normative assessment of acts of public authorities is central to the Court's fundamental rights jurisprudence. The ECJ would not be engaging in a qualitatively different inquiry when applying the S&P framework in assessing jurisdictional questions. Furthermore the ECJ could require the Commission, Parliament and Council to provide a more substantial record that reflects their engagement with subsidiarity/proportionality concerns. It could then assess whether that record plausibly validates the conclusion that a piece of EU legislation fulfills subsidiarity/proportionality requirements. There were some early signs that the ECJ would go that way. Yet, on the whole, the ECJ's jurisprudence does not reflect serious engagements with the S&P framework and the requirement of reason-giving is generally

the Union'. Helpful overviews are provided by A. v. Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', (2002) 39 *Common Market Law Review*, 227; and U. di Fabio, 'Some Remarks on the Allocation of Competences Between the European Union and its Member States', (2002) 39 *Common Market Law Review*, 1289.

addressed by the Court only in a cavalier fashion.⁶⁹ Given the traditional role of the ECJ as the 'motor' of European integration that may not be surprising.

It is at this point that an important innovation comes into play. The Lisbon Treaty establishes that national Parliaments 'shall ensure compliance with that principle'.⁷⁰ The Treaty incorporates a Protocol⁷¹ that lays out a special procedure to enable national Parliaments to play that role. The Protocol establishes that the Commission should forward all documents of legislative planning and all legislative proposals to national parliaments at the same time as it forwards them to the European Parliament and the Council. All European legislative acts have to be justified with regard to the principles of subsidiarity and proportionality. Art. 4 of the Protocol on the application of these principles establish qualitative standards that these justifications must meet: They have to 'contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality.' It should 'contain some assessment of the proposal's financial impact' (these costs are generally incurred by member states, not the European Union as the legislating institution). Furthermore 'the reasons for concluding that a Union objective can be better achieved on the Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.'

A more fully informed Parliament serves two functions. First, it can more effectively control the executive branch of its government as it participates in legislation on the European level. Second, the Protocol establishes a specific role for Parliament to help police jurisdictional boundaries on the European level. If a national Parliament concludes that it holds a proposed legislative act to be incompatible with a commitment to subsidiarity, it can send a reasoned opinion to the Presidents of the European Parliament, the Council and the

⁶⁹ The ECJ has held that failure to give adequate subsidiarity related reasons may constitute a violation of an essential procedural requirement, but then interpreted that requirement so laxly as to render it a weak tool for the enforcement of jurisdictional constraints, see for example Case C-110/97 *Netherlands v. Council* [2001] E.C.R. I-08763, recitals 158-167.

⁷⁰ Protocol No. 2 On the Application of Subsidiarity and Proportionality.

⁷¹ *Ibid.*

Commission stating why it considers that the draft in question does not comply with the principles of subsidiarity. That reasoned opinion 'shall be taken into account'. If at least one third of all national parliaments have sent such a reasoned opinion, the draft must be reviewed.⁷² The draft can then be maintained, amended or withdrawn and reasons must be given for this decision. Given the substantial record created by competing and mutually engaged reasoned opinions that will have been formulated by a wide range of actors by the time litigation is likely to occur, the ECJ will more plausibly be in a position to play a role in assessing subsidiarity and proportionality concerns, if asked to do so in the context of annulment proceedings. The ECJ is not the only institution assessing the jurisdictional question using the S&P framework. The Commission, the Council and national Parliaments work together to provide a written record of the reasons that justify their actions that the ECJ can then assess. All are arguing about the same thing. The reasons that the CT requires the political actors to assess are the same as the reasons that ultimately the ECJ is asked to pass judgment on. The ECJ is thus in a partnership relation with other institutions, engaged in solving the same puzzle as political actors. As an editor of European laws it does not claim authorial skills or authority. But it does claim that a structured reasoned assessment of the kind the S&P framework requires, when supported by a well-developed record supplied by other institutions, allows it to effectively pass judgment on whether or not the arguments provided by the legislator were reasonable or not.

But this still leaves the concern relating to incentives and institutional culture. Even if the ECJ is put in a position where it could theoretically play a useful role in the application of the S&P approach, can it be expected that the ECJ will play an impartial, unbiased role as an institution of the central government? Is it really to be expected that the ECJ will significantly sharpen its review of the reason-giving requirements as it relates to subsidiarity and

⁷² See Art. 6 of the Protocol on the Application of Subsidiarity and Proportionality, *supra* note 71. To be more precise, a third of all votes allotted to parliaments is necessary. Each national parliament has two votes, leaving one for each chamber in bicameral legislatures.

proportionality? Here too a unique feature of the European legal system may help to allay at least some degree of scepticism.

In Europe, like in the US, 'federal' law as interpreted by the highest court of the central authorities claims to be the supreme law of the land. Yet in Europe national courts insist on a residual role to ensure that basic national constitutional commitments remain secure. Under certain circumstances, circumstances that vary between member states, national courts will refuse to apply EU law on national constitutional grounds. The Danish and German Constitutional Courts, for example, have explicitly held that those grounds include European institutions acting outside of the jurisdictional boundaries defined in the EC Treaty.⁷³ In Europe the ECJ may claim that it has the ultimate say about where the jurisdictional boundaries of the Community lie as a matter of EU Law. But some national courts have insisted that it is their task as a matter of national constitutional law to ensure that EU institutions do not, under the guise of interpreting the constitution, amend it and enact legislation *ultra vires*. Of course the ECJ is the institution charged with that task under the EC Treaty. But from a national constitutional perspective the ECJ is just one more EU institution that, in principle, could act *ultra vires* under the color of interpreting the Treaty.

This means that in Europe national constitutional courts provide an important check on the ECJ. The more national constitutional courts are unconvinced that the ECJ takes seriously the task assigned to it under the EC's constitution, the more inclined they are likely to be to subject the practice of the ECJ to scrutiny. It is not implausible to believe that political resistance supported by the threat of national constitutional courts in the high profile *Tobacco Advertising* case may have helped the ECJ to focus its attention on the jurisdictional issue. *Swedish Match* and the recent *Tobacco Advertising* decision⁷⁴ suggest that such scrutiny by national constitutional courts may well have the potential to produce further salutary effects.

⁷³ For a discussion of these issues, see e.g. M. Kumm, 'Who is the Final Arbiter of Constitutionality in Europe?', (1999) 36 *Common Market Law Review*, 346; and, with regard to changes to be brought about by the Constitutional Treaty, *id.*, 'The Jurisprudence of Constitutional Conflict', (2005) 11 *European Law Journal*, 262.

⁷⁴ Case C-380/03 *Germany v. Parliament and Council* [2006] [ECR] I-11573 (*Tobacco Advertisement II*).

Conclusion

Questions of procedural legitimacy have a jurisdictional dimension. The assumption that national decision-making is legitimate simply in virtue of meeting national constitutional requirements that include a commitment to electoral politics is mistaken. When there are structural deficits on the level of national decision-making relating to externalities or unrealised coordination benefits national constitutions are required to enable the development of transnational institutional practices that help effectively address these deficits. The S&P framework provides a principled framework for assessing whether and to what extent intervention by transnational institutions is desirable. This section addresses three distinct, but connected questions concerning the constitutionalisation of subsidiarity in integrated markets.

First, it analyses the ECJ's jurisprudence with regard to the European Union's Commerce Clause to see how it can be understood as reflecting a commitment to subsidiarity. The ECJ is right not to recognise 'interjurisdictional economic effects' as a ground for legislative intervention. But beyond the 'removal of obstacles to trade' the ECJ also recognises 'distortion of competition' as a reason that justifies intervention in situation where undertakings are facing different costs and benefits as a result of state regulation. This is a mistake. In integrated markets the choice of location of an undertaking is appropriately conceived as part of its competitive strategy. Furthermore the ECJ's real concern cannot be persuasively reconceived as focused on a regulatory 'race to the bottom'. But the ECJ is right to believe that there is a *prima facie* case for federal intervention when state regulation confers unequal costs and benefits on mobile economic actors across jurisdictions. This is because of the potentially corrupting structural biases in favor of mobile economic actors when the democratic process is local and markets are not.⁷⁵ The purpose of federal legislative jurisdiction here is to ensure that the desirability of federal intervention can be assessed in a political process that is itself not structurally biased.

⁷⁵ For an understanding of the principle of subsidiarity more generally as a principle about democratic structuring see N. W. Barber, 'The Limited Modesty of Subsidiarity', (2005) 11 *European Law Journal*, 308.

But it is not sufficient for the European Union to have established a legitimate purpose for it to exercise its jurisdiction under Art. 114 TFEU (Art. 95 old). The second part of the article moves from the discussion of legitimate purposes to the development of a comprehensive conceptual framework that provides a check list of individually necessary and collectively sufficient legal conditions that EU regulation must meet. The S&P framework is constitutionally set up to play a central constitutional role in the protection of federalism values in the EU. Art. 5 TEU establishes a commitment to the principle of conferred powers (para. 2), subsidiarity (para. 3) and proportionality (para. 4). All three are interlinked and all are focused on issues of competencies, ultimately in the service of safeguarding member states' autonomy. Yet there is a remarkable degree of confusion in the jurisprudence of the ECJ about how the three are related, that is particularly apparent in *Swedish Match*.

The S&P framework as it is developed here consists of three prongs: legitimate purpose – necessity – and balancing.

The commitment to subsidiarity is directly relevant to the kind of purposes that are legitimate under the first prong of the test. Thus the idea of subsidiarity in the context of common market regulation serves to restrict the purposes that the EU may legitimately pursue. The only legitimate problems related to market regulation the EU may attempt to address, are collective action problems or achieving coordination benefits. Without using the language of subsidiarity directly, the ECJ's focus on 'obstacles to trade' and 'distortion of competition' – better understood as 'structural bias in the democratic process' – operationalises the commitment to subsidiarity in its interpretation of Art. 95 ECT.

But even if there is a legitimate purpose, the proportionality requirement, as it applies in the jurisdictional context, imposes further requirements. Only if EU legislative intervention furthers a legitimate purpose in a way that is narrowly tailored to achieve it, and does not lead to a disproportionate loss of member states autonomy, is legislative intervention justified, all things considered. The ECJ has so far failed to connect the proportionality test to jurisdictional or subsidiarity related concerns as required by Art. 5 ECT. As *Swedish Match* in particular illustrates, the ECJ has instead

devised a freestanding proportionality test that is focused on the furtherance of substantive policy objectives as they relate to substantive countervailing concerns. This test ignores the jurisdictional concerns that the principle of proportionality in Art. 5 ECT clearly seeks to address. It also tends to unnecessarily replicate the substantive core of fundamental rights analysis. The wrong answer is what the wrong question begets. Practically this results in the ECJ upholding legislation that it should have struck down as beyond the EC's legislative jurisdiction.

The third part of this section focuses on institutional questions and the role of the judiciary in enforcing jurisdictional limits. Countervailing experience to date notwithstanding, the ECJ has a potentially important role to play in helping to police the jurisdictional boundaries of the European Union. The traditional arguments that courts are not well placed to engage in an assessment of the complex empirical and normative questions that application of the S&P framework requires, are significantly weaker in the European context than they would be elsewhere. If the subsidiarity oriented provisions of the CT will enter into force, as they are likely to, competing institutions involved in the legislative process will engage one another in a way that produces a substantial record on the basis of which the ECJ can assess whether the conclusions reached by the legislator are reasonable. Furthermore the argument that as an institution of the center, the ECJ does not have the right kind of incentives and is not part of the kind of institutional culture that facilitates the impartial analysis of jurisdictional issues is also weaker in the EU than it would be in most other federal systems. National constitutional courts have in the last decade or so started breathing down the ECJ's neck and supervise its activities while threatening to disapply EU Law deemed by them to have been enacted *ultra vires*. Under these circumstances the ECJ has reasonable incentives to adequately perform the role the Constitution establishes for it.

Federalism values can be protected by means of at least three different mechanisms.⁷⁶ First, there are judicially enforceable legal limits related to the principle of conferred or enumerated powers (power federalism). Second, there are the political safeguards of

⁷⁶ For substantively similar distinctions see Young, *supra* note 67.

federalism, focusing on securing an important role for state actors and state organised groups in the federal legislative process (political safeguards federalism). Third, there are political safeguards that consist in effective exit options that states can exercise politically. In the US, for example, the S.Ct. has created effective possibilities for states not to comply with certain federal laws, by granting states immunity from individuals bringing suits grounded in federal law against them. In Europe national constitutional courts have insisted on the authority to exercise such an option when fundamental constitutional commitments are at stake. Call this exit federalism.

A unique feature of the European system is the close conceptual and institutional connection that exists between power federalism, political safeguards federalism and exit federalism. The institutional connection lies in a partnership between the ECJ, the Commission, the Council and national Parliaments all engaged in a practice of reason-giving.⁷⁷ The substantive focus of the reason-giving practice that grounds this institutional partnership is the S&P framework. The S&P framework establishes highly open-ended normative standards that have the purpose to help institutional actors to determine whether there are good jurisdictional reasons for European regulators to act.⁷⁸ These standards are not only to be used in judicial review. They are also central for structuring reasoned political disagreement between the Commission and the Council and EU institutions and national Parliaments. Furthermore the exit options that some national

⁷⁷ Alexander Somek is right to point out in an analogous context that a practice such as this transforms the very idea of the rule of law. Law no longer appears as a system of rules, but a system allocating burdens of general practical reason-giving ('Dogmatischer Pragmatismus: Die Normativitätskrise der Europäischen Union', in S. Hammer, A. Somek, M. Stelzer and B. Weichselbaum (eds), *Demokratie und sozialer Rechtsstaat in Europa* (Facultas, 2004), at 58). See for an explicit embrace of this idea in the human rights context D. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004).

⁷⁸ This does not imply, of course, that these reasons are in fact what is *motivating* political actors. Institutional affiliations more than reasons are likely to determine substantive positions of practically all major actors practically all of the time. European politics is no more the enactment of an ideal rational discourse guided by the regulative ideal of attaining truth than is politics anywhere else. But whatever the politics of various jurisdictional disagreements may be, the Constitutional Treaty requires the major political actors of these struggles to frame their disagreements using the standards of the S&P framework in the written justifications they provide.

constitutional courts insist upon are directly linked to the ECJ's performance in policing the jurisdictional boundaries of the community, as defined by the S&P framework. Only if the ECJ has rubber-stamped an act by the EU that clearly does not meet the standards established by the S&P framework is it likely that national courts will disapply EU law. In this way the reason-giving requirement to the S&P framework softens the differences between the between power federalism, political safeguards and exit federalism, both conceptually and practically. EU procedures establish a cooperative partnership between a whole range of institutional actors. This partnership requires contestation over the jurisdictional boundaries of the EC to take a reasoned form, with the S&P framework providing the appropriate structure.

The Treaty carves out a remarkably powerful role for the ECJ to assess the reasonableness of market intervention in the context of reviewing whether the EU was legally competent to act. There are unique features of the EU political and legal process which suggest that skepticism about the Court being able to play such a role are unjustified. Even though there are some promising points of departure the ECJ has not yet fully embraced that role and has not yet adopted a doctrinal framework that would reflect and help implement such an understanding of its role. Yet such an understanding of its role would fit the role it has assumed in the adjudication of the four freedoms and human rights and would better connect questions of competencies with the underlying values that need to be reconciled, thus exhibiting fidelity to the European conception of legality.

Chapter 5

A proportionate constitution? Economic freedoms, substantive constitutional choices and *dérapages* in European Union law

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Bien entendu, on peut sauter sur sa chaise comme un cabri en disant l'Europe!, l'Europe !, l'Europe ! [...] mais cela n'aboutit à rien et cela ne signifie rien.

Charles De Gaulle, 14 December 1965

History is that certainty produced at the point where the imperfections of memory meet the inadequacies of documentation

Julian Barnes, *The Sense of an Ending*

Introduction

The European Court of Justice (ECJ) and the General Court of the European Union (hereafter, the European Courts)¹ have come to play a key role as guardians of European constitutionality vis-à-vis national (and supranational) legislatures. In discharge of such a task, the European Courts have become inclined to support (and

¹ There is also a third European Court, the Civil Service Tribunal, which basically decides controversies between the institutions of the Union and the supranational civil service. This entails that such a Court rarely decides questions with a constitutional dimension. For that reason I do not pay attention to it in this chapter.

contribute to the dissemination of) a rather peculiar understanding of economic freedoms, and one could perhaps say, of fundamental rights in general. According to this conception of rights of the European Courts, priority should be assigned to the rights of capital-holders over the socio-economic rights affirmed in most of the fundamental laws of the member states of the European Union (including, above all, collective fundamental rights and collective fundamental goods).²

This double move entails that the argumentative syntax characteristic of postwar democratic constitutional law (the proportionality review of all norms allegedly infringing core fundamental rights) seems to have been turned upside down and used to justify fundamental decisions which would appear to collide with the substantive content of the postwar European constitutions. This so because the national constitutions of the member states (as, I would argue, the founding Treaties of the Communities) are underpinned by the characterisation of the state as a Social and Democratic *Rechtsstaat*, aimed at the simultaneous realisation of the civic, political and socio-economic rights of its citizens, something which required playing down and circumscribing the protection afforded to the right to private property.

While the present shape of the case law of the European Courts is the result of a long and protracted process (which in this chapter I date back to – at least – the *Cassis de Dijon* judgment), the Luxembourg judges seemed at first to be really tucked away in a fairyland duchy, as Eric Stein put it long ago,³ and later to enjoy an extremely good press with legal and politico-scientific scholars. Everything might have changed forever after the European Court of Justice decided in 2008 *Viking*.⁴ *Viking* was a ferry company incorporated in and run from Finland, which intended to wind up its legal existence in that Nordic country and establish itself in Estonia. There was slight doubt

² Admittedly, the constitutional role of the European Court of Justice is more salient. Not only is it the highest court of the European Union *now*, it was also the only European Court around for most of the history of European integration.

³ E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 (1981) *American Journal of International Law*, 1.

⁴ To be more precise, the quarter of *Viking*, *Laval*, *Ruffert* and *Commission v. Luxembourg*. *Viking* is here employed as symbolic of the line of jurisprudence resulting from these four cases.

that such a decision was motivated by the prospect of lower wages and a less onerous set of obligations for employers under Estonian labour law. When the Finnish trade unions managed to successfully engage into transnational collective action and block the smooth realisation of the plans of the company, Viking started legal proceedings claiming that its right to freedom of establishment had been breached by the Finnish trade unions. The European Court of Justice, following the lead of Advocate General Maduro, basically agreed with the Finnish company. Both the right to freedom of establishment of the corporation and the right to engage into collective action of the workers were part of European constitutional law. But in the case at hand, the right of freedom of establishment should prevail.

This chapter joins the growing chorus of critics of *Viking* and of the case law of the European Courts, but does so in a peculiar fashion, as it assumes that *Viking* is but another turn of a rather old screw. Instead of focusing on the reasoning of the Court in *Viking* or other isolated cases (and claiming, as has been convincingly done on what concerns *Viking*, that Community law as it stood before the ruling supported a different result in *Viking*; a line of criticism which underplays the extent to which *Viking* was but the natural follow up of the previous case law of the ECJ) or on the (limited) legitimacy of European Courts insofar as they are *supranational* institutions (from which it tends to follow the claim that that *national institutions, perhaps national courts*, should stop acknowledging the authority of the European Courts in an unconditional manner), this chapter takes a more structural view and a more long-term perspective.

The chapter assumes that the proper analysis of the case law of the Court requires distinguishing rather clearly two different problems that are somehow entangled in the debate on the legitimacy of the decisions of the European Court of Justice, and perhaps especially aftermath of *Viking*. These two questions are on the one hand the justification of the *structural* role that European Courts play as guardians of European constitutionality and on the other hand the justifiability of defining the *substantive contents* of European constitutional as they are spelt out in the case law of the European Courts, critically including the superior weight assigned to economic freedoms.

Two different questions, two different answers. There is a case to be made for European Courts playing the role of guardians of European constitutionality and for European Courts discharging such a task with the argumentative syntax of proportionality. But proportionality (because it is a formal and not a substantive principle) cannot not provide legitimacy to a ruling by itself. The justifiability of a ruling crucially depends on the justifiability of the substantive choices made when undertaking the proportionality review. Making use of this critical potential of proportionality, I argue that *Viking* and *Laval* are but two instances of a larger and older pattern, the more recent consequences of a *constitutional dérapage* that can be traced back to *Cassis de Dijon*. It was on that judgment that the European Courts introduced an autonomous, self-standing conception of economic freedoms, detached from the collective of national constitutions. It was by means of expanding and spelling out the implications of such a move that the European Courts developed a new understanding of the four economic freedoms which transcended their characterisation as operationalisations of the principle of non-discrimination on the basis of nationality. That was indeed the road to *Viking* and *Laval* and to the constitutional primacy of the rights of capital holders over socio-economic rights. This leads me to make a plea for the recalibration of the jurisprudence of the European Courts on economic freedoms. In particular, it seems to me that some of the most problematic substantive choices made by the European Courts in their case law should be rendered coherent with the common constitutional law of the member states and with the case law of national constitutional courts acting (admittedly, implicitly for the time being) as guardians of European constitutionality.

The chapter is divided in three parts. In the first part, I claim that there is a very good case for European Courts playing a fundamental role in the guardianship of European constitutional law, including the review of the European constitutionality of national statutes. Such a case is grounded on the *constitutional* nature of Union law and on the systematic interpretation of the Treaty provisions defining the different procedures before the ECJ and the shape and content of the rulings of the ECJ. However, the European Courts have to take seriously the peculiar constitutional nature of the European Union. In particular, the European Courts have to be conscious of the fact that the deep constitution of the European Union is the collective of national constitutions (the constitutional law *common* to the member

states, as the ECJ phrased it relying on the founding Treaties) and of the fact that the guardianship of European constitutionality must be *shared* between the ECJ and national constitutional courts, because they stand in a horizontal, not vertical and hierarchical, relationship.

In the second part, I present several criticisms concerning the way in which the European Courts have come to discharge their task as constitutional guardian when reviewing the European constitutionality of national statutes. Resort to proportionality as the argumentative syntax of constitutional rulings can only carry the European Courts so far because proportionality is a structural principle, and not a substantive one. Contrary to what a good deal of the European literature seems to affirm, resort to proportionality is not enough to render a decision legitimate. On what concerns substantive choices and substantive legitimacy, proportionality is merely a useful analytical device, which allows us to distinguish more neatly the substantive choices made by the European Courts. Focusing on the case law on direct personal taxation, I conclude that the European Courts have tended to leave unjustified some of the most decisive substantive choices in the shaping of its argument. Not only the European Courts have failed to offer a strong justification in favour of its *new individualistic understanding of economic freedoms*, but it favours economic freedoms by assigning the argumentative burden systematically to any conflicting principle. Similarly, the ECJ sets idiosyncratic proof burdens against national norms allegedly infringing fundamental freedoms, and fails to take seriously the normative structure of the principles colliding with economic freedoms when giving concrete weight to each of them in concrete cases. The third and last part holds the conclusions.

The role of the European Courts in the guardianship of European constitutionality

The first thesis: European Courts as guardians of European constitutionality

The first thesis I sustain in this chapter is that the European Courts play a key role in shaping the law in the European Union. This is so to the extent that they elucidate the substantive contents of European constitutional law (foremost economic freedoms) *and* review supranational and national norms against such a yardstick, thus acting as

guardians of the core contents of the European constitution.⁵ Or to put it differently, European Courts exert an authority to review the degree to which supranational and national laws fit with the fundamental principles of European constitutional law when applying supranational norms to concrete cases and when interpreting in general and abstract terms the provisions of Community law (this is what is hereafter referred as review of European constitutionality). This entails that the European Courts have come to play a constitutional role which is not dissimilar from that characteristic of national constitutional courts formally empowered to ensure the direct effect of their national fundamental law (such as is the case with the German, Italian or Spanish constitutional courts).

My first thesis is very likely to raise (at least) three sets of objections:

- Is it really the case that the rulings of the European Courts result in the fleshing out of constitutional standards that actually limit the breadth and scope of valid policy options to European legislatures? This question is essentially an empirical one, as its positive or negative answer depends on what is present European constitutional practice;
- Should Community law be regarded as a constitutional legal order? Can the alleged primacy of national constitutions be reconciled with the idea that supranational law contains the normative yardstick against which the validity of national laws is to be assessed? This question concerns the normative foundations of Union law; it requires showing that indeed there European Union law is a constitutional legal order, and one which comprises in one way or another national constitutional orders (and consequently, fleshing out the general lines of a constitutional theory for the European Union);
- Are European Courts justified in claiming a role as guardians of European constitutionality? Even if we are to grant that

⁵ For both historical (the European Court of Justice was for a long time the only European Court, which through its case law clarified the constitutional stature and dignity of Community law) and hierarchical reasons (the decisions of the General Court can in some cases be appealed before the European Court of Justice).

Community law is a constitutional order, is it one where courts are legitimately empowered to act as guardians of constitutionality? Given the transcendence of that choice, can it be traced back to any open political decision codified into the written law? This question requires us to undertake a careful and systematic reconstruction of the provisions of the founding Treaties dealing with the tasks of European Courts.

Do European Courts actually undertake the review of European constitutionality of supranational and national norms?

Is it really the case that the rulings of the European Courts result in the fleshing out of constitutional standards that actually limit the breadth and scope of valid policy options to European legislatures (both supranational and national)? Is there really such a thing as the review of European constitutionality? This question is one that, as has just been said, has to be answered by reference to present European constitutional practice. It thus requires considering what European Courts actually do and how other constitutional actors (courts, parliaments, governments) react to it.

The European Courts pass judgments on the different procedures referred to in the Treaties (now in the Treaty on the Functioning of the European Union).

Some of these procedures do require the Court to decide on the validity of Community acts, including Community legislation. When the European Courts declare that one (or more) norms enshrined in a Regulation or Directive are void, such a judgment entails for all purposes that the said law is *unconstitutional*.

However, the literal tenor of the Treaties seems not to empower the European Courts to declare the constitutionality or unconstitutionality of national norms. The Court cannot rule on the validity of national norms, but at most, on the *infringement* of the Treaties by member states (a breach which may result from the contents of the national legal order) or on the general and abstract meaning of a Community norm (which may guide a requesting national court to decide how to solve an eventual conflict between a Community and a national norm). While this is a *formally correct* reconstruction of the case law of the Court, a proper consideration of the normative implications of the rulings of the Court will lead us to conclude that

indeed the European Courts review the European constitutionality of national norms. This can be perhaps be better illustrated by two of the best known leading cases of the European Court of Justice, those in *Cassis de Dijon* and *Avoir Fiscal*.

In the leading case on economic freedoms, *Cassis de Dijon*,⁶ a German court requested the European Court of Justice to clarify the meaning of 'measures having an equivalent effect to quantitative restrictions of imports' in what was formerly Art. 30 of the Treaty of European Community. While, as we will see, the answer to a preliminary request is supposed to be general and abstract, the submitting Court could not but inform the ECJ that its doubts centred on a specific German law which conditioned the sale of liquors to their having a minimum alcoholic graduation. That was indeed the case which was pending before the requesting court, and the one for which that court requested the assistance of the European Court of Justice. The pending case hinged on whether that German law was to be applied to the case or not. French *cassis* was legally on sale in France, but had an alcoholic graduation which was lower than the minimum one legally mandated for fruit liquors in Germany. So the request concerned in formal terms how the concept of measures having an equivalent effect to quantitative restrictions of imports was to be interpreted, that question was inextricably linked, in practical terms, to the very concrete facts of the case, and consequently, to the interaction between a German and a French statute. The Court of Justice limited itself in formal terms to throw light on what a measure having an equivalent effect is under Community law. But in doing so, it could not but touch (even if under the veil of generality and abstractness) on the concrete legislation at stake. The operative part of the judgment is very telling in that regard and is worth quoting at length:

[The concept of] measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where

⁶ Case 120/78, [1979] ECR 649.

the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned.

So the Court stated that a *hypothetical law* doing what the German law *actually did* would constitute a measure having an equivalent effect. In substantive terms, this ruling implied that the German law prohibiting the sale of French *cassis* was in breach of Community law. Given the direct effect of the Treaty provision on freedom of establishment and the primacy of Community law, the necessary implication of the decision was that the German law was to be set aside. In other words, the normative implications of *Cassis de Dijon* were exactly the same as those of a constitutional ruling of a national constitutional court reviewing the constitutionality of a national statute.

In the leading case on the relationship between economic freedoms and national direct tax laws, *Avoir Fiscal*⁷, the European Commission requested the European Court of Justice to declare that by means of giving a different tax treatment on the one hand to dividends paid to insurance companies with a registered office in France and on the other hand to dividends paid to insurance companies with a registered office in another member state, France had breached the freedom of establishment of insurance companies with registered offices in other member states.⁸ The Court granted the claim of the Commission. Formally speaking the outcome of the case was the declaration that France had breached Community law. But in substantive terms, given the direct effect of the provision of freedom of establishment and the primacy of Community law, the ruling not only required the French State to eliminate these provisions from its *code fiscal*, but also entailed that any private party *should* be offered judicial protection against previous and future applications of that norm for as long as it remained in force. So the normative implications of *Avoir Fiscal* were very similar to those of a constitutional ruling of national constitutional court reviewing the constitutionality of a national statute.

While in both cases the Court limited itself to a restrained judgment (the decision that by means of *this concrete normative provision* and *in*

⁷ Case 270/83, [1986] ECR 273.

⁸ Para. 29.

this concrete case France had infringed Community law and the decision that a *hypothetical* law banning the sale of goods which could be legally acquired in another member state would constitute a measure having an equivalent effect to an import restriction), the normative implications of the two rulings had the same normative effects as rulings formally declaring that the German and the French provisions were unconstitutional and consequently to be set aside. While in *Cassis de Dijon* the Court seems to limit itself to offer a general and abstract interpretation of Community law, the judgment contrasts a German statute with a concrete Treaty provision (free movement of goods) and establishes a derivative constitutional rule which not only largely determines the concrete outcome of the case at hand, but also places some policy options outside of the realm of what national legislators can do. Similarly, in *Avoir Fiscal* the Court seems to restrain itself to a decision on a very narrow factual basis, but still the European Court of Justice sets a precedent applicable in similar cases. A precedent consisting in a derivative rule which places certain policy options outside the reach of the national legislator.

This is compounded by the fact that the structural principles governing the relationship between supranational and national law (primacy, direct effect and attribution of competences) result in the derivative rules having full legal effect not only within the supranational subsystem, but also within each and every national legal subsystem. We are thus confronted with the typical structure of rulings determining the constitutionality of a norm: a norm being reviewed (the German law, the French law), a constitutional yardstick (free movement of goods, freedom of establishment) and a decision on the breadth and scope of what the legislator can do in compliance with the constitution.

Both the substantive case law of the European Courts and its structural implications (the assumption of a power to review the constitutionality of not only supranational but also national laws against the yardstick of European constitutional norms, hereafter referred as a review of European constitutionality) have come to be accepted by all major national constitutional actors. This is well documented in the literature, such as in Karen Alter's monograph on

the 'making of an international rule of law in Europe'.⁹ While she focuses on the acceptance of the structural principle of supremacy of Union law over national law, that process had a *substantive* dimension which basically concerned the unfolding conception of economic freedoms pushed forward by the European Court of Justice. Similarly, Joseph Weiler's writings on the osmotic relationship between the European Court of Justice and national courts (other than constitutional courts or supreme courts in systems without a formal constitutional court) consider the underlying structural reasons why national courts have contributed to affirm and consolidate the role of the European Courts as guardians of European constitutionality. A role that has not been systematically challenged by national legislators. National political actors may have made open critical remarks of this or that judgment, and been even tempted to be ferociously critical of the European Courts (especially of the European Court of Justice). But they have not acted upon such statements. That does not rule out national legislatures aiming at circumscribing or even circumventing specific rulings. But such a dynamic can also be found in national constitutional orders. The guardianship of a democratic constitution is always an open-ended process, in which it is *We the People* and not *We the Court* that has the last word.¹⁰

Should Union law be acknowledged a constitutional stature?

It may well be that European constitutional practice has come to be so that the European Courts have successfully arrogated themselves the power to review the constitutionality of supranational and national norms, and that national constitutional actors have acquiesced to such a role. Still, we could ponder wonder *that* should be the case? Is this state of affairs constitutionally sound? Or does that constitutional practice undermine the pre-existing constitutional framework, in particular, the constitutional stature and dignity of Community law? What would remain of the claim of national constitutions to be the supreme law of the land if Union law would be acknowledged a constitutional status? Would that not necessarily entail *downgrading*

⁹ K. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001).

¹⁰ Admittedly, whether the legislature manages to break the muscle of the court, or not, tends to depend on the extent to which the legislative countermove resonates in the electorate. Such a test is for the time being a rather improbable one in Community law.

the stature of national constitutions? Given that the supremacy of national constitutions is said to be based on the intense democratic legitimacy of such constitutions, would not that *downgrading* also entail the *subversion of democratic legitimacy*? And if, at the end of the day, we conclude that Union law *is not* a constitutional order, should then we not rebuff the claim of European Courts to be empowered to take decisions which imply contrasting national norms with a non-existent European constitutional yardstick? Indeed should we not conclude that rulings such as those in *Avoir Fiscal* or *Cassis de Dijon* would simply be *ultra vires* decisions?

The answer to this question hinges on whether the European Union should or should not be regarded as a constitutional order. In *material* terms, that may be decided by means of considering the institutional structure, decision-making procedures and competences of the European Union. If all these three dimensions the European Union resembles a democratic federal state more closely than an international organisation, we would have good reasons to conclude that the legal order which constitutes such institutions, decision-making processes and grants such competences is a constitutional legal order. Still, whether we should grant the European Union the normative acknowledgment of regarding its legal order as a constitutional one depends on the democratic legitimacy of Union law. Determining what is the legitimacy basis of Union law requires proper attention (and adequate reconciliation) of the regulatory ideals of a democratic constitution, of the primacy of the national democratic constitution, and of the structural principles of direct effect of certain Community norms and primacy of Community law. Or, in short, a proper constitutional theory of Community law.

Union law as a *material* constitutional order: Institutional structures, decision-making processes and competences

A systematic construction of the founding Treaties (and the successive amendments to them) allows us to make a good case for the constitutional stature of Union law. This is so because the political community that the Treaties constitute is characterised by the robustness of its institutional structure and of its decision-making processes; and by the breadth and width of the powers which have been transferred to the European Union. Consequently, a legal order that constitutes a polity with such features is to be regarded as a *material constitutional order*.

Even if the Union has (and always had) limited, enumerated competences, the breadth and scope of what the Union does largely corresponds to what one could expect a level of government in a federal structure to do. The founding Treaties envisaged in clear cut-terms *the transfer of the exercise if not the full title of significant public powers from member states to the European Union*. In the case of the ECSC and the Euratom, this was somehow obscured by the fact that the power being transferred concerned a rather specific and narrow set of issues (even of dramatic importance, as coal, steel and atomic energy were the sinews of war in the 1950s). In the case of the EEC, there was some equivocation resulting from the combination of a detailed set of negative integration measures (aimed at realising a 'common market') with vague references to wider goals of economic and political Union. But in all cases what count as key competences in the political process of a democratic polity were agreed to be transferred to the European level. At the time of writing, not only the Union exerts fundamental regulatory powers concerning the single market and agricultural policy,¹¹ but monetary policy is in the hands of the very federal system of European central banks (with the European Central Bank at its height, and having opted for an interpretation of its own powers which leaves no doubt concerning the open fiscal implications its decisions have), while Union powers of 'justice and home affairs' affect deeply the relationship between citizens and states as holders of the monopoly of force. Even the area of taxation has not been left untouched. Not only did the ECSC expect the Community to be self-financing through the use of its taxing power over coal and steel industries (thus granting the newly created institutions a limited but revealing power of the purse), but the EEC Treaty implied the full transfer of powers to the Community over customs duties as an unavoidable consequence of the creation of a common external tariff,¹² and a partial but decisive transfer of

¹¹ Agricultural policy (once the inconclusive provisions of the Treaty were rendered concrete in political practice), which was at the very centre of political debate in the fifties, given the higher economic and social importance of farming at the time (it might be added that a large part of the population was still occupied in the primary sector and that the failure to ensure a decent standard of living to farmers in the interwar period had facilitated the rise of fascists to power).

¹² Still a far from negligible tax, and historically a determinant one. See A. Milward, 'Tariffs as Constitutions', in S. Strange and R. Tooze (eds), *The International Politics of Surplus Capacity* (George Allen and Unwin, 1981), 57-66; and B. Eichengreen *Golden Fetters* (Oxford University Press, 1992), at 9.

legislative competence over turnover taxes.¹³ To that we must add the transfer of competences on external trade, also a logical part of the creation of a customs union. The road to the single market in the late 1980s led to a growing intervention of the Union on direct taxation, which has been deepened by the case law of the ECJ on personal and corporate income taxation.¹⁴

Although the founding Treaties resulted in a rather incomplete and undefined institutional structuring of the Union, the institutional structure resulting from them went well beyond what was (and is) generally associated with an international organisation. The institutional structure of the original Communities included (1) a supranational High Authority or Commission with competences much bolder than those of either a permanent secretariat or even a supranational independent administrative agency, and (2) a Parliamentary Assembly (which from early on had the vocation to become a parliament, that is, a body elected by the direct suffrage of the citizens),¹⁵ and (3) a Court of Justice to whose jurisdiction member states were compulsorily subject. This was further composed by the fact that the Rome Treaties of 1957, while resulting in the multiplication of the number of institutional structures (three Council of Ministers and three Commissions/High Authority, one for each Community) made the Assembly and the Court of Justice *common* institutions to the three Communities, thus laying the basis for a common institutional framework, which was indeed achieved through the Merger Treaty of 1965, and at any rate pointing to a decision to create a wide and encompassing supranational structure *beyond* the concrete Communities being launched to make integration feasible and possible at first. This has been basically achieved by the progressive development of the institutional structure of the Union, either replicating or adapting national institutional structures, or by

¹³ That in itself implied transferring key taxing powers, which have always been at the very centre of the political constitution of democracies (and of revolutionary democratic politics, from the Glorious Revolution of 1689 to the French Revolution of 1789).

¹⁴ A. J. Menéndez, 'The Unencumbered European Taxpayer as the Product of the Transformation of Personal Taxes by the Judicial Empowerment of "Market Forces"', in R. Letelier and A. J. Menéndez (eds), *The Sinews of European Peace*, RECON Report No. 8 (ARENA Centre for European Studies, 2009), 157-268.

¹⁵ For an account of the Common Assembly's metamorphosis into the European Parliament, see B. Rittberger, *Building Europe's Parliament* (Oxford University Press, 2005).

means of experimenting with new institutional solutions (as has been remarkably the case of comitology).

So much so that at the time of writing, Community decision-making process, even if widely geared towards the transfer of democratic legitimacy from member states to the Union (as is typical in international structures), also generate *direct democratic legitimacy* (critically, through the decision-making processes in which the European Parliament plays a decisive role, such as the co-decision law-making procedure).

Firstly, The Communities were assigned from their very foundation normative powers, concretely, the power to approve regulations and directives. Such legal norms were not to be regarded as a congeries of technical or specific norms, but were framed by constitutional principles, of which they were expected to be concretisations. Key in that regard is the principle of equality before the law, which in the context of a process of European integration was essentially defined as the principle of non-discrimination (crucially on the basis of nationality, but also on the basis of sex; to which, much later in the process, race would be added).¹⁶

Secondly, Community law has pervasive effects over all EU citizens and EU territory, as a result of the wide acknowledgement that it stands in a structural relationship to national legal orders marked by the structural principles of *direct effect* and *primacy*. The doctrine of direct effect implies that the legal effects of Community norms are governed by Community, not national norms, even from the perspective *internal* to the national legal order. Primacy, as it emerges from European constitutional practice, implies that Community norms prevail over conflicting national norms, even if the latter are constitutional norms. Controversy remains on whether primacy is indeed absolute or, as seems more frequently accepted, it has limits. National constitutional courts, following the lead of the German constitutional court, have become quite interested in defining such limits by reference to an alleged set of 'core' constitutional

¹⁶ Art. 6 contained a clause on prohibition of discrimination on the grounds of nationality, and Art. 119 stated the principle of equal pay for equal work for men and women. For the limited and truncated character of the constitution of anti-discrimination, see A. Somek, 'A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law', (1999) 5 *European Law Journal*, 243.

substantive contents, competences and now even 'identity', whatever that means. It seems to me that this is a rather confused way of posing the problem, as it assumes that supranational and national constitutional norms are part of clearly distinct legal orders. But what is relevant at this stage is to highlight that even national constitutional courts have abandoned the characterisation of Community law as just a peculiar form of international law and have progressively scaled back the breadth and scope of the so-called 'hard core' of national constitutions, theoretically more than practically *superior* to Community law.¹⁷

The constitutional dignity of Union law

A synthetic constitutional order

As has just been argued in the previous section, there are very good reasons to acknowledge that Union law has a *material* constitutional stature. The founding Treaties of the European Union constituted a polity with institutional structures, will-formation processes and powers which clearly set it apart from classical international organisations, and make it rather similar to a federal polity. Consequently, it makes full sense to characterise Union law as a constitutional legal order. Not only in a purely material sense (which is rather banal, as all legal orders have a constitution in this sense), but in a stronger, more restrictive sense, as one which identifies the polity and the legal order as proper and characteristic of a full-blown political community. But the democratic conception of constitutional law is even more demanding. Democratic constitutional norms, as all the constitutions of the member states of the European Union claim to be, are characterised not only by their *material stature*, but also by their *normative* dignity, that is, by their enjoying a high and intense democratic legitimation.

Can that be fairly said of European constitutional law? Is a supreme and directly effective Community law democratically required? In particular, in the absence of an explicit act of democratic constitution-making, or of legitimacy-carrying transformations which could justify

¹⁷ The characterisation of Community law as public international law has been rather resilient in the doctrine. See for example D. Wyatt, 'New Legal Order or Old', (1982) 7 *European Law Review*, 147. And indeed Treaty amendments keep on being characterised as mere matters of ratification of international treaties in many member states (indeed most during Lisbon resulting from the characterisation of the process by the European Council).

in democratic terms the mutation of an international order into a constitutional one,¹⁸ how can we explain that Community law is now widely regarded as a constitutional one? And should we indeed accept such a transformation?

This constitutional *riddle* is due to a large extent to the inadequacy of the theoretical lenses through which Union law is reconstructed and assessed. If one reconstructs the law of the European Union, assesses its democratic credentials or tries to understand its institutional transformation through the lenses applied to an international organisation, to a revolutionary constitutional polity, or for that matter to an evolutionary constitutional polity, one ends up submerged in paradoxes and inconsistencies, above all the *riddle* concerning the mutation of an international order into a constitutional one. And thus one is confronted with a major dilemma: Union law has constitutional stature, European constitutional practice acknowledges it, but there is no good normative foundation for acknowledging constitutional dignity to Union law.

This dilemma is thus not to be sorted out by denying the constitutional dignity of Union law, but by means of seriously reconsidering the constitutional theory with which we approach Union law. By this I do not mean the usual (and a trifle post-modern) claim that European integration being a new phenomenon we should put forward a radically new theory to understand it; which indeed boils down to repudiating centuries of democratic political and constitutional thinking.¹⁹

My claim is much more limited. The basic normative components of democratic constitutional theory are fully relevant when reconstructing and assessing Union law. Democratic constitutional law plays a key role in the stabilisation of democratic power by means of the proper combination of constitution-making, constitutionalisation and ordinary decision-making processes. Still, democratic constitutional theory should take into account the specific

¹⁸ Certainly the 'limited judicial *coup d'état*' hypothesis will not wash. Who are the judges to undertake these changes? How could that have happened within years of the core member states of 'little Europe' undergoing transformative processes of constitution-making?

¹⁹ I am thus no post-modernist, or what is the same for these purposes, no believer in the radical novelty of the European Union.

nature of the European Union, and in particular, the fact that the European Union is a polity made of constitutional polities which aimed at integrating through constitutional law. Democratic constitutional theory should be sensitive to the (1) peculiar shape of the process of European integration, and (2) the way in which constitution-making and constitutionalisation processes have been combined through the history of European integration. Together with John Erik Fossum, I have claimed that democratic constitutional theory can be rendered sensitive to the genuine peculiarities of Union law by fleshing out a constitutional theory of integration through constitutional law, which, for a better name, we have labelled as 'constitutional synthesis'.²⁰ The core of the theory can be summarised in three premises, which are the following.

The *first premise of constitutional synthesis* is that the constitutional law which frames and contributes to steer the process of European integration is neither revolutionarily established in a 'Philadelphian' constitutional moment, nor the outgrowth or accumulation of 'Burkean' constitutional conventions and partial constitutional decisions *à l'anglaise*. On the contrary, constitutional synthesis is characterised by the central structuring and legitimising role played by the constitutions of the participating states (*seconded* to a new role as part of the collective constitutional law of the new polity),²¹ or by

²⁰ J. E. Fossum and A. J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union* (Rowman and Littlefield, 2011).

²¹ The idea of a supranational constitutional law which is the result of seconding national constitutions was hinted at by the European Court of Justice in Case 11/70 *Internationale*, para. 4 when claiming that the lack of a written bill of rights in the primary law of the Union came hand in hand with an unwritten principle of protection of fundamental rights, which was filled in by reference to the 'constitutional traditions common to the Member States' properly spelled out in the context of European integration ('the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'). In doing this, the Court was following a line of reasoning pioneered by Pierre Pescatore: see P. Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities', (1970) 18 *American Journal of Comparative Law*, 343. On the technical aspects of legal synthesis, it must be stressed that a critical comparative approach has underpinned the case law of the ECJ since its very inception. See K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', (2003) 52 *International and Comparative Law Quarterly*, 873. On the constitutional aspects of the idea of constitutional synthesis, see A. J. Menéndez, 'The European Democratic Challenge', (2009) 15 *European Law Journal*, 277.

the regulatory ideal of a common constitutional law, which is progressively recognised as the constitution of the new polity, and whose normative consequences are fleshed out and specified as the process develops further. To put it differently, instead of a revolutionary act of constitution-making, or the slow growth of constitutional conventions, constitutional synthesis is launched by an act which implies the secondment of national constitutions to the role of common constitutional law. This makes synthetic founding much more economical in political resources than revolutionary founding, and, at the same time, it is much quicker than evolutionary founding. The price to be paid is that, instead of an explicit set of constitutional norms, the founding Treaties reflect a scattered set of norms, while the bulk of the common constitutional law remains implicit, *a regulatory ideal* to be fleshed out as integration progresses.

European constitutional law was composed of, and, to a large extent, keeps on being composed of, the *common constitutional law* of the member states. The establishment of the European Communities was thus akin to a foundational moment; but, contrary to what is the case in a revolutionary constitutional tradition (such as the French or the Italian one), the constitution of the Union was not written by *We the European People*, but was defined by implicit reference to the six national constitutions of the founding member states. In this way, the French, German, Italian, Dutch, Belgian and Luxembourgian constitutions were *seconded* to the role of being part of the constitutional collective of Europe. National constitutions started living a 'double constitutional life'. They combined their old role as national constitutions and the new role as part of the *collective* supranational constitution.²²

Constitutional synthesis is grounded on the national constitutional provisions which not only authorise, but also mandate, the active participation of national institutions in the creation of a supranational legal order as the only way of fully realising the principles which underlie the national constitution(s). Thus, the 'opening' clauses of

²² This could be illustrated by using the image of the 'field' as a metaphorical device. Indeed, the founding of the Communities implied that national constitutions abandoned their constitutional solitude as constitutions of the self-sufficient nation-state and placed themselves in the common European constitutional field. Constitutional autarchy was thus replaced by constitutional openness, co-operation and reflexivity.

post-war constitutions, and the explicitly European clauses of the more recent ones are constructed as reflecting the self-awareness of the national constitution(s) about the limits of realising constitutional values in one single nation-state. Constitutional synthesis claims that there is a substantive identity between national constitutional norms and Community constitutional norms. In other words, European integration pre-supposes the creation of a new legal order, but not the creation of a new set of constitutional norms; a key source of the legitimacy of the new legal order is, indeed, the transfer of national constitutional norms to the new legal order. However, the process, by necessity, has major constitutional implications for each member state. Firstly, the accession of a state to the European Union marks a new constitutional beginning for that state. Contrary to what is the case in most constitutional transformations, constitutional change is not mainly about the substantive content of the fundamental law, but concerns the *scope* of the polity (there is an implicit re-definition of who we acknowledge as the co-citizens of our political community) and the very *nature* of the new polity (as it actually aims at re-founding both the national and the international legal orders by means of transforming sovereign nation-states into parts of a cosmopolitan federal order). Secondly, the very essence of the process of constitutional synthesis is that of the progressive ascertainment of common constitutional standards which may eventually result in marginal changes in national constitutional norms *to align them* with the contents of Community constitutional law, which, in turn, is reflective of what is actually *common* to the member states. In this regard, it should be noted that Community constitutional law is not defined by reference to individual sets of constitutional norms, but to what is common to *all* national constitutional norms. In those cases in which national constitutional norms point to different normative solutions, synthesis is not achieved by finding a common minimum denominator, but by means of considering which of the national constitutional norms is more congenial to Community law. This is to be decided by considering the underlying arguments for or against the competing national constitutional solutions, and, in particular, by considering the extent to which the national norm can be 'Europeanised', both in the sense of fitting with European constitutional law as it stands (as already synthesised in the Treaties, the amendments to the Treaties or the legislation and case law of the

Union), and with its consequences being acceptable in the Union as a whole.²³

The *second premise of constitutional synthesis* is that the supranational legal order comes hand in hand with a supranational institutional structure. But the latter is only partially established at the founding, takes time to be rendered functional in a process in which different national institutional cultures and structures try to leave their mark at the supranational level, and its structure is necessarily rendered more complicated as new institutions and decision-making processes are added in order to handle new policies. This entails that constitutional synthesis can be described as the combination of normative synthesis and institutional development and consolidation, two processes that have very different inner logics. While normative synthesis exerts a centripetal pull towards homogeneity, institutional consolidation is a more complex process with strong built-in centrifugal elements – it serves as the conduit through which the constitutional plurality of the constituting states is wired into the supranational institutional structure.

Institutional consolidation concerns the outgrowth and consolidation of the institutional structure of the supranational polity. Its logic is not exclusively *normative*. Institutions are mainly about law, but not exclusively about law. Institutions are organisations infused with value. They occupy buildings, make use of objects with empirical existence, and are represented by very material (when not venial) beings. Institutional organisations cannot be brought into existence by a normative regulatory ideal; they have to be created, staffed and funded, and develop their own institutional identity. In a constitutional union of already established constitutional states, this process is complicated by three factors. Firstly, constitutional synthesis pre-supposes the combination of a single constitutional order with a pluralistic institutional structure, to the extent that supranational and national institutions are not hierarchically organised or ranked. Secondly, constitutional synthesis at the

²³ If all national constitutional norms converge, as in most cases they do, the common norm is easy to establish. The strong affinity between national and Community constitutional norms is due to the history of European integration, to the fact that all member states are parties to the European Convention on Human Rights; moreover accession to the European Union is conditioned to candidate states indeed fitting in the constitutional paradigm defined by the common constitutional traditions.

regional-continental level of government (*i.e.*, in between global organisations and nation-states) tends to proceed in a far from crowded institutional space. In contrast to the constitution of a nation-state, which *de facto* relies upon an existing institutional structure, constitutional synthesis requires the creation of new institutional structures. This usually entails that institution-making proceeds in a fragmentary fashion, that the synthetic polity starts with bits and pieces of an institutional structure, instead of with a complete one. Thirdly, the derivative character of the synthetic polity implies that the *institutional void* is only formally a *void*, as the creation of supranational institutions consists of the *projection* of national institutional structures and cultures to the supranational level. But because such structures and cultures are much more idiosyncratic than national constitutional laws, the probable result is that the creation of supranational institutions is the site of a bitter contest between different national institutional structures and cultures.

Upon such a basis, the *homogenising* logic of normative synthesis contrasts with the manifold pluralistic proclivities proper of institutional consolidation. This tension is aggravated over time, and a crisis emerges when the relationship between the two processes is polarised. As normative synthesis proceeds, it fosters some institutional convergence. But the synthetic process can also feed institutional pluralism and conflict, and thus produce a constellation incapable of solving institutional conflicts among the different levels of government.

The *third premise of constitutional synthesis* is that the regulatory ideal of a single constitutional law comes hand in hand with the respect for national constitutional and institutional structures. This entails that, while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. The peculiar combination of a single law and a pluralist institutional structure results from the just mentioned fact that there is no ultimate hierarchical structuring of supranational and national institutions, and is compounded by the pluralistic proclivities of institutional consolidation at supranational level.

The fact that the synthetic constitutional path is one in which participating states retain their separate existence, as well as their

separate constitutional and institutional identity, implies that constitutional synthesis is a peculiar breed of pluralistic constitutional theory. On the one hand, it *is not* pluralistic to the extent that it endorses the monistic logic of law as a means of social integration through the *regulatory ideal of a common constitutional law*. The integrative capacities of law (its role as a complement of morality in the solving of conflicts and the co-ordination of action by means of determining, in a certain manner, what the common action norms are) require law to be as conclusive as possible. Were law to be as inconclusive as morality, it would not add much to our practical knowledge, and it would not be capable of operating effectively as a means of social integration. Both autonomy and the motivational force of law require that we assume that law gives one *right* answer to all the problems to be solved through it. Legal argumentation breaks down if we assume that the same case can have different, even contradictory solutions. This may be the case *empirically*, but, from an internal perspective of law, this cannot be endorsed as part of the social practice of integration through law. Democratic legal systems are further pushed into this peculiar form of 'monism' by the normative requirements of the principle of equality before the law.

On the other hand, constitutional synthesis is pluralistic in a double sense. First, the regulatory ideal of a common constitutional law co-exists with the actual plurality of national constitutional laws. The constitutional moment in synthesis only results in the endorsement of a regulatory ideal, and in the bits and pieces of the set of common constitutional norms. Most constitutional norms remain *in nuce*, or better put, in several drafts, as many national constitutions participate in the process of integration. The regulatory ideal of a common constitutional law is fleshed out in *actual* common constitutional norms (and, in general, in common legal norms) only very slowly (and not without setbacks and backlashes). Furthermore, the regulatory ideal of a common constitutional law comes hand in hand with a pluralistic institutional setting. As already indicated, instead of a hierarchically-structured institutional set-up, a synthetic polity is characterised by the existence of a plurality of institutions all of which legitimately claim to have a relevant word in the process of applying the 'single' constitutional legal order. This is, in my view, the proper implication to draw from the 'differentiated, but equal' viewpoints thesis. Indeed, constitutional synthesis has not led (and is not expected to lead) to member states losing their autonomous

political and legal identity (which has been coined, in the European constitutional jargon, as the national constitutional identity).²⁴ This is so *thanks to*, and not *despite of*, integration. The constitutional pluralism that comes hand in hand with constitutional synthesis is both rendered possible *and* stabilised by the new institutional structure and the growing substantive convergence between national constitutional orders. Constitutional synthesis could be seen as the political and legal counterpart to the common market of old (not the single market of the Single European Act!) in the objective of rescuing the nation-state;²⁵ in our view, it is more proper to consider it as a means of re-configuring and re-defining the state, and, thereby, at the very minimum, detaching the state from the nation; and perhaps even disposing of the idea of the sovereign state completely.²⁶

Thus, constitutional synthesis articulates two key insights of the pluralist theory of Community law when (1) it stresses the open character of the process of constitutional synthesis (which accounts for the fact that no institutional actor has been acknowledged the power to solve, in an authoritative and final manner, conflicts

²⁴ The term 'national constitutional identity' entered the European debate in the famous ruling of the German Constitutional Court *Solange I*, 1974 WL 42441 (BverfG (Ger)), [1974] 2 C.M.L.R. 540, para. 22: 'Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-state institution'. It was then propelled to the supranational level in Maastricht (resulting in Art. 6.3 of the Treaty of European Union, where the principle of respect of national identities in general terms was affirmed). And in the Constitutional Treaty and in the Treaty of Lisbon, this principle was spelled out by reference to constitutional identity. On the academic debate following the Constitutional Treaty, see A. von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe', (2005) 3 *International Journal of Constitutional Law*, 295; M. Rosenfeld, 'The European Treaty-Constitution and Constitutional Identity: A View from America', (2005) 3 *International Journal of Constitutional Law*, 316; J. H. Reestman and L. F. M. Besselink, 'Constitutional Identity and the European Courts', (2007) 3 *European Constitutional Law Review*, 177. In more general theoretical terms, see the interesting reflections of Gary Jeffrey Jaconsohn, in 'Constitutional Identity', (2006) 68 *The Review of Politics*, 361.

²⁵ A. Milward, *The Rescue of the European Nation-State* (Routledge, 1992).

²⁶ W. E. Scheuermann, 'Postnational Democracies without Postnational States? Some Skeptical Reflections', (2009) 2 *Ethics & Global Politics*, 41; H. Brunkhorst, 'Reply: States with Constitutions, Constitutions without States, and Democracy - Skeptical Reflections on Scheuermann's Skeptical Reflection', (2009) 2 *Ethics & Global Politics*, 65.

between norms produced through Community and national law-making processes), and (2) it highlights the pluralist source of European constitutional law, the actual result of the process of constitutional synthesis of national constitutional norms. This not only provides the basis for the claim to the democratic legitimacy of Community law (transferred from the national to the European constitutional order when national constitutional norms become the core constitutional framework of the Union), but also reveals the complexity of constitutional conflicts in the European legal order, as they are, at the very same time, 'vertical' conflicts between Community and national law, and 'horizontal' conflicts between national constitutional laws, aspiring to define the common constitutional standard.

However, the theory of constitutional synthesis reconciles pluralism with the normative defence of a monist re-construction of the European legal order, in part on account of the social integrative capacity of European law and the fostering of equality before the law across borders, in part on account of the substantive identity of European and national constitutional law. Moreover, it offers a limited, but comprehensive, explanation of the sources of stability of the European legal order, which, at the same time, accounts for the progressive weakening of the said sources.

Equipped with the 'synthetic' constitutional theory of European integration, we can realise why and in which sense the Union has been since its very establishment a constitutional polity and Community law a constitutional legal order. The path of democratic constitution-making followed by the Union was an innovative (even if not *sui-generis*) one. Indeed, that of synthetic constitutionalism. A constitutional animal neither constituted in a democratic revolutionary fashion through an act of constitution-making reflected in a written fundamental law, nor resulting from a protracted process of normative and institutional evolution punctuated by critical turning points where the evolved norms and structures get infused with democratic sanction. Thus a peculiar and innovative constitutional animal: a synthetic constitutional animal.

The key features which seem *prima facie* to require denying the constitutional nature of the Union reveal themselves as compatible with the constitutional dignity and stature of Community law. The

tension between the international form and the constitutional substance and the lack of specific provisions empowering the ECJ to act as a constitutional court is but a mark of the synthetic nature of European constitutional law. The aspiration to combine the regulatory ideal of a single law guaranteeing equality to its recipients, and a pluralistic institutional structure, where the final word on the substantive content of the common law is shared, rather than monopolized, is congenial with the establishment of what is substantially a constitutional structure through an international legal form (the founding and amending Treaties). Similarly, the assignment of a role in the guardianship of European constitutionality to the ECJ is not reflected in an explicit constitutional provision, but results from the construction of specific Treaty provisions *in the light* of the substantive constitutional nature of Community law.

Can European Courts claim to have a mandate to be the guardians of European constitutionality?

Even if we were to accept the constitutional character of Community law, it would not necessarily follow that we should necessarily acknowledge that the European Courts are competent to undertake the review of constitutionality of legislation (especially on what concerns national statutes, not to speak of national constitutional norms). The assignment of the power of constitutional review to courts, or to be more precise, to those hybrid organs that constitutional courts are, is far from being a common feature of the fundamental law of the member states of the European Union. Granted, the institutional setup of many member states *does* include a constitutional court. It could further be said that the number of such member states has tended to grow over time, and that even those legal orders whose historical evolution seemed more at odds with the judicial review of the constitutionality of legislation (such as France and the United Kingdom) are now close to accepting it in one way or the other. Still, judicial review of legislation is not foreseen in the fundamental laws of all member states. And even if it were a common piece of the national constitutional edifices, it would not necessarily follow that such a power should be granted to the European Courts. So the question remains a relevant one: Where in the founding Treaties can we find a basis for this role of European Courts?

The short answer is that the Treaties of the European Union mandate the European Court of Justice and the Court of First Instance (hereafter the European Courts) to ensure that the law is observed in the 'interpretation and application of the Treaties' (art 19 TEU, originally art 164 TEC).

In discharge of such a task, the Treaties mandate the European Courts to review the 'legality' of the legislative acts of Community institutions (Art. 263 TFEU), something which entails the empowerment to review the European constitutionality of Community norms.²⁷

But leaving aside this specific mandate, a too literal interpretation of the specific provisions dealing with each procedure before the European Courts may lead us into the belief that the Treaties require the European Courts either to *interpret* Treaty provisions and/or secondary Community norms in a general and abstract manner, abstaining from any judgment on the normative validity of any national norm, or to apply Community norms to concrete cases, and thus deciding on the proper legal qualification of specific acts and decisions, which excludes passing judgment on the general validity of any norm. However, as I will argue in the following paragraphs (and as I have already indicated considering the normative implications of *Cassis de Dijon* and *Avoir Fiscal*), the discharge of both tasks requires doing something *more* than that, resulting in the task of interpretation requiring the consideration of the concrete normative and factual context; and the task of application resulting in the need to clarify the proper construction of certain norms. The fact that the European Court is required to discharge both tasks *simultaneously* increases the chances of the line between these two tasks becoming blurred.

In a number of procedures the European Courts seem to be required to apply Community law; in particular, to review the legality of specific actions or omissions of the member states or of the

²⁷ The literal text of the article reads 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.

institutions of the Union by reference to European laws. In these instances, European Courts are expected to produce a ruling with an operative part consisting in the legal qualification of a certain fact (the act or omission of a member state or a European institution). This would seem to indicate that the decisive part of these rulings would be the finding of fact of whether a given act is or is not in compliance with 'the law'. In these cases, the task of European Courts comes rather close to that entrusted to national courts when reviewing the legality of the actions and omissions of the (national) public administration. This is largely the case of the infringement procedure concerning member states (ex. Arts 258 and 259 TFEU) and acts of the institutions of the Union (ex. Art. 263 TFEU) in breach of Community law (or failure to act of Union institutions ex Art. 265 TFEU). A specific application is the procedure on the non-contractual liability of the European Union (ex. Art. 268 TFEU).

The application of the law to concrete cases clearly will not infrequently hinge upon how the law to be applied is to be interpreted. Indeed, applying any legal norm, quite obviously including European Community norms, consists in ascertaining the specific and concrete normative consequences that a general norm has in a particular case. While any modern legal system can only function properly if in most cases such normative contents are known in advance of the act of application and remain rather uncontroversial, *hard cases* in which such substantive content is controversial may be very marginal in general statistical terms, but constitute a sizeable majority of the cases that are decided by courts (the remaining majority of cases being those on which the facts of the case are disputed). Whether a member state or a European institution is in breach of Community law by means of having done or omitted to do something depends on what are the concrete normative implications of the general norms of Community law. Indeed, a good number of cases before the European Court of Justice and the General Court hinge on the proper normative breadth and scope of the substantive provisions of Community law and of the overriding interests that justify in the fullness of argumentation what *prima facie* seems a breach of Community law. Many infringement procedures turn on the breadth and scope of one or the other economic freedom. To apply Community law to one concrete case, one indeed needs to have established the actual content of Community law, and that in its turn may require interpreting Community law. That is the same as

saying that in order to properly *apply* Community law, the European Court of Justice is not infrequently required to *interpret* Community law. In these frequent instances, the ruling will not only apply a given Community norm at the case at hand, but will also contribute to the specification of the substantive contents of Community norms, and either directly or indirectly, to the shaping of the fundamental principles of Community law by determining the content of derivative constitutional rules.

Consider again the ruling in *Avoir Fiscal*. On the surface of the text of the judgment of the Court, its normative effects seem to be limited to declaring that this very concrete French law, applied to this very concrete case, constitutes an infringement of Community law. However, the actual normative implications of the judgment are certainly wider. To determine whether the French Republic was in breach of Community law, the European Court of Justice had to clarify the normative implications of the principle of freedom of establishment in this concrete case. This required the ECJ to engage into the interpretation of the principle and the clarification of its normative content in view of the facts of the case. As a result, the ruling not only contains a decision applying the law to a specific set of facts, but also a normative precedent, a derivative constitutional rule that should be applicable in all similar cases.

European Courts are also assigned a special authority when it comes to elucidate the interpretation of supranational law. In these cases, they are instructed to explore and expose the normative consequences of Community norms, but they are barred from applying such an interpretation to the resolution of a concrete and specific case. Interpretative judgments would thus typically be expected to contain a general and abstract construction of one or several fundamental provisions of the Treaties *without* engaging in the task of elucidating their normative implications in concrete cases. This is clearly the case of preliminary judgments (ex. Art. 267 TFEU), of judgments on procedures where the annulment of supranational legislation is sought (Art. 230 TFEU), and of opinions concerning international agreements to be entered into by the Union (Art 218.11 TFEU).

The interpretation of Community norms at the request of national courts proceeds under a very peculiar setting. While the European

Court of Justice is expected to limit itself to explore in general and abstract terms the normative content of a Community norm or set of norms, the request always arises in a specific legal controversy. While the degree to which the actual facts of the case are known to the Court would rather depend on the way the national court would frame its request, it is certainly the case that national courts have an incentive to feed the European Court with the details of the case (I would even say with *their* specific reconstruction of the facts) so as to ensure that the reply of the European Court would be actually helpful in solving the case at hand, or even would be more likely to be in line with the answer that the national court would prefer to obtain. This results in a predictable tension between the generality and abstraction which is formally required from the European Court of Justice and the degree to which it actually knows the facts and the effectiveness of its decision depends on considering such specific factual context when providing its interpretation of Community law.

Consider again *Cassis de Dijon*. The submitting court informed the ECJ that in the case at hand, a German supermarket (Rewe) had had trouble selling a French liquor, on account of the fact that the German authorities insisted on applying a national law that required that any *cassis* had a minimum alcoholic graduation that the French product did not have. It was clear that the rationale of the German law was to avoid the consumers being fooled by the arbitrary labelling of goods by exporters and/or retailers. To avoid confusion, German law reserved the use of the label *cassis* to goods meeting the expectations of the average German consumer (the teutonic person in the Clapham omnibus, if one is allowed to use a rather old fashioned expression). That, however, failed to consider whether free movement of goods had placed beyond the realm of the constitutionally possible that specific legislative choice.

Formally speaking the ECJ limited itself in its ruling to offer a general and abstract interpretation of the provision on free movement of goods enshrined in the Treaties (as was seen in the long excerpt reproduced on pp. 174-5 above).

However, the rationale of the *ratio decidendi* of the case goes further: a ban on *any* product that was legally sold in *any* other member state of the Communities would constitute *prima facie* a disproportionate infringement on the constitutional principle of free movement of

goods. Consequently, any national norm putting obstacles to the sale of goods legally available in another member state would be considered as a breach of a key European constitutional norm, and thus void unless there were countervailing reasons which could justify this infringement. While the ruling is phrased in general and abstract terms, it is hard to imagine how the German court could avoid the conclusion that the German law prohibiting the sale was to be set aside, as this blank selling prohibition was incompatible with Community law.

Finally, the very fact that European Courts are required to do these two things at the same time was likely to result in the progressive blurring of the dividing line between interpretation and application of law. Such a dynamic is not unique to the European Court of Justice, and indeed can be said to be typical of the 'hybrid' European constitutional courts established in the postwar period, such as the German, the Italian or the Spanish one. Entrusted once and at the same time with the task of undertaking the general and abstract review of constitutionality in the Kelsenian fashion and with the task of applying the Constitution to concrete cases in the US fashion, those courts have ended up combining those tasks in a rather unorthodox fashion. This is rather underlined by those instances in which the courts are confronted at rather the same time with an 'interpretative' and an 'applicatory' procedure which at the end of the day hinge on the very same constitutional questions. A clear instance of that is indeed the *Bachman* case, which was decided by the ECJ the very same day that it sorted out. Or by the fact that the *Viking*, *Laval* and *Ruffert* cases are part of the same line of jurisprudence as *Commission v. Luxembourg*.

It must be noticed that the lack of an explicit empowerment of the European Courts to undertake the review of European constitutionality has a result that such a review cannot not be *directly* sought by the plaintiffs in any procedure before the European Courts, with the sole exception of those procedures in which the parties can request the annulment of a supranational norm. In all other cases, and very particular, on all instances where the European constitutionality of national norms is at stake, the Court retains a discretion to produce a judgment which entails the setting aside of the national norm. European Courts have made a rather strategic use of such discretion,

in particular on preliminary requests, by pitching their interpretation of Community law at different levels of generality and abstraction.

The second thesis: The shared guardianship of European constitutionality

The second thesis of this chapter is that the peculiar nature of Union law, and in particular, the very distinctive constitutional path it has trailed – that of constitutional synthesis – results in both (1) a very idiosyncratic relationship between supranational and national constitutional law, but also in (2) a very characteristic bond between the ECJ and national constitutional courts (or supreme courts where no specific constitutional court exists as such), which definitely excludes the hierarchical superiority of the ECJ, and thus, necessarily entails a shared and collective exercise of the guardianship of European constitutional law instead of a *solo* discharge of the task by the judges sitting in Luxembourg. Instead, the ECJ stands in a complex (and clearly non-hierarchical) relationship with national constitutional courts, which are also properly said to be part of the ‘collective’ that guards constitutionality and shapes the yardstick of European constitutionality. The very reasons that underpin the assignment of a key role to the ECJ in making effective the constitutional norms of the European Union also limit the authority of the ECJ.

Firstly, the regulatory ideal of a single constitutional order under which Europeans can be equal under the law is not to be achieved by means of writing a supranational constitution anew and imposing it *on top of* national legal orders, but by turning all national constitutions into a collective constitutional law. This constitutive feature of Union law explains why the tension between the primacy of Community law and of national constitutions is more apparent than real; the tension is indeed very much eased once we properly identify the very consistency of European constitutional law as what is common to national constitutions (and once we take properly into account the several factors and procedures which account for the remarkable axiological and even institutional similarities between the constitutions of the founding Members of the Union, and of the states which have successively joined it). Such a supranational constitutional order will be poorly served by assigning to the ECJ an exclusive role as guardian of European constitutionality, neglecting the key

contributions which *should* be made by national constitutional courts as reflective of long-standing national constitutional traditions.

Secondly, Union law aspires to be a single legal order, but not one supported on a single and hierarchically organized institutional structure. The genuine institutional pluralism of Community law also applies to the task of constitutional guardianship, and excludes that the ECJ and national constitutional courts stand in a hierarchical relationship. That is what, rather imperfectly, is captured in the fashionable reference to a 'dialogue' between courts.

It is important to notice that the fact that the process of European integration still follows the synthetic path (as a result of the failure to transcend it through an act of democratic constitution-making and as a consequence of the resilience of the established institutional and decision-making process vis-à-vis the attempts to reconfigure it according to the grammar of governance as an alternative means of social integration) implies that the regulatory ideal of a common constitutional law remains the key bedrock of the European constitution. This is closely related to the persistence of an institutional configuration shaped by the imperative of ensuring *the transferring of democratic legitimacy from national political processes to the supranational one* and by *a horizontal relationship* between the supranational and national institutions. This creates a very peculiar constitutional setting, in which not only *constitutional law* as the higher law of the land becomes a resource to context the legitimacy of statutes *from within the legal order* (as is typical in all constitutional systems) but also where there may be a plurality of *constitutional laws* competing for the role of being *the* constitutional law.

The second thesis of this chapter will prove to be especially relevant when considering the justifiability of the substantive choices that underlie the proportionality review of national legal norms against the yardstick of European constitutionality. The pluralistic nature of Community law makes advisable that the European Courts ground their substantive choices on the substantive choices made by national constitution-makers and legislators, as systematically constructed by national courts. Something that the European Courts have been less willing to do since they started interpreting economic freedoms as transcendental faculties, substantively detached from the common constitutional law of the member states.

How European Courts review European constitutionality

In the first section of this chapter, I have argued that the role of the European Courts as guardians of European constitutionality is grounded on a systematic interpretation of the Treaties to the extent that the latter are seen as part and parcel of a constitutional legal order. With that we have, however, only shown that review of European constitutionality by the European Courts is structurally justified. The line of arguments rehearsed in the previous section do not say much about the further question of whether the specific way in which the European Courts discharge such a task renders their decisions justified. To reach that further conclusion, we would have to show that the European Courts are not only empowered to undertake the review of European constitutionality, but also that they do so in a manner that could be regarded as proper by and large. And that, rather obviously, depends on *how* the European Courts *actually* review the European constitutionality of legal norms. That is the object of the second part of this chapter.

The *actual how* is to be considered in two steps. Firstly, we should consider the *structure* of the judgments in which the European Courts undertake the review of European constitutionality of legal norms. Such a framework is basically constituted by the argumentative framework of the principle of proportionality. This implies a major similarity between how the European Courts discharge their constitutional task and how national constitutional courts undertake theirs. As a consequence, resort to proportionality gives to the review of European constitutionality a formal resemblance to the review of national constitutionality.²⁸ Secondly, we should also consider the substantive arguments with which the European Courts fill in the

²⁸ It is far from surprising that this is the structural framework in which the ECJ undertakes the review of European constitutionality. The grammar of proportionality has been the dominant one in European postwar constitutional argumentation. Its extension or projection to the supranational level is thus to be expected once Community law started to be constructed in a constitutional key. Institutional actors probably regarded this solution as rather congenial, as the 'natural' (in the sense of obvious) one, and one which will contribute to smoothing the acceptance of the constitutional status and primacy of Community law. Indeed where such constitutional grammar had not been developed (as was in the case of the UK) the progressive affirmation of that constitutional grammar will contribute to reticence and resistance vis-à-vis the process of European integration.

principle of proportionality. This requires us considering not only the substantive contents of the yardstick of European constitutionality, of the core principles which define the policy options which Community law deprives legislatures from choosing, but also (1) the specific conception of the substantive principles that make up the yardstick of European constitutionality, and very especially, of economic freedoms, that the European Courts have come to flesh out in their case law; (2) the way in which the European Courts assign argumentative burdens when there is a conflict between basic constitutional principles; (3) the criteria the European Courts follow in assigning proof burdens of the facts relevant to apply the adequacy and necessity tests at the core of proportionality; (4) the specific guidelines the European Courts use to assign specific weight to conflicting constitutional principles when undertaking the review of strict proportionality.

The relationship between the formal argumentative structure and the substantive choices is mediated by the third thesis of this chapter. As I argue at length under the sixth thesis below (p. 213ff), proportionality is only a *formal* principle, which defines an argumentative structure, but which does not by itself determine the substantive content of any decision. Contrary to what it is sometimes assumed in the literature on Community law, proportionality can thus only contribute to a rather minor extent to justify any ruling or decision (it is not a comprehensive and self-sufficient *legitimising* principle, resort to which guarantees institutional actors that their decisions should be regarded by its addressees as justified). Proportionality can and should indeed be used in a rather different fashion, as an analytical tool which renders visible the implicit substantive choices underlying a judgment, thus allowing the addressees of the decisions to assess by themselves the justifiability (and thus legitimacy) of the ruling.

Proportionality as the structural framework of the review of European constitutionality

The basic argumentative structure of the constitutional rulings of the European Courts

The third thesis of this chapter is that the structural argumentative framework within which the European Courts justify their rulings on the European constitutionality of both supranational and national

norms is the principle of proportionality. Whether the European Courts do explicitly follow the structure of proportionality or not, their *constitutional* rulings are open to be reconstructed with the help of the principle (as I will illustrate by returning to *Cassis de Dijon* and *Avoir Fiscal*). Proportionality constitutes the *deep* argumentative syntax of the review of European constitutionality. Full proof of this argument would require reconstructing each and every judgment rendered by the European Courts, and showing that their *deep structure* corresponds to the argumentative syntax of proportionality. In this chapter, I will limit myself to consider the reconstruction of *Cassis de Dijon* and *Avoir Fiscal* to illustrate how that reconstruction proceeds, and take for granted that all other judgments can be equally reconstructed. That is of course an assumption and not a proof. But not only undertaking such a complete reconstruction would be tedious and result in an even lengthier chapter (perhaps a long monograph on its own, which would make an even less attractive read than this chapter), but seems to me unnecessary. On the basis of an admittedly incomplete exposure to the case law of the European Court of Justice on economic freedoms, I am still to find a case that does not fit this pattern.

The fourth thesis of this chapter is that the argumentative syntax of proportionality requires the European Courts to follow five steps: (1) determine the constitutional principles which underlie the legal norms in apparent conflict; (2) assign argumentative burdens, by means of identifying a *prima facie* infringing norm and a *prima facie* infringed norm (the latter enjoying the argumentative burden); (3) test the adequacy of the infringing norm to realise its underlying principle; (4) the necessity of the infringing norm to realise its underlying principle; (5) determine the specific weight that should be assigned to each of the conflicting principles in the case at hand, and on the basis of that, solve the conflict by assigning *final* preference to one principle over the other, by means of a derivative rule that settles the dispute between the two conflicting norms by setting one aside in favour of the other.

This implies adding to the standard understanding of the principle of proportionality as a three-stepped argumentative framework in the theory of legal argumentation two additional steps; to be more precise, what the systematic analysis of Community law renders visible and advisable is the convenience of rendering explicit these

two first steps, which tend to be rather non-controversial in the national constitutional setting, but which have a major and eventually decisive influence when confronted with a less settled constitutional law, such as European Union law is.

The review of the European constitutionality of a legal norm presupposes that there is a *prima facie* or *apparent* conflict between a supranational or national legal norm and a norm of European constitutional law, or what is the same, that a supranational or national legal norm *seems* to be in breach of European constitutional norm. This conflict is always amenable to be reconstructed as a conflict between two principles, the principle of European constitutionality which underpins the norm of Community law *allegedly* infringed and the constitutional principle underpinning the *allegedly infringing* supranational or national legal norm. Thus, in *Cassis de Dijon*, we had an *alleged* conflict between a German statute and Art. 30 of the Rome Treaty, which was underpinned by a conflict between the principles of free movement of goods and of the protection of the consumer (which could be argued was already a principle of European constitutional law, and indeed has come to be acknowledged as such explicitly, both by the European legislator and by European Courts). In *Avoir Fiscal*, we had a conflict between a particular French norm included in the French tax code (regulating the assessment of the tax debt in the corporate income tax) and Art. 52 of the Rome Treaty. That conflict was underpinned by an apparent clash between the principle of freedom of establishment and the principle of autonomous and democratic configuration of national tax systems (and perhaps also, or alternatively, the substantive principle of tax fairness or even progressivity).

Once the two principles underlying the norms in apparent conflict are identified, the Court has to assign the argumentative burden and the argumentative benefit in the case.

What I mean by that is the choice of the norm which is to be regarded *prima facie* as *infringing* and the norm which is (consequently) to be considered as *prima facie being infringed*.

The allocation of that burden basically depends on two factors. Firstly, on a pre-understanding of what is the *normative* center of gravity of the case, if one is allowed to borrow a concept developed in

intra-state conflicts of law, or what is the same, of which of the conflicting principles is more relevant *prima facie* in the concrete factual and normative setting of the case. Was *Cassis de Dijon* mainly about free movement or was it about consumer protection? Which of the two clashing principles was more deeply affected, or more obviously relevant, in this context? Secondly, the assignment of the argumentative burden depends on the abstract weight acknowledged to each principle in previous constitutional, legislative and judicial decisions. Such sets of decisions *restrict* the remaining discretion of Courts when assigning argumentative burdens. Is there sufficient authority to consider that in *Cassis de Dijon* preference should a priori be assigned to free movement of goods over consumer protection?

The commutative principle does necessarily apply to legal argumentation. Whether we start considering whether it is justified to breach principle X to realize principle Y, or whether we consider whether it is justified to breach principle Y to realize principle X, may be far from irrelevant. So how we allocate the argumentative burden might be of essence.

The first two steps in the argumentative framework of proportionality lead to an implicit but rather detailed conceptualisation of the legal principles in conflict. It goes without saying that constitutional principles, both in the European and in the national constitution, are abstract and general, and as such, open in principle to different conceptualisations. The difference between European and national constitutional law lies on the density of the previous authoritative decisions that define and shape the conception of such principles. When a national constitutional court has to review the constitutionality of a given norm, it tends to have to come to terms with a very dense web of previous authoritative decisions which contribute to the detailed conceptualisation of the principles involved. In particular, national courts are guided by both the constitutional debates preceding key constitutional decisions (explicit constitution-making processes in 'revolutionary' constitutional traditions -such as the French, Italian or to a rather large extent, Spanish one- and key constitutional moments in 'evolutionary' constitutional traditions -such as the British or to a rather large extent, German one) and by the political debates preceding the passing of new legislation, in which the relationship between the new norms and constitutional norms might be of relevance. The European Courts

have less guidance at their disposal from such sources. The peculiar constitutional path through which the European Union has evolved (see pp. 182-92 above) entails that contestation over the proper conceptualisation of basic constitutional principles is rendered endemic by the structural fact that Union law is the constitutional framework in which a (growing) number of constitutional legal orders integrate. While the constitutional principles are largely the same in all legal orders, the way in which such principles relate to each other and are thus conceptualised is far from homogeneous. At the same time, the synthetic constitutional path of European integration entails that European Courts are not to find much guidance from key constitutional debates (given the absence of constitution-making processes and the scarcity of constitutional moments which can be said to be akin to decisive ones in evolutionary constitutional traditions). While the peculiar way in which legislation proceeds at the European level restrains the authoritative guidance to be derived from legislative debates, even from such debates in the European Parliament.

The structural differences in the density of the previous authoritative decisions defining the conception of basic constitutional principles explains why these two steps in the argumentative framework of proportionality seem rather uninteresting at the national constitutional level, but prove to be potentially decisive at the European level. As we will see *infra* (p. 231), the European Courts assign *always* the argumentative preference to economic freedoms when reviewing the European constitutionality of national norms. The sheer invariability of this rule, despite the fact that European constitutional law is composed of other constitutional principles, and outstandingly, of the principle of protection of fundamental rights, turns both the specific conceptualisation of economic freedoms and the assignment of argumentative burdens highly problematic steps. These two steps are indeed at the core of the tension between European and national constitutional law.

The third argumentative step requires us to assess the adequacy of the *allegedly infringing* norm to realise the principle which underlies it. In *Cassis de Dijon* we have to consider whether fixing minimum alcoholic graduation standards and banning the sale of products which do not meet these standards *will actually* protect the consumer against being misled by the name of the product into buying

something different from what he wanted to purchase (a question which is implicitly answered in a positive manner by the ECJ). In *Avoir Fiscal*, we have to determine whether the power to treat differently insurance companies depending on where they have their registered office would contribute to the realisation of the principle of autonomous determination of the tax system (and/or tax fairness of tax progressivity) (again answered in the affirmative implicitly by the ECJ).

Fourthly, we have to determine the *necessity* of the allegedly infringing norm, or what is the same, whether there is no other normative alternative which would also realize the principle underlying the allegedly infringing norm while not affecting the allegedly infringed principle (or infringing it to a significant lesser extent). In *Cassis de Dijon* the ECJ claims that there are indeed other normative alternatives which allowed a better reconciliation of the principles in conflict; thus the German law is to be regarded as in breach of Community law. In *Avoir Fiscal* it seems to be the case that the ECJ accepts that the differentiated treatment is necessary to realize the *conflicting* principle.

Finally, we have to weigh and balance the conflicting principles, so as to decide which should carry more weight in this concrete case. That operation was not necessary in *Cassis de Dijon*, as an outright ban was regarded as unnecessary; in the terms I have just rehearsed. However, it was decisive in *Avoir Fiscal*, the ECJ arguing that freedom of establishment should trump democratic configuration of the tax system and/or the principle of (national) equality or (national) tax progressivity.

These five steps constitute the complete, deep form of proportionality as a syntactic structure. In actual practice, we may take for granted or regard as unnecessary some of these five steps (as we have indeed just seen on what concerns the first and the second step in the practice of national constitutional courts). Whether this implies that we have followed in an inadequate or incomplete manner the principle of proportionality, or whether it simply means that some of these steps do not need to be gone through because the answer is rather obvious is something that cannot be determined but in the light of the facts in each concrete case. But I want to stress here is that no structural differences can be established on the basis of how many

of the limbs are used by Courts. In that regard, perhaps it is pertinent to anticipate that the *Wednesbury* review developed in British administrative law and the standard German constitutional proportionality review are *both* instances of application of the structural principle of proportionality to legal reasoning. The difference is not structural, but as we will see, revolves around the different substantive assumptions made in each case. Similarly, the fact that in a given judgment a Court seems to obviate some of the 'steps' in the proportionality syntactic structure should not lead us to the precipitated judgment that there are structural differences between different proportionality judgments.²⁹

The limited justificatory power of proportionality

The fifth thesis of this chapter is that the claim that proportionality plays a key role in justifying the rulings in which the European Court of Justice reviews the European constitutionality of national laws is confounded (and unfounded). This is so because the principle of proportionality is a *formal* principle, a basic principle of legal reasoning that by itself cannot reveal the right answer to a concrete and specific legal dispute. Each and every concrete decision depends on substantive choices that proportionality can only make more explicit. The mere *formal* character of proportionality derives rather immediately from the fact that the use of the principle of proportionality in legal reasoning does not depend on its being *positivised*, on its being explicitly referred to by the legislator, as on its being a principle of general practical reasoning. Whether or not judges can find a positive mention to proportionality, they will amply use of the structural framework characteristic of the principle once they are confronted with the typical questions which arise once the state assumes a wide set of *positive obligations*, once the state starts to actively shape its economic and social environment through law.

The principle of proportionality is a structural principle of general practical reason which has become increasingly *legalised*, put to use in

²⁹ Thus the standard distinction between 'Proportionality I and Proportionality II' in the case law of the ECJ should be interpreted as calling our attention to the different substantive assumptions made by the ECJ when reviewing the constitutionality of Community and of national norms. The distinction between Proportionality I and Proportionality II is used by T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2007) and P. Craig, *EU Administrative Law* (Oxford University Press, 2008).

legal argumentation. But no matter how much used and resorted to in legal discourses, proportionality is properly described as the *structural syntax* of general practical reason through which we solve conflicts between colliding principles. In particular, proportionality forces us to consider *all relevant* interests at stake, to ponder on both the abstract and the concrete importance each of them has, and finally to make a considerate judgment in the fullness of reasoning. As David Beatty points, 'proportionality requires judges [but really here we could say anybody taking a decision] to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most.'³⁰ In brief, '[proportionality] makes it possible to compare and evaluate interests and ideas, values and facts, that are radically different in a way that is both rational and fair,'³¹ as David Beatty claims in his book-length analysis of proportionality. This is indeed the core intuition behind Alexy's treatment of proportionality in *A Theory of Constitutional Rights*, as Mattias Kumm has reminded us: 'The proportionality test provides an analytical structure for assessing whether limits imposed on the realization of a principle in a particular context are justified.'³² Proportionality as a syntactic structure of general practical reason is put to use in *legal argumentation*, by means of 'filling in' the formal structure with arguments relevant from the standpoint of the specific legal system in which the principle is applied.

This *borrowing* is closely related to the *constitutional turn* of modern law, which in its turn implies a radical reconsideration of the law as a

³⁰ D. A. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004), at 160.

³¹ *Ibid.*, at 169.

³² M. Kumm, 'Political Liberalism and the Structure of Rights', in G. Pavlakos (ed.), *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Hart Publishing, 2007), 131-66, at 136. Kumm goes on to support a rather formalistic understanding of proportionality which in my view will fail to overcome Habermas' firewall objection. However, Habermas' objection is addressed to a specific understanding of how proportionality is to be applied in legal reasoning, one that does not take seriously that the abstract weight assigned to certain principles (foremost, the interdiction of torture and cruel and inhuman treatment) does away with the need of weighing and balancing characteristic of the third prong or step in proportionality review. The very central importance of such unqualified rules should make us doubt the convenience of approaching the application of law as a matter of weighing and balancing, and similarly, to describe principles as optimisation commands (both terms, optimisation and commands being objectionable).

means of social integration, and of the societal tasks to be trusted to the state as the embodiment of collective action. In particular, once law is charged with integrating society not mainly by means of solving specific conflicts but by means of coordinating action with a view to achieve collective goals, law tends to be written by reference first and foremost to legal principles, not to narrow legal rules. Indeed, as Alexy reminds us in *The Theory of Constitutional Rights*:

[There] is a connection between the theory of principles and the principle of proportionality. This connection is as close as it could possibly be. The nature of principles implies the principle of proportionality and vice versa. That the nature of principles implies the principle of proportionality implies the principle of proportionality means that the principle of proportionality with its three sub-principles of suitability, necessity (use of the least intrusive means) and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles.³³

Notice that it follows in *logical*, not *legal* dogmatic terms. And it follows logically because the structure of proportionality requires that before we take a decision, we consider in a rigorous and disciplined matter what is normatively at stake.³⁴

This accounts for the fact that *proportionality* reviews tend to pop up in all legal systems once the development of the social and democratic state results in growing powers being assigned to state agents. Once law becomes an empowering device, and not a restraining device of state action, the democratic discipline of state power is carried through legal principles that are established to *programme* state action. As state action unavoidably collides with other legal principles, we need a structural framework with the help

³³ R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), at 66.

³⁴ Both Alexy and Beatty would further add that a constitution cannot exist without reference to proportionality as an optimising principle (of the realisation of constitutional principles) (Beatty, *supra* note 30, at 163). But perhaps we can suspend our disbelief on this regard, as it may well be, as Habermas claims, that such understanding of principles fails to give proper due to some specific norms in modern legal systems, such as the prohibition of torture, which *should not* be regarded as being subject to being *optimised*. But that is not of essence in our previous discussion. What matters is that proportionality is not a positive principle, but a structural principle of legal reasoning.

of which to think these problems. That framework is proportionality as a structural principle.³⁵

Similarly, it is rather predictable that the use of proportionality will tend to be more explicit where decisions have to be taken by actors who lack a homogeneous legal culture, whether on account of different disciplinary backgrounds (public vs. private law) or of different national backgrounds. Thus there is nothing strange in the leading role of constitutional courts in postwar Europe or in the ECJ and the ECHR in the explicit use of proportionality review.

Furthermore this entails that the assumption that the principle of proportionality has become incorporated into positive European constitutional law as a transfer from German public law,³⁶ thus reflecting the influence of German law upon Community law (as part of the incoming tide of national legal systems falls into Community law) is misconceived. While resort to proportionality in the case law of the Court of Justice may have been explicitly advocated by German jurists, the trigger of its use is to be found in the very nature of the legal questions with which the Luxembourg judges were confronted. Indeed, the use of the principle of proportionality became widespread in France and in the United Kingdom³⁷ as soon as French

³⁵ Assuming that state power is democratically legitimated, and so are principles. Keep in mind manipulative use of principles. Consider in that regard Gustav Radbruch's claim, see G. Radbruch 'Statutory Lawlessness and Supra-Statutory Law (1946)', (2006) 26 *Oxford Journal of Legal Studies*, 1, at 13-15; and on the other hand Bodenheimer's reflections on the subversion of law through positive law, *Jurisprudence: The Philosophy and the Method of the Law* (Harvard University Press, 1962).

³⁶ Indeed, its 'transplant' into Community law would have in the fullness of time resulted in the incoming tide of Community law 'implanting' the principle of proportionality in the national public laws of the member states.

³⁷ In the leading ruling of the French Conseil d'État in Benjamin (19 May 1933), available at:

<<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007636694&fastReqId=1286398039&fastPos=1>>: 'Considérant qu'il résulte de l'instruction que l'éventualité de troubles, alléguée par le maire de Nevers, ne présentait pas un degré de gravité tel qu'il n'ait pu, sans interdire la conférence, maintenir l'ordre en édictant les mesures de police qu'il lui appartenait de prendre ; que, dès lors, sans qu'il y ait lieu de statuer sur le moyen tiré du détournement de pouvoir, les requérants sont fondés à soutenir que les arrêtés attaqués sont entachés d'excès de pouvoir'. In the leading ruling of the British King's Bench in *Wednesbury (Associated Provincial Picture Houses v. Wednesbury Corporation* [1947] 1 KB 223): 'What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the

and British administrative law had to come to terms with the growing power of the state under the *Social Rechtsstaat*. The difference laid not so much on the *structure* of the legal train of reasoning, as on the substantive assumptions made in one case or the other. Indeed, when we consider that proportionality is a structural principle of general practical reasoning that is frequently “filled in” with legally relevant arguments, we come a long way to explain how proportionality has become pervasive in basically all modern legal systems,³⁸ even if the principle has not been explicitly positivised in the Constitution or in statutes of a constitutional relevance and importance.

Finally, the nature of proportionality is corroborated by the fact that the principle is used in all legal discourses, from discourses of application of the law to constitution-making discourses which by definition are not governed by authoritative legal norms.

The difference lays not so much on the structure of the argument, but on the extent to which *authoritative law* weighs on the actual decision. In *constitution-making discourses*, proportionality is substantially filled by reference to prudential, ethical and normative considerations, but not necessarily by arguments referring back to authoritative legal arguments (if that arguments are authoritative in that situation is because of their normative value, not because of their legal authority). In *judicial discourses*, proportionality is filled to a rather large extent by what is taken to be the body of *authoritative legal decisions* making up the legal order. In *legislative discourses*, proportionality has to be

authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition [...] What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters’.

³⁸ Although there is also a specific *politics* of proportionality, but that has to do more with the confusion of the structural and substantive dimensions of proportionality, and indeed with the very substantive contents with which proportionality judgements are filled.

filled by reference to constitutional authoritative decisions, but not by reference to previous laws and judicial decisions.³⁹

It follows from the structural character of the principle of proportionality that, contrary to what is widely assumed,⁴⁰ the *form of the syntactic structure* of proportionality can only play a modest legitimising role. Taking a decision following the syntactic structure of proportionality (or even if some other form was used, writing rulings capable of being reconstructed by reference to that structure) is a necessary, but insufficient condition for the legitimacy of the decision. In particular, compliance with proportionality can only guarantee the *formal* correctness of the decision taken after following the four steps which compose it in the terms that I considered. This minimal legitimacy is indeed the kind of legitimacy that follows from the *Wednesbury* review: that the decision is not foolish in the sense that its aim makes sense and that no obvious alternative solution that could reconcile the two principles at stake was available. It cannot provide a thicker legitimacy without borrowing it from the substantive principles with which the structural principle is filled in. In other words, proportionality cannot guarantee the *substantive correctness* of the decision, which critically depends on the substantive correctness of the arguments with which the principle is 'filled in'.

The justifiability of the substantive choices made by European Courts (the *alternative* use of proportionality)

The sixth thesis of this chapter is that the principle of proportionality provides us with the analytical tools to subject any of the judgments

³⁹ Indeed, it may only be slightly exaggerated to claim that most of legal norms are the products of decisions taken with the help of the structure principle of proportionality. This should help us reconsider what happens when a decision is taken following the principle of proportionality in a simplified, incomplete manner. That is usually constructed as reflecting a deeper or more superficial decision-making process, or if proportionality is used to review not to decide, a stricter or more lax standard of review. In substantive terms, however, that implies also a specific attitude towards the extent to which we can rely for our judgment on past decisions, and the extent to which the proportionality judgments implicit in them are to be trusted or, on the contrary, are to be reconsidered.

⁴⁰ Beatty, *supra* note 30, at 160, 161. He claims this is because proportionality certifies the neutrality of the arguments of the courts, and as such can be seen as a *metalegitimating principle*. See also Kumm, *supra* note 32; and Tridimas, *supra* note 29.

of European Courts to a more thorough critical review.⁴¹ Proportionality renders easier to determine which are the concrete substantive choices underpinning a ruling, and consequently, also makes easier to assess the normative correctness of the decision (a judgment which largely depends on the coherence between the substantive choices underlying the ruling and the substantive choices that stem from a systematic construction of the legal order).

Proper attention to the *structural* nature of the principle of proportionality as a syntactic structure of general practical reasoning should lead us to distinguish very clearly between the *formal* requirements of practical reasoning and the *substantive* elements with which we fill in the syntactic structure, and to which I have just referred. The correctness of a legal argument depends not only on following the structure of proportionality, but in getting the substance right. Indeed, in that distinction, in rendering us capable of making that distinction, resides the key analytical value of the principle of proportionality. It allows us to distinguish what parts of the decision are required by the very structure of legal reasoning (as a special case of general practical reasoning), which parts of the decision are dependent on substantive assumptions made in a rather uncontroversial way in previous legal decisions (essentially, through acts of constitutional significance and importance) and which parts depend on substantive assumptions made by the decision-maker. In particular, attention should be paid to the actual foundation of assumptions on the argumentative and proof burdens, the specific conceptions of each legal principle and the abstract weight assigned to each of them.

In particular, I will consider (a) the definition of the yardstick of European constitutionality; (b) the unqualified assignment of the argumentative benefit to economic freedoms; (c) the conceptualisation of economic freedoms as the operationalisation of a transcendental economic freedom; (d) the unrealistic assumptions which render possible to assume that there are less stringent alternatives to national measures which infringe economic freedoms;

⁴¹ That is, it seems to me, the core point of Alexy's *Theory of Constitutional Rights*. To develop a sophisticated analytical approach so as to render as explicit as possible what is most of the time done implicitly, or even worse, done in such a muddled way that what is a substantive argument is presented as a structural one.

and (e) the distortion of the degree of non-satisfaction of national constitutional principles trumped by Community economic freedoms.

While there is no exhaustive approach to the case law, it is perhaps pertinent to say that most of the cases here referred to concern the interplay and conflicts between supranational economic freedoms and national personal taxes. In addition to some substantive reasons which could perhaps be cited to ground such choice, the more contingent reason that these are the cases which the present author is more familiar with was determinant of the selection.

The yardstick of European constitutionality and the specific conceptualisation of economic freedoms

The first set of substantive choices with which the syntactic structure of proportionality is filled in is that concerning the elucidation of the constitutional principles which underpin the two apparently colliding norms. As we already saw, this step, together with the assignment of the argumentative burden, requires to and results in the conceptualisation of the principles at stake, in particular the consideration of the concrete faculties they comprise.

This conceptualisation poses two sets of problems, related to two implicit substantive decisions made by the European Courts when undertaking it.

The first concerns the definition of the yardstick of European constitutionality. Because there is no written European constitution, but we have a regulatory ideal of a common constitutional law only partially fleshed out in the founding Treaties plus the set of national constitutional norms, the yardstick of European constitutionality is not formally established in a single authoritative constitutional document. This implies that the European Courts have a role to play in fleshing out the constitutional yardstick, a role in which they make substantive choices the justifiability of which is to be open to scrutiny.

The second concerns the characterisation of the principles which make part of the yardstick of European constitutionality. Even if we assume that the European Courts have rightly decided that the substantive principles which make up the yardstick of European constitutionality are the four economic freedoms, the principle of

non-discrimination on the basis of sex and the principle of protection of fundamental rights, there are very good reasons to consider how the European Courts conceptualise each of these constitutional principles by means of fleshing out derivative constitutional norms that concretise the implications of each principle in specific factual and normative settings.

Defining the yardstick of European constitutionality

As the reader has just been reminded, the synthetic path through which the European Union was constituted and has evolved into a full-blown constitutional polity entails that instead of a single and authoritative written European constitution, European Union law is based on the regulatory ideal of a common constitutional law, only partially fleshed out in the founding Treaties plus national constitutions.

As a result, the yardstick of European constitutionality is not formally established in a single authoritative constitutional document. Instead, the European Courts played a key role in rendering explicit the implicit constitutional yardstick. This role is at the core of the process of *transformative constitutionalisation*, the internalisation by constitutional actors (especially, national constitutional actors) of the constitutional character of European Union law.

This process is marked by its four main features.

Firstly, it was rather belated. While the Court had enunciated the core structural principles governing the relationship between Community law and national constitutional law in the early 1960s (paramountly in the two leading cases of the case law of the ECJ *par excellence*, *Van Gend en Loos* and *Costa*), it was only in the 1970s that such structural principles were filled in with constitutional substance. The leading case on the protection of fundamental rights (*Internationale*) was decided in 1970 (a year after the first tentative affirmation of the unwritten principle of protection of fundamental rights in *Stauder*), and the leading case on the direct effect of economic freedoms was *Dassonville*, decided in 1974.

Secondly, the yardstick of European constitutionality is two-fold. On the one hand, we find the principle of protection of fundamental rights, which as has just been said, was for a long time an 'unwritten'

constitutional principle, in the sense that it was not explicitly affirmed and stated in the Treaties, but was derived from a systematic interpretation of the fundamental norms of the Union, with clear and explicit reference to the idea of a common constitutional law as the deep constitution of the European Union. While the principle ceased being an 'unwritten' one once the preamble of the Single European Act contained an explicit reference to it,⁴² the Union kept on having a judicially (sometimes wittily characterised as 'praetorian') defined bill of rights until European institutions solemnly proclaimed the Charter of Fundamental Rights in 2000.⁴³ On the other hand, we find the economic freedoms plus the principle of undistorted competition. The Court turned these Treaty provisions into key components of the yardstick of European Constitutionality by means of affirming that the articles in which they

⁴² 'Determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.' Article F of the Treaty of Maastricht made fundamental rights part of the text of the primary law of the Union: '[T]he Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms [...] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

⁴³ The Court enlarged the breadth and scope of substantive principles by going beyond the literal text of the Treaties and considering the *deep contents of European constitutional law*, namely, the constitutional law common to the member states, and in particular, fundamental rights. The more the Union was acknowledged as the holder of full public powers, the more there was a pressure to counterbalance the exercise of such powers by protecting fundamental rights. In addition, major political events on both sides of the Iron Curtain accelerated the process of constitutionalisation in this regard. The Prague Spring of 1968 undermined the Soviet propaganda concerning the purely 'bourgeois' character of civil rights. Rights were more than ever to be part of Western cold-war diplomacy. (Besides which Czechoslovak protestors would have indeed profited from having their rights respected). At the same time, the upheaval and unrest of May 68 in France and in other Western countries made urgent the need to find a discourse to challenge the materialistic and alienating critique of Western welfare states. Cf P. Pescatore, 'Les Droits de l'Homme et l'Intégration Européenne', (1968) 4 *Cahiers de droit européen*, 629, and id. 'Fundamental Rights and Freedoms in the System of the European Communities', (1970) 24 *American Journal of Comparative Law*, 343; N. J. S. Lockhart and J. H. H. Weiler, "'Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence', (1995) 32 *Common Market Law Review*, 51 (Part I) and 579 (Part II). In developing the set of rights protected under Community law, it is important to stress that the Court engaged in the weighing and balancing of different types of constitutional rights from an early date.

were enshrined were to be acknowledged direct effect.⁴⁴In formal terms, thus, the role played on national constitutional texts by the norms affirming a 'constitutional core' (as the eternity clause in the German constitution, the norms distinguishing different review procedures and making more onerous to amend certain provisions of the Constitution in other constitutional traditions; or the norms defining the set of fundamental rights whose protection citizens can directly seek from the constitutional court) is played in Community law by the criteria which make of a Treaty provision a directly applicable one.⁴⁵

Thirdly, there is an apparent marked division of labour between the two arms of the yardstick of European constitutionality. On the one hand, review of the European constitutionality of Community secondary norms tends to proceed by reference to the principle of protection of fundamental rights, and only rarely by reference to the four economic freedoms. This is the lasting legacy of the fact that under the traditional Community Method, the Council of Member States was required to unanimously support a given legislative proposal for its becoming Community law in force. Even if procedurally speaking a decision of the Council (even if unanimous) was rather different from a decision taken in an Intergovernmental Conference, the fact of the matter was that a unanimous decision of the Council came close to a decision supported by a constitutional will. So in fact the ECJ tended to look for inspiration to construct

⁴⁴ Schermers and Waelbroek concluded ten years ago that such articles were (in the numbering relevant at that time) 12; 23; 25; 28,29, and 30 (free movement); 31(1) and (2); 39-55; 81(1); 82; 86(1) and (2); 88(3); 90, first and second paragraphs; and 141. This basically means that the positive argumentative burden is assigned to the four economic freedoms, undistorted competition and non-discrimination on the basis of sex. See their *Judicial Protection in the European Union*, (Kluwer, 2001), at 183-5.

⁴⁵ The 'economic' side of the substantive constitutional yardstick was only very preliminary developed in the early case law of the ECJ on customs (as in *Van Gend en Loos*) and in the old Art. 95. But it was fleshed out in earnest from mid-1968 onwards, that is, once the fourth stage towards the common market was completed. From that date onwards, the ECJ considered that three of the four economic freedoms (and the principle of undistorted competition) were so defined in the Treaties as to merit to be acknowledged direct effect once the transitory phases were over. The fourth freedom (the free movement of capital) was so circumscribed and limited in the original drafting of the Treaties as to be considered as not having direct effect. That would remain being the case until the 1988 Directive (ad intra) and the Maastricht Treaty (1991) radically changed the Community legal discipline and consequently the status of this freedom, which within a decade moved from cindirella to über-freedom.

Treaty provisions on secondary legislation and not the reverse. Even if qualified majority making and co-decision have changed things, the fact still is that the degree of legitimacy which a regulation or directive carries with it makes the ECJ very cautious when undertaking review on the basis of economic freedoms. Very different considerations apply when it comes to the protection of fundamental rights. Here it is not only the case that the main reference point cannot be the decisions of the Council of Ministers (a body of an open executive nature), but the substantive contents of national constitutions. On the other hand, review of the European constitutionality of national norms proceeds by reference to economic freedoms, while the protection of specific fundamental rights has traditionally been used, and only to a rather limited extent, as a reference point when shaping the canon of exceptions to economic freedoms. This is the result of the fact that the principle of protection of fundamental rights was not enshrined in the original Treaties, but derived by the ECJ from the constitutional law common to the member states, and consequently, regarded as limiting not the power of the member states (already constrained by each of the fundamental rights constitutional traditions which are part of the European collective).

Fourthly, this does not do away with the fact that the yardstick is not only two-fold but Janus-faced for the simple reason that the key constitutional issue, in Community law as in all other constitutional legal orders, is how these two sets of principles relate to each other. While this conflict was present all through the process of European integration, the case law of the European Courts remained rather unproblematic until the late seventies. Indeed, the European Courts solved this conflict in line with the basic constitutional choices of postwar national constitutions. It is worth keeping in mind that the first cases on the protection of fundamental rights concerned in many occasions the conflict between the right to private property and the collective goals pursued through common agricultural policy. By means of giving preference to the latter, the European Courts may have been furthering European integration; but in doing that, they were solving the conflicts in a way congenial to the characterisation of private property in the social and democratic *Rechtsstaat*. In fact, the key leading cases concerned conflicts in which Community law fostered collective goods and interests, and plaintiffs claimed that it

was in breach of their right to private property.⁴⁶ However, once the European Courts affirmed an autonomous and self-standing conception of economic freedoms, once they favoured a different conceptualisation of economic freedoms, the tension at the core of the yardstick of European constitutionality could only mount over time. This is a typical, almost millenarian conflict at the core of fundamental rights protection.⁴⁷ *Viking* and *Laval* are but late chapters in a long saga from this perspective.

I will come back to the one of the aspects of the tension between economic freedoms and fundamental rights at the core of European constitutional law when considering the way in which the European Courts assign specific weight to conflicting principles.

What is worth highlighting now is that the criteria that determine whether a given principle is part of the yardstick of European constitutionality have been distilled by the European Courts from the set of European constitutional materials (from the constitutional law common to the member states, the deep constitution of the Union, and from the text of the Treaties, which have rendered partially explicit the integrated common constitutional law). In this process of distillation, the European Courts have exerted their discretion through *substantive choices*, the justifiability of which cannot be grounded on the principle of proportionality, but must be grounded on substantive reasons.

The development of a jurisprudential bill of rights entails not only defining which rights are *fundamental* (something on which there is far from being complete agreement among the member states) but also how different fundamental rights are to relate to each other (as indeed, the Social and Democratic *Rechtsstaat* is based on the reconciliation, but on the full convergence, of the ideals of the rule of law, the democratic state, and the social/welfare state). The solemn proclamation of the Charter of Fundamental Rights and its later

⁴⁶ Typically, Case 4/73 *Nold* [1973] 491 and Case 44/79 *Hauer* [1979] ECR 3727, where the right to private property was invoked against regulatory powers on coal retailing and on use of agricultural land.

⁴⁷ What is revealing is that it is substantively identical to the ones which have been at the heart of public debate in the last years, with the revealing difference that what conflicted with collective goods was a Community protected economic freedom, and that the Court solved the conflicts according to a different normative logic.

formal incorporation to the primary law of the Union should be regarded by the European Courts as authoritative decisions relieving them of many of these discretionary choices. However, as I will argue in the coming paragraphs, the Charter renders even more visible the problematic character of the assignment of the argumentative benefit to economic freedoms (p. 230ff) and the criteria which the European Courts follow when assigning specific weight to European constitutional principles (p. 237ff).

Similarly, the definition of the criteria according to which to determine whether a Treaty provision is to be regarded as directly effective or not is not to be found in the Treaties, but must be derived from a systematic and rather teleological construction of the constitutional materials of European Union law.

Still, it seems to me that the definition of the yardstick of European constitutionality advocated by the European Courts is by and large well grounded. The very idea of integrating constitutional states through constitutional law requires placing the fundamental rights characteristic of the social and economic *Rechtsstaat* at the very centre of the yardstick of European constitutionality. While it is hard to contest that the case law led by *Internationale* was causally motivated by the challenge to the primacy of Community law and consequently to the institutional authority enjoyed by European Courts, the affirmation of the unwritten principle of protection of fundamental rights was clearly required by the regulatory ideal of a common constitutional law of democratic states integrating through constitutional law. The prominence of economic freedoms has a clear literal basis on the founding Treaties. And while much could be said (and should be said) on the peculiar conception of the economic freedoms supported by the Court (see next subsection), the centrality of the project of the internal market and the principle of non-discrimination on the basis of nationality, leading to the opening of national economies, is hard to contest.

Conceptualising the components of the yardstick of European constitutionality, especially economic freedoms

In the previous section, I have claimed that the yardstick of European constitutionality is basically composed of (1) the fundamental rights which were first elucidated by the European Courts in its case law ('filling in' the unwritten principle of protection of fundamental

rights) and have been recently enumerated in the Charter of Fundamental Rights of the European Union; (2) the economic freedoms at the core of the socio-economic constitution enshrined in the Treaty establishing the European Economic Community, and now reproduced in the Treaty on the functioning of the European Union. And I also concluded that there were good reasons why the yardstick of European constitutionality should be defined in these terms, even if such reasons were not always, and not even mostly, fleshed out by the European Courts in their rulings. However, it is still the case that general constitutional principles are formulated at a high level of generality and abstraction. As I also argued, there are very good reasons why the concretisation of these principles, the progressive development of a specific conception of each of them, is a more problematic task under Community law than under national constitutional law. So what can be said of the way in which the European Courts have conceptualised the components of the yardstick of European constitutionality?

The conceptualisation of fundamental rights remains unproblematic to a rather large extent, if only because the number of cases in which the European Courts had engaged in the detailed specification of fundamental rights has been limited. As was already indicated, fundamental rights have been considered upon by the Court only when reviewing the constitutionality of Community norms, not of national ones. And when doing so, the European Courts have tended to be rather attentive to the substantive choices stemming from the common constitutional traditions and from the case law of national constitutional courts. This is something reflected, as was already said, in the preference assigned to fundamental collective goods realised through public policies over the right to private property, or on the restrictive approach followed when it comes to define the extent to which legal persons (namely corporations) can be regarded as holders of fundamental rights. This pattern could also be recognised in the controversial *Kadi* decision. The decision of the Court of Justice (in contrast to that of the Court of First Instance) did not only affect the structural principles governing the relationship between international law and Community law, but also the substantive content of certain basic civil rights.

In contrast, the conceptualisation of economic freedoms offered by the European Courts is highly problematic. Three observations are

due in this regard. Firstly, that while economic freedoms have always been defined by reference to the normative ideal of 'an internal market', what has been understood by the latter has changed over time. The historical reconstruction of Community law is revealing of the fact that the original understanding of the internal market as a common market has been superseded by the characterisation of the internal market as a single market. The net outcome has been to turn economic freedoms from concretisations and operationalisations of the principle of non-discrimination on the basis of nationality (which entailed that the substantive content of economic freedoms depended on each national legal order) to concretisations and operationalisations of a self-standing and transcendental ideal of economic freedom. Secondly, that this shift implies a substantive choice which does not logically follow from the idea of the single market. Thirdly, that this shift has only been partially endorsed by successive constitutional amendments to the founding Treaties.

Firstly, there has been a marked change in the conceptualisation of economic freedoms. Under the common market conception of the Treaties, economic freedoms aimed at operationalising the right of a resident or economically active non-national to be treated in the same way that nationals are dealt with. A right which is more likely to be infringed than that of citizens for the very simple reason that European non-nationals are denied the right to vote in national elections, and as a consequence, lack in most cases direct means to influence the actual content of legislation.⁴⁸ Under the single market conception of the Treaties, economic freedoms are transformed into self-standing constitutional norms, the substantive content of which is to be determined by reference to a transcendental ideal of freedom. The right holders of economic freedoms are no longer non-nationals, but actually all European citizens, including nationals, as the very aim of the single market is to get rid of all borders and distinctions, including reverse discrimination and purely internal situations. Any

⁴⁸ Their right not to be discriminated through the enjoyment of Community fundamental rights and economic liberties compensates the democratic pathology stemming from the mismatch between the circle of those affected by national laws and those entitled to participate in the deliberation and decision-making over national laws. This is perhaps the core implication of Weiler's principle of constitutional tolerance. See J. H. H. Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg', in R. Howse and K. Nicolaidis (eds), *The Federal Vision* (Oxford University Press, 2001), 54-70.

obstacle to the exercise of *any* economic freedom of *anybody*, including a non-discriminatory one, would constitute a breach of Community law. Breaches of economic freedoms are thus no longer limited to discriminatory normative patterns (which implied the anchoring of the European yardstick of constitutionality to the national one, because non-discrimination is a formal, not a substantive, principle) but are now extended to cover any 'obstacle' to the realisation of the economic freedoms (something which by definition could not be determined by reference to national constitutional standards).

The shift from the common to the single market conception of economic freedoms in particular and of the internal market in general is to be traced back to *Cassis de Dijon*. As we already saw, in that case the European Court of Justice reviewed the European constitutionality of a German statute setting minimum alcoholic contents of fruit liquors. By setting this statute aside, the ECJ established a derivative constitutional rule according to which goods in compliance with any national regulatory standard should be allowed unhindered access to all national markets, as all national regulatory standards would realise a functionally equivalent regulatory function. Indeed, the Commission derived from the derivative constitutional rule affirmed in the *Cassis* ruling the wider paradigm of *the* mutual recognition of laws, which it claimed rendered unnecessary positive European regulation before incorporating specific goods or sectors to the *common market*.⁴⁹ This jurisprudential move was fully confirmed when the line of jurisprudence in *Cassis* was extended to the other three economic freedoms.⁵⁰ And the shift was normatively crowned in the ruling in

⁴⁹ Cf. Declaration of the Commission concerning the consequences of the judgment given by the European Court of Justice on 20 February 1979 (*Cassis de Dijon*), OJ C 256, 2, 3, 30 October 1980.

⁵⁰ Key leading cases were Case C-76/90, *Säger*, [1991] ECR I-4221; Case C-55/94, *Gebhard*, [1995] ECR I-4165; Case C-415/93, *Bosman*, [1995] ECR I-4921; and after the entry into force of Directive 88/361 on free movement of capital, Case C-163/94, *Sanz de Lera*, [1995] ECR I-4821. On the literature, see Á. de Castro Oliveira, 'Workers and Other Persons: Step by Step from Movement to Citizenship', (2002) 39 *Common Market Law Review*, 77; V. Hatzopoulos and T. U. Do, 'The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005', (2006) 43 *Common Market Law Review*, 923; E. Wymeersch, 'The Transfer of the Company's Seat in EEC Law', (2002) 40 *Common Market Law Review*, 661; S. Mohamed, *European Community Law on the Free Movement of Capital* (Kluwer Law International, 1999); A. Landsmeer, 'Movement of Capital and other Freedoms', (2001) 28 *Legal Issues of Economic Integration*, 57; L. Flynn, 'Coming of Age: The Free Movement of Capital Case Law', (2002) 39 *Common Market Law Review*, 773; M. Andenæs, T. Gütt and M. Pannier, 'Free Movement of

Martínez Sala, as the European Court of Justice started to refer to citizenship as the new fundamental principle which economic freedoms operationalised under this new paradigm (and in the process, identifying European citizenship with a set of economically based, even if not economically conditioned, faculties).⁵¹ *Viking* and *Laval* are but concrete applications of this new understanding of economic freedoms.

Secondly, the 'obstacle' conception of economic freedoms is not the 'logical development' of the 'discrimination' conception, but rather a different one, based on a rather different socio-economic and constitutional vision. Just consider the following four major structural implications.

For one, the obstacle conception implies a transcendental yardstick of European constitutionality, emancipated from national constitutional law, and mysteriously derived by the Court from the rather dry and concise literal tenor of the Treaties. This *dis-anchoring* is at the core of the 'legitimacy' crisis of the European Union, and calls for either a rolling back of integration to render the old constitution of discrimination sustainable, or a federal leap through democratic constitution-making.

For two, the re-calibration of economic freedoms has resulted in a massive growth of the horizontal effect of European constitutional principles. Areas of national law which had not been much Europeanised through supranational law-making (such as personal tax law) or which seemed clearly outside the scope of the Treaties (such as non-contributory pensions) were *absorbed* into European constitutional law, with national policy decisions being progressively subject to a review of their European constitutionality. This is why we are confronted with vertical conflicts proper, in which the collision between supranational and national law is not the result of a horizontal conflict among national constitutional norms competing to define the common, collective standard, but rather results from a

Capital and National Company Law', (2005) 16 *European Business Law Review*, 757. An overall interpretation congenial to the one hinted at here can be found in A. Somek, *Individualism* (Oxford University Press, 2008).

⁵¹ Somek, *supra* note 50, and A. J. Menéndez, 'More Humane, Less Social', in M. Poiares and L. Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishers, 2010), 363-93.

conflict between an autonomously defined supranational constitutional standard and national ones (even most or even all national constitutional standards, viz. the kind of situation underlying *Viking* or *Mangold*). Indeed, *Cassis* implies doing away with the idea of a constitutional space in which economic freedoms do not mediate the constitutional validity of any national legal norm. Indeed, the idea of a *diagonal* conflict (as in Christian Joerges' theory of constitutional conflicts) is either quaint and obsolete if one embraces *Cassis*, or else it constitutes an implicit vindication of the old understanding of economic freedoms as principles of non-discrimination.

For three, the engine of integration shifted from the law-making process (precisely at the time at which that was becoming potentially democratic with the direct election of the Members of the European Parliament) to the constitutional adjudication process into which preliminary requests were progressively transformed into the path of review of the European constitutionality of national statutes. If one endorses *Cassis de Dijon* and *Centros*, one is endorsing not a process of juridification (as these are matters which are within the realm of the law anyway) as a process of judicialisation.

For four, as the shape of economic freedoms as constitutional standards became progressively specific, the negative move in mutual recognition was harder to combine with the positive move of re-regulation, because the combined effect of European constitutional decisions by the European Court of Justice was to foreclose the realm of national legislative autonomy. *Centros* is, indeed, a poignant case. The 'optimistic' interpretation put forward by Joerges seems to me rather naïve. The best illustration of how far the judgment reinforced the structural power of capitalists and weakened the taxing and regulatory grip of the state as *longa manus* of the public interest is provided by the 400% increase of the number of 'shell' companies constituted in England after *Centros*, most of which were German.⁵² It should be added that the more the Court has developed its jurisprudence, the more it has foreclosed the actual realm of re-regulatory discretion on the side of the member states. This is, in my

⁵² The figures are taken from M. Becht, C. Mayer and F. Wagner, 'Where do Firms Incorporate? Deregulation and the Cost of Entry', (2008) 14 *Journal of Corporate Finance*, 241.

view, fully illustrated by the tragic and rather foolish case law of the Court on personal taxation,⁵³ where the much-maligned harmonisation has, to a large extent, progressed thanks to the iron fist of market adaptation accelerated by the ECJ. The price of substituting politically led harmonisation by market-led harmonisation is always paid in the hard currency of (a lesser modicum) of distributive justice, in flat contradiction with the basic principles of the *Sozialer Rechtsstaat*.

Thirdly, it is to be doubted that this new paradigm of economic freedoms can be grounded on positive constitutional choices.

While the leading case on the matter (*Cassis de Dijon*) could be said to reflect the ongoing transformation of the understanding of economic freedoms in certain national constitutional orders (above all, the British, and to a lesser extent, the German one as the result of the drift of the ordoliberal model towards a neoliberal understanding under the specific circumstances brought about by the two oil crises and the turbulence in the international monetary system), it did *anticipate*, and not *follow*, the changes introduced in the Treaties by the Single European Act and the Treaty of Maastricht. Moreover, the latter two Treaties made explicit that the European Union aimed at the realisation of an internal market, and seemed to endorse the legislative changes resulting from the legislative programme put together in the White Paper on the Single Market.

The Single European Act and the Treaty of Maastricht *do not* contain an unequivocal endorsement of the *obstacles* conception of economic freedoms. Firstly, it is still the case that a different chapter is devoted to on the one hand economic freedoms and on the other hand the other four economic freedoms. And that in between these two, we find the chapter consecrated to the common agricultural policy. Secondly, the Treaties do still affirm the 'neutrality' of Community law on what concerns national choices on the legal regime of the right to private property. Thirdly, the amending Treaties are presented as means to further align the European Union to the constitutional ideal of the social and democratic *Rechtsstaat*, something that is especially reflected in the provisions on social policy enshrined in the Maastricht Treaty. And fourthly and above all, none of the amending Treaties alter the constitutional identity of member states as social

⁵³ See Menéndez, *supra* note 14.

and democratic *Rechtsstaats*, something which seems difficult to reconcile with the characterisation of economic freedoms as concretisations of a self-standing and transcendental understanding of economic freedom.

All this leads to the sixth thesis of this chapter, namely, that the 'obstacles' conception of economic freedoms, according to which the latter are to be regarded as operationalisations and concretisations of a transcendental and self-standing ideal of (individualistic and economic) freedom is neither a logical development of the founding Treaties, nor is fully endorsed by the amendments to the Treaties, not even the Single European Act and the Treaty of Maastricht. Such a conception should be reconsidered and revised in the case law of the European Court of Justice. It does not only sever a basic source of legitimacy of Community law (the transfer of legitimacy through the key role played by the common constitutional law as the deep constitution of the European Union) but runs the risk of placing Union law at constitutional odds with national constitutional law, to the extent that the latter keeps on being inspired by the normative goal of reconciling the rule of law with the democratic and the social state. The Court should indeed take seriously the pluralistic basis of Community law, and keep in mind that its role as guardian of European constitutionality is one in which it has to be especially attentive to the substantive content of the constitutional law common to the member states, and which it shares with national constitutional courts. Where the European Courts to persist in putting forward this peculiar understanding of economic freedoms, it is more than likely that national constitutional courts would act on the basis of their legitimate role as part of the collective of guardians of European constitutional law.⁵⁴

Two cases that illustrate the deep constitutional problems associated with the 'obstacle' conception of breaches of Community law are *Schwarz* and *X*.

⁵⁴ A most benign manifestation of such a role would follow the path of the German Constitutional Court in several of its 'European' judgments, including the Lisbon judgment. A rather less benign result would ensue if national constitutional courts would limit themselves to act as guardians of the national constitutional law.

*Schwarz*⁵⁵ revolved around the pretence of a German couple to be granted a deduction from their income tax liabilities on account of the cost of sending their children to Cademuir International School, a private (and expensive: 23,400 sterling pounds full board a year in 2004/2005, or circa 34,281 euro) school in Scotland. The Schwarzs may have obtained the deduction if the school was established in Germany, and had been certified by the tax authorities. Germany claimed that even if the policy was articulated through a tax norm, the policy remained education. Deduction was necessarily linked with supervision by the state, which in turned ensured the achievement of a set of goals, including non-segregation by income of the parents. The Court, as will be considered again *infra*, disregarded the way in which the German authorities characterised the issue, and seizing the high constitutional ground to claim that the German tax norm was restrictive not only of the freedom to provide services of Cademuir (and in general, in the Commission proceedings of all providers of education for fees) but also of the right to citizenship of the children, which were discriminated against for the sole reason of making use of their right to be Europeans and move.⁵⁶ In the romantic language of the ECJ:

In so far as it links the granting of tax relief for school fees to the condition that those fees be paid to a private school meeting certain conditions in Germany, and causes such relief to be refused to payers of income tax in Germany on the ground that they have sent their children to a school in another Member State, the national legislation at issue in the main proceedings disadvantages the children of nationals solely on the ground that they have availed themselves of their freedom of movement by going to another Member State to attend a school there.⁵⁷

⁵⁵ Joined cases C-76/05, *Schwarz* and C-317/08, *Commission v. Germany*, [2007] ECR I-6849.

⁵⁶ Paras 129 and 130.

⁵⁷ Para. 92 of the Judgment. See also para. 66: 'Legislation such as that under Paragraph 10(1)(9) of the EStG has the effect of deterring taxpayers resident in Germany from sending their children to schools established in another member state. Furthermore, it also hinders the offering of education by private educational establishments established in other member states, to the children of taxpayers resident in Germany'.

But if one drops the romantic language, what the Court is saying is that European citizenship implies the right of extremely well-off parents not so much to send their children to study to an exclusive British school,⁵⁸ (a right which seems to me predates by far Community law: I am not aware of a prohibition to send children to study abroad in any European state in the recent European history), but also to be granted a tax deduction on account of the fees thus paid. But can we really accept that a fundamental right is at stake when we are discussing whether somebody who could pay a fee of 30,000 euro plus in 2004 is to obtain a relatively modest tax rebate from the authorities? Can this be said to be a core content of the right to European citizenship?

Even more telling is the Freudian lapse of the Court in joined cases *X and Passenheim-Van Schott*.⁵⁹ In this case it was discussed whether a recovery period of taxes which was longer when concerning income obtained abroad was or was not contrary to Community law. In *X*, Belgian authorities had spontaneously forwarded Dutch authorities information on capital holdings in a Luxembourgian bank. Mr *X* happened to be among those holding capital without informing the authorities, and thus, without paying the taxes due. Mrs Passenheim-Van Schott was a widow who decided to make full disclosure to Dutch authorities of capital which her late husband and herself held in a German bank. In both cases the plaintiffs protested the pretence of the tax authorities to extend recovery to twelve years, instead of the five years which would have been applicable had the capital been held in The Netherlands. While the Court ended up finding that the longer recovery period was justified because it did not only contribute to the effectiveness of fiscal supervision⁶⁰ but was not disproportionate because Directive 77/799 does not require an automatic exchange of information,⁶¹ it did find that the longer

⁵⁸ And not long-lasting, alas! The school closed down in September 2006 due to financial difficulties, after severe doubts have been raised on the press concerning the actual quality of the education and of the care and protection children received at the school. Her Majesty Educational Inspectors were not especially enthusiastic in the first inspection of 2004 and were far from fully satisfied one year afterwards. Indeed the Court knew that this had been the case by the time both the Advocate General delivered the case and of course the Court gave its judgment.

⁵⁹ Joined Cases C-155/08 and C-157/08, [2009] ECR I-5093.

⁶⁰ Para. 52.

⁶¹ And it is correct to assume that it will be hard to spot concealed tax information held abroad than in the member state. See para. 72 of the judgment: 'the fact remains

recovery period was *prima facie* restrictive of free movement of capital, on the basis of a very peculiar argument, which is worth reproducing:

The application to taxpayers resident in the Netherlands of an extended recovery period in regard to assets held outside that Member State and their income therefrom is such as to make less attractive for those taxpayers to transfer assets to another Member State in order to benefit from financial services offered there than to keep the assets, and obtain financial services, in the Netherlands.

Indeed, this seems to imply that economic freedom includes the right to minimize the chances of being caught avoiding taxes, which cannot be curtailed by the competence of the member state to graduate the length of recovery period by reference to the intrinsic difficulty of monitoring compliance, on the basis of the information which is available to them.

Argumentative burdens

We have already considered that proportionality as the syntactic structure of constitutional argumentation is structured in five steps. And I already argued that a key move in the process of filling the formal structure of proportionality with substance so as to reach a decision through its application concerns the assignment of the argumentative burden. In this section I will focus on a feature of the review of European constitutionality of national norms, the choice of the ECJ to always assign the argumentative benefit to economic freedoms, and the argumentative burden to the principle or principles colliding with the economic freedom.⁶²

The *argumentative benefit* granted to economic freedoms was rather inconsequential as long as economic freedoms were understood as

that, in regard of assets and income which are not the subject of a system for the automatic exchange of information, the risk for a taxpayer that assets and income which have been concealed from the tax authorities of his Member State of residence will be discovered is less in the case of assets and income in another Member State than in the case of domestic assets and income.'

⁶² Or eventually, with the principle of non-discrimination on the basis of sex by reference to Art. 157 TFEU or to citizenship to the extent that it gives rise to autonomous rights.

operationalisations of the principle of equality, and thus were substantially defined by national standards. This was so because the national standards of protection of economic freedoms were the result of weighing and balancing economic freedoms with other constitutional principles, so that the *renvoi* to national constitutional standards implies that the argumentative benefit is based on a previous balancing undertaken at the national constitutional level. Indeed, when national norms enter into conflict with economic freedoms as operationalisations of the principle of non-discrimination, what is put into question is exclusively the personal scope of application of the national norms, not their inner normative logic.

Things change considerably once we conceptualise economic freedoms as self-standing, transcendental standards defined at the end of the day by the European Courts. This is so because the Community conception of economic freedom replaces the national standard, and as such, does away with the crafted balance reached at the national level. But if that is so, there is no obvious reason why we should assign an *argumentative* favour to economic freedoms.

Such an argumentative *favour* is contrary to a coherent characterisation of Community law as a constitutional order. If Community law is to be understood as the means through which constitutional states integrate by reference to constitutional norms, there is a very good case to follow the consistent practice of national constitutional courts. The assignment of the argumentative burden depends on the different abstract weight assigned to the constitutional principles in conflict (something which is determined by reference to the fundamental law itself, and by the interpretation consolidated in statutes and previous judicial decisions) and by the 'normative' centre of gravity of the case (which is determined by determining on a case by case basis what is the central question at stake).

It is doubtful whether the argumentative preference of economic freedoms could be grounded on the fact that economic freedoms were positively enshrined in the Treaties while the principle of protection of fundamental rights was not. Since the affirmation of the principle of protection of fundamental rights in *Stauder* and *Internationale*, even more so since the solemn proclamation of the Charter of Fundamental Rights in 2000, and definitely so since the full incorporation of the Charter to the primary law of the Union,

such an assumption is at any rate highly dubious. At any rate, it cannot be sustained by claiming that the literal tenor of the Treaties limits the *yardstick* of constitutionality of Union law to economic freedoms (plus undistorted competition and the prohibition of discrimination on the basis of sex).

Indeed, the full acknowledgment of the constitutional nature of the Treaties *after the formal incorporation of the Charter* would require a deep reconsideration of the assignment of the argumentative burden.

This was hinted at in the opinion of the late AG Geelhoed in *American Tobacco*. Geelhoed revisited in his opinion the relationship between economic freedoms and social goals in Community law. He argued that at the stage of development at which it was a decade ago (following the solemn proclamation of the Charter in 2000), Community law did not aim exclusively at the creation of a single market, but there were also other fundamental legitimate goals of Community action, such as the protection of public health. The basis of the competence of the Union might still be grounded on the realisation of the basic economic freedoms,⁶³ but this did not entail that the *actual* exercise of Community competences was to be exclusively aimed at market-making.⁶⁴ Indeed, some of the social goals constitute basic preconditions for a single market. This prompts the late AG to hint at a radical change in the structure of the review of European constitutionality. Instead of focusing in a first step on whether a given national provision distorts the common market, and only in a second step on whether such a measure can be justified by reference to some legitimate public goal, some paragraphs of the opinion invite a shift of the argumentative burden.⁶⁵

⁶³ Case C-112/00, Opinion delivered on 11 July 2002, para. 100: 'The issue boils down to the following: if a (potential) barrier to trade arises, the Community must be in a position to act. Such action must, as I construe the biotechnology judgment, consist in the removal of those barriers. Article 95 EC creates the power to do so'.

⁶⁴ Para. 106: 'In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, the interest of the internal market is not yet the principal objective of a Community measure. The realisation of the internal market simply determines the level at which another public interest is safeguarded' (my emphasis).

⁶⁵ Para. 229: 'The value of this public interest [public health] is so great that, in the legislature's assessment other matters of interest, such as the freedom of market participants, must be made subsidiary to it.'

The recent opinion of Advocate General Cruz in *Santos Palhota and Others*⁶⁶ might be hinting at something similar. The AG considers in particular the impact that the changes introduced by the Lisbon Treaty, and above all the incorporation of the Charter of Fundamental Rights, must have in the solving of conflicts between freedom and establishment and fundamental collective goods. Cruz argues explicitly for recalibrating the specific weight to be assigned to the principle allegedly infringing a Community freedom in the fifth step of the proportionality argument (when considering proportionality *strict sensu*), but seems to be favouring implicitly a thorough reconsideration of the way in which proportionality is applied in line with the new literal tenor of the Treaties. It is worth quoting at length:

As a result of the entry into force of the Treaty of Lisbon, when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality.⁶⁷

Proof burdens

The third set of implicit substantive choices made by the European Courts in the application of the principle of proportionality concerns the standards of proof of the facts on which (to a lesser extent) the adequacy and (to a large extent) the necessity of the *prima facie* infringing norm are to be assessed.

⁶⁶ Case C-515/08, opinion of 5 May 2010, available at <<http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=515/08&td=ALL>>.

⁶⁷ Para. 53.

Whether a measure is adequate or not to achieve a certain objective, and, very especially, whether there is a feasible alternative rule which reconciles better the two fundamental principles in conflict, depends to a rather large extent on the assumptions we make about the external (empirical) world. Such assumptions do not follow from the principle of proportionality, but depend on substantive decisions on how we pass judgment on the probability that a future event will come to happen.

It would be expected of the European Court that it will apply the same criteria to consider the likelihood of events whether they support the adequacy and necessity of the infringing norm or they work on the opposite direction.

However, that is not always the case. It can indeed be argued that in many occasions, the review of European constitutionality is biased in favour of economic freedoms and against the principles colliding with economic freedoms. This is so because the European Courts lower the threshold to proof the probability of a fact happening in the future when that fact contradicts the adequacy or necessity of the infringing principle; and do the opposite (raising the threshold of proof) when the fact supports the adequacy and necessity of the infringing norm.

This can be illustrated by considering (1) the standards applied by the European Courts when considering whether the 'effectiveness of fiscal supervision' justifies limiting one economic freedom; (2) the standard applied by the European Court of Justice to determine whether a corporate structure is an artificial arrangement aimed at tax evasion.

The 'effectiveness of fiscal supervision' was one of the first 'rules of reason' or 'overriding interests' to be acknowledged by the ECJ as justifying the infringement of an economic freedom even if not explicitly stated in the Treaties.⁶⁸

⁶⁸ Indeed even before that personal taxation was subject to review of European constitutionality in *Avoir Fiscal*. It was in the leading judgment on *Cassis de Dijon*, precisely in the ruling in which 'rule of reason' exceptions were first referred to, that the ECJ coined the justification (see para. 8 of the ruling).

The Court has turned the principle almost ineffective by applying unrealistic proof standards to member states invoking the principle. Firstly, the ECJ has systematically rejected that the curtailment of economic freedoms can be justified by any evidence of a revenue loss. No revenue loss is by itself proof that economic freedoms have to be curtailed. Secondly, the ECJ once and again has rejected the argument that the monitoring of tax compliance is hampered by “informative” deficits concerning economic transactions on other member states, and thus restricting economic freedoms *ex ante* was justified. Member states have once and again stumbled on the rock of Directive 77/799, despite the fact that the Commission itself has recognised once and again the limited effectiveness of cross-border tax administrative cooperation,⁶⁹ and that indeed the Community seems now to be heading to automatic exchanges of tax information.

Similarly, a very peculiar set of (highly artificial) factual assumptions concerns the rationale which moves tax lawyers to create complex corporate structures and incorporate companies in a multitude of jurisdictions where they have no observable business.

The ECJ has claimed that a breach of an economic freedom is justified if it is intended to avoid that ‘*wholly artificial arrangements*’ (my italics) are employed to reduce the tax bill.⁷⁰ This has been confirmed in *Lankhorst*,⁷¹ *Marks and Spencer*,⁷² *Halifax*⁷³ and *Cadbury Schweppes*,⁷⁴ and has been further developed in X.

⁶⁹ See for example the Commission Communication (2006) 254 on a European strategy to combat tax fraud, available at:

<[http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/control_anti-fraud/combating_tax_fraud/COM\(2006\)254_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/control_anti-fraud/combating_tax_fraud/COM(2006)254_en.pdf)>; and the related initiatives at:

<http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/reports/index_en.htm>.

⁷⁰ Case C-264/96, *ICI v. United Kingdom*, [1998] ECR I-4711, para. 26: ‘As regards the justification based on the risk of tax avoidance, suffice it to note that the legislation at issue in the main proceedings does not have the specific purpose of preventing wholly artificial arrangements, set up to circumvent United Kingdom tax legislation, from attracting tax benefits, but applies generally to all situations in which the majority of a group’s subsidiaries are established, for whatever reason, outside the United Kingdom. However, the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment’

⁷¹ C-324/00, *Lankhorst*, [2002] ECR I-11779.

⁷² C-446/03, *Marks & Spencer*, [2005] ECR I- 10837.

⁷³ C-255/02, *Halifax*, [2006] ECR I-1609.

⁷⁴ C-196/04, *Cadbury Schweppes*, [2006] ECR I- 7995.

Still, the residual justification is not only limited, but the phrase ‘wholly artificial arrangements’ is indicative of a rather peculiar understanding of economic and legal realities. In line with the structural implications of *Centros* and *Inspire Art* on freedom of establishment, the ECJ has said that ‘the fact that the company was established in a Member State for the purpose of benefiting from more favourable legislation [my note: thus including tax legislation] does not in itself suffice to constitute abuse of that freedom’. It is only an abuse when what is being used is a mere ‘letter box corporation’. Only that seems to qualify as a ‘wholly artificial’ institutional structure.⁷⁵ *A contrario*, partially artificial structures, or for that purpose, any structure that is not ‘wholly artificial’ should be considered as the exercise of economic freedoms, and consequently the justification could not be invoked. Can this be regarded as *factually* accurate?

Assigning concrete weight to principles in conflict
The strange case of coherence of the tax system

The fourth set of problematic substantive choices with which the principle of proportionality is filled concerns the specific weight assigned to colliding legal principles in the concrete case. Or what is the same, the set of substantive choices with which the principle of proportionality *stricto sensu* is filled in.

It is rather obvious that the principle of proportionality does not provide an objective (mathematical?) formula by the application of which we can solve concrete conflicts. In his recent work, Alexy has indeed stressed that what proportionality can do is to render explicit the weighing exercises which are undertaken. This basically corresponds to what he calls the ‘Law of Balancing’:

The law of balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, the third stage establishes whether the

⁷⁵ Opinion of AG Mengozzi in C-298/05, *Columbus*, [2007] ECR I-10451, paras 182 and 183: Actual physical existence plus financial activity are enough to pass the test.

importance of satisfying the competing principle justifies the detriment to, or non-satisfaction, of the first.⁷⁶

While discretion is impossible to eliminate, the law of balancing allows us not only to understand the actual shape of the decision-making process (especially on what concerns its last limb), but also to detect instances in which predetermined substantive choices are cloaked under the appearance of the proportionality principle *stricto sensu*.

The case law of the European Courts on economic freedoms is biased in favour of economic freedoms in this regard on a double account.

Firstly, the European Courts tend to take for granted that any curtailment of an economic freedom results in a serious breach of Community law, thus always assuming that the weight of economic freedoms is to be high.

Secondly, the European Courts distort the weigh and balance assigned the principle underlying the infringing norm by means of appraising it from the perspective of the realisation of the single market. Instead of taking *seriously* the point and purpose of the principle underlying the norm allegedly infringing the economic freedom, European Courts appraise and reconstruct that principle as if the realisation of a single market was the only or overriding goal of European integration. But that not only was *never the case* but is even *less the case* after the recognition of the unwritten principle of fundamental rights protection, and definitely not the case after the formal incorporation of the Charter of Fundamental Rights of the European Union. That was indeed the key argument made by AG Cruz in *Santos Palhota*, as already indicated.

Perhaps the clearest example of this kind of bias is to be found in the jurisprudential development of the overriding public interest in the coherence of the tax system as justifying the infringement of one or several economic freedoms.

The European Court of Justice accepted in *Bachmann* that the coherence of the tax system could justify a *prima facie* breach of the

⁷⁶ Alexy, *supra* note 33, at 401.

freedom to provide services. In doing that, the ECJ seemed to take seriously the *systemic, multilateral* and *redistributive* character of tax fairness, resulting from the very character of taxes as the legal operationalisation of the solidaristic obligations that members of a political community have to each other. The systemic character of tax fairness entails that whether there is a proper allocation of the tax burden cannot be determined by means of considering individual tax systems, but by means of assessing the distributive implications of the tax system as a whole. The multilateral character of tax fairness means that the just allocation of the tax burden depends on the *relative* economic capacity of each taxpayer, and not on the benefits that each of them enjoys through the public provision of goods and services. And the redistributive character of tax fairness requires that the tax burden is allocated with a view not only to provide revenue to support the public provision of goods and services, but also to reduce economic inequalities, so as to ensure the full realisation of social and economic rights, and to make the socio-economic structure compatible with the social and democratic *Rechtsstaat*.

Since *Bachmann*, however, the ECJ has steadily narrowed down the understanding of coherence of the tax system, and moved to consider that the infringement of an economic freedom would only be justified if *compensated* by a tax benefit enjoyed the same taxpayer on regards of the very same tax figure. However, that narrow and peculiar understanding of what coherence of the tax system is flatly contradicts the referred *systemic, multilateral and redistributive character of tax fairness*. It reverts to a consideration of coherence at the level of each tax figure, considers tax fairness in rather commutative terms, and pays no attention to the redistributive purpose of a democratic tax system. Consequently, the restricted characterisation of 'coherence of the tax system' does not take seriously the coherence of national tax systems as a key part of the social and democratic *Rechtsstaat*, as indeed they are defined in the constitutional law of the member states, and understood in the jurisprudence of national constitutional courts.

Mr *Bachmann* (and the Commission)⁷⁷ contested the European constitutionality of Belgian tax norms governing the deductibility of

⁷⁷ Joined Cases C-204/90, *Bachmann*, and C-300/90, *Commission v. Belgium*, [1992] ECR I-249.

certain premia (relating to insurance against a variety of risks, including sickness and old-age). In concrete, the plaintiffs argued that the contested Belgian tax provisions were in breach of both free movement of workers and freedom of establishment, because they subjected deductibility to the condition that premia *were paid in Belgium*. And this for two reasons. First, it was more than probable that the cohort of taxpayers denied the right to deduct insurance premia will be mostly formed by nationals of other member states (who would have already contracted insurance before moving into Belgium); and that even if some Belgians will also be denied benefits, they were likely to suffer less economic damage than non-nationals (as they were likely to return to Belgium, and thus receive the benefits free of Belgian taxes). Thus, the contested norm posed obstacles which were likely to have some deterring effect on prospective 'movers', and for sure entailed a less beneficial treatment for those who had actually moved into Belgium having previously contracted insurance in another member state.⁷⁸ This was said to be enough as to ground the claim that the right to free movement of persons had been breached. Second, the Belgian tax provision placed insurance companies not established in Belgium in a less competitive position than that enjoyed by companies established in the country; rational taxpayers would add the 'lost' tax deductions to the cost of the premium when deciding which policy to subscribe. The case concerned thus both the right of taxpayers as individuals to deduct insurance premia when assessing their income tax liabilities and the right of insurance companies as entrepreneurs to provide their services all through the Community.⁷⁹

Both the Advocate General and the Court were persuaded by the arguments made by the plaintiffs and declared that indeed the contested Belgian provisions infringed the economic liberties of the plaintiffs. Nonetheless, and to the surprise of many, they did not

⁷⁸ As either the prospective mover had to accept the eventual cost of not being able to deduct his contributions, or the economic cost of cancelling her policy every time she moved.

⁷⁹ And although it was not explicitly said in the judgment, the ruling had potential far-reaching implications for the public finances of Belgium, and some other member states (especially Italy and Greece) with high levels of public debt, by then still (partially). By the time the case was brought before the Court of Justice, the said States still imposed on the insurance companies established in their territory the obligation to subscribe public debt as part and parcel of their safe assets and reserves.

believe that this was the end of the argument. Indeed, they ended up finding that the norm was a necessary, adequate and proportional means to ensure the 'coherence of the [Belgian] tax system', a newly formulated 'rule of reason' exception to economic freedoms.⁸⁰ By this it seems that it was essentially meant that the European constitutionality of national tax norms could not be established in isolation; but had to consider in a systemic way all the norms which assess the economic ability to pay which derives from a given economic operation (in the case at hand, all the norms applicable to the taxation of the insurance contract over the whole life of the contract, from its signature to its 'maturity'). This was especially so given the fact that there is no overarching Community framework governing the interactions of national tax systems, and this entails that each system could opt for different solutions.

The Court implied a definition of the 'cohesion' exception which left open its precise views on its structural features. By appealing to the idea of 'cohesion' of the 'tax system' and not only of the 'tax figure' or specific tax at hand, the Court seemed to open up the possibility of making prevail the collective interests articulated in different tax policy choices, or different objective or temporal elements in the treatment of a given tax base, over the subjective economic freedoms enshrined in the Treaties. In particular, the language of *Bachmann* seemed to consider not so much, or at least not only, the effects that the norms had upon the concrete individuals (Bachmann and those whose complaints have moved the Commission to open infringement proceedings) but the systemic *rationale* behind the way in which they were treated. This 'objective' language is at play in *Bachmann*, perhaps more clearly in the following paragraphs:

The cohesion of such a tax system, the formulation of which is a matter for the Belgian State, presupposes, therefore, that in the event of that State being obliged to allow the deduction of life assurance contributions paid in another Member State, it should be able to tax sums payable by insurers.⁸¹

⁸⁰ On the origin of 'rule of reason' exceptions, originating in *Cassis de Dijon*, see K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union* (Sweet and Maxwell, 2004), at 165-6.

⁸¹ *Commission v. Belgium*, *supra* note 77, at 16.

In the case at hand, determining whether the breaching legislation was nonetheless justified entailed assessing the relation between the rules governing the deduction of premia and the taxation of the benefits when the contract reached maturity. In particular, whether national norms could be justified as means of ensuring the coherence of the national tax system was to be determined by assessing whether the differentiated regimes applicable to 'nationals' and 'transnationals' were nonetheless equivalent in economic terms (or what is the same, whether the overall economic implications of the rights and duties imposed upon 'national' and 'transnational' citizens were equivalent).⁸² The Court concluded that this was indeed the case with the Belgian tax system in the case at hand. On the one hand, taxpayers who subscribed a policy with an insurance company established in Belgium were entitled to deduct premia every year from their tax liabilities; but were also required to pay income tax on the benefits they eventually received. On the other hand, taxpayers who subscribed a policy with an insurance company which was not established in Belgium could not deduct premia, but were not required to pay any Belgian tax when receiving the benefits. Both systems were different, but equivalent. If 'transnational' citizens would be entitled to both a deduction and not to pay taxes to the Belgian state upon receiving the benefits, this will destabilise the Belgian tax system (by undermining its coherence, to use the very phrase coined by the ECJ).

It follows that in a tax system of this kind, the loss of revenue resulting from the deduction of life insurance contributions, a term which includes pension insurance and insurance against death, from the total taxable income is offset by the taxation of pensions, capital sums or surrender values payable by the insurers. In cases where the deduction of such contributions was not allowed, those amounts are exempt from tax.⁸³

Without denying the explicit relevance of other factors in getting to the final decision,⁸⁴ it is plausible to reconstruct the ruling in light of

⁸² Second, whether the financial sustainability of national public finances would be imperiled unless the discriminating measure was regarded as justified.

⁸³ See especially para. 22 of the judgment.

⁸⁴ Indeed, the rather underdeveloped stage of Community law on what regarded the provision of insurance services, or the looming implications that a different result would have had for the sustainability of Belgian public debt (and with it, the

the institutional and democratic implications of the decision. Although both the request for a preliminary ruling and the infringement proceedings of the Commission originated in 'transnational' citizens who were far from happy with suffering what they regarded as a discrimination with negative economic effects, the circle of those affected had the Belgian tax norm been quashed by the European Court of Justice would have been much larger than in other cases. Indeed, it is not far-fetched to claim that 'national' citizens would have been affected mostly, both in numbers and in depth. Had a norm such as the Belgian one been declared unconstitutional, and the right to deduct extended to premia paid to non-established insurers, more and more 'national' citizens would have considered subscribing such kind of policy. In the short run, this would have required the Belgian state to reconsider overnight how to fund a sizeable part of its public debt, funded until then in part by insurance companies, obliged to invest part of its reserves in the acquisition of public debt. In the long run, it may have created structural pressures to alter the general framework of the taxation of pensions, especially if a sizeable number of 'nationals' would decide to transfer their residence upon retirement, for which they would have an extra incentive: to avoid being taxed by tax authorities who had acknowledged them the right to deduct the premia.⁸⁵

prospects of a central member state being part of the eventual third stage of the Monetary Union).

⁸⁵ A good deal of the ensuing confusion with the notion of 'coherence of the tax system' may derive from the fact that the Court wished to strike two objectives simultaneously: to retain the larger breadth and scope of economic freedoms, now 'capturing' in their constitutional next national tax norms; and to avoid erecting itself in a constitutional judge of national tax norms. While in *Daily Mail* it opted from excluding from the very definition of freedom of establishment the legal prerogative to change the seat of the company without being forced to wind the company up, thus avoiding expanding the breadth and scope of freedom of establishment beyond the situations in which companies actually extended their economic activity across borders, it avoided affirming that the Belgian national tax law actually did comply with Community law. It could have done so claiming that while the tax treatment of transnational citizens was not exactly the same as that of purely 'national' citizens who had never exercised their rights to free movement, or had done so without relevant economic consequences, the two regimes were equivalent. Had the Court done so, it would have to revise its blank rejection of similar claims made by national governments in previous and later cases (and even by some Advocates General). Still, the implications of an eventual ruling declaring that the Belgian tax provision was unconstitutional in a European sense would have had consequences not only and not mainly for transnational citizens (putting an end to what seemed to be

For three years, the Court did not really reconsider what breaches of economic freedoms 'coherence of the tax system' could justify as an overriding public interest. In the meantime, the said ruling was very discussed and actively criticised by legal scholars.⁸⁶ The coherence justification may have played a role in *Schumacker*, but the ECJ shifted the argumentative ground suggested by the parties, and decided the case on the ground that Community law required considering non-resident trans-frontier workers as residents for tax purposes. It was only in August 1995, when deciding *Wielockx*,⁸⁷ that the ECJ started to review *Bachmann*, and in doing so, to narrow the scope of the justification. Slowly but steadily, this 'rule of reason' justification was narrowed down by developing a three-pong test for its application: (1) there should be a direct link between the tax constitutionally suspect and a tax advantage; (2) tax charge and tax advantage should be part of the normative framework of the same tax; (3) the taxpayer being charged and being assigned the benefit should be the same.

In *Wielockx*, the Court confronted another case in which what was at stake was the taxation of pension plans. The facts were somehow different from those in *Bachmann* for two main reasons, related to the fact that Mr Wielockx was self-employed (while *Bachmann* was a dependent worker). First, Dutch legislation contemplated the possibility that self-employed persons simultaneously constituted a pension reserve and enjoyed a tax incentive, while the assets so earmarked remained available to the company as company assets (and thus could be used by the company as a source of funding). Second, Mr Wielockx was national and resident in Belgium, but his company was established in the Netherlands. This entailed that even if Mr Wielockx would not be subject to personal income tax in the Netherlands after retirement, he will not be able to get hold of any benefit if the Dutch company did not pay them; thus the residual effectiveness of the power to tax of the Netherlands was in this case higher than that of Belgium in *Bachmann*. It is important to notice that Advocate General Léger made a quite wide interpretation of the *Bachmann* exception, which would cover a national tax law correlating the double advantage of tax deductibility and availability

negative economic consequences for them amounting to a minor discrimination)⁸⁵ but basically for the whole structure of the insurance business in the Union.

⁸⁶ See the case notes of W.-H. Roth [30 (1993) *Common Market Law Review*, 387] and L. Hinnekens and E. Schelpe [(1992) *EC Tax Review*, 59].

⁸⁷ Case C-80/94, [1995] ECR I-2508.

of the fund to the company to the taxability of the retirement benefits.⁸⁸ If Léger found that the Dutch tax norm was contrary to Community law was not because of that constitutionally justified correlation, but because the Dutch tax system did not impose such correlation all across the board. The network of Double Taxation Conventions signed by the Netherlands implied that the Dutch had opted for ensuring the 'cohesion' of its tax system by means of negotiating mutual concessions with other member states.⁸⁹ Still, the Court was much more laconic and less clear on the grounds why it found the Dutch norm contrary to Community law. In its ruling the Court seemed to hint at the requirement that the taxpayer whose economic freedom was being curtailed will be 'compensated' by a specific tax advantage, especially when it claimed that 'Fiscal cohesion has not therefore been established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions'.⁹⁰ Still, the reasoning of the ECJ seems to have been influenced by the same train of reasons that grounded the opinion of the Advocate General. To the extent that the Netherlands had signed bilateral conventions in the context of which mutual concessions were made concerning the power to tax contributions and pensions, the Dutch government was in *Wielockx* in a different position than the Belgian government in *Bachmann*. Coherence of the Dutch tax system was no longer protected by a bilateral equivalence at the level of each taxpayer, but was 'shifted to another level, that of the reciprocity of the rules applicable in the Contracting States'.⁹¹

In *Svensson and Gustavsson*,⁹² decided three months later, the Court was of a clearer mind. In its ruling, it clearly introduced the first

⁸⁸ Para. 46. He added in the following paragraph; 'Since *Bachmann* it has been clear that, in the name of the principle of the cohesion of the tax system, a Member State is free to base the tax regime applying to a particular type of pension on a principle of correlation between the deductibility of the contributions (granted for social reasons or to promote the financing of undertakings) and the taxation of the pensions (necessary for budgetary reasons)'.

⁸⁹ Para. 54.

⁹⁰ Para. 24.

⁹¹ Also para. 24. And then in para. 25, the Court concluded: 'Since fiscal cohesion is secured by a bilateral convention concluded with another Member State, that principle may not be invoked to justify the refusal of a deduction such as that in issue'.

⁹² Case C-484/93, [1995] ECR I-3955.

prong of what would become the three-pronged coherence test: the 'direct link' between the tax constitutionally suspect and another tax advantage.⁹³ Moreover, the Court came to affirm that such a link had to be a revenue link, and not merely a 'policy' link, something which implicitly pointed to the third prong of the 'coherence' test, namely the identity of the taxpayer.⁹⁴ Still, it may be said that this case could still be interpreted as not determining which way the concept should be constructed; it could still be thought that the connection between the two policies was too far-fetched; whatever the historical context in which the decision was taken, the granting of such reduced rates was part and parcel of the definition of the economic ability to pay of all taxpayers, and there was no longer (if there ever was) a good reason to claim that the additional expenditure effort should be paid by financial establishments themselves.⁹⁵ The subjective turn consisting in the identity of the taxpayer was confirmed in *Asscher*, *ICI*⁹⁶ and *Saint Gobain*⁹⁷. In particular, in *Asscher* coherence was reinterpreted as requiring that the taxpayers whose economic freedoms were restricted received a proper compensation. There was

⁹³ Para. 18 of the Judgment: 'In those cases there was a direct link between the deductibility of the contributions and the tax on the sums payable by the insurers under death and old-age insurance policies, a link which had to be preserved in order to preserve the integrity of the relevant fiscal regime, *whereas there is no direct link whatsoever in this case between the grant of the interest rate subsidy to borrowers on the one hand and its financing by means of the profit tax on financial establishments on the other*' (my italics).

⁹⁴ The Court constrained the breadth and scope of such coherence, by claiming that it was irrelevant whether the concrete history behind the granting of interest rate subsidies (limited to credits taken from nationally established banks) was associated with the existence of a taxing of the profit of financial establishments (which by definition was only applied to *national* financial establishments). Given that the wide majority of taxes in modern polities are not earmarked, the principle results in the narrowing down the potential breadth of 'coherent' tax norms to those which 'compensated' a discriminatory or restrictive tax levy with a peculiar tax benefit to the one and the same taxpayer.

⁹⁵ The rejection of the defence of cohesion in 55/98 *Vestergaard* may be taken as reflecting the distinction the Court made between cohesion and the effectiveness of fiscal supervision. It may have opted otherwise, cohesion becoming the larger exception within which the latter would be one part. But it did not so, and what the Court ruled here implied an invitation to member states to keep the two defences clearly separated (see para. 24 of the judgment).

⁹⁶ Para. 29 of the judgment.

⁹⁷ Para. 70 of the judgment.

to be a tax tit for tat, so to say, for coherence to be available as a justification.⁹⁸

Still, it may be said that this case could still be interpreted as not determining which way the concept should be constructed; it could still be thought that the connection between the two policies was too far-fetched; whatever the historical context in which the decision was taken, the granting of such reduced rates was part and parcel of the definition of the economic ability to pay of all taxpayers, and there was no longer (if there ever was) a good reason to claim that the additional expenditure effort should be paid by financial establishments themselves.⁹⁹

In *Baars*,¹⁰⁰ the Court introduced the second prong of the coherence test, namely the requirement that the both the tax disadvantage and advantage concerned one and the same tax.¹⁰¹ This implied that coherence was not to be established only at the economic level, but also at the formal level. This was confirmed in full clarity in *Skandia*, where the Swedish and Danish argument made an explicit appeal to the fact that the tax regime, even if formally affecting different taxes

⁹⁸ *Asscher*, para. 60: 'The application of a higher rate of tax does not provide any social security protection'.

⁹⁹ The rejection of the defence of cohesion in 55/98 *Vestergaard* may be taken as reflecting the distinction the Court made between cohesion and the effectiveness of fiscal supervision. It may have opted otherwise, cohesion becoming the larger exception within which the latter would be one part. But it did not so, and what the Court ruled here implied an invitation to member states to keep the two defences clearly separated (see para. 24 of the judgment).

¹⁰⁰ Case C-251/98, [2000] ECR I-2787.

¹⁰¹ See paras 39 and 40 of the Judgment: [39] 'First, there is no double taxation of profits, even in economic terms, because the tax at issue in the main proceedings is not charged on the profits distributed to shareholders in the form of dividends but on the assets of the shareholders through the value of their holdings in the capital of a company. Whether or not the company makes a profit does not in any event affect liability to wealth tax; [40] Second, in *Bachmann* and *Commission v. Belgium*, *supra* note 77, there was a direct link between the deductibility of pension and life assurance contributions and the taxation of the sums received under those insurance contracts, and it was necessary to preserve that link in order to safeguard the cohesion of the tax system in question. There is, however, no such link in the present case, which concerns two separate taxes levied on different taxpayers. It is therefore irrelevant, for the purposes of granting shareholders a tax allowance in respect of the wealth tax, that companies established in the Netherlands are subject to corporation tax in the Netherlands and that companies established in another member state are not.

and taxpayers, did concern the tax regime of old-age and insurance pensions of the very same taxpayer.¹⁰²

The restrictive movement became full circle in *Verkooijen*.¹⁰³ The participating member states in *Verkooijen* still fought their corner by reference to a wider interpretation of the coherence justification, sensitive to the multilateral and collective dimension of tax law. By doing so, they seemed to be convinced that there was still room for the Court to reconsider its case law. But from this ruling onwards, member states started in earnest to consider which other overriding interests could be invoked to shelter national personal tax laws from a too radical review of European constitutionality.¹⁰⁴

The final coda did come in *Weidert and Paulus*,¹⁰⁵ where the Court seemed to abandon the extraordinary decision in *Bachmann* to find that openly discriminatory tax laws could be justified by reference to 'rule of reason' exceptions. In *Weidert and Paulus*, the ECJ claimed that coherence, as all exceptions to economic freedoms, should be interpreted narrowly. Indeed, it could be argued that this rendered explicit what the ECJ had been doing implicitly since *Wielockx*.

Coherence was thus narrowed down as it was reinterpreted. From an exception, which seemed to allow member states to uphold a collective good (the *coherence* of the tax system as a whole being hardly open to be reduced to the coherence of the taxes charged upon concrete individuals), it was redefined into a guarantee of consistent taxation for each and every taxpayer. This entailed two shifts:

1. From its objective definition to its subjective assessment, or what is the same, from coherence as the way in which the tax system

¹⁰² See paras 31 and 33 of the judgment.

¹⁰³ Case C-35/98, *Verkooijen*, [2000] ECR I-4073.

¹⁰⁴ The case was also significant because the very same Advocate General (La Pergola) wrote two opinions on the case. While this double opinion-making was caused by some difficulties around the construction of national provisions, the first opinion was more amicable to a wider, more collective-oriented conception of coherence of the tax system; in the second, the Advocate General argued by reference to the prong test which have been forged in the case law that we have just considered. The Court did follow the second opinion, and thus consecrated the narrowing down of the coherence of the tax system justification.

¹⁰⁵ Case C-242/03, [2004] ECR I-7379.

allocates burdens and benefits among taxpayers, to coherence in the way each Community citizen is treated by each national tax;

2. From coherence defined in the context of the social functions of the tax system to a narrow coherence limited to exquisitely equivalent treatment of each taxpayer.

The very narrow reading of the justification was spectacularly confirmed in *Meilicke*,¹⁰⁶ where the ECJ did not only reject that the national tax law could be justified, but did not even acknowledge the grave economic and legal implications of affirming the unconstitutionality of the German law. While the figures were in dispute, and seemed to have been inflated by the German exchequer in the first stages of the proceedings, it was calculated that the unconditional declaration of European unconstitutionality of the national law would cost the German exchequer up to a quarter of a point of the national GDP. Still, the Court refused to consider limiting the temporal effects of the ruling, a standard technique resorted to by national constitutional courts to avoid dramatic negative effects.¹⁰⁷ Not even after asking a second opinion from a second Advocate General on the matter. Indeed, AG Stix Hackl managed to contribute to the 'privatising' turn of 'coherence', or in general overriding public interests, by claiming that the limitation of the temporal effects of a judgment of the ECJ would only make sense if a limitation would enhance the legal security of taxpayers as private actors.¹⁰⁸

Conclusions

In this chapter, I have claimed that the European Courts have come to play a key role as guardians of European constitutionality (first thesis of the chapter). This comes controversially clear in the aftermath of the *Viking* saga of judgments. However, I have argued that the power of European Courts to undertake the review of European constitutionality of legal norms, including national legal norms, is well grounded on positive law. It follows from the systemic interpretation of the founding Treaties (and now from the Treaty on the functioning of the European Union). When such Treaties are rightly appraised as the founding block of a constitutional legal

¹⁰⁶ C-292/04, *Meilicke and others*, [2007] ECR I-1835.

¹⁰⁷ See R. Letelier, *Nulidad y Reestablecimiento en procesos contra normas* (Civitas, 2011).

¹⁰⁸ Para. 67 of her opinion.

order, one is bound to conclude the Treaty provisions which define the task of the European Courts (to ensure that the *law*, and not merely the *Treaty*, is observed) and which articulate the different procedures before the European Courts empower the European Courts to become guardians of European constitutionality. However, the very arguments which support the constitutional nature of Community law also reveal the peculiar constitutional nature of European integration as a process of constitutional synthesis. And from the synthetic nature of European constitutional law follows not only that European constitutional law has a substantive pluralistic basis (with the constitutional law common to the member states – the common constitutional traditions in the terms usually employed by the European Courts – being the ‘deep’ constitutional law of the Union) but also that the guardianship of European constitutionality is shared by the European Courts and national constitutional courts (or supreme courts in those member states where there is no constitutional court) (the second thesis of this chapter). This should lead the European Courts to be especially attentive to national constitutions as they constitute part of the substantive contents of European constitutional law and to the rulings of national constitutional courts, as key interpreters not only of each national constitutional tradition, but also increasingly (even if implicitly) of the constitutional law common to the member states.

There is a well-grounded *structural* case to be made for European Courts reviewing the European constitutionality of national norms. But is this task to be properly discharged? In the second part of the chapter, I claimed that the past and present practice of the European Courts has been to employ more or less explicitly the argumentative syntax of the principle of proportionality (third thesis of the chapter). By doing this, European Courts have basically followed the practice of national constitutional courts. However, two caveats must be added. The first one is that the critical reconstruction of the case law of the European Court of Justice reveals that the standard three-stepped reconstruction of proportionality (adequacy, necessity and proportionality) pays insufficient attention to two previous and occasionally decisive steps, namely, the elucidation of the constitutional principles underlying the colliding norms and the assignment of the argumentative benefit and burden. In these two steps, courts contribute to the concretisation (conceptualisation) of the conflicting principles and determine how the conflict is to be

understood, from which principle, so to say, are we going to start the argument (third thesis of the chapter). The second is that proportionality is a formal principle; this necessarily entails that resort to proportionality guarantees the formal correctness of the decision but cannot ensure the substantive correctness of the decision. That cannot but depend on the substantive justifiability of the substantive choices with which the formal argumentative syntax of proportionality is 'filled in'. Indeed, far from being a *legitimising* principle, proportionality must be understood as a critical analytical tool, equipped with which we can reveal the substantive choices made by a court, and assess whether they are properly grounded on previous legal authoritative decisions, on good substantive reasons put forward by a court, or on the contrary, are largely unjustified (fourth thesis of the chapter).

Making use of the critical potential of proportionality I approach the case law of the European Court of Justice on economic freedoms. This leads me to four key problems in the fleshing out of European constitutional law in the jurisprudence. Firstly, I find that the while the affirmation that economic freedoms constitute a key part of the canon of European constitutionality is well-grounded, the European Court of Justice has shifted its characterisation of economic freedoms from operationalisations of the principle of non-discrimination on the basis of nationality and building blocks of a common market to concretisations of a self-standing and transcendental economic freedom and vanguard of the single market. Such a shift may seem to have been endorsed (even if, *ex post casu*) by the Treaty amendments introduced by the Single European Market and the Treaty of Maastricht. However, I claim that it remains hard to reconcile with the synthetic constitutional identity of the European Union and impossible to square with the constitutional identity of the member states as social and democratic *Rechtsstaats*. Indeed, it seems to me much more plausible to conclude that the jurisprudence of the European Courts took a *wrong turn* when it shifted from one conception of economic freedoms to the other, or what is the same, that *Cassis de Dijon* and the later jurisprudence expanding the 'obstacles' conception of breaches to economic freedoms are properly characterised as part of a 'constitutional *dérapiage*' in the development of Community law. Secondly, I find extremely problematic the tendency of the European Court of Justice to invariably assign the argumentative benefit to the economic freedoms and the argumenta-

tive burden to the principle underlying the colliding norm. That is difficult to reconcile with the fact fundamental rights have long been acknowledged to be part of the yardstick of European constitutionality, and become formally and undeniably so after the formal incorporation of the Charter of Fundamental Rights to the primary law of the Union. The opinions of AG Geelhoed in *American Tobacco* and of AG Cruz Villalón in *Santos Coelho* could be so constructed as to become precedents of a more flexible and balanced approach. Thirdly, I have serious objections to the standards which the European Court of Justice employs to determine the probability of events when assessing the adequacy and necessity of the norms colliding with an economic freedom. While the ECJ assumes without paying much attention to any evidence that all breaches of economic freedoms would result in a *grave infringement*, it eventually sets a too high threshold to prove the adequacy and necessity of infringing norms. This was exemplified by the fully unrealistic assumptions the ECJ makes on the alternative means on the hands of member states to ensure the effectiveness of fiscal supervision (flatly contradicted by the several legislative initiatives of the Commission, only partially successful, to increase the degree of tax assistance, especially in the form of automatic exchange of tax data). Fourthly, the European Court of Justice tends to fail to approach on its own terms the principles underpinning the norms colliding with economic freedoms. The breadth and scope of these principles is not only defined in the most restrictive manner, but the inner normative logic of these principles tends to be neglected. This was exemplified by considering the peculiar characterisation of the overriding national interest in the coherence of the national tax system.

Having argued all that, it might not be completely improper to conclude with a plea for the recalibration of the case law of the European Courts. There is a very good case for the European Courts playing a key role in the guardianship of European constitutionality. The European Court of Justice was reasonably successful in the way it discharged this task in the first decades of European integration. Not only the rulings were very attentive and indeed deeply informed by the pluralistic nature and institutional setup of the European Union, but the Court avoided pushing too far its autonomous characterisation of the norms of Community law. The paradigmatic shift which followed from *Cassis de Dijon* led not only to a major structural change in the conception of economic freedoms, but also to

paying much lesser attention to the pluralistic nature of European integration. The argumentative benefit assigned to economic freedoms, coupled with a tendency to distort the understanding of other colliding principles when assigning concrete weight to them and resort to biased criteria to determine the probability of future events have stressed if not severed the fundamental link between national and European constitutional law. The price of the wider autonomy in the short run may be a loss of legitimacy in the long run. The Court runs a double risk in that regard. As a supranational institution, it is not in a position to search for cover in the direct legitimacy of European decision-making processes, as such direct legitimacy is still very thin. As a judicial institution, it is in a position to limit the realm of what is politically possible, but not of taking constructive political decisions, not even when the cumulative effect of its case law is the full disempowerment of all levels of government.

Chapter 6

One market, two courts The case law of the EFTA Court

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Introduction

The European Economic Area (EEA) Agreement is the story of the sceptical periphery of the European Union (EU), about those states which cannot quite bring themselves to become full members of the EU due not least to the supranational, or even federalist, traits of the EU. Nevertheless, they have found that it is in their own good interest to be an integral part of the internal market.¹

In the second half of the 1980s, the European Free Trade Association (EFTA) states – at that time Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland – had become increasingly nervous about the consequences the European Community's (EC) plan for an 'internal market' by 1992 might have for them. If this plan to achieve what in reality was the 'common market' which the EC Treaty had always foreseen was successful, the EFTA states risked

¹ In addition, these states also participate in other fields of the EU cooperation, such as justice and police cooperation and foreign and security affairs. However, the participation in those fields is based on other legal instruments than the EEA Agreement.

losing out in the competition with a reinvigorated EC. Although the EFTA states had their free trade agreements, dating from the 1970s, with the EC these were traditional free trade agreements without the mechanisms for abolishing technical barriers to trade in goods which the EC plan for an internal market called for. The free trade agreements also did not include services, investments and the free movement of workers

On its side, the EC also had an interest in better access to the markets of the EFTA states. Taken together, they were one of the biggest trading partners of the EC.

The initiative for a new comprehensive agreement between the EFTA states and the EC was taken in 1989. After rounds of informal discussions, the negotiations started in earnest in June 1990, and the Agreement, which by then carried the grand name of the Agreement on the European Economic Area, was signed on 2 May 1992. It entered into force on 1 January 1994, after a Swiss referendum on that country's ratification of the Agreement ended with a 'No' in late 1992, causing a postponement of the entry into force by one year. Switzerland has later negotiated its own set of bilateral agreements with the EU.

Basically, the EEA Agreement is a 'carbon copy' of EU law² pertaining to the internal market: the general rules on free movement, competition law and state aid, as well as the more detailed rules set out in secondary EU law. However, there are some important differences. Firstly, with the exception of phytosanitary and veterinary rules, agriculture and fisheries fall outside the scope of the Agreement. There is no common EEA agricultural or fishery policy. Secondly, there is no customs union. This means that only goods originating within the EEA are protected by the rules on free movement of goods and there are no common trade policy vis-à-vis third countries. Thirdly, although EEA 'secondary law' is constantly being updated to keep track of the legislative developments within the EU, the general rules found in EU primary law were based on the

² Although the EEA Agreement only deals with matters which fall under the EC Treaty, I will generally refer to 'EU law'.

EC Treaty prior to the Maastricht Treaty and have never been updated. As we shall see, this may cause problems for the EEA.

By the time the Agreement entered into force, four of the EFTA states – Austria, Finland Norway and Sweden – were already negotiating for membership in the EU. Norway ended up not joining the EU, after a referendum on the membership issue produced a majority against joining. This means that the EEA today consists of only three states on the EFTA side of the table: Iceland, Liechtenstein and Norway with slightly less than 5 million people altogether, of which 4.7 million are Norwegians. The EU has swelled to 27 member states with a total population of around 500 million people.

Still, the EEA continues to function. Although it would probably have been impossible for the three EFTA states to negotiate such an arrangement with the EU today, it is easier both for the EU and for the three EFTA states to let the EEA continue to function than to start negotiating a new agreement or new set of agreements (which would then probably have to be modelled on the Swiss set of bilateral agreements). This is probably so even if Iceland were to join the EU as a new member state: for the EU, the continued existence of the EEA is a better way of handling its relationship with, in particular, Norway than to start negotiating a new set of agreements.

This is not so only because of the effort involved in any new negotiations as such, but also because the surveillance and judicial mechanisms – the EFTA Surveillance Authority and the EFTA Court – guarantee a level of respect for the legal obligations involved which is difficult to achieve in a ‘classical’ international treaty regime where all disputes are solved on a diplomatic level.

In this context, it is interesting to note that there are thoughts within the EU on introducing some kind of mechanism for ‘homogenous interpretation’ in a new ‘umbrella agreement’ between Switzerland and the EU, together with a mechanism for ‘regular updating’ of new EU rules.³ In the EEA, the latter mechanism already exists in the form

³ Draft Council conclusions on EU relations with the EFTA countries, 16651/1/08 REV 1, dated 5 December 2008, adopted by the Council at its meeting of 8 December 2008, cf. Press Release 16862/08 (Presse 359), 32.

of the EEA Joint Committee, which decides on the incorporation of new EC legal acts into the EEA Agreement. If these ideas are acted on, the difference between the 'Swiss solution' and the EEA Agreement would become small indeed.

Surveillance and judicial mechanism

In the EU, a surveillance mechanism in the form of the Commission with its powers to enforce competition rules, authorise state aid schemes and generally to bring infringement proceedings against the member states before the European Court of Justice (ECJ), has always been considered vital for the good functioning of the EU common/internal market. This is also the case with the ECJ's role in preserving a homogeneous interpretation of EU law in the national courts of the member states through a system of preliminary rulings on EU law upon request by national courts seized with matters where EU law is relevant.

Therefore, it soon became clear that a similar mechanism would be needed in the EEA. What it should look like, was however a matter of controversy – not so much between the EFTA states and the EU as between the Council and the Commission on one side, and the ECJ on the other.

In addition to an EFTA Surveillance Authority (ESA) with the same surveillance functions vis-à-vis the EFTA states as the Commission has in relation to the EU member states, the draft Agreement initially foresaw an EEA Court composed of judges from the ECJ and judges from the EFTA states. This court would then render judgments which would be binding both on the EFTA side and the EU side – including, on the EU side, the ECJ. In its Opinion 1/91,⁴ the ECJ declared such a court to violate the EC Treaty, as it would lay down the interpretation not only of the rules of the EEA Agreement but also, for all practical purposes, of the corresponding rules of EU law. The ECJ also found it objectionable that the preliminary rulings given to national courts on the interpretation of EEA law would be 'advisory opinions' and thus not formally binding on the requesting court.

⁴ Opinion 1/91 [1991] ECR I-60.

This led to the setting up of a separate EFTA Court, which would have jurisdiction broadly corresponding to that of the ECJ in relation to the member states and the Commission, but only in relation to the EFTA states within the EEA and the EFTA Surveillance Authority. As would have been the case with the EEA Court, the EFTA Court delivers 'advisory opinions', not binding rulings, on the interpretation of EEA law to national courts.

On the EU side, the EEA Agreement forms part of EU law, as do other treaties with third states. Consequently, the Commission surveys the member states' implementation of the EEA Agreement, and the ECJ is competent to rule on the interpretation of the Agreement.

In order to make sure that EEA law in fact is interpreted in the same way as its source, EU law, Art. 6 of the EEA Agreement states that '[w]ithout prejudice to future developments of case law,' the provisions of the EEA Agreement, 'in so far as they are identical in substance' to corresponding rules of EC law, shall 'be interpreted in conformity with the relevant rulings' of ECJ given prior to the date of signature of the EEA Agreement (2 May 1992). Although this provision is usually thought of as a rule to secure homogeneity between EEA law and EU law on the EFTA side, it was in fact meant just as much as a way of binding the ECJ to its own interpretation of internal EU law when interpreting EEA law. Given the way in which the ECJ had interpreted provisions of the free trade agreements which were identical in wording to provisions of the EC Treaty differently from the Treaty,⁵ it was by no means a foregone conclusion that it would interpret the EEA Agreement in the same way as EU law.

For reasons of principle, Art. 6 did not bind the Contracting Parties to the interpretation laid down in rulings handed down after the signature of the Agreement. However, from a practical point of view, it does not make sense to distinguish between case law before and after a certain date. Most case law does not break openly with previous case law but settle questions which are new based on arguments which are presented as a natural consequence of existing

⁵ Cf. Case 270/80, *Polydor* [1982] ECR 329, paras 17–20.

case law. In this perspective, it would not be possible to treat case law after a certain date as irrelevant. Therefore, Art. 3(2) of the Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice (SCA) states that the EFTA Court (and ESA) 'shall pay due account to the principles laid down by the relevant rulings' of the ECJ given after the signature of the EEA Agreement.

There is nothing in the legal texts governing the activities of the ECJ corresponding to Art. 3(2) SCA. However, also this Court has not made a distinction, based on the date of signature of the EEA Agreement, with regard to the relevance of its own case law concerning EU law when interpreting the EEA Agreement.⁶

No direct effect and primacy

A difficult question during the negotiations for the EEA Agreement was whether the principles of direct effect and primacy of EU law should become part of EEA law. For traditional EU law experts, the principle of direct effect and primacy of EU law⁷ is a basic premise for the good functioning of the internal market.⁸ If the practical effect of EU law on the national level would depend on national law, the law of the internal market, as seen from the economic operators, would not be the same in the whole of the market. As an internal market can be defined as a geographical area where the same rules apply to economic activity, one would then simply not have an internal market.

As supremacy of federal law over state law is a hallmark of a federal legal order,⁹ the principles of direct effect and primacy of EU law

⁶ Cf. Case C-452/01, *Ospelt* [2003] ECR I-9743.

⁷ However, only for EU law within the 'First Pillar', i.e. EC law.

⁸ As is well known, direct effect and primacy is conditioned upon certain criteria being fulfilled, which means that not all EC law has direct effect and primacy. However, this is not the place to dwell upon those criteria.

⁹ From the point of view of international law, it is of course never a valid defence that national law does not correspond to the international obligations of the state. However, international law generally does not require of states to let international law prevail over national law before national courts should there be a conflict between international law and national law. It is this latter kind of supremacy which EU law demands of the member states. Some states provide for direct effect and primacy of (some of) their international obligations, but this supremacy are then

over national law also has a deep symbolic value: it demonstrates that EU integration not only goes further, but also deeper, than traditional international cooperation.

However, the fear of a European 'super state' was – and remains – one of the main reasons why at least some of the EFTA states did not – and do not – join the EU. For these states, it was a condition sine qua non to avoid EU-style direct effect and primacy.¹⁰

The EEA Agreement itself is not very clear on the matter. Art. 6 EEA could be interpreted to exclude ECJ case law on direct effect and primacy by requiring homogeneous interpretation of EEA and EU rules only 'in so far as they are identical in substance' – that is to say only with regard to their material content and not as far as the legal effect of those rules in national law is concerned. According to Art. 7 EEA, the Contracting Parties may choose to implement regulations, obviously meaning that they are not treaty-bound to establish a situation according to which regulations have direct applicability, as they have in the EU legal order. The preamble to Protocol 35 to the Agreement states that the Agreement does not require any Contracting Party to transfer legislative powers. Protocol 35 therefore lays down an obligation to 'introduce, if necessary, a statutory provision' to the effect that 'implemented EEA rules' shall prevail over 'other statutory provisions'. In other words, this would be a 'quasi primacy rule' which would only work in favour of rules of national law which implement EEA law in case of a conflict with other national rules which – by mistake, presumably – have not been abolished or amended as part of the implementation of the relevant EEA rule. Had EEA law been intended to have the same kind of direct effect or primacy as EU law, such a 'quasi primacy rule' would be redundant.

based on national law and exists only for as long as, and in so far as, national law allows it.

¹⁰ This does not mean that national courts are not willing to go far in interpreting national law – and if need be, and when possible, also international law – in ways which would otherwise not come naturally in order to be able to conclude that there is no conflict.

The ECJ got the point. In Opinion 1/91, it interpreted the EEA Agreement as not taking on board the EU principles of direct effect and primacy.¹¹

Nevertheless, many legal scholars argued for the EEA Agreement imposing the same principles of direct effect and primacy on the contracting parties as does EU law on the member states.¹²

The EFTA Court for its part has not accepted direct effect and primacy as part of EEA law. In *Karlsson*,¹³ the Court referred to Art. 7 EEA and Protocol 35 and concluded that, since there is no transfer of legislative powers under the Agreement, 'EEA law does not require that individuals and economic operators can rely directly on non-implemented EEA rules before national courts.'¹⁴ This was reiterated in *Criminal Proceedings Against A*,¹⁵ where the Court also stated that 'this applies to all EEA law, including provisions of a directive' and that 'EEA law does not require that non-implemented EEA rules take precedence over conflicting national rules, including national rules which fail to transpose the relevant EEA rules correctly into national law'.¹⁶ The case concerned Liechtenstein, which has failed to transpose a directive in the correct manner.

¹¹ Cf. para. 27 of Opinion 1/91. A different question is whether the EU legal order will extend its own principles of direct effect and primacy to provisions of treaties to which the EU is a party. In principle, the answer to this question is 'yes'. The Court of First Instance has attributed direct effect and primacy to the EEA Agreement, cf. Case T-115/94, *Opel Austria* [1997] ECR II-39, paras 100–102.

¹² Cf. i.e. the following writers for the opinion that the EEA Agreement establishes the same principles of direct effect and primacy as Community law: W. van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect', (1992–93) 16 *Fordham International Law Journal*, 955; T. Bruha, 'Is the EEA an Internal Market?', in P.-C. Müller-Graff and E. Selvig (eds), *EEA-EU Relations* (Berlin Verlag, 1999), 97–129, at 115–18). One could also point to T. Blanchet, R. Piipponen and M. Westman-Clément, *The Agreement on the European Economic Area* (Oxford University Press, 1994), at 21–2 and C. Bright and K. Williams, 'Understanding the European Economic Area: Context, Institutions, and Legal Systems', in C. Bright (ed.) *Business Law in the European Economic Area* (Oxford University Press, 1994), at 17–18, although these authors point to the possibility that this view may not be accepted by some EFTA states.

¹³ Case E-4/01, *Karlsson* [2002] EFTA Ct. Rep. 240.

¹⁴ *Ibid.*, para. 28.

¹⁵ Case E-1/07, *Criminal Proceedings Against A* [2007] EFTA Ct. Rep. 246.

¹⁶ *Ibid.*, para. 40.

As Liechtenstein's constitutional order accords direct effect and primacy to the international obligations of Liechtenstein, one may ask whether the issue of direct effect and primacy under EEA law arose at all. The explanation for this is that only the Liechtenstein Constitutional Court, the *Staatsgerichtshof*, has the authority to declare Liechtenstein internal law inapplicable as violating the international obligations of the state. The case which gave rise to Case E-1/07 before the EFTA Court was still pending before a regular court of first instance. Under EU law, any court shall apply the principles of direct effect and primacy, regardless of whether, under national law, the equivalent principles of direct effect and primacy for the norms of public international law can only be applied by the highest courts.¹⁷ The EFTA Court came to the conclusion that as the Contracting Parties to the EEA Agreement are free to decide whether, under their national legal order, national administrative and judicial organs can apply the relevant EEA rule directly, and they are also free to decide on which administrative and judicial organs they confer such a power.¹⁸

Nevertheless, in *Sveinbjörnsdóttir*,¹⁹ the EFTA Court characterised the EEA Agreement as 'an international treaty sui generis which contains a distinct legal order of its own'²⁰ and that 'the scope and objective of the EEA Agreement goes beyond what is usual for an agreement under public international law'. These statements have served as the starting point for the Court in establishing, in *Sveinbjörnsdóttir*, a principle of state liability for infringement of EEA law similar to the principle established by the ECJ in relation to EU law.²¹ The Court further referred to the objective of homogeneity between EEA law and EU law and the right to equal treatment and equal opportunities for individuals and economic operators, as well as the general loyalty clause found in Art. 3 EEA.²² However, it did not refer to ECJ case law on state liability.

¹⁷ Cf. Case 106/77, *Simmmenthal* [1978] ECR 629.

¹⁸ *Criminal Proceedings Against A*, *supra* note 15, para. 41.

¹⁹ Case E-9/97, *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95.

²⁰ *Ibid.*, para. 59. Cf. also *Karlsson*, *supra* note 13, para. 25.

²¹ Cf. i.e. Joined cases 6/90 and C-9/90, *Francovich* [1991] ECR I-5357 and Joined cases C-46/93 and C-48/93, *Brasserie du pêcheur/Factortame* [1996] ECR I-1029.

²² *Sveinbjörnsdóttir*, *supra* note 19, paras 60 and 61.

When the Norwegian Government, in *Karlsson*, argued that the Court should reverse itself compared to *Sveinbjörnsdóttir* and come to the conclusion that since there was no direct effect and primacy in EEA law, there could be no state liability either, the Court refused. It stated that although

[T]he principle of State liability under Community law is regarded as a necessary corollary of the direct effect of Community provisions [...] this cannot mean that the finding of a principle of State liability, based directly on the EEA Agreement as such, is in any way contingent upon recognition of a corollary principle of direct effect of EEA rules.

The Court has made cautious references to ECJ case law with regard to the criteria for state liability, while at the same time keeping the door ajar for state liability under EEA law not necessarily being identical to state liability under EU law.²³

The EFTA Court has also borrowed the principle of harmonious interpretation from the ECJ without referring to ECJ case law as grounds for why this principle exists also in EEA law. Instead it has referred to

[T]he general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public international law principle of effectiveness.²⁴

The general attitude of the EFTA Court to the case law of the ECJ

When the EEA Agreement came into force, there were already decades of case law from the ECJ which, under Art. 6 EEA, would be relevant for the interpretation of the EEA Agreement. As the EU part of the 'EEA internal market' is much bigger than the EFTA part of it, the ECJ continues to produce a lot more case law than does the EFTA

²³ Ibid., paras 30 and 32.

²⁴ *Karlsson*, *supra* note 13, para. 28.

Court itself concerning the interpretation of common rules. Already from its very first case, the EFTA Court has therefore based its own interpretation of the EEA Agreement on case law from the ECJ concerning both the general principles found in the EC Treaty itself and the provisions of secondary law. In doing so, the Court has not made a distinction between ECJ rulings given before and after the signature of the EEA Agreement. If there is a tendency in this regard, it would rather be to let newer decisions prevail over older ones, in spite of the less binding wording of 'pay due account' found in Art. 3(2) SCA, in order to safeguard the homogenous interpretation of EU law and EEA law.²⁵ Nor has the EFTA Court felt any need to justify, in each case, why it follows the interpretation of the ECJ – the case law is, for all practical purposes, treated as binding case law.

The EFTA Court has chosen to follow the ECJ also when interpreting the SCA, even though there is no provision which compels the Court to take account of ECJ case law concerning the corresponding EU provisions when applying the SCA. It has done so 'in the interest of equal treatment and foreseeability for parties appearing before the ECJ, the CFI and the EFTA Court'.²⁶

What to do when the ECJ changes course?

One reason why the EFTA states chose less binding language in Art. 3(2) SCA than found in Art. 6 EEA was probably to make it possible for the EFTA Court not to follow the ECJ in cases where it is felt that the ECJ engages in 'judicial activism' and pushes the EU towards further integration. The reason for not following the ECJ in such cases would be the general assumption that the EEA was meant to be the 'less integrationist' solution for those states which found the EU too integrationist to begin with.

The ECJ sometimes openly admits to changing course. So far, the EFTA Court has only had to deal with this situation in relation to a question where the ECJ arguably went from a 'more integrationist' to a 'less integrationist' interpretation. In its famous *Keck* judgment,²⁷ the

²⁵ Cf. examples of this below.

²⁶ Cf. Case E-9/04 COSTS, *The Bankers' and Security Dealers' Association of Iceland v. the EFTA Surveillance Authority (taxation of costs)* [2007] EFTA Ct. Rep. 74, para. 16.

²⁷ Cf. Joined cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097.

Court openly admitted that it would henceforth not consider as a restriction on trade certain national measures which hitherto had been considered as restrictions. This judgment was handed down in 1993, after the EEA Agreement had been signed. However, the EFTA Court has applied it to the EEA Agreement without even mentioning the fact that it fell under Art. 3(2) SCA rather than Art. 6 EEA. Most would probably agree that it would indeed have been a strange result if the EEA Agreement should remain stuck with a more integrationist interpretation than that applied to corresponding EU law.

Otherwise, the situation is rather that the EFTA Court has had to deal with questions where the ECJ's case law, at the time of the signature of the EEA Agreement, did not offer a clear answer. A typical example would be the concept of 'restriction' with regard to the right of establishment, where the prevailing view at the time of concluding the EEA Agreement seemed to be that only discriminatory measures were caught,²⁸ but where the ECJ clearly has moved beyond that in the last 15 years.²⁹ However, already before the conclusion of the EEA Agreement, there was also case law from the ECJ pointing in the direction of a wider concept of 'restriction',³⁰ and the EFTA Court has followed suit as the ECJ has clarified its position that also non-discriminatory national measures may constitute restrictions on the right of establishment.³¹

A slightly different problem emerged in the Liechtenstein helplessness allowance case³² concerning the exportability of a certain social security benefit. It was argued by Liechtenstein that the ECJ, after Liechtenstein had become an EEA state, had changed its interpretation of the relevant EEA provisions, finding certain social benefits which had hitherto not been considered exportable, to be exportable.³³ Exportability means that the competent state has to award the benefit to persons living in other EEA states, provided the individuals in question have fulfilled all other criteria for receiving

²⁸ Cf. for instance Case 221/85, *Commission v. Belgium* [1987] ECR 719, para. 9.

²⁹ Cf. for instance Case C-55/94, *Gebhard* [1995] ECR I-4165 and Case C-140/03, *Commission v. Greece* [2005] ECR I-3177.

³⁰ Cf. for instance Case 107/83, *Klopp* [1984] ECR 2971, para. 19.

³¹ Cf. for instance Case E-3/06, *Ladbroke's* [2007] EFTA Ct. Rep. 86, para. 40.

³² Case E-5/06, *EFTA Surveillance Authority v. Liechtenstein* [2007] EFTA Ct. Rep. 295.

³³ Cf. para. 46 of that judgment.

the benefit, for instance by having been a member of the relevant social security scheme for a certain number of years (typically by virtue of having worked in the competent state). However, the judgments which Liechtenstein referred to as confirming that the benefit was non-exportable were in fact handed down after Liechtenstein joined the EEA.³⁴ It may very well be that those judgments were in line with the interpretation that was common among the EU member states and the EFTA states at the time Liechtenstein entered the EEA. That interpretation held that the listing of a particular benefit in a particular annex to the Regulation applicable to the case, had constitutive effect – i.e. made the benefit non-exportable regardless of whether the benefit ought to have been exportable according to the general provisions of the Regulation. The ECJ later came to the conclusion that a social security benefit which is exportable according to the general provisions of the regulation could not be made non-exportable by the member states by listing it in the annex in question. In the Liechtenstein helplessness allowance case, the EFTA Court based itself on the same view. In addition to simply referring to the ECJ's most recent case law, it did however point out that the interpretation advocated by Liechtenstein could lead to a result where a person would not receive the benefit in question in any EEA state, regardless of the fact that the person clearly fulfilled the conditions for receiving the benefit. One should probably not draw the conclusion from this that had the EFTA Court found the ECJ's latest case law less convincing as to the merits, it would have accepted Liechtenstein's interpretation based on earlier case law. It may just as well have been the Court wanting to explain why Liechtenstein's position could not be accepted in any case.

The EFTA Court goes first, and the ECJ then disagrees

Seen from the point of view of the EFTA Court, perhaps the most uncomfortable situation it can face is a case where it is asked to reconsider its own previous case law in the light of later case law by the ECJ where the ECJ has taken a different position than the EFTA Court. As cases seldom come before the EFTA Court unless there is at

³⁴ Cases C-20/96, *Snares* [1997] ECR I-6057, C-297/96, *Partridge* [1998] ECR I-3467 and C-90/97, *Swaddling* [1999] ECR I-1075. Liechtenstein joined the EEA on 1 May 1996.

least one question which still has not been settled by the ECJ, this is a constant danger for the EFTA Court. However, after 15 years, it has only happened once that the Court has had deal with this situation head-on. This happened in *L'Oréal*.³⁵

In 1997, the EFTA Court had interpreted Art. 7(1) of the Trade Mark Directive³⁶ to mean that it was still possible for the EFTA states to retain so-called international exhaustion of trademark rights for products originating from outside the EEA.³⁷ This meant that the EFTA states could still allow parallel import of such products provided that the products in question had been put on the market with the consent of the right holder in a third state (non-EEA state).³⁸ The arguments put forward by the EFTA Court at that time were of a

³⁵ Joined cases E-9/07 and E-10/07, *L'Oréal* [2008] EFTA Ct. Rep. 259.

³⁶ Directive 89/104/EEC.

³⁷ Case E-2/97, *Maglite* [1997] EFTA Ct. Rep. 129.

³⁸ 'Exhaustion of rights' means that the right of e.g. a trademark holder or patent holder to control the trade in his products ceases to be effective, is 'exhausted', with regard individual copies of the product which has been placed on the market with his consent. In other words, the copies may be sold on to a new buyer without asking for permission from the right holder. 'International exhaustion' means that this right is exhausted also with regard to copies of the product which have been placed on the market with the consent of the right holder in another country than the country where it is sold on, after importation, to a new buyer. This makes it possible to engage in 'parallel import', which means import in parallel with the import taking place from the right holder himself to his authorised dealers in the country of import. As purchasing power, consumer preferences and, with regard to certain goods such as medicinal products, price control regimes vary between states, producers of products protected by industrial property rights such as trade marks and patents often maintain different price levels for their products in different countries. This may be exploited by 'parallel importers' who buy the products in countries where the price is low and then import them to a country where the price is high. Even after having paid the full retail price in the country where the price is low, and after having paid for transport, it may still be possible to make a profit from selling the products at the lower price than that asked by the right holder himself and his authorised dealers in the country of import. The ensuing intra-brand price competition has traditionally been looked upon as a good thing for consumers. However, it is also often contended that parallel import, leading to this form of 'static' competition, may work against 'dynamic' inter-brand competition consisting in existing products being challenged by new, differently branded alternatives which may be technologically more advanced or have a more appealing design. The argument is that the development of new products may depend on a comprehensive protection of industrial property rights in order for the producers to be able to recoup the development costs.

two-fold nature. Partly, the Court argued that the interests of free trade and enhanced competition spoke in favour of allowing the states to opt for international exhaustion. Those arguments would be equally valid in a pure EU law perspective. Partly, the Court employed arguments of a specific EEA law nature, namely that the EEA Agreement, unlike the EC Treaty, did not establish a customs union with a common foreign trade policy. Consequently, the Contracting Parties to the EEA, unlike the EU member states in relation to the Community as such, retained their freedom of action vis-à-vis third states, including the right to opt for international exhaustion of trademark rights in relation to products originating from outside the EEA.

In 1998, the ECJ came to the conclusion that the Trade Mark Directive did not allow international exhaustion of trade mark rights, but made EEA-wide exhaustion mandatory: parallel import of products which had been put on the market with the consent of the trade mark holder within the EEA could not be hindered, but parallel import of products which had been put on the market outside the EEA with the consent of the trade mark holder could not take place. The ECJ based this result partly on the wording of the Directive and partly on the objective of securing the same protection for registered trademarks within the whole of the internal market. Both sets of arguments are obviously as relevant in the context of EEA law as they are on the context of EU law. The ECJ also explicitly formulated its interpretation of the Directive as an interpretation of EEA law,³⁹ without commenting, however, on the specific EEA law arguments which the EFTA Court had employed. In a later case it upheld the same interpretation in a case which clearly concerned products originating from outside the EEA.⁴⁰

This put the EFTA Court in a doubly uncomfortable position: not only had the ECJ disagreed with the EFTA Court on how a certain

³⁹ Operative part of the judgment: 'National rules providing for exhaustion of trademark rights in respect of products put on the market outside the EEA under that mark by the proprietor or with its consent are contrary to Article 7(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, as amended by the Agreement on the European Economic Area of 2 May 1992'.

⁴⁰ Cf. Case C-173/98, *Sebago* [1999] ECR I-4103.

provision should be interpreted as a matter of parallel EU law; the ECJ had also disagreed with the EFTA Court on how to interpret EEA law.

Responding to this, the EFTA Court, in *L'Oréal*, made a distinction between arguments which would be equally valid in an EU law context and an EEA law context, and arguments which were particular to the EEA Agreement. With regard to the former, it observed that although Art. 3(2) SCA⁴¹ did not explicitly address the situation where the EFTA Court has ruled on an issue first and the ECJ has subsequently come to a different conclusion, the consequences for the internal market within the EEA are the same in that situation as in a situation where the ECJ has ruled on an issue first and the EFTA Court subsequently were to come to a different conclusion. That called for an interpretation of EEA law in line with new case law of the ECJ regardless of whether the EFTA Court has previously ruled on the question. The EFTA Court then went on to discuss whether the specific EEA elements of the case – no customs union with no common foreign trade policy – did 'constitute compelling grounds' for a different interpretation of the Directive when seen as part of the EEA Agreement than in its capacity as pure EU law. Based on several provisions of the EEA Agreement dealing specifically with intellectual property rights, the Court came to the conclusion that there were no such 'compelling grounds' in this case.

From this, one can draw two conclusions. Firstly, in so far as there are no arguments why a certain rule should be understood differently in EU law and EEA law, the EFTA Court will as a general rule adjust its interpretation to that of the ECJ without 'reviewing' ECJ's latest case law on its merits. In other words, it will treat this case law basically in the same way as it treats new case law of the ECJ on questions where the EFTA Court has not previously expressed itself. Secondly, to the extent the ECJ has also interpreted EEA law; the EFTA Court will still make its own assessment of whether EEA law should be different

⁴¹ The Court also mentioned Protocol 28 to the EEA Agreement in this context, which contains a specific provision on intellectual property rights and which provides that exhaustion of rights shall be dealt with according to the relevant rulings of the ECJ given prior to the signature of the Agreement, but 'without prejudice to future developments of case law'.

from EU law. However, by making ‘compelling grounds’ the relevant criterion, it would seem that it would take weighty arguments to let the specific EEA law arguments trump the aim of securing homogeneity between EU law and EEA law.

Differences between EEA law and EU law

As has just been mentioned, EEA law sometimes depart from EU law and this may have consequences also for the interpretation of EEA law on points where the EEA provisions at the outset are copied from EU law. The EFTA Court has therefore in several judgments made the observation that ‘differences in scope and purpose may under specific circumstances lead to a difference in interpretation between EEA law and EC law’.⁴² As mentioned above (see p. 258ff), the Court has even hinted that the principles of state liability may be different for this reason.⁴³

However, the Court has rarely acted on this. *Maglite* has already been mentioned. The only other case which springs to mind is a case which demonstrates that the differences that may exist are not necessarily in the form of the EEA Agreement being ‘less integrationist’ than EU law. In *Einarsson*,⁴⁴ the Court had been asked whether it was contrary to Art. 14 EEA (corresponding to Art. 90 EC) on discriminatory internal taxation for Iceland to maintain a lower VAT rate on books in the Icelandic language than on books in other languages. One of the arguments of the Icelandic Government for why this preferential tax treatment was lawful was that Art. 6(3) of the Treaty on the European Union (TEU) provides that ‘[t]he Union shall respect the national identity of its Member States’. A similar provision is not found in the EEA Agreement, since this Agreement has not been updated to take account of the developments of EU primary law after 1992. The Icelandic Government nevertheless argued that the provision ought to be taken into account when interpreting the EEA Agreement. The Court remarked that

⁴² Cf. for instance Case E-3/98, *Rainford-Towning* [1998] EFTA Ct. Rep. 205, para. 21, Case E-2/06, *EFTA Surveillance Authority v. Norway* [2007] EFTA Ct. Rep. 164 (the waterfalls case – ‘*hjemfall*’), para. 59, and *L’Oréal*, *supra* note 35, para. 27.

⁴³ *Karlsson*, *supra* note 13, para. 30.

⁴⁴ Case E-1/01, *Einarsson* [2002] EFTA Ct. Rep. 1.

[s]ince the Treaty on European Union was negotiated before the conclusion of the EEA Agreement, it must be assumed that this discrepancy is intentional. The Court cannot base its reasoning on the analogous application of Article 6(3) TEU in the instant case.⁴⁵

This potentially opens up for an EEA Agreement that on certain points will deviate from EU law, and not necessarily to the advantage of what one might presume to be the 'state interests' of integration-wary EFTA states. However, a Court which 'updated' the EEA Agreement with those parts of EU primary law which it presumed the EFTA states would like (although they may not have found it in their wider interest to raise the question of a treaty revision with the EU), and disregarded other developments of primary law, would overstep its powers.

On the other hand, it is doubtful that the result in *Einarsson* would have been different had the EFTA Court in principle recognised the relevance of Art. 6(3) TEU. The provision does not necessarily lead to the result that differentiated VAT rates of the sort employed by Iceland would be OK. By not recognising the relevance of the provision, the EFTA Court did not have to go into this question.

Furthermore, in cases concerning the free movement of goods, services etc., ECJ case law opens up for a wide variety of societal concerns to serve as a basis for lawful restrictions on free movement. To the extent developments of EU primary law reflect such concerns the EFTA Court will often be able to take them into account in any case.

The EFTA Court's attitude towards the unilateral understanding by EFTA states of EEA law at the time of signature of the Agreement

As is always the case when states enter into treaties, also the EFTA states had their understanding of what their rights and obligations would be under the EEA Agreement. Due to the extensive case law of the ECJ, this understanding was more detailed on many points than

⁴⁵ Ibid., para. 43.

is the case for most other treaties. However, many questions were of course still open, such as the concept of 'restriction' with regard to the right of establishment, mentioned above (see p. 263ff).

In a couple of cases, the EFTA states have argued that their understanding, at the time of signature, of what their obligations would be under the Agreement, ought to influence the EFTA Court's interpretation of the provisions in question. So far, the Court has not been willing to listen.

In the Liechtenstein helplessness allowance case, Liechtenstein argued that it had been a condition sine qua non for the country when it joined the EEA that the social security benefit in question would only have to be paid out to residents. Apparently, this had been raised by Liechtenstein during the negotiations with the other contracting parties, and on their advice, Liechtenstein had changed its system on a certain point in order for the benefit in question to qualify as non-exportable. (However, according to the ECJ case law on which the EFTA Court based itself, this change was insufficient.) The Court was not persuaded by Liechtenstein's reference to its informal understanding with the other contracting parties that the benefit was non-exportable. It noted that this has simply led to all the contracting parties to agreeing to the benefit being listed in the annex which at that time was believed to have constitutive effect. Agreement by all contracting parties (or in the EU: acceptance by a qualified majority in the Council) was in any case a precondition for anything being entered into the annex. Therefore, this did not put Liechtenstein in a special position, different from that of the other EEA states, in relation to the question of whether the annex had to be interpreted as having constitutive effect. The Court 'cannot be bound by mere expectations of the Contracting Parties as to the exact content of the obligations the Parties enter into'.⁴⁶

In the waterfalls case⁴⁷ (*'hjemfall'*), the Norwegian and Icelandic Governments likewise argued that the special Norwegian regime for 'reversion' to the state of ownership to waterfalls developed for hydroelectric power production could not be challenged because they

⁴⁶ Cf. para. 63 of the judgment.

⁴⁷ Case E-2/06, *EFTA Surveillance Authority v. Norway* [2007] EFTA Ct. Rep. 164.

concerned the management of essential natural energy resources and therefore fell outside the scope of the Agreement. The Norwegian Government argued that this understanding must be accepted by the Court as it had been expressed during the negotiations for the EEA Agreement and during the subsequent parliamentary procedures as a precondition for ratification. Again, the Court simply stated that 'unilateral expressions of understanding of the kind claimed to have been made by Norway and Iceland cannot constitute [...] circumstances [which lead to a different understanding of EEA law than of EU law].'⁴⁸

On the other hand, in *Einarsson*, the EFTA Court kept the door open for interpreting the EEA Agreement in light of Joint Declarations annexed to the Final Act of the EEA Agreement. The Icelandic Government had argued that also the formulations found in a Joint Declaration on Cultural Affairs provided a basis for accepting the Icelandic VAT regime for books. The Court noted that it 'cannot see that these formulations can provide a concrete basis for national derogations from the important provisions of Article 14 EEA'.⁴⁹ In other words, the Court did not rule that Joint Declarations as such were irrelevant for the interpretation of the Agreement.

Conclusions

As pointed out above (see p. 258ff), an internal market can be defined as a geographical area where the same rules apply to economic activity. Obviously, the best way to achieve this is not to establish two courts which independently of each other shall interpret the applicable rules. Nor is it, for that matter, the best solution to establish this integrated market on the basis of two legal orders, in this case EU law and EEA law. However, for political reasons, some states have not (yet?) wanted to join the EU as regular member states, nor have they been willing to contemplate the ECJ as the sole judicial

⁴⁸ Para. 59 of the judgment. Cf. also the Report for the Hearing in the case, at para. 49. Norway's argument that management of essential energy resources fell outside the scope of the Agreement was in any case somewhat undercut by the fact that the Agreement in Art. 73(1)(c) contains a provision in which the contracting parties pledge, in their actions relating to the environment, to pursue the objective of ensuring a prudent and rational utilisation of natural resources.

⁴⁹ Para. 44 of the judgment.

master of both legal orders. (Such a possibility was never discussed during the negotiations for the EEA Agreement.)

Consequently, a separate EFTA Court is necessary for the EFTA side of the EEA. This Court has seen it as its prime responsibility to safeguard homogeneity, and it has done so in the only way it could be achieved, namely by closely following the case law of the ECJ. Had the Court utilised the possibility under Art. 3(2) to distance itself from new ECJ case law on points where it thought that ECJ case law had developed in the direction of even further integration, compared to the situation at the time of signature of the Agreement, it is questionable whether the EEA Agreement would have survived for 15 years.

However, it has to be said that the EFTA Court has not been faced with any real 'revolutions' from the ECJ in this regard. Should that happen, it is likely that it would happen in fields where EU primary law has developed since the drafting of the EEA Agreement, and that the reasoning of the ECJ would draw on this development. Here, we have seen that the EFTA Court has been unwilling to interpret new provisions of EU primary law into the EEA Agreement.

The one exception to the EFTA Court following ECJ case law concerning EU law is direct effect and primacy. However, also the ECJ itself has recognised that the EEA Agreement is different on this point.

Still, it may be seen as an anomaly that the EEA internal market consists of one part which recognises direct effect and primacy of the internal market rules, and one part which does not. In theory, this means that economic operators face different legal regimes 'on the ground', before national authorities and courts. However, this does not seem to have been a big practical problem. Violations of EU law happen in the EU member states in spite of direct effect and primacy, and it does not seem that there are more violations of the common rules in Iceland and Norway, without direct effect and primacy, than there are in comparable EU member states.

Had the EFTA Court established direct effect and primacy as part of EEA law, it is likely that its legitimacy would have been badly

damaged in the Nordic EFTA states. Potentially, it could have been the end of the Agreement.

Generally, then, it would seem that the EFTA Court has managed to navigate in a way which does not please everybody at all times, but which nevertheless has contributed to keeping the EEA Agreement afloat for 15 years. In 1992, few people thought it would last for so long.

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The purpose of this report is to analyse the consequences that the judicial decisions of the European Court of Justice (ECJ) have on the European political system, from both a theoretical and a practical perspective.

The jurisprudence of the European Court of Justice of the European Communities is an optimal repository of evidence for the purposes of the workshop that this report emanates from. This is so for three concurrent reasons. First, the ECJ has played a key role as a constitutional court ensuring through its decisions that 'the law is observed' in the whole of the European Union. Second, European integration has proceeded in the absence of a normatively salient 'constitutional moment'; on the contrary, integration has been the result of a progressive process of 'constitutional synthesis' in which a common constitutional law has been concretised by means of distilling the commonalities out of the manifold national constitutional norms. Third, the peculiarity of the constitutional setup of the European Union has rendered more obviously salient the democratic legitimacy (or lack thereof) of the norms regarded as part of EU law.

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