The Contribution of the United States Supreme Court and the European Court of Justice in the Vertical and Horizontal Allocation of Power

By

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ABSTRACT

This thesis explores the contribution of the US Supreme Court (USSC) and the European Court of Justice (ECJ) in the vertical and horizontal allocation of power. Said differently, it answers the two following questions: How do both Courts draw the line between the realm of politics and judicial process? How do they allocate power between the Union and its component States? After examining standing, the political question doctrine, negative and positive integration and liability in damages on both sides of the Atlantic, it is concluded that both Courts should not always look for “substantive” constitutional benchmarks. The reason lies in that sometimes the latter may turn to be either questions deemed too political for judicial resolution or insufficient to control congressional or Community legislative powers. Additionally, the judicial department should also pay due regard to a “process” review. This type of review would operate at two levels. At first stage, Courts should solve flaws in the procedure by which the political institutions adopt their decisions. For instance, this would be the case where procedures neglect “discrete and insular” minorities, or where they entrench incumbent political majorities. Thus, judicial review would be principled upon understanding “democracy” as an intangible value that cannot succumb to majoritarian pressures. At a second stage, Courts should also examine whether, in their deliberations, political actors pay due account to all interests at stake, particularly, to those not represented in the political process.
Statutory Declaration

I hereby declare that this thesis has been written by myself without any external unauthorised help, that it has been neither presented to any institution for evaluation nor previously published in its entirety or in parts. Any parts, words or ideas, of the thesis, however limited, which are quoted from or based on other sources, have been acknowledged as such without exception.
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I am very grateful to my parents and sisters for their never-ending encouragements and for always reminding me to be inspired by what Antonio Machado once wrote,

“Caminante, son tus huellas
el camino y nada más;
caminante, no hay camino,
se hace camino al andar.

Al andar se hace camino
y al volver la vista atrás
se ve la senda que nunca
se ha de volver a pisar”

For being the way she is, I owe Isabelle much more than the dedication of my PhD Thesis.
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<th><strong>ABBREVIATIONS</strong></th>
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</tr>
</tbody>
</table>
# TABLE OF CONTENTS

ABBREVIATIONS .................................................................................................................. 5

TABLE OF CASES .................................................................................................................. 11

INTRODUCTION ...................................................................................................................... 23

CHAPTER I
Standing Doctrines in the US and in the EU ......................................................................... 30
I.- Standing under Article III US Constitution and Article 230 EC .................. 35
   A.- General Overview. – Concept and Purposes........................................ 35
       1.- Concept .................................................................................... 35
       2.- The purpose of Standing ......................................................... 38
   B.- Standing and public applicants...................................................... 40
       1.- Standing of the US Government, States and Members of
          Congress ...................................................................................... 41
       2.- Concluding Remarks................................................................. 46
   C.- Standing and private applicants ................................................... 47
       1.- “Injury-in-fact” ......................................................................... 47
       2.- “Individual concern” and “General Grievance”......................... 51
       3.- Direct Concern and the Causation Requirement under Article
          III US Constitution ........................................................................ 59
II.- Standing as a “Jurisdictional Shifting Strategy” ........................................... 66
    1.- Article 234 EC, an alternative remedy? .................................... 66
    2.- “No jurisdictional shifting” strategy under US law ...................... 70
III.- Standing before national courts: Article III US Constitution a
     complying example .............................................................................. 72
IV.- Conclusion ............................................................................................... 76

CHAPTER II
The Political Question Doctrine in the US and in the EU ........................................ 79
I.- The Political Question Doctrine and the US Supreme Court.......................... 80
   A.- Concept ........................................................................................ 80
   B.- The Normative Justification ........................................................ 82
   C.- The Rise and Fall of the Political Question Doctrine ..................... 84
II.- The Political Question Doctrine and Foreign Policy .................................... 93
III.- Political Questions in the EU ................................................................. 100
   A.- Article 7 TEU and the Guarantee Clause ........................................ 100
   B.- Judicial Review and European Elections ..................................... 103
   C.- Self-governance of the European Parliament ............................... 106
   D.- Treaty Amendments .................................................................... 110
   E.- Foreign Policy ............................................................................. 111
       1.- Horizontal dimension ............................................................. 112
       2.- US Flexibility vs. EU Rigidity: Expanding judicial control over
           the CFSP .................................................................................... 114
       3.- Vertical Dimension .................................................................. 119
IV.- Concluding Remarks .................................................................................. 123
CHAPTER III
Negative Integration: The Dormant Commerce Clause And Article 28 EC

I.- Constitutional Limits on State Regulatory Powers .......................................................... 129
II.- Constitutional Foundation and Normative Evolution .................................................. 134
III.- Discriminatory State Measures ................................................................................. 139
   A.- Facial and Material Discrimination ......................................................................... 139
   B.- The American “Virtually per se rule of invalidity” and Article 30 EC .................... 142
   C.- Special Provisions ....................................................................................................... 145
   D.- Discrimination to the benefit of one single operator ................................................ 146
   E.- The Market-Participant Exception and Congressional Superseding Powers .......... 149
IV.- Non-Discriminatory State Measures .......................................................................... 152
   A.- The Pike Balancing Test ........................................................................................... 152
   B.- The Principle of Mutual Recognition and Mandatory Requirements .................... 155
   C.- Keck: non-discriminatory selling arrangements fall outside Article 28 EC .......... 158
V.- Extraterritorial and inconsistent state regulations: An example, the Internet .......... 165
VI.- A Comparison: Beyond discrimination? ..................................................................... 170
VII.- Conclusions .................................................................................................................. 174

CHAPTER IV
Positive Integration: The Commerce Clause and Article 95 EC ......................... 176
I.- The Principle of Enumerated Powers applied to the Commerce Clause 177
   A.- The History of the Commerce Clause until Lopez .................................................... 177
   B.- The Lopez-Morrison-Raich Trilogy: The beginning and the end of “the federalist revolution” ................................................................. 183
      1.- United States v Lopez: The beginning ................................................................. 183
      2.- United States v Morrison: The Confirmation ...................................................... 187
      3.- Gonzales v Raich: The end? ................................................................................ 188
      4.- The Lopez and Morrison Legacy after Raich ....................................................... 191
   C.- The Necessary and Proper Clause: An alternative approach .... ............................. 193
II.- The Principle of Attribution applied to Article 95 EC ...................................... 195
   A.- Article 95 EC (ex 100a EEC) and Titanium Dioxide ............................................. 195
   B.- The Tobacco Saga in three acts ................................................................................. 198
      1.- Act I. – Tobacco Advertising I ............................................................................. 198
      2.- Act II. – BAT, Arnold André and Swedish Match ................................................ 204
      3.- Act III. - Tobacco advertising II ............................................................................... 208
   C.- Article 308 EC: a “Scalia-like” alternative? ................................................................. 212
III.- Enumerated Powers Compared ................................................................................. 213
   A.- Can the Community criminalise the possession of cannabis under Article 95 EC? .................................................................................................................. 213
   B.- Appreciable distortions of competition ................................................................. 216
C.- Concluding Remarks ................................................................. 217
IV.- Other Solutions to Counterbalance the Centripetal Trend .......... 218
A.- Reliance on the Political Process .............................................. 218
B.- Controlling the Exercise of Commercial Power ......................... 222
1.- The Principle of Proportionality .............................................. 222
2.- The principle of Subsidiarity ................................................... 225
V.- Conclusion ................................................................................... 228

CHAPTER V
The Principles of Sovereign Immunity of States and Non-Contractual
State Liability Compared ................................................................. 230
I.- The Principle of Sovereign Immunity of States under US Law ........ 232
A.- Concept ................................................................................... 232
B.- Legal Basis of State Sovereign Immunity .................................. 234
C.- Why has the USSC endorsed States’ immunity? ......................... 241
D.- Alternative Remedies ............................................................... 245
1.- United States as a Plaintiff ...................................................... 245
2.- Suits for Prospective relief: Ex parte Young ............................... 247
3.- Suits for retrospective relief: state official’s liability ................... 250
II.- The Principle of State Liability under EC Law .............................. 254
A.- Concept ................................................................................... 254
B.- The Break-through: Francovich ............................................... 256
C.- Legal Basis .............................................................................. 259
1.- Principle of Effectiveness ...................................................... 259
2.- Principle of Loyal Cooperation: Article 10 EC ......................... 261
D.- From filling in a lacuna to a General Principle: Joined Cases
Brasserie du Pêcheur and Factortame III ......................................... 262
E.- Conditions of State Liability .................................................... 264
1.- The law infringed was intended to confer rights on individuals. 265
2.- Serious breach ....................................................................... 266
3.- Direct casual link ................................................................... 268
F.- Liability of the national judiciary .............................................. 270
III.- Structural Differences and State Financial Implications ............. 275
A.- Structural differences: EC Directives and the Principle of “Anti-
Commandeering” ........................................................................... 276
1.- Some theoretical views on Commandeering .............................. 276
2.- The EU and the US ................................................................. 278
3.- State Liability and Commandeering ....................................... 280
4.- Köbler: a functional substitute for the absence of an appellate
jurisdiction. ................................................................................... 283
B.- Remedies and the State Treasuries ......................................... 286
1.- America’s antagonism between past remedies and future rights 286
2.- The ECJ’s convergent view on remedies ................................... 289
IV.- Conclusions ............................................................................. 291

CONCLUSIONS ............................................................................... 295
ANNEX ........................................................................................... 310
BIBLIOGRAPHY ............................................................................. 313
### TABLE OF CASES

#### EU Case-Law

- **ECJ Cases**

<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joined Cases 19/62 to 22/62</td>
<td><em>Fédération nationale de la boucherie en gros and Others v Council</em> [1962] ECR 491</td>
</tr>
<tr>
<td>Case 6/64</td>
<td><em>Costa v ENEL</em> [1964] ECR 585</td>
</tr>
<tr>
<td>Cases 9/70</td>
<td><em>Frans Grad v Finanzamt Traunstein</em> [1971] 2 ECR 825</td>
</tr>
<tr>
<td>Case 8/74</td>
<td><em>Procureur du Roi v Dasonville</em> [1974] ECR 837</td>
</tr>
<tr>
<td>Case 41/74</td>
<td><em>Van Duyn v the Home Office</em> [1974] ECR 1337</td>
</tr>
<tr>
<td>Case 72/74</td>
<td><em>Union Syndicale and Others v Council</em> [1975] ECR 401</td>
</tr>
<tr>
<td>Case C-43/75</td>
<td><em>Defrenne v Sabena,</em> [1976] ECR 455</td>
</tr>
<tr>
<td>Case 59/75</td>
<td><em>Pubblico Ministero v Manghera</em> [1976] ECR 91</td>
</tr>
<tr>
<td>Case 60/75</td>
<td><em>Russo v AIMA</em> [1976] ECR 45</td>
</tr>
<tr>
<td>Case 33/76</td>
<td><em>Rewe v Landwirtschaftskammer für das Saarland</em> [1976] ECR 1989</td>
</tr>
<tr>
<td>Case 45/76</td>
<td><em>Comet BV v Produktschap voor Siergewassen</em> [1976] ECR 2043</td>
</tr>
<tr>
<td>Joined Cases 103 and 145/77</td>
<td><em>Royal Scholten-Honig v Intervention Board for Agricultural Produce,</em> [1978] ECR 2037</td>
</tr>
<tr>
<td>Case 78/85</td>
<td><em>Group of the European Right v Parliament</em> [1986] ECR 1753</td>
</tr>
<tr>
<td>Case 120/78</td>
<td><em>Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)</em> [1979] ECR I-649</td>
</tr>
<tr>
<td>Case 148/78</td>
<td><em>Ratti</em> [1979] 1629</td>
</tr>
<tr>
<td>Case 34/79</td>
<td><em>Henn and Darby</em> [1979] ECR 3795</td>
</tr>
<tr>
<td>Case 155/80</td>
<td><em>Oebel</em> [1981] ECR 1993</td>
</tr>
<tr>
<td>Case 158/80</td>
<td><em>Rewe v Hauptzollamt Kiel</em> [1981] ECR 1805</td>
</tr>
<tr>
<td>Case 75/81</td>
<td><em>Joseph Henri Thomas Blesgen v Belgian State,</em> [1982] ECR 1211</td>
</tr>
<tr>
<td>Case 124/81</td>
<td><em>Commission v United Kingdom (UHT Milk)</em> [1983] ECR 203</td>
</tr>
<tr>
<td>Case 249/81</td>
<td><em>Commission v Ireland (Buy Irish)</em> [1982] ECR 4005</td>
</tr>
<tr>
<td>Case 286/81</td>
<td><em>Criminal proceedings against Oosthoeke's Uitgeversmaatschappij BV</em> [1982] ECR 4575</td>
</tr>
<tr>
<td>Case 40/82</td>
<td><em>Commission v United Kingdom,</em> [1984] ECR 2793</td>
</tr>
<tr>
<td>Joined Cases 177 &amp; 178/82</td>
<td><em>Criminal proceedings against Van de Haar</em> [1984] ECR 1797</td>
</tr>
<tr>
<td>Case 191/82</td>
<td><em>Fedidi v Commission</em> [1983] ECR 2913</td>
</tr>
<tr>
<td>Case 222/82</td>
<td><em>Apple and Pear Development Council v Lewis</em> [1983] ECR 4083</td>
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<tr>
<td>Cases 15/83</td>
<td><em>Denkavit Nederland</em> [1984] ECR 2171</td>
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<tr>
<td>Cases 72/83</td>
<td><em>Campus Oil</em> [1984] ECR 2727</td>
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<tr>
<td>Case 207/83</td>
<td><em>Commission v UK (Origin Marking)</em> [1985] ECR 1202</td>
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<td>Joined Cases 60 and 61/84</td>
<td>Cinéthèque SA and others v Fédération nationale des cinémas français [1985] ECR 2605</td>
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<tr>
<td>Case 152/84</td>
<td>Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723 (Marshall I)</td>
</tr>
<tr>
<td>Case 178/84</td>
<td>Commission v Germany (&quot;Beer Purity Case&quot;) [1978] ECR1227</td>
</tr>
<tr>
<td>Case 222/84</td>
<td>Johnston v RUC [1986] ECR 1651</td>
</tr>
<tr>
<td>Case 282/85</td>
<td>DEFI v Commission [1986] ECR 2469</td>
</tr>
<tr>
<td>Case 222/86</td>
<td>UNECTEF v Heylens [1987] ECR 4097</td>
</tr>
<tr>
<td>Case 302/86</td>
<td>Commission v Denmark [1988] ECR 4607</td>
</tr>
<tr>
<td>Case C-45/87</td>
<td>Commission v Ireland (Dundalk Waters) [1988] ECR 4929</td>
</tr>
<tr>
<td>Case 106/87</td>
<td>Asteris [1988] ECR 5515</td>
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<tr>
<td>Case 302/87</td>
<td>European Parliament v Council (Comitology case) [1988] ECR 5615</td>
</tr>
<tr>
<td>Case 382/87</td>
<td>R. Buet and Educational Business Services (EBS) v Ministère public [1989] ECR 1235</td>
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<tr>
<td>Case C-21/88</td>
<td>Du Pont de Nemours Italiana [1990] ECR I-889</td>
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<tr>
<td>Case 152/88</td>
<td>Sofrintop v Commission [1990] ECR 2477</td>
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<tr>
<td>Case C-23/89</td>
<td>Quietlynn Limited and Brian James Richards v Southend Borough Council, [1990] ECR I-3059</td>
</tr>
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<td>Case 45/89</td>
<td>Commission v Council (Generalized Tariff Preferences) [1987] ECR 1493</td>
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<tr>
<td>Case C-188/89</td>
<td>Foster v British Gas [1990] ECR-I 3313</td>
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<tr>
<td>Case C-213/89</td>
<td>The Queen v Secretary of State for Transport ex parte: Factortame Ltd and others [1990] ECR I-2433</td>
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<tr>
<td>Case C-221/89</td>
<td>The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others (&quot;Factortame II&quot;) [1991] ECR I-3905</td>
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<tr>
<td>Case 300/89</td>
<td>Commission v Council (Titanium Dioxide) [1991] ECR I-2867</td>
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<tr>
<td>Joined Cases C-6/90 and C-9/90</td>
<td>Andrea Francovich and Danila Bonifaci and others v Italian Republic, [1991] ECR I-5357</td>
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<td>Case C-68/90</td>
<td>Blot and Front national v Parliament [1990] ECR 1-2101</td>
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<td>Case C-70/88</td>
<td>Parliament v Council, (Chernobyl) [1990] ECR I-2041</td>
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<td>Joined cases C-87/90, C-</td>
<td>Verholen and others v Sociale</td>
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<td>Verzekeringsbank Amsterdam [1991] ECR I-3757</td>
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<td>Case C-313/90</td>
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<td>Cases C-126/91</td>
<td>Schutzverband gegen Unwesen in der Wirtschaft e.V. v Yves Rocher GmbH [1993] ECR I-2361,</td>
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<td>Case C-155/91</td>
<td>Commission v Council (Waste 1) [1993] ECR I-940</td>
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<tr>
<td>Case C-213/91</td>
<td>Abertal and Others v Commission [1993] ECR I-3177</td>
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<tr>
<td>Joined Cases C-267 and 268/91</td>
<td>Criminal proceedings against Bernard Keck and Daniel Mithouard, [1993] ECR I-6097</td>
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<td>Case C-271/91</td>
<td>Marshall v Southampton &amp; SW Hampshire Area Health Authority, [1993] ECR I-4367</td>
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<tr>
<td>Joined cases C-277/91, C-318/91 and C-319/91</td>
<td>Ligur Carni and Others v Unità Sanitaria Locale, [1993] ECR I-6621</td>
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<td>Paola Faccini Dori v Recreb Srl, [1994] ECR I 3325</td>
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<td>Schindler [1994] ECR I-1039</td>
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<td>Salomone Haim v Kassenzahnarztliche Vereinigung Nordheim, [1994] ECR I-425</td>
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<td>Case C-359/92</td>
<td>Germany v Council [1994] ECR I-3685</td>
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<tr>
<td>Case C-391/92</td>
<td>Commission v Greece (Baby Milk) [1996] ECR I-1621</td>
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<tr>
<td>Case C-19/93</td>
<td>Rendo and Others v Commission [1995] ECR I-3319</td>
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<tr>
<td>Joined Cases C-46/93 and C-48/93</td>
<td>Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, [1996] ECR I-1029</td>
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<td>Case C-51/93</td>
<td>Meyhui [1994] ECR I-3879</td>
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<td>Case C-69/93</td>
<td>Punto Casa v Capena, [1994] ECR I-2355</td>
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<td>Case C-384/93</td>
<td>Alpine Investments [1995] ECR I-1141</td>
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<td>Case C-387/93</td>
<td>Banchero [1995] ECR I-4663</td>
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<td>Case C-392/93</td>
<td>The Queen v H. M. Treasury, ex parte British Telecommunications plc [1996] ECR I-1631, also</td>
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<td>Case C-470/93</td>
<td>Mars [1995] ECR I-1923</td>
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<td>Case C-5/94</td>
<td>The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas, [1995] ECR I-2553</td>
</tr>
<tr>
<td>Case C-55/94</td>
<td>Gebhard [1995] ECR I-4165</td>
</tr>
<tr>
<td>Case C-63/94</td>
<td>Belgapom v ITM Belgium [1995] ECR I-2467</td>
</tr>
<tr>
<td>Case</td>
<td>Joined Cases</td>
</tr>
<tr>
<td>------</td>
<td>--------------</td>
</tr>
<tr>
<td>Case C-137/94</td>
<td>R v Secretary of Health, 1995 ECR I-3407</td>
</tr>
<tr>
<td>Joined Cases C-178, C-179, C-188 to 190/94</td>
<td>Dillenkofer and others v Budesrepublik Deutschland, 1996 ECR I-4845</td>
</tr>
<tr>
<td>Case C-209/94 P</td>
<td>Buralux and Others v Council, 1996 ECR I-615</td>
</tr>
<tr>
<td>Joined Cases C-321 to 324/94</td>
<td>Criminal proceedings against Jacques Pistre and other, 1997 ECR I-2343.</td>
</tr>
<tr>
<td>Case C-83/94</td>
<td>Leifer and Others, 1995 ECR I-3231</td>
</tr>
<tr>
<td>Case C-10/95P</td>
<td>Assocarne v Council, 1995 ECR I-4149</td>
</tr>
<tr>
<td>Joined Cases C-34 to 36/95</td>
<td>Konsumentombudsmannen (KO) v De Agostini and others, 1997 ECR I-3843</td>
</tr>
<tr>
<td>Case C-124/95</td>
<td>the Queen, ex parte Centro-Com v HM Treasury and Bank of England, 1997 ECR I-81.</td>
</tr>
<tr>
<td>Case C-189/95</td>
<td>Franzén, 1997 ECR I-5909.</td>
</tr>
<tr>
<td>Case C-265/95</td>
<td>Commission v France, 1997 ECR I-6959</td>
</tr>
<tr>
<td>Case C-293/95P</td>
<td>Odigitria AAE v Council and Commission, 1996 ECR I-6123</td>
</tr>
<tr>
<td>Case C-321/95P</td>
<td>Greenpeace &amp; Others v Commission, 1998 ECR I-1651</td>
</tr>
<tr>
<td>Case C-368/95</td>
<td>Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag, 1997 ECR I-3689</td>
</tr>
<tr>
<td>Case C-1/96</td>
<td>Compassion in World Farming, 1998 ECR I-1251</td>
</tr>
<tr>
<td>Case C-15/96</td>
<td>Schoning-Kougebetopolou, 1998 ECR I-47</td>
</tr>
<tr>
<td>Case C-114/96</td>
<td>Kieffer and Thill, 1997 ECR I-3629</td>
</tr>
<tr>
<td>Case C-170/96</td>
<td>Commission v Council, (Airport Transit Visa) 1998 ECR I-2763</td>
</tr>
<tr>
<td>Case C-319/96</td>
<td>Brinkmann Tabakfabriken GmbH v Skatteministeriet, 1998 ECR I-5255</td>
</tr>
<tr>
<td>Case C-95/97</td>
<td>Région Wallonne v Commission, 1997 ECR I-1787</td>
</tr>
<tr>
<td>Case C-180/97</td>
<td>Regione Toscana v Commission, 1997 ECR I-5245</td>
</tr>
<tr>
<td>Case C-189/97</td>
<td>Parliament v Council, 1999 ECR I-4741</td>
</tr>
<tr>
<td>Case C-209/97</td>
<td>Commission v Council, 1994 ECR I-3681</td>
</tr>
<tr>
<td>Case C-269/97</td>
<td>Commission v Council (Beef Labelling), 2000 ECR I-2257</td>
</tr>
<tr>
<td>Cases C-273/97</td>
<td>Sirdar v The Army Board and Secretary of State for Defence, 1999 ECR I-7403</td>
</tr>
<tr>
<td>Case C-302/97</td>
<td>Konle v Austria, 1999 ECR I-3099</td>
</tr>
<tr>
<td>Case C-414/97</td>
<td>Commission v Spain, 1999 ECR I-5585</td>
</tr>
<tr>
<td>Case C-424/97</td>
<td>Salomone Haim v Kasenzahnärztliche Vereinigung Nordrhein (No.2), 2000 E.C.R. I-5123</td>
</tr>
<tr>
<td>Case C-437/97</td>
<td>EKIF, 2000 ECR I-1157</td>
</tr>
<tr>
<td>C-285/98</td>
<td>Tanja Kreil v Bundesrepublik Deutschland, 2000 ECR I-69</td>
</tr>
<tr>
<td>C-352/98P</td>
<td>Laboratoires Pharmaceutiques Bergadem and Goupil v Commission, 2000 ECR I-5291</td>
</tr>
<tr>
<td>Case C-376/98</td>
<td>Germany v Parliament and Council (Tobacco Advertising I.), 2000 ECR I-8419</td>
</tr>
<tr>
<td>Case C-379/98</td>
<td>PreussenElektra AG v Schleswag AG, in the</td>
</tr>
<tr>
<td>Case Reference</td>
<td>Description</td>
</tr>
<tr>
<td>----------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Joined Cases C-397 &amp; 410/98</td>
<td>Metallgesellschaft Ltd and Others (C-397/98), Hoechst AG and Hoechst (UK) Ltd (C-410/98) v Commissioners of Inland Revenue and HM Attorney General [2001] ECR I-1727</td>
</tr>
<tr>
<td>Case C-423/98</td>
<td>Alfredo Albore [2000] ECR I-5965</td>
</tr>
<tr>
<td>Case C-448/98</td>
<td>Guimont [2000] ECR I-10663</td>
</tr>
<tr>
<td>Case C-67/97</td>
<td>Criminal proceedings against Ditlev Bluhme, [1998] ECR I-8033</td>
</tr>
<tr>
<td>Case C-74/99</td>
<td>The Queen v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others [2000] ECR I-8599.</td>
</tr>
<tr>
<td>Case C-50/00P</td>
<td>Unión de Pequeños Agricultores v Council (UPA) [2002] ECR I-6677</td>
</tr>
<tr>
<td>Case C-112/00</td>
<td>Schmidberger v. Austria [2003] ECR I-5659</td>
</tr>
<tr>
<td>Case C-118/00</td>
<td>Gervais Larisy v Institut national d'assurances sociales pour travailleurs independants (&quot;Inasti&quot;) (No.2) [2001] E.C.R. I-5063</td>
</tr>
<tr>
<td>Case C-129/00</td>
<td>Commission v Italy [2003] ECR 1-14637</td>
</tr>
<tr>
<td>Case C-253/00</td>
<td>Antonio Muñoz y Cía SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd [2002] ECR I-7289</td>
</tr>
<tr>
<td>Case C-325/00</td>
<td>Commission v Germany [2002] ECR I-9977</td>
</tr>
<tr>
<td>Case C-416/00</td>
<td>Morellato [2003] ECR I-9343</td>
</tr>
<tr>
<td>Case C-13/01</td>
<td>Safalero Srl v Prefetto di Genova [2003] ECR I-8679</td>
</tr>
<tr>
<td>Case C-63/01</td>
<td>Samuel Sidney Evans v The Secretary of State for the Environment, Transport and the Regions and The Motor Insurers' Bureau [2003] ECR 1-14447</td>
</tr>
<tr>
<td>C-224/01</td>
<td>Köbler v Austria [2003] ECR I-10239</td>
</tr>
<tr>
<td>Case C-243/01</td>
<td>Gambelli and Others [2003] ECR I-13031</td>
</tr>
<tr>
<td>Case C-488/01 P</td>
<td>Martínez v Parliament [2003] ECR I-13355</td>
</tr>
<tr>
<td>Case C-491/01</td>
<td>The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd [2002] ECR I-11453</td>
</tr>
<tr>
<td>Case C-491/01</td>
<td>British American Tobacco [2002] ECR I-11453</td>
</tr>
<tr>
<td>Case C-71/02</td>
<td>Karner v Troostwijk, [2004] ECR 13025</td>
</tr>
<tr>
<td>Case C-216/02</td>
<td>Österreichischer Zuchtverband für Ponys, Kleinpferde und Spezialrassen v Burgenländische Landesregierung [2004] ECR I-10683</td>
</tr>
<tr>
<td>Case C-222/02</td>
<td>Peter Paul and Others v Bundesrepublik</td>
</tr>
<tr>
<td>Case Number</td>
<td>Description</td>
</tr>
<tr>
<td>-------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Case C-239/02</td>
<td><em>Douvè Egberts</em> [2004] ECR I-7007</td>
</tr>
<tr>
<td>Case C-263/02 P</td>
<td><em>Commission v Jégo-Quéré</em> [2004] ECR I-3425</td>
</tr>
<tr>
<td>Case C-434/02</td>
<td><em>Arnold André</em> [2004] ECR I-11825</td>
</tr>
<tr>
<td>Case C-438/02</td>
<td><em>Criminal proceedings against Krister Hanner</em> [2005] ECR I-04551</td>
</tr>
<tr>
<td>Case C-78/03P</td>
<td><em>Commission v Germany (ARE case)</em> [2005] ECR I-10737</td>
</tr>
<tr>
<td>C-131/03P</td>
<td><em>Reynolds Tobacco and Others v Commission</em> [2006] ECR I-7795</td>
</tr>
<tr>
<td>C-173/03</td>
<td><em>Traghetto del Mediterraneo</em> [2006] ECR I-5177</td>
</tr>
<tr>
<td>Case C-208/03P</td>
<td><em>Jean-Marie Le Pen v Parliament</em> [2005] ECR I-6051</td>
</tr>
<tr>
<td>Case C-209/03</td>
<td><em>The Queen (on the application of Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills</em>, [2005] ECR I-2119</td>
</tr>
<tr>
<td>Case C-380/03</td>
<td><em>Germany v Parliament and Council</em> [2006] ECR I-11573</td>
</tr>
<tr>
<td>Case C-470/03</td>
<td><em>A.G.M. – COS.MET Srl</em> [2007] ECR I-2749</td>
</tr>
<tr>
<td>Case C145/04</td>
<td><em>Spain v United Kingdom</em>, [2006] ECR I-7917</td>
</tr>
<tr>
<td>Joined Cases C-154/04 and C-155/04</td>
<td><em>Alliance for Natural Health and Others</em> [2005] ECR I-6451</td>
</tr>
<tr>
<td>Joined Cases C-158 and 159/04</td>
<td><em>Alfa-Vita</em> [2006] ECR I-8135</td>
</tr>
<tr>
<td>Case C-170/04</td>
<td><em>Rosengren and Others v Riksåklagaren</em> [2007] ECR I-04071</td>
</tr>
<tr>
<td>Case C-300/04</td>
<td><em>Eman and Sevinger</em> [2006] ECR I-8055</td>
</tr>
<tr>
<td>Case C-354/04 P</td>
<td><em>Segi v Council</em> [2007] ECR I-1579</td>
</tr>
<tr>
<td>Case C-434/04</td>
<td><em>Ahokainen and Leppik</em>, [2006] ECR I-9171</td>
</tr>
<tr>
<td>Case C-91/05</td>
<td><em>Commission v Council, 20 May 2008, n.y.r.</em></td>
</tr>
<tr>
<td>Case C-142/05</td>
<td><em>Mickelsson and Roos</em>, 14 December 2006, n.y.r.</td>
</tr>
<tr>
<td>Case C-362/05 P</td>
<td><em>Wunenburger v Commission</em> [2007] ECR I-4333</td>
</tr>
<tr>
<td>Case C-402/05</td>
<td><em>Kadi v Council</em>, 3 September 2008, n.y.r.</td>
</tr>
<tr>
<td>Case C-432/05</td>
<td><em>Unibet</em> [2007] ECR I-2271</td>
</tr>
<tr>
<td>C-440/05</td>
<td><em>Commission v Council, n.y.r. 23 October 2007</em></td>
</tr>
</tbody>
</table>

• **CFI Cases**

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case 11/82</td>
<td><em>Piraiki-Patraiki and Others v Commission</em> [1985] ECR 207</td>
</tr>
<tr>
<td>Case T-113/89</td>
<td><em>Nefarma and Bond van Groothandelaren in het Pharmaceutische Bedrijf v Commission</em> [1990] ECR II-797</td>
</tr>
<tr>
<td>Case T-435/93</td>
<td><em>ASPEC and Others v Commission</em> [1995] ECR II-1281</td>
</tr>
<tr>
<td>Case T-442/93</td>
<td><em>AAC and Others v Commission</em> [1995] ECR II-1329</td>
</tr>
<tr>
<td>----------------------------</td>
<td>---------------------------------------------------------------</td>
</tr>
<tr>
<td>Case T-266/94</td>
<td>Skibsværftsforeningen and Others v Commission [1996] ECR II-1399</td>
</tr>
<tr>
<td>Case T-380/94</td>
<td>AIUFFASS and AKT [1996] ECR II-2169</td>
</tr>
<tr>
<td>Case T-13/99</td>
<td>Pfizer Animal Health v Council [2002] ECR II-3305 and</td>
</tr>
<tr>
<td>Case T-212/00</td>
<td>Nuove Industrie Molisane v Commission [2002] ECR II-347</td>
</tr>
<tr>
<td>Case T-353/00</td>
<td>Le Pen v Parliament [2003] ECR II-1729</td>
</tr>
<tr>
<td>Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01</td>
<td>Philip Morris and Others v Commission [2003] ECR II-1</td>
</tr>
<tr>
<td>T-315/01</td>
<td>Kadi v Council [2005] ECR II-3649</td>
</tr>
<tr>
<td>Case C-486/01 P</td>
<td>National Front v Parliament [2004] ECR I-6289</td>
</tr>
<tr>
<td>Case T-228/02</td>
<td>Organisation des Modjahedines du peuple d'Iran v Council [2006] ECR II-04665</td>
</tr>
<tr>
<td>Case T-229/02</td>
<td>PKK v Council, judgment of 3 April 2008, n.y.r.</td>
</tr>
<tr>
<td>Case T-231/02</td>
<td>SNF SA v Commission, [2004] ECR II-3047</td>
</tr>
<tr>
<td>Case T-333/02</td>
<td>Gestoras Pro AmnistiA and Others v Council, not published in the ECR;</td>
</tr>
<tr>
<td>Case T-338/02</td>
<td>Segi and Others v Council [2004] ECR II-1647</td>
</tr>
<tr>
<td>Case T-60/03</td>
<td>Regione Siciliana v Commission [2005] ECR II-4139</td>
</tr>
<tr>
<td>Case T-327/03</td>
<td>Al-Aqsa v Council, judgment of 11 July 2007 n.y.r.</td>
</tr>
<tr>
<td>Case T-47/04</td>
<td>Sison v Council, judgment of 11 July 2007,</td>
</tr>
<tr>
<td>Joined Cases T-236/04 and T-241/04</td>
<td><strong>EEB and Stichting Natuur en Milieu v Commission</strong> [2005] ECR II-4945</td>
</tr>
<tr>
<td>Case T-91/07</td>
<td><strong>WWF-UK v Council</strong>, n.y.r. of 2 June 2008</td>
</tr>
<tr>
<td>Case T-215/07R</td>
<td>Order of the 13 December 2007 (Joint Cases pending C-393/07 and C-9/08)</td>
</tr>
</tbody>
</table>

**US Case-Law**

- **U.S Supreme Court Cases**

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chisholm vs. State of Georgia</td>
<td>2 US. 419 (1793)</td>
</tr>
<tr>
<td>Marbury v Madison</td>
<td>5 U.S. (1 Cranch) 137 (1803)</td>
</tr>
<tr>
<td>Martin v Hunter's Lessee</td>
<td>14 US (Wheat) 304 (1816)</td>
</tr>
<tr>
<td>McCulloch v. Maryland</td>
<td>17 US. 316 (1819)</td>
</tr>
<tr>
<td>Cohens v Virginia</td>
<td>19 US (6 Wheat) 264 (1821)</td>
</tr>
<tr>
<td>Gibbons v Ogden</td>
<td>22 US (9 Wheat.) 1 (1824)</td>
</tr>
<tr>
<td>Martin v Mott</td>
<td>25 US (12 Wheat.) 19, 30 (1827)</td>
</tr>
<tr>
<td>Cooley v Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots</td>
<td>12 How. 299 (1852)</td>
</tr>
<tr>
<td>Paul v Virginia</td>
<td>75 US (8 Wall) 168 (1868)</td>
</tr>
<tr>
<td>Cowles v. Mercer County</td>
<td>7 Wall. 118 (1869)</td>
</tr>
<tr>
<td>New Hampshire v Louisiana</td>
<td>108 US 76 (1883)</td>
</tr>
<tr>
<td>Clark vs. Barnard</td>
<td>108 US. 436 (1883)</td>
</tr>
<tr>
<td>Kimmish v Ball</td>
<td>129 US 217 (1889)</td>
</tr>
<tr>
<td>Hans vs. Louisiana</td>
<td>134 US 1 (1890)</td>
</tr>
<tr>
<td>United States v E.C. Knight Co.</td>
<td>156 US 1 (1895)</td>
</tr>
<tr>
<td>In re Debs</td>
<td>158 US. 564 (1895)</td>
</tr>
<tr>
<td>Smith v. Reeves</td>
<td>178 US. 436 (1900)</td>
</tr>
<tr>
<td>Gunter vs. Atlantic Coast Line R. Co.</td>
<td>200 US 273 (1906)</td>
</tr>
<tr>
<td>Kansas vs. United States</td>
<td>204 US 331 (1907)</td>
</tr>
<tr>
<td>Georgia v Tennessee Cooper Co.</td>
<td>206 US 230 (1907)</td>
</tr>
<tr>
<td>Ex parte Young</td>
<td>209 US 123 (1908)</td>
</tr>
<tr>
<td>Southern Railway Co. v United States</td>
<td>222 US 20 (1911)</td>
</tr>
<tr>
<td>Shreveport Rate Cases</td>
<td>234 US 342 (1914)</td>
</tr>
<tr>
<td>Hammer v Dagenhart</td>
<td>247 U.S. 251 (1918)</td>
</tr>
<tr>
<td>Massachusetts v Mellon</td>
<td>262 US 447 (1923)</td>
</tr>
<tr>
<td>Rooker v Fidelity Trust Co.</td>
<td>263 US 413 (1923)</td>
</tr>
<tr>
<td>Oliver Iron Mining Co. v Lord</td>
<td>262 US 172 (1923)</td>
</tr>
<tr>
<td>DiSanto v Pennsylvania</td>
<td>273 US 34 (1927)</td>
</tr>
<tr>
<td>Fidelity Natural Bank &amp; Trust Co. of Kansas City v Swope</td>
<td>274 US 123 (1927)</td>
</tr>
<tr>
<td>New State Ice Co. v. Liebmann</td>
<td>285 U.S. 262 (1932)</td>
</tr>
<tr>
<td>Mintz v Baldwin</td>
<td>289 US 346 (1933)</td>
</tr>
<tr>
<td>Principality of Monaco v. Mississippi</td>
<td>292 U.S. 313 (1934)</td>
</tr>
<tr>
<td>Baldwin v GAF Seelig, Inc</td>
<td>294 US 511 (1935)</td>
</tr>
<tr>
<td>Louisville Joint Stock Land Bank v Radford</td>
<td>295 US 555 (1935)</td>
</tr>
<tr>
<td>Scherchter Poultry Corp. v United States</td>
<td>295 US 495 (1935)</td>
</tr>
<tr>
<td>United States v Butler</td>
<td>297 US 1 (1936)</td>
</tr>
<tr>
<td>Carter v Carter Coal Co</td>
<td>298 US 238 (1936)</td>
</tr>
<tr>
<td>Ashton v Cameron County Dist.</td>
<td>298 US 513 (1936)</td>
</tr>
<tr>
<td>Ex parte Leveit</td>
<td>302 U.S. 633 (1937)</td>
</tr>
<tr>
<td>NLRB v Jones &amp; Laughlin Steel</td>
<td>301 US 1 (1937)</td>
</tr>
<tr>
<td>Case Name</td>
<td>Year</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>United States v Carolene Products Co., 304 US 144</td>
<td>(1938)</td>
</tr>
<tr>
<td>Tennessee Electric Power Co v Tennessee Valley Authority, 306 US 118</td>
<td>(1939)</td>
</tr>
<tr>
<td>Coleman v Miller, 307 U.S. 433</td>
<td>(1939)</td>
</tr>
<tr>
<td>United States vs. Shaw, 309 US 495</td>
<td>(1940)</td>
</tr>
<tr>
<td>United States vs. United States Fidelity &amp; Guaranty Co., 309 US 506</td>
<td>(1940)</td>
</tr>
<tr>
<td>United State v Darby, 312 US 100</td>
<td>(1941)</td>
</tr>
<tr>
<td>Wickard v Filburn, 317 US 111</td>
<td>(1942)</td>
</tr>
<tr>
<td>Georgia v Pennsylvania R Co, 324 US 439</td>
<td>(1945)</td>
</tr>
<tr>
<td>Prudential Insurance Co., v Benjamin, 328 US 408</td>
<td>(1946)</td>
</tr>
<tr>
<td>Colegrove v Green, 328 US 549</td>
<td>(1946)</td>
</tr>
<tr>
<td>Testa v Katt, 330 US 386</td>
<td>(1947)</td>
</tr>
<tr>
<td>C &amp; S. Air Lines v Waterman S.S. Corp., 333 U.S. 103</td>
<td>(1948)</td>
</tr>
<tr>
<td>Hood &amp; Sons, Inc v Du Mond, 336 US 525, 534</td>
<td>(1949)</td>
</tr>
<tr>
<td>Dean Milk Co v City of Madison, 340 US 349</td>
<td>(1951)</td>
</tr>
<tr>
<td>Doremus v Board of Education of Hawthorne, 342 US 429</td>
<td>(1952)</td>
</tr>
<tr>
<td>Cooper v Aaron, 358 U.S. 1</td>
<td>(1958)</td>
</tr>
<tr>
<td>Parden vs. Terminal R. CO., 377 U.S. 184</td>
<td>(1964)</td>
</tr>
<tr>
<td>Reynolds v Sims, 377 US 533</td>
<td>(1964)</td>
</tr>
<tr>
<td>Katzenbach v McClung, 379 US 294</td>
<td>(1964)</td>
</tr>
<tr>
<td>Griswold v. Connecticut, 381 U. S. 479</td>
<td>(1965)</td>
</tr>
<tr>
<td>United States v Guest, 383 US 745</td>
<td>(1966)</td>
</tr>
<tr>
<td>Flast v Cohen, 392 US 83</td>
<td>(1968)</td>
</tr>
<tr>
<td>Zschernig v Miller, 389 US 429</td>
<td>(1968)</td>
</tr>
<tr>
<td>Pike v Bruce Church Inc., 397 US 137</td>
<td>(1970)</td>
</tr>
<tr>
<td>Perez v United States, 402 US 146</td>
<td>(1971)</td>
</tr>
<tr>
<td>Orlando v Laird, 404 US 869</td>
<td>(1971)</td>
</tr>
<tr>
<td>Sierra Club v Morton, 405 US 727</td>
<td>(1972)</td>
</tr>
<tr>
<td>Lake Carriers Association v MacMullan, 406 US 498</td>
<td>(1972)</td>
</tr>
<tr>
<td>Laird v. Tatum, 408 U.S. 1</td>
<td>(1972)</td>
</tr>
<tr>
<td>Gilligan v Morgan, 413 US 1</td>
<td>(1973)</td>
</tr>
<tr>
<td>Linda RS v Richard D, 410 US 614</td>
<td>(1973)</td>
</tr>
<tr>
<td>United States v. Richardson, 418 U.S. 166</td>
<td>(1974)</td>
</tr>
<tr>
<td>Schlesinger v Reservist Commission to Stop the War, 418 US 208</td>
<td>(1974)</td>
</tr>
<tr>
<td>United States v Maine 420 US 515</td>
<td>(1975)</td>
</tr>
<tr>
<td>United States v Florida, 420 US 531</td>
<td>(1975)</td>
</tr>
<tr>
<td>Eastland v Unite States Servicemen’ Fund, 421 US 491</td>
<td>(1975)</td>
</tr>
<tr>
<td>Warth v Seldin, 422 US 490</td>
<td>(1975)</td>
</tr>
<tr>
<td>Craig v Boren, 429 US 190</td>
<td>(1976)</td>
</tr>
<tr>
<td>Eisenstadt v Baird, 405 US 438</td>
<td>(1976)</td>
</tr>
<tr>
<td>Matthews v Eldridge, 424 US 319, 335</td>
<td>(1976)</td>
</tr>
<tr>
<td>Case Title</td>
<td>Citation</td>
</tr>
<tr>
<td>--------------------------------------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Washington v Davis</td>
<td>426 US 229</td>
</tr>
<tr>
<td>Hughes v Alexandria Scrap Corp.</td>
<td>426 US 794</td>
</tr>
<tr>
<td>National League of Cities v Usery</td>
<td>426 US 833</td>
</tr>
<tr>
<td>Fitzpatrick v Bitzer</td>
<td>427 U.S. 445</td>
</tr>
<tr>
<td>Milliken v Bradley</td>
<td>433 US 267</td>
</tr>
<tr>
<td>Stump v Sparkman</td>
<td>435 US 232</td>
</tr>
<tr>
<td>Exxon Corp. v Governor of Maryland</td>
<td>437 US 117</td>
</tr>
<tr>
<td>Baldwin v Montana Fish and Game Commission</td>
<td>436 US 371</td>
</tr>
<tr>
<td>Hicklin v Orbeck</td>
<td>437 US 518</td>
</tr>
<tr>
<td>Philadelphia v New Jersey</td>
<td>437 U.S. 617</td>
</tr>
<tr>
<td>Hutton v Finney</td>
<td>437 US 678</td>
</tr>
<tr>
<td>Butz v Economou</td>
<td>438 US 478</td>
</tr>
<tr>
<td>Gladstone, Realtors v Village of Bellwood</td>
<td>441 US 91</td>
</tr>
<tr>
<td>Japan Line Ltd. v City of Los Angeles</td>
<td>441 US 434</td>
</tr>
<tr>
<td>Babbitt v United Farm Workers</td>
<td>442 US 289</td>
</tr>
<tr>
<td>Goldwater v Carter</td>
<td>444 US 996</td>
</tr>
<tr>
<td>Reeves Inc. v Stake</td>
<td>447 US 429</td>
</tr>
<tr>
<td>Hodel v Virginia Surface Mining &amp; Reclamation Assn., Inc.</td>
<td>452 US 264</td>
</tr>
<tr>
<td>FERC v Mississippi</td>
<td>456 US 742</td>
</tr>
<tr>
<td>Edgar v MITE Corp.</td>
<td>457 US 624</td>
</tr>
<tr>
<td>Blum v Taretsky</td>
<td>457 US 991</td>
</tr>
<tr>
<td>United States v Texas</td>
<td>143 US 621</td>
</tr>
<tr>
<td>Separation of Church and State</td>
<td></td>
</tr>
<tr>
<td>District of Columbia Court of Appeal v Feldman</td>
<td>460 US 462</td>
</tr>
<tr>
<td>City of Los Angeles v Lyon</td>
<td>461 US 95</td>
</tr>
<tr>
<td>Camden</td>
<td></td>
</tr>
<tr>
<td>Wunnicke, Inc.</td>
<td></td>
</tr>
<tr>
<td>Allen v Wright</td>
<td>468 US 737</td>
</tr>
<tr>
<td>Garcia v San Antonio Metropolitan Transit Authority</td>
<td>469 US 528</td>
</tr>
<tr>
<td>Brown-Forman Distiller Corp. v NY State Liquor Authority</td>
<td>476 US 573</td>
</tr>
<tr>
<td>Maine v Taylor</td>
<td>477 US 131</td>
</tr>
<tr>
<td>Davis v Bandermer</td>
<td>478 U.S. 109</td>
</tr>
<tr>
<td>CTS Corp. v Dynamics Corp. of America</td>
<td>481 US 69</td>
</tr>
<tr>
<td>Anderson v Creighton</td>
<td>483 US 635</td>
</tr>
<tr>
<td>New Energy Co. of Ind. v Limbach</td>
<td>486 US 269</td>
</tr>
<tr>
<td>Healy v Beer Institute</td>
<td>491 US 324</td>
</tr>
<tr>
<td>United States Department of Labor v Triplett</td>
<td>494 US 715</td>
</tr>
<tr>
<td>Whitmore v Arkansas</td>
<td>495 US 149</td>
</tr>
<tr>
<td>United States v Munoz Flores</td>
<td>495 US 385</td>
</tr>
<tr>
<td>Howell v Rose</td>
<td>496 US 356</td>
</tr>
<tr>
<td>Oklahoma</td>
<td></td>
</tr>
<tr>
<td>Power v Ohio</td>
<td>499 U.S. 400</td>
</tr>
<tr>
<td>Case Name</td>
<td>Citation</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td>Fort Gratiot Sanitary Landfill, Inc. v Michigan Department of Natural Resources</td>
<td>504 US 353</td>
</tr>
<tr>
<td>Lujan v Defenders of Wildlife</td>
<td>504 US 555</td>
</tr>
<tr>
<td>New York v United States</td>
<td>505 US 144</td>
</tr>
<tr>
<td>Nixon v United States</td>
<td>506 US 224</td>
</tr>
<tr>
<td>Scewiker v Chilicky</td>
<td>487 US 412</td>
</tr>
<tr>
<td>FDCI v Meyer, 510 US 471</td>
<td></td>
</tr>
<tr>
<td>C&amp;Carbone, Inc. v Town of Clarkstown</td>
<td>511 US 383</td>
</tr>
<tr>
<td>Associated Indus. of Missouri v Loham</td>
<td>511 US 641</td>
</tr>
<tr>
<td>Oregon Waste System, Inc. v Department of Environmental Quality of Ore.</td>
<td>511 US 93</td>
</tr>
<tr>
<td>Fort Gratior Sanitary Landfill, Inc. v Michigan Department of Natural Resources</td>
<td>504 US 353</td>
</tr>
<tr>
<td>West Lynn Creamery, Inc v Healy</td>
<td>512 US 186, 210</td>
</tr>
<tr>
<td>United States v Lopez</td>
<td>514 US 549</td>
</tr>
<tr>
<td>United States Term Limited v Thornton</td>
<td>514 US 779</td>
</tr>
<tr>
<td>Seminole Tribe vs. Florida</td>
<td>517 US 44</td>
</tr>
<tr>
<td>Camps Newfound/Owatonna, Inc v Town of Harrison</td>
<td>520 US 564</td>
</tr>
<tr>
<td>City of Boerne v Flores</td>
<td>521 US 507</td>
</tr>
<tr>
<td>Raynes v Byrd, 521 US 811</td>
<td></td>
</tr>
<tr>
<td>Printz v United States</td>
<td>521 US 898</td>
</tr>
<tr>
<td>College Savings Banks vs. Florida Prepaid Postsecondary Education</td>
<td>527 US 666</td>
</tr>
<tr>
<td>Alden vs. Maine</td>
<td>527 US 709</td>
</tr>
<tr>
<td>Friends of the Earth v Laidlaw Environmental Services</td>
<td>528 US 167</td>
</tr>
<tr>
<td>Jones v United States</td>
<td>529 US 848</td>
</tr>
<tr>
<td>Crosby v National Foreign Trade Council</td>
<td>530 US 363</td>
</tr>
<tr>
<td>Bush v Gore (Bush II)</td>
<td>531 US 98</td>
</tr>
<tr>
<td>Kimel v. Florida Bd. of Regents</td>
<td>528 U.S. 62</td>
</tr>
<tr>
<td>United States v. Morrison</td>
<td>529 U.S. 598</td>
</tr>
<tr>
<td>Solid Waste Agency of North Cook County v United States Corps of Engineers</td>
<td>531 US 159</td>
</tr>
<tr>
<td>University of Alabama v. Garrett</td>
<td>531 U.S. 356</td>
</tr>
<tr>
<td>Lapides v. Board of Regents of University System of Georgia</td>
<td>535 US 613</td>
</tr>
<tr>
<td>Hillside Diary Inc. v Lyons</td>
<td>539 US 59</td>
</tr>
<tr>
<td>American Insurance Association v Garamendi</td>
<td>539 US 396</td>
</tr>
<tr>
<td>Virginia v Hicks</td>
<td>539 US 113</td>
</tr>
<tr>
<td>NIKE, Inc. v Kasky</td>
<td>539 US 654</td>
</tr>
<tr>
<td>Hamdi v Rumsfeld</td>
<td>542 US 507</td>
</tr>
<tr>
<td>Tennessee Student Assistance Corporation v Hood</td>
<td>541 U.S. 440</td>
</tr>
<tr>
<td>Vieth v. Jubelirer</td>
<td>541 U.S. 267</td>
</tr>
<tr>
<td>Tennessee vLane</td>
<td>541 U.S. 509</td>
</tr>
<tr>
<td>Gonzales v Raich</td>
<td>545 U.S. 1</td>
</tr>
<tr>
<td>Granholm v Heald</td>
<td>544 US 460</td>
</tr>
<tr>
<td>Central Virginia Community College v Katz</td>
<td>548 US 356</td>
</tr>
<tr>
<td>League of United Latin American Citizens v Perry</td>
<td>548 U.S. 399</td>
</tr>
</tbody>
</table>

21
<table>
<thead>
<tr>
<th>Federal Courts of Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>United Haulers Association v Oneida-Herkimer Solid Waste Management Authority</strong>, 550 U.S. _ (2007)</td>
</tr>
</tbody>
</table>

| **Doe v Bush**, 322 F.3d 109 (1st Cir. 2003) |
| **Orlando v Laird**, 443 F.2d 1039 (2d Cir.) |
| **DaCosta v Laird**, 471 F.2d 1146 (2d Cir. 1973) |
| **United States v City of Philadelphia**, 644 F.2d 187 (3d. Cir. 1980) |
| **United States v Salomon**, 563 F.2d 1121 (4th Cir. 1977) |
| **Ford Motor Company v Texas Department of Transportation**, 264 F.3d 493 (5th Cir. 2001) |
| **Village of Elk Grove Village v Evans**, 997 F. 2d 328, 329 (7th Cir. 1993) |
| **United States v Mattson**, 600 F.2d 1295 (9th Cir. 1979) |
| **United States v Dorsey**, 418 F. 3d 10398 (9th Cir. 2005) |
| **ACLU v Johnson**, 194 F.3d 1149 (10th Cir. 1999) |
| **United States v Maxwell**, 386 F. 3d 1042 (11th Cir. 2004) |
| **United States v Maxwell**, 446 F. 3d 1218 (11th Cir. 2006) |
| **Mitchell v Laird**, 488 F.2d 611 (DC Cir. 1973) |

<table>
<thead>
<tr>
<th><strong>US District Courts</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Santa Fe Natural Tobacco Co. v Spitzer</strong>, No. 00 Civ. 7274, 2000 WL 1694307 (2000)</td>
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<tr>
<th><strong>State Courts</strong></th>
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In the *Federalist no 51*, James Madison stated that, in order to protect individual liberty, the US Constitution had submitted the Federal Government to two different levels of checks and balances\(^1\). On the one hand, the principle of separation-of-powers ensures that all branches of the Federal Government stand on an equal footing and that no branch will prevail over the other. On the other hand, by limiting the competences of the Federal Government, the principles of federalism guarantee that component States have sufficient powers to defend their citizens from the federal tyranny. Hence, he concluded that, since “[t]he different governments will control each other, at the same time that each will be controlled by itself”, this system of “double security”\(^2\) provides a structural framework within which individual rights are protected.

In the same way, the EC Treaty also lays down a system of double verification. First, though the principle of institutional balance is more limited than the principle of separation of powers in that it does not imply an equal distribution of powers among the institutions, it is nonetheless a constitutional principle which prevents a Community institution from encroaching on the prerogatives of the others\(^3\). Secondly, by virtue of the principle of attribution of competences, Community institutions have limited competences and consequently, the lawfulness of their action is conditioned upon the finding of the proper legal basis in the Treaty\(^4\). Thus, one can affirm that in both legal orders, there are, though different, horizontal and vertical “checks and balances”, which operate as structural framework in which individual rights are protected.

The purpose of this PhD dissertation is therefore to examine the contribution of the US Supreme Court (USSC) and the European Court of Justice (ECJ) in ensuring the “double security” devised by Madison. Yet,

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1 THE FEDERALIST No 51, at 67. (James Madison) (Lester DeKoster Ed., 1976)
2 *Ibid*
the aim is not to look at the way in which both Courts allocate power between the Legislature and the Executive. The reason is that both the EC Treaty and the US Constitution have laid down a very different institutional framework and accordingly, a comparative study, albeit possible, arguably would be heavily influenced by this original difference. Instead, this thesis will centre its focus on the principle of separation-of-powers as applied to the judiciary itself. As opposed to the different constitutional setting of the US political branches and the EU political institutions, the USSC and the ECJ play an analogue role in constitutional governance. Accordingly, our first aim is to compare how the USSC and the ECJ have drawn the line between the realm of politics and the purview of the judiciary. Secondly, assuming that the EU is a federal system, this dissertation subsequently attempts to explain how both Courts allocate powers between, on the one hand, the Union and, on the other hand, the States. By addressing selective questions, the vertical allocation of powers will be explored in two different yet complementary ways. At first, the extent of the Union and state regulatory powers is examined and subsequently, the consequences of the violations of federal and Community law by the States.

Of course, far from being in isolation, vertical and horizontal allocations of powers are deeply intertwined: in federal systems, courts are often called upon to decide whether and to what extent the protection of federalism ought to be trusted to the political process. In the affirmative, not only would the judicial department restrict its own powers vis-à-vis the other branches of government, but determinations at federal level would also become final. In the negative, the judicial department would become

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3 RONSELFED, Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court, (2006) 4 ICON, pp. 618-651 (holding that they both allocate power [1] among the branches of government, [2] and between the states and the Union and [3] they both protect fundamental rights and economic liberties)

6 K LENEARTS, Constitutionalism and the Many Faces of Federalism, (1990) 38 Am.J.Comp.L., pp 205-264 (The author opines that there are two rule-of-law principles governing American federalism, namely [1] a dual constitutional structure and [2] the capacity of the federal government to act directly upon the people. In this regard, he believes that the European Union meets both requirements. First, by allocating powers among the Community institutions (horizontal dimension) and between the Union and its Member States (vertical dimension), the ECJ has “constitutionalised” the EC Treaty. Secondly, by virtue of the doctrine of direct effect, Community law may bestow judicially enforceable rights and impose obligations on individuals.)
the final arbiter of the federalist debate to the detriment of a dialogue among the different political actors. Needless to say, one does not need to write a doctoral thesis to know that ideal answers are to be found somewhere in the middle. However, this thesis does not seek to find the “optimal solution” to these two questions. Rather, after explaining in the light of the relevant case-law why, and how, the USSC and the ECJ have reached converging or diverging outcomes, our ultimate goal is to signal positive judicial strategies that, in our view, would help defining, on the one hand, the role of courts vis-à-vis the political process and, on the other hand, reconciling federal interests with states’ autonomy.

In spite of an ever-increasing enthusiasm for transatlantic constitutional law\(^7\), an analogue study as the one to follow has not yet been undertaken. Most of the studies are self-contained and limited to a particular issue of constitutional law\(^8\). It is true that valuable contributions have been made\(^9\). However, due to the recent developments in the case-law of both

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courts, in particular the federalism revolution of the Rehnquist Court, most of the literature is largely out-of-date. Besides, another shortcoming is that comparative studies tend to rely excessively on secondary sources. By contrast, this dissertation proposes to draw its conclusions directly from the latest case-law of both courts, without, nonetheless, obviating the doctrinal discussions on both sides of the Atlantic. The advantage of this methodology is twofold. First, it provides the reader with a factual framework to understand the rulings of both Courts. Secondly, not only does it facilitate comparisons, but it also enables answering whether in similar factual contexts, similar rulings would have been obtained.

The thesis is divided into five chapters. To begin with, in order to evaluate how the USSC and ECJ draw the line between judicial procedure and political process, first we must examine how both courts interact with private and public litigants. If the constitutional design (or rather its judicial interpretation) favours public law litigation brought by private actors while barring access to the political branches, direct judicial intervention into the realm of politics becomes more difficult. Indeed, courts would not directly address inter-branches conflicts, but rather exercise “their traditional function in constitutional cases” namely, redressing the violation of constitutional or federal rights by public actors. On the contrary, if debates among political institutions are welcomed, even without requiring any harm, it is more difficult for the courts not to become involved in policy-making. Accordingly, by looking at standing rules in the US and in the EU, chapter I examines whether the litigating structure in the US and in the EU facilitates or rather hinders judicial intrusions into politics. By examining the case-law of both courts, it is maintained that, while standing under Article III US Constitution has been read as preventing the federal courts from violating the principle of separation-of-powers, this is not the case in the EU. The ECJ interprets Article 230 EC as welcoming political debates among political actors, while largely shifting “normal judicial business” to the

national courts. It is a jurisdictional rule, rather than an implement of the separation-of-powers.

Next, in the absence of a constitutional structure preventing the judicial department from starting policy-making, it is still possible for the courts to exclude certain “substantive” questions on the ground that they are “too political”. To this effect, the USSC has coined the “political question doctrine”, pursuant to which, by virtue of textual constitutional basis or prudential considerations, absolute deference to the political branches takes place. It is thus a substantial limitation on judicial review. Although the ECJ has not formally adopted this doctrine, it is still interesting to verify whether it has been implicitly embraced. In this regard, after explaining its American rise and fall as well as its continuing importance in foreign affairs, Chapter II is devoted to searching for a political question doctrine in a European context. It is concluded that both Courts converge in adopting a post-

\textit{Baker}^{10}\textsuperscript{10} reading of the doctrine, that is, judicial intervention must be underpinned by democratic principles and the protection of human rights. That does not mean that the ECJ does not pay due account to the institutional capacities of the political institutions. On the contrary, recent cases on terrorism show that the Community Courts\textsuperscript{11} have opted for a balance. Whereas policy decisions are not second-guessed, their implementation must comply with procedural individual rights.

In Chapters III and IV, the regulation of interstate commerce is taken as the paradigmatic example to examine how the judiciary allocates regulatory powers between the Union and the States. This allocation takes place in two ways.

On the one hand, both the US Constitution and the EC Treaty entrusts the judiciary with the enforcement of constitutional and treaty provisions protecting interstate trade, that is, the internal market is protected

\textsuperscript{10} \textit{Baker v. Carr}, 369 U.S. 186 (1962)

\textsuperscript{11} In this thesis, the term “Community Courts” alludes to the ECJ and the Court of First Instance (CFI). The case-law of the recently created Civil Service Tribunal is not taken into account.
through “negative integration”. In this regard, Chapter III is devoted to a comparative study between the Dormant Commerce Clause (DCC) and Article 28 EC. There, it is argued that the USSC enforces the DCC as only forbidding discriminatory state measures, while leaving “balancing” to the States. Conversely, Article 28 EC goes beyond discrimination, Keck\(^{12}\) notwithstanding. The reason for this divergence lies in that the US and EU internal markets have reached different levels of market integration, and that the USSC has a higher level of trust of the institutional capacities of state legislatures. From these differences, it is inferred that a way of improving the Keck doctrine would be for national courts to defer to the national legislatures when examining non-discriminatory selling arrangements. Yet, courts would still examine that national legislators, in their deliberations, provide sufficient evidence demonstrating that they have seriously reflected upon the negative effects that market organisation rules may have on free movement of goods.

On the other hand, both the US Constitution and the EC Treaty empower Congress and the Community to enact commercial legislation, that is, the internal market is set-up trough “positive legislation”. However, this vast grant of power does not imply that the powers of the Union are unlimited. Quite the contrary, both the US and the EU constitutional system recognise the principle of enumerated powers and the principle of attribution respectively. However, after examining the case-law of both Courts, it is concluded that the enforcement of this principle does not suffice to contain the competence creep. In looking for alternative or additional means to safeguard federalism, this Chapter finally advocates for a “process-oriented” review, whereby, in exercising their competences, both Congress and the EC legislator properly examine the values of federalism.

Further, not only does the vertical allocation of powers take place in examining the extent of regulatory powers corresponding to each level of governance, but also by measuring the effects of state action or inaction

\(^{12}\) Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097
when violating federal and Community law. In this regard, Chapter V attempts to answer why the USSC and the ECJ have given opposite answers to the possibility of suing States for damages. After examining the relevant case-law of both Courts, it is concluded that, on the one hand, structural differences and, on the other hand, the interaction between state treasuries and remedies provide an explanation for diverging views on state liability for damages. At the same time, this divergence also influences the way both Courts apprehend the principle of supremacy of federal and Community law. Whereas in the EU, this principle is indissolubly linked to providing Community rights with adequate remedies, the USSC has opted for a “schism”. Article VI US Constitution is therefore interpreted as providing mechanisms to ensure that States sufficiently abide by “the rule of federal law”, regardless of federal rights violated in the past.

Finally, while not attempting to devise a theory of judicial review, it is concluded that, when drawing the line between politics and the judicial process as well as when considering allocation of powers between the Union and its component states, courts should not narrow their focus to finding “substantive” benchmarks. Whereas providing substance to the US Constitution and the EC Treaty remains a necessary function of the judiciary, courts sometimes lack the expertise and institutional capacities to do so. Likewise, at times putting flesh on the bones of a constitutional text is not sufficient to preserve horizontal and vertical balances of powers. Accordingly, both the USSC and the ECJ should also pay due regard to a “process review”, which operates in two ways. First, courts should be vigilant that the political process is underpinned by democratic values. Secondly, instead of always adopting a stand-alone approach to provide ideal answers, it is maintained that courts should also cooperate with political actors to find such answers.
Chapter I

Standing Doctrines in the US and in the EU

In *Marbury v Madison*\(^{13}\), the US Supreme Court (USSC) was caught by the horns of the most famous constitutional dilemma ever decided. It had to choose between applying Article III of the US Constitution\(^{14}\) and a conflicting federal statute. Chief Justice Marshall opted for the former, and thus, judicial review was born. Ever since, all American courts have been empowered to declare that “*an act of the legislature, repugnant to the constitution, is void*”\(^{15}\). Additionally, not only did the Chief Justice announce this constitutional institution, but he also indicated the way in which judicial review would operate in federal courts\(^{16}\). This dilemma did not arise as an abstract constitutional question referred by the political branches, but it was anchored in a factual context. Indeed, the *Marbury* Court’s ultimate goal was to clarify whether Mr. Marbury was entitled to his commission. The annulment of § 13 of the Judiciary Act of 1789 was a mere procedural incident necessary to solve the dispute. Judicial review was “*a mean to an end*” and not an end in itself. Two centuries after *Marbury* was delivered, the USSC still holds these findings true. Judicial review may only occur in adversarial contexts capable of resolution through the judicial process. As Monagham puts it, “*constitutional adjudication [meaning compliance of public law actors with the Constitution] is still viewed as a by-product of preventing unjustified injury to private interests*”\(^{17}\). Thus, the notion of “injury” is the key element allowing the federal judiciary to call in the Constitution. Accordingly, only parties having suffered injuries resulting from constitutional violations may seek judicial review. Standing,

\(^{13}\) *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803)

\(^{14}\) See Annex

\(^{15}\) *Ibid*, 176


\(^{17}\) HP MONAGHAN, Constitutional Adjudication: the Who and the When, (1973) 83 *Yale L. J.*, pp 1363-1397
understood as the procedural capacity to bring proceedings and to have a court decide on the merits, may be employed to reinforce the “Marbury paradigm” of judicial review. As a matter of fact, the USSC has relied on Article III US Constitution to restrict the universe of possible applicants to those proving an “injury” capable of being redressed by judicial intervention. “Injury” appears as the condicio sine qua non for applicants to invoke constitutional justice. From the standpoint of the USSC, without a factual substratum provided by a relevant injury, the federal judiciary is not entitled to “say what the law is”\(^{18}\).

Has the EU followed the American model of judicial review? Is standing used to reinforce a certain paradigm of constitutional justice? Before answering these questions, a distinction must be drawn between judicial review of “Community measures” and of “national measures”. This distinction is completely irrelevant under American constitutional law. In so far as they act within their respective jurisdictions, both state and federal courts may declare both federal and state law unconstitutional. However, in the EU, it is not the case. While Community Courts enjoy exclusive jurisdiction to annul Community acts\(^{19}\), it is only for national courts to declare an act of national law incompatible with the EC Treaty\(^{20}\). Therefore, the EC Treaty allocates the power of judicial review between Community and national courts in accordance with the origin of the measure challenged.

As for judicial review of Community measures, the EU model mirrors the system established by the Austrian, German, French, Portuguese, Spanish and the more recent Eastern European Constitutions\(^{21}\). The EU has a centralised system of judicial review of Community measures. In pursuance with Article 230 EC, while Community institutions and the

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\(^{18}\) [*Marbury*, 137]

\(^{19}\) Case 314/85 [*Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199]

\(^{20}\) However, in some occasions, the ECJ extracts from the questions referred by the national court those elements of the legal and factual background concerning the interpretation of Community law that would allow the national court to solve the dispute before it. See e.g. Joined Cases C-330/90 and C-331/90 [*López Brea and Hidalgo Palacios* [1992] ECR I-323, para 5, and Case C-224/01 [*Köbler* [2003] ECR I-10239, para 60]

Member States need not prove any interest in bringing proceedings, private parties must overcome very strict standing rules to directly access the Community Courts. Therefore, following the Kelsenian model of judicial review\(^{22}\), Article 230 EC lays down preferential standing rules to the benefit of the political institutions. Direct actions are construed as a mean of favouring horizontal and vertical debates among the Member States and the Community institutions. Relieving injuries of private parties caused by “unconstitutional” Community measures is rather a marginal objective of this treaty provision. Therefore, one may argue that Article 230 EC does not emulate the American model of judicial review.

However, Article 230 EC does not present the full picture. Along with direct challenges, the validity of Community measures may be also contested indirectly. In the light of Article 234 EC, when, in order to solve the dispute before it, a national court questions the validity of a Community measure, it must suspend proceedings and refer the matter to the ECJ. The latter will then rule over this constitutional question and send the case back to the national court for its final resolution. Indirect challenges are vital for the European system of remedies to comply with the principle of judicial protection. Bearing in mind that private applicants seldom have direct access to the Community Courts, the ECJ believes that it is for national courts to facilitate indirect challenges\(^ {23}\). Hence, the system of referral laid down in Article 234 EC presents some common elements with the “\textit{Marbury} paradigm”. There is an underlying storyline providing a factual background. Perhaps most importantly, the constitutional question arises as a by-product to resolve unjustified injuries. Yet, two major differences persist. First, by contrast to the American model, it is not the trial court which examines the validity of the challenged Community measures, but a distant court sitting in Luxembourg. Arguably, the relevance of the factual input is thus watered-down\(^ {24}\). Secondly, since litigants may not compel

\(^{23}\) Case C-50/00P, Unión de Pequeños Agricultores v Council (UPA), [2002] ECR I-6677; Case C-263/02 P Commission v Jégo-Quéré [2004] ECR I-3425  
\(^{24}\) Stone Sweet, Op cit, p 2771
national courts to make a reference, the system of preliminary rulings is not a judicial remedy, but a tool of judicial cooperation. Accordingly, in order to safeguard the dialogue with national courts, the ECJ may be called upon to examine Community measures even when litigating parties have suffered no injury. Conversely, in spite of the existence of patent injuries, the ECJ cannot intervene without a national court willing to start dialoguing. As a result, the ECJ has difficulties in elucidating the real purpose of the preliminary reference proceedings.

In relation to national measures, national courts enjoy exclusive jurisdiction to set aside national law conflicting with the EC Treaty. Although the ECJ has sometimes decided the case before it, for the final decision rests with the national courts alone as to whether national law is compatible with the EC Treaty. What type of judicial review takes then place before national courts? National courts are not compelled to embrace a precise standing doctrine when reviewing the consistency of national law with the EC Treaty. Nevertheless, as all national procedural law, standing rules are subjected to two limitations, namely the principles of effectiveness and equivalence. Provided that national procedural law complies with these two limitations, the ECJ does not impose a particular model of judicial review. To some extent, the same applies to American state courts. The USSC has ruled that Article III of the US Constitution does not bind state courts even when adjudicating over federal questions. When seeking the annulment of either a federal or state law, parties litigating before state courts are not necessarily required to show an injury. Besides, some states grant political state actor with free-standing to bring proceedings. Of course, state standing rules must comply with Due Process. In addition, it is also argued that the latter cannot be stricter than the requirements contained in Article III. Accordingly, “federal” standing rules set a minimum threshold for state courts when adjudicating over federal questions.

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26 See supra fn 20
27 Case C-432/05 Unibet [2007] ECR I-2271
28 § 1 XIVth Amendment US Constitution in Annex
From the foregoing, one can draw four immediate implications. First, while in the US, judicial review is vested to federal and state courts on an equal basis, in the EU it is exercised by the courts of the legislature adopting the challenged act. Secondly, the US federal jurisdiction does not distinguish between private and public applicants. Thirdly, in so far as the preliminary reference procedure is subjected to the varying dynamics of judicial dialogue, analogies with the American model must be examined with caution. Finally, one may draw some parallelism between state and national rules of standing. Both must comply with minimum requirements. Yet, once they are fulfilled, European and American States are free to adopt liberal standing rules.

This chapter aims to compare the standing doctrines in the US and in the EU. For the purpose of clarity, judicial review is defined broadly, so that it includes review of both legislative statutes and administrative action. The reason is twofold. In both EU and US, the same standing rules apply regardless of whether a statute or an administrative act is challenged. Additionally, on both sides of the Atlantic, most of the case-law has been provided by administrative litigation. The chapter is divided into three parts. Part I attempts to compare “locus standi” under Article 230 EC with the standing doctrine emanating from Article III US Constitution. Its first section starts by evaluating whether the rules of standing under the two systems have the same objectives. Next, it proceeds to examine why the USSC refuses to grant “special plaintiff status” to the political branches and States. Section two then compares “locus standi” of private applicants under Article 230 (4) EC with the US case-law. In particular, it is discussed whether the Plaumann formula entails a higher admissibility threshold than the prohibition to vindicate “generalized grievances” under Article III. This section also examines whether the “traceability” and “redressability” elements can be found under Article 230 EC. Part II looks at standing under Article 230 EC as a “jurisdictional shifting” strategy. Having examined the failed attempts made by AG Jacobs in UPA and the Court of FirstInstance (CFI) in Jégo Quéré to liberalize standing, this chapter evaluates whether
the USSC takes into account the availability of a state forum when denying access to federal courts. Part III is dedicated to analysing standing before national courts. It is argued that the ECJ does not require “actio popularis”. Still, it is also maintained that the adoption of the Plaumann formula by national legislatures is unacceptable. Thus, when challenging national law, it is suggested that standing under Article III US Constitution would comply with the standards of judicial protection imposed by the ECJ for national courts. Finally, this Chapter concludes with two important findings. On the one hand, it welcomes the step taken by the USSC in favouring litigation by States as a check in the congressional delegation of powers. On the other hand, it considers that private applicants have better chances of challenging unconstitutional measures under Article III, than under the combined effect of Articles 230 and 234 EC.

I.- Standing under Article III US Constitution and Article 230 EC

A.- General Overview. – Concept and Purposes

1.- Concept

Under the US Constitution, standing addresses the question “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues”⁵, that is, whether the applicant has a “personal stake in the outcome of the controversy”⁶. As Tribe points out, standing can be distinguished from the other elements of justiciability in that it primarily focuses on the applicant⁷. The USSC has consistently stated that “the irreducible constitutional minimum of standing contains three elements”⁸ namely, the applicant must prove that he has suffered [1]“an injury in fact”, that the latter is [2]“causally connected” to the actions of the defendant, and that the injury can [3] “be redressed” by a favourable judicial intervention⁹.

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²⁹ Warth v Seldin, 422 US 490, 95 (1975)
³¹ LH TRIBE, American Constitutional Law Volume I, (Foundation 3rd Ed. 2000), pp385-386
³³ Idem.
The intangible nature of these elements implies that Congress may never override them by statutory grant. For instance in *Lujan v Defenders of Wildlife*, the USSC quashed a federal statute conferring standing upon applicants having suffered no injuries. In addition, the USSC has also laid down additional prudential rules which, though may be superseded by Congress, deny standing to applicants having suffered [1] “a general grievance shared in substantial equal measure by all or a large class of citizen”, where the plaintiff is not asserting [2] “his own legal rights”, or where the claim does not fall within [3]“the zone of interests” protected by the statute or constitutional norm invoked[^34].

As for Community law, “*locus standi*” under Article 230 EC can be defined as the personal capacity to bring direct actions challenging the validity of Community acts before the Community Courts[^35]. In accordance with this treaty provision, this capacity varies depending on the identity of the applicant. Where the latter is a Member State, the Commission, the Council or the European Parliament (“privileged applicants”), the Treaty provides that they may challenge any reviewable act, regardless of “a lack of interest in bringing proceedings”[^36]. In an intermediate position, the third paragraph of Article 230 enables the European Central Bank and the Court of Auditors to institute annulment proceedings in defense of their prerogatives (“semi-privileged applicants”). By contrast, where the applicant is a private person or entity or a political subdivision of the State[^37] (“private or non-privileged applicants”), standing rules are rigorously strict. The fourth paragraph of Article 230 EC lays down three different scenarios under which private applicants satisfy standing rules. First, a private applicant may challenge a decision addressed to him. Secondly, he may also challenge a decision “in the form” of a regulation. Finally, he may bring an

[^35]: P CRAIG & G De BURCA, EU LAW, Text, Cases and Materials (Oxford, OUP:2003), p 486-487
[^36]: Case 45/89 Commission v Council (Generalized Tariff Preferences) [1987] ECR 1493 para 3
annulment action against a decision addressed to a third party. In the last
two cases, he is required to show a “direct and individual concern”. The
first type of case is straightforward and unsurprisingly, most of litigation has
concentrated in the other two. Further, from the wording of Article 230 EC,
it appears that a private applicant is only allowed to contest the validity of
Community acts when they are “in substance” a decision. On the contrary,
purely legislative measures could only be annulled by privileged or semi-
privileged applicants. However, since Codorniu, the ECJ has consistently
recognised that the conferral of standing does not depend on the legislative
or administrative nature of the challenged act, but rather on private
applicants being directly and individually concerned.

From both definitions, one may infer that there is no equivalent to
“privileged applicants” under Article III US Constitution. All litigants,
either private or public, must demonstrate they have suffered a relevant
injury. As for private applicants, just like US notion of “injury-in-fact”, the
ECJ also requires some sort of “harm”. Indeed, the Community Courts have
consistently stated that private applicants must have an “interest in bringing
proceedings”. Besides, as explained below, an applicant is individually
concerned when she manages to prove that the challenged act adversely
affects her in particular way. Furthermore, it appears that there is an
element of causation in both the notion of “direct concern” under Article
230 EC and in the notions of “traceability and redressability” of Article III.
As for the prudential elements of Article III, it appears that the ECJ also
opposes to applicants filing annulment actions with a view to remedying

38 Case C-309/89 Codorniu v Council [1994] ECR I-1853, para 19 See also Joined Cases T-
480/93 and T-483/93 Antillean Rice Mills and Others v Commission [1995] ECR II-2305,
para 59
38 CML Rev., pp 7-52; 23. JA USHER, Direct and Individual Concern- An Effective
ENCHELMAIER, No-One Slips Through the Net? Latest Developments, and Non-
YEL, pp 173-221; 176-77
para 13; Case C-174/99 P Parliament v Richard [2000] ECR I-6189, para 33; and Case
C-362/05 P Wunenburger v Commission [2007] ECR I-4333, para 42
“generalized grievances”. In the same way, few exceptions notwithstanding, the ECJ is also reluctant to granting third-parting standing. Finally, it seems that the “zone of interests” test is already subsumed under the notion of individual concern. Indeed, when examining whether the applicant is individually concerned, the Community Courts already examine whether “the interests sought to be protected by the complainant [fall] within the zone of interest to be protected or regulated by the [relevant] statute”\(^\text{41}\). A further comparative analysis of these elements will be undertaken in the pages below, but prior to this the purpose of standing on each side of the Atlantic is examined.

2.- The purpose of Standing

In the US, the federal standing doctrine has evolved from being considered as a utilitarian device rendering litigation more concrete, and thus facilitating the task of federal judges, into an implement of the principle of separation of powers\(^\text{42}\). At first stage, the USSC ruled that standing was a prudential or discretionary instrument which improved the quality of litigation. By rejecting that the standing doctrine could raise separations of powers problems\(^\text{43}\), the USSC held that standing aimed at preventing federal courts from adjudicating over “ill-defined facts over constitutional issues” and cases having “a hypothetical or abstract character”\(^\text{44}\). However, since \textit{Allen v Wrights}\(^\text{45}\), the real purpose of standing has been to implement the principle of separation of powers\(^\text{46}\). Particularly, Justice Scalia maintains

\(^{41}\) \textit{Association of Data Processing Service Organization v Camp}, 397 US 150, 153 (1970)


\(^{43}\) \textit{Flast v Cohen}, 392 US 83, 100 (1968)

\(^{44}\) \textit{Baker v Carr}, 204


\(^{46}\) This jurisprudential shift is well illustrated by \textit{Steel Co v Citizens for a Better Environment}, Op cit, where the USSC rejected to follow a “hypothetical jurisdiction”, pursuant to which “where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied”, federal courts could proceed on the merits. Thus, \textit{Steel Co} demonstrates that even
that the law on standing must be understood as confining courts to their
traditional and limited role of protecting minorities, rather than enabling the
clarification of constitutional provisions to the benefit of the majority. In his
famous article, he stated that owing to its lack of political accountability, the
judicial department is ill-fitted to protect interests of the majority, which are
better safeguarded by the political branches. Later, in *Lujan v Defenders of
Wildlife*, writing for the USSC, he added that since the Take Care Clause of
Article II of the US Constitution calls for a dividing line between the
powers of the Executive and the Judiciary, whereby the latter cannot replace
the former in its constitutional assigned task of generally enforcing federal
legislation; standing rules must be interpreted in the light of this
constitutional mandate.

Thus, standing is currently seen as a self-imposed limit which guarantees
that “the proper role of the courts in a democratic society” is respected,
that is to say, in order for the courts to adjudicate on the merits, the
applicant must prove that he has suffered an “injury”, which separates him
from the majority and hence, his claim can be “appropriately resolved
trough the judicial process”. As a result, it can be affirmed that the USSC
has opted for a private law model of constitutional adjudication, in which,
by virtue of the principle of separation of powers, standing rules are
construed as fully and exclusively committed to confining federal courts to
solving individual disputes.

Under Article 230 EC Treaty, does standing also operate as an
implement of the principle of separation of powers? I would suggest a reply
in the negative. It is true that the ECJ conferred standing to the European
Parliament, in spite of the then wording of EC Treaty suggesting the

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48 See Annex
50 *Allen*, 750
51 *Lujan*, 560
By allowing the Parliament to lodge annulment proceedings in order to defend its prerogatives, the ECJ sought to re-establish the inter-institutional balance disturbed by the Council. Yet, the application of this principle did not respond to the reasons alluded by the USSC in *Allen* or *Lujan*. The ECJ applied the principle with a view to guaranteeing an “equality of arms” between the political institutions. The conferral of judicial access upon the European Parliament was the only way of protecting its political power. However, Article 230 EC was never construed as to impeding the ECJ from encroaching upon the realm of the political institutions. Thus, the purpose of Article 230 EC is to encourage a constitutional debate among the Member States and the Community Institutions, while shifting the “normal judicial business”, understood as redressing individual injuries, to the national courts. It enshrines a “jurisdictional principle”, whereby Luxembourg becomes the principal judicial venue for the Community political actors, while attributing the primary role in defending private interests to the national courts. As a result, whereas Article III standing has a “horizontal” dimension which enables the USSC to draw the line between the law and politics, standing under Article 230 EC has a “vertical and jurisdictional” one.

B.- Standing and public applicants

One could suggest that the unequal treatment under Article 230 EC between privileged and non-privileged applicants encompasses the different roles assigned by the EC Treaty. Whereas Member States and Community Institutions operate as “Guardians of the Treaties”, individuals or entities only initiate proceedings in order to protect their private interests.

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32 The original version of Article 230 EC did not include the European Parliament and thus, the ECJ refused to confer standing on it either as a privileged or non-privileged applicant. See Case 302/87, *European Parliament v Council*, [1988] ECR 5615 (*Comitology case*). However, alluding to the principle of institutional balance, the ECJ subsequently changed its opinion and decided to grant standing to the European Parliament, but only to actions capable of hindering its prerogatives. See Case C-70/88, *Parliament v Council*, (*Chernobyl*) [1990] ECR I-2041. This ruling was codified in the following Treaty Amendments and finally, with the entry into force of the Treaty of Nice, the European Parliament reached the status of privileged applicant.

Consequently, as it occurs in the European States which followed Kelsen’s model, direct access to Community Courts should be granted to the political actors, since they are the ones adopting the norms in the first place. On the contrary, the law, as an expression of “voluntas popularis”, should be shielded from capricious attacks of a few. Otherwise, the proper functioning of Community Institutions would be unnecessarily disturbed.

On the contrary, in lawsuits brought by the Federal Government, members of Congress and States, the existence of an “injury-in-fact” remains an admissibility requirement. Although the USSC does not oppose proceedings brought by the public litigants when asserting their own sovereign or proprietary interests, it is suspicious when they represent the interests of third parties. The reason is that concern for the separation of powers and federalism dominate the rationale of the USSC even more intensively than with private standing. However, the USSC’s case-law has not always been crystal clear.

1.- Standing of the US Government, States and Members of Congress

While the USSC allows the Federal Government to protect the general interest of the public when enforcing specific statutory schemes, it has struggled to determine when to do so in the absence of a supporting statute. Suffice it to juxtapose In re Debs against US v Salomon and US v Mattson. While in the first case, the USSC conferred standing to the United States in order to prevent railway strikers from injuring the general welfare and regardless of the lack of pecuniary interest in bringing

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54] SCHWARZE, The Legal Protection of the Individual against Regulations in European Union Law, (2004) 10:2 EPL, pp 288-290 (holding that traditionally, direct action against Community Acts was entrusted to the Member States and the Community Institutions. Individuals acting as applicants were rather the exception); pp 287-288.
56] In re Debs, 158 U.S. 564 (1895)
57] US v Salomon, 563 F.2d 1121 (4th Cir. 1977)
58] US v Mattson, 600 F.2d 1295 (9th Cir. 1979)
proceedings, in *Salomon* and *Mattson*, two US Courts of Appeal reached the opposite conclusion. They found that conferring standing would entail an excessive encroachment of the Executive upon congressional domains. Indeed, in the absence of a statutory authorisation, it is not possible to ascertain whether Congress actually intended to ban the activity challenged by the Federal Government, which would displace state law and constraint individual liberty. Otherwise, the non-democratic process of litigation would decide matters of paramount public importance, leading to a “government by injunction [which] is anathematic to the American judicial tradition”\(^59\).

Furthermore, in exceptional circumstances, States have been conferred standing to sue as “*parens patriae*”. Where the health and well-being of its residents are put at risk, a State may intervene to defend them\(^60\). This was the case in *Georgia v Tennessee Cooper Co.*, where Georgia sought an injunction against a private company located in Tennessee, which was contaminating the plaintiff’s air and mountains. Owing to the fact that Georgia owned little of territory affected, the USSC acknowledged that it was not suing in its own interest, but in its “*quasi-sovereign*” capacity\(^61\). Additionally, the USSC has also conferred standing where a State wishes to vindicate “*not being discriminatorily denied its rightful status within the federal system*”\(^62\). Moreover, the USSC has pointed out that a good indication to determine whether a State acting as “*parens patriae*” has standing is to determine whether this type of injuries is “*one that the State, if it could, would likely attempt to address through its sovereign making powers*”\(^63\). Nevertheless, in *Massachusetts v Mellon*, the USSC stated that States could not institute proceedings against the Federal Government, by invoking *parens patriae* standing to protect their citizens from the operation of an allegedly unconstitutional federal statute\(^64\).

\(^{59}\) *US v City of Philadelphia*, 644 F.2d 187 (3d. Cir. 1980)
\(^{60}\) *Georgia v Tennessee Cooper Co.*, 206 US 230, 236-38 (1907)
\(^{61}\) *Ibid*, 236-38
\(^{63}\) *Ibid*, 607
\(^{64}\) *Massachusetts v Mellon*, 262 US 447, 485-86 (1923)
However, nearly a century later, the USSC reconsidered its approach. In *Massachusetts v EPA*, with a view to combating global warming, a group of States, local corporations and private organisations sought to enforce, in relation to the emission of four greenhouses gases, the application §202(a) (1) of the Clean Air Act, according to which the Environmental Protection Agency (EPA) is obliged to regulate the emission of any air pollutant from new motor vehicles. In particular, Massachusetts stated that if global warming continued, it would certainly loose a substantial portion of its coastal property. On the contrary, by considering that these emissions inflicted a widespread harm, the EPA maintained that plaintiffs lacked standing to sue. Considering that only one of the plaintiffs needed to have standing to review the merits of the case, the USSC examined the claim of the State of Massachusetts. First, the USSC stated that, by contrast to *Lujan* where the plaintiff was a private association, this case involved a State, which is “not [a] normal litigant [...] for the purposes of invoking federal jurisdiction”. Secondly, the USSC pointed out that the facts of this case were similar to the ones in *Georgia v Tennessee Copper Co*, inferring that Massachusetts’ desire to preserve its sovereign territory was well-founded. Additionally, the USSC based its finding on the idea that standing could operate to counterbalance the transfer of competences from States to the Union. Indeed, since Massachusetts had lost its law-making powers to regulate greenhouse gas emissions for new vehicles, not only was the EPA in charge of protecting it, but Congress had also laid down an additional safeguard consisting of “a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious”. Thus, the USSC concluded that these circumstances entitled Massachusetts to “a special solicitude”. Expressing his dissent, Chief Justice Robert Jr. stressed that, while in *Georgia v Tennessee Copper Co.* the defendant was a private corporation, in this case a State was asserting a quasi-sovereign interest against the Federal Government. Hence, by recalling *Massachusetts v Mellon*, the Chief Justice

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66 Ibid, 512  
67 Ibid, 513  
68 Ibid, 514
contested the USSC’s findings. In a footnote, the USSC replied that dissenting Justices had erred in granting *Mellon* with such broad reading. It drew a distinction between cases where a State tries “to protect her citizens from the operation of federal statutes” and cases where “a State asserts its rights under federal law”. Whereas in the first case, *Mellon* remains applicable, in the latter it does not. One can thus affirm that, although in *Massachusetts v EPA* the USSC did not overrule *Mellon*, it did narrow down its scope. It seems that *Mellon* only remains applicable where a State is challenging the applicability of a federal statute to its citizens. Conversely, where a State is seeking the enforcement of a federal statute, standing is granted as a check on the Federal Agencies’ delegated powers.

Finally, the USSC is reluctant to grant standing to Members of Congress alleging the “loss of political powers” caused either by the inter-branch or intra-branch disputes. The reason is that the so-called “institutional injuries” involve separation-of-powers considerations, in relation to which the USSC has proved to favour great deference to the political process. Indeed, it is argued that where institutional cleavages do not affect private rights, federal courts should abstain from entering a political debate. First, a distinction must be drawn between cases where congressmen do not possess the fiat of their respective Houses of Congress to institute proceedings and cases where they do. In the former case, since legislative power is not individually vested on each member of Congress but on the body as a whole, standing should be denied. Accordingly, legislators should be powerless to litigate without their House’s approval. Secondly, the USSC also appears to distinguish between cases where an institutional injury provokes the “abstract dilution” of legislators’ votes and where it

69 *Idem*
71 *Ibid*. Authors reinforce this argument by referring to corporate law. The members of a board do not have any powers to act individually. Nor can they start proceedings to defend the board’s interest without its approval. See pp 277-281. However, while this limitation seems accurate for “interbranch” injuries, it is troublesome where institutional injuries are caused by some legislators to their fellows.
72 *Raines*, 826
generates their nullification. In *Coleman v Miller*\(^\text{73}\), half of the Senators of the Kansas legislature opposed the ratification of Child Labor Amendment to the US Constitution. The vote was split. However, with the view to breaking the tie, the Lieutenant Governor intervened in favour of ratification. In order to stop Kansas authorities from certifying the amendment, the 20 opposing Senators and four members of the Kansas legislature sought injunctive and declaratory relief. On direct appeal, the USSC first noted that if the Lieutenant’s intervention were declared unlawful, plaintiffs’ vote would have sufficed to stop the ratification process. Thus, standing was granted on the ground that the Lieutenant’s intervention had deprived the plaintiffs’ votes from all validity. By contrast, in *Raines v Byrd*, five members of Congress challenged the constitutionality of the Line Item Veto Act, which empowered the President to cancel certain expenditures or fund provisions financing certain projects without censoring the entire bill. Indeed, the Line Item Veto Act gave great flexibility to the President to cancel legislation, since he could approve the bill while refusing the accompanying projects. Plaintiff invoked the earlier findings of the USSC in *Coleman* and argued that the challenged act “dilute[d] their Article I powers” and undermined the “effectiveness of their votes”. However, the USSC differentiated *Coleman* on two grounds. On the one hand, the plaintiffs’ votes were given full effect, “they just had lost that vote”. On the other hand, not only did the plaintiffs maintain their legislative power in passing or rejecting appropriation bills, but they could also regain the power lost by voting to repeal the act or by exempting a given appropriation bill\(^\text{74}\). Thus, while the plaintiffs in *Coleman* were deprived of all means to reverse the ratification process, the members of Congress in *Raines* had alternative legislative means to address the problem. Hence, the USSC concluded that a “dilution” of legislative powers did not suffice to confer standing.

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\(^{73}\) *Coleman v Miller*, 307 U.S. 433 (1939)

\(^{74}\) *Raines*, 822-821
2. Concluding Remarks

Neither the United States, nor the States, nor members of Congress acting as a plaintiff enjoy the same standing status as the EU institutions and Member States. There is no “special regime” under Article III US Constitution. Indeed, in Raines v Byrd, writing for the USSC, Justice Rehnquist stated: “There would be nothing irrational about a system that granted [congressional] standing; some European constitutional courts operate under one or another variant of such a regime. (…) But it is obviously not the regime that has been obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts”\(^\text{75}\). Therefore, the absence of privileged applicants under the US Constitution implies that the federal courts will not act as direct arbiters of vertical and horizontal constitutional disputes. As suggested by Marbury, the existence of “a private injury” arises as the main procedural requirement all litigants, private or public, must demonstrate. Indeed, in Clinton v City of New York\(^\text{76}\), the USSC subsequently declared void the Line Item Veto Act. But, this time proceedings were brought by a private corporation responsible for the operation of public health care in New York and Idaho potatoes farmers. They alleged that President’s Clinton cancellation of certain provisions of the Balance Budget Act of 1997 and of the Tax Relief Act of 1997 respectively amounted to a liability of several billions of dollars and to the loss of tax benefits. By contrast to Raines, the USSC granted standing to the applicants, holding that they “had a personal stake” in having an actual injury redressed rather than an “institutional injury” that is “abstract and widely dispersed”\(^\text{77}\).

Yet, Massachusetts v EPA shows that the USSC is willing to accept “special solicitudes” from States checking upon federal agencies’ delegated powers. What is the most relevant aspect of this case? Perhaps, it is that the USSC granted greater standing rights to Massachusetts than it would have to private individuals. In effect, had a private individual brought the same suit,

\(^{75}\) Ibid, 828
\(^{76}\) Clinton v City of New York, 524 U.S. 417 (1998)
\(^{77}\) Ibid, 430
it would have been certainly dismissed. Holding that global warming affects all of us equally, the USSC would have ruled out the lawsuit under the “general grievance” exception. Accordingly, since no private applicant could control the legality of the federal agency, the USSC might have considered that it was legitimate for States to step-in. Besides, States become allies with Congress in checking that the federal government faithfully executes federal law. As a result, by applying relaxed standing rules when States act as “parens patriae” plaintiffs, the USSC has enhanced their role in controlling congressional delegation of powers. However, though this ruling brings American States close to their European counterparts, there is still a major difference. Whereas *Mellon* still prevents American States from challenging a federal statute on the ground that it violates the constitutional rights of their citizens, the EU Member States can normally do so.

C.- Standing and private applicants

The objectives of this section are threefold. First, the following paragraphs try to determine whether there is an equivalent under Article 230 EC to the “injury-in-fact” requirement. Secondly, some parallelisms and distinctions will be drawn between the notion of “individual concern” and the “generalized grievance” exception. Finally, the same operation will be undertaken regarding the notion of “direct concern” and the “causation requirement” under Article III US Constitution.

1.- “Injury-in-fact”

Stemming from Article III US Constitution, the notion of “injury-in-fact” is the constitutional core of the US standing doctrine. Paradoxically, it did not appear until 1970, when *Association of Data Processing Service Organization v Camp*78 (*ADPSO*) was delivered. Traditionally, in order to determine whether the case was judicially cognizable, the Court employed

78 *ADPSO, supra* note 41
the “legal interest” test, according to which the plaintiff had to prove that the defendant had adversely affected his statutory or common law rights (arising out of property, contract, tort or privilege). Thus, the “legal interest” test was easily met where rights of a private nature were involved. On the contrary, where the plaintiff tried to assert public rights, his claim was often dismissed. However, this test, which seemed consistent with the economic and social policies of the liberal state of the XIXth and early XXth centuries, could no longer cope with the incipient regulatory and administrative State born with the New Deal. Thus in ADPSO, the USSC felt the urgent need to initiate “the trend toward enlargement of the class of people who protest against administrative action”. Writing for the USSC, Justice Douglas rejected the legal interest test by affirming that the applicant no longer needed to show an “invasion of protectable legal interests” which “goes to the merits”. He stressed that “[t]he question of standing [was] different” and introduced a new test whereby standing would be conferred to applicants demonstrating an injury-in-fact. The ruling in ADPSO has two immediate implications. On the one hand, it suggests that the introduction of the “injury-in-fact” test aimed at liberalising standing, so that increasing administrative and regulatory action no longer escaped from judicial review. On the other hand, it also shifted the focus of standing from a legal interpretation of the norm invoked to a factual inquiry.

The USSC has also pointed out that, although plaintiffs “do not have to wait for the consummation of the threatened injury to obtain relief”, the “injury-in-fact” must be “distinct and palpable”, “concrete”, “certainly impeding”, “real and immediate”, “actual or imminent”, as opposed to

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79 *Tennessee Electric Power Co v Tennessee Valley Authority*, 306 US 118(1939) In this case, the USSC denied standing to the applicants, which were private power companies and whose market interests were adversely affected by the respondent’s competition in this market. The USSC held that, since no statutory or common law right was being invaded by the Federal Agency, it had to refrain from hearing the merits of the case.

80 For instance, whereas beneficiaries of governmental programs and competitors did not have standing to sue, companies submitted to federal regulation did. See CR SUNSTEIN, *Standing and the Privatization of Public Law*, (1988) 88 *Colum. L. Rev.*, pp 1436-81

81 *J Leonard & JC Brand*, supra note 42, pp15-23

82 *ADPSO*, supra note 78, 154

83 *Ibid*, 153

84 *Blum v Yaretsky*, 457 US 991, 1000 (1982).
“conjectural” or “hypothetical”. For instance in *Lujan v Defenders of Wildlife (DoW)*, an environmental association challenged a new joint regulation of the Fish and Wildlife Service and National Marine Fisheries Service interpreting § 7 of the Endangered Species Act. The challenged regulation made consultation no longer necessary between one of these two agencies and other federal agencies prior to adopting measures adversely affecting endangered species located in foreign nations. In order to prove that it had suffered an injury, the plaintiff relied on the affidavits of two of its members, who sustained that the challenged regulation would prevent them from doing “some day” trips abroad to directly observe endangered species. However, owing to the lack of “any description of concrete plans, or indeed even any specification of when the some day will be”, the USSC concluded that DoW’s members had suffered no “actual or imminent” injury. However, in *Friends of the Earth (FoE) v Laidlaw Environmental Services*, the USSC reached a different outcome in a similar factual background. By contrast to the plaintiff in *Lujan*, FoE did provide evidence showing that its members had suffered injuries resulting from the defendant’s illegal pollutant activities, which could not “be equated with speculative “some day intentions to visit endangered species halfway around the world”.

Is there an equivalent to the “injury-in-fact” requirement under Article 230 (4) EC? The answer must be in the affirmative. As starting point, this treaty provision requires private applicants to demonstrate “an interest in bringing proceedings”, which must be “vested and present”. For instance, in *NBV and NVB v Commission*, Dutch associations entrusted...
with protecting the interests of the Netherlands banking sector brought annulment proceedings against a European Commission decision granting a negative clearance to an interbank agreement on the grounds that it did not have an intra-community effect. The applicants did not object the operative part of the decision, but they challenged a statement of the European Commission noting that the agreement restricted competition significantly. The applicants maintained that national courts could rely on this statement to declare the agreement unlawful, while disagreeing with the European Commission over its territorial effects. However, the CFI rejected this argument stating that it was based “upon future and uncertain situations". In any case, uncertainties over the scope of the agreement could be solved by a reference to the ECJ. Besides, a change in the territorial effects of the agreement would enable the European Commission to reassess its position, after which the applicants could institute judicial proceedings. Since applicants “retain the possibility of asserting their rights in future”, the CFI dismissed the application. Hence, it seems that both the USSC and Community Courts would dismiss actions based on “conjectural” or “hypothetical” interests.

Another common feature is that litigants’ interests can be “economic or otherwise”91. Indeed, since ADAPSO, the USSC has repeatedly recognised that the “injury-in-fact” requirement does not need to be of an economic nature. For instance, the USSC has qualified environmental harms92, racial discrimination on housing practices93, the diminished ability to receive racially desegregated education94, failure to obtain public information95, and an adverse judgment issued by a state court96 as “injuries-in-fact”. Likewise, in Greenpeace and other v the Commission, the CFI recognised that it is not necessary to assert an economic interest in order for an applicant to have locus standi.

91 ADAPSO, Op cit, 152.
92 Sierra Club v Morton, 405 US 727 (1972)
94 Allen v Wright, supra note 45, 738. However, the claim was dismissed because the applicants failed to prove a causal link between the injury suffered and the challenged governmental action. See infra pp 3
2. “Individual concern” and “General Grievance”

From the above, one may suggest that Article 230 (4) EC and Article III require private applicants to demonstrate that their interests have been or are likely to be adversely affected. However, while both Article 230(4) EC and Article III US Constitution bar injuries common to the general population, the latter does not require the applicant’s injury to be singled out from all others.

a) Individual Concern

The notion of “individual concern” was defined by the ECJ in Plaumann, where it held that “persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”\(^97\). In this case, a German importer of clementines sought to annul a European Commission decision addressed to Germany refusing to partially suspend custom duties on clementines imported from third countries. After enunciating the aforementioned formula, the ECJ held that the applicant was not individually concerned because he was only affected by reason of pursuing a commercial activity, which “may at any time be practised by any person”. Put differently, since both the applicant and any prospective importers of clementines would be affected by the contested measure in the same way, he did not have sufficient standing.

It follows that the notion of individual concern not only excludes “actio popularis” applicants, but it goes further. It renders Community Courts directly inaccessible for applicants who fall within the scope of application of the challenged measure, but who cannot be differentiated

\(^97\) Case 25/62, Plaumann & Co. v Commission, [1963] ECR 95
from other persons also affected by it. Indeed, even if, by virtue of objective or factual criteria, the number of persons harmed by the challenged act can be determined, the ECJ has held that this situation does not suffice in itself to confer standing.\(^98\)

Due to the notoriously strict construction of the *Plaumann* formula, when do private applicants have standing? It has been suggested that applicants must belong to “a closed category” to which a defined number of persons sharing peculiar attributes belong and which is no longer accessible to others once the contested measure has entered into force. It is true that it is possible for there to be more than one applicant individually concerned. Still, the broader the category becomes, the more difficult it is for them to have *locus standi*.\(^99\) Authors have also identified three paradigms where the ECJ has held that applicants were individually concerned.\(^100\) The first is where, in adopting the contested measure, a Community institution has failed to comply with its procedural obligations vis-à-vis the applicant. In *Sofrimport*, a European Commission Regulation imposed a temporary ban on the importations of Chilean apples. However, when adopting the contested regulation, the European Commission did not follow the Council’s instructions to identify the importers whose cargo was in transit during the relevant period. Hence, the ECJ concluded that the applicant, whose apples were in transit when the regulation was enacted, was individually concerned and proceeded to rule on the merits. In the second paradigm, the contested measure contains an express reference to the applicant’s name. For instance, Council regulations listing the names of the persons on whom economic sanctions must be imposed by the Member States. Lastly, standing is granted where the adoption of the contested measure leads to the nullification of the applicant’s “*in rem*” rights. In

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100 Echelmaier, *supra* note 39, pp 183-91. See also *Arnul*, Op cit, pp 32-40 (holding that individual applicants must advance a “closed class” argument, a “specific right” argument or a “pre-adoption procedure argument”)
Codorniú, a Spanish producer of sparkling wines brought an annulment action against a Council regulation reserving the designation “grand crémant” to sparkling wines produced in Luxembourg and some regions of France. The ECJ noted that, decades prior to the entry into force of the contested regulation, the applicant had registered the trade mark “grand crémant de Codorniú” in Spain. Thus, it held that, since the regulation at issue would amount to the deprivation of its intellectual rights, the applicant was individually concerned. However, the ECJ has stated that interferences with the soundness of contractual relationships entered into prior to the adoption of the contested act are not a sufficient ground to comply with the Plaumann formula. Likewise, the ECJ refuses to extrapolate the conclusions drawn in Codorniú to cases where, as opposed to the nullification of rights, the challenged act only entails economic disadvantages for the applicant. As a result, the Codorniú paradigm has been applied restrictively.

b) Generalized Grievance

The USSC has stated that applicants, whose claim relies on “generalized grievances” common to the general population, lack standing to sue in federal courts. Again, it seems that the reason justifying the denial of standing in these cases lies in that the alleged harm is abstract and of an undefined nature. Additionally, in Lujan v Defenders of Wildlife, Justice Scalia also alluded to the principle of separation of powers, stressing that “these injuries” are better addressed in a political forum. As opposed to alleging generalized grievances, applicants must assert a concrete and

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102 Codorniú, supra note 38
103 More recently, see Cases T-13/99 Pfizer Animal Health v Council [2002] ECR II-3305 and T-70/99 Alpharma v Council [2002] ECR II-3495. In Alpharma, the applicant brought an annulment action against a Council decision withdrawing from the market an antibiotic of which it was the largest trader and supplier. The CFI did not confer standing because of its prevailing market position, but on the ground that, in accordance with the Community legislation, it was the only person entitled to seek an authorisation to market the product. The same rationale was followed in Pfizer.
105 Arnull, supra note 39, pp 32-40
106 It is noteworthy mentioning that from the case-law of the USSC, one cannot clearly determine whether the requirement of “generalized grievance” has a constitutional or prudential nature. See Akins, supra note 95, 23
individuated injury. For instance, the USSC has consistently rejected that an
injury resulting from the violation of a right “to have the Government act in
accordance with law” could confer standing. In Schlesinger v Reservist
Committee to Stop the War, a pacifist organisation sought injunctive and
declaratory relief against members of Congress, who were also reservists,
arguing that they were in breach of the Incompatibility Clause of the US
Constitution. However, the USSC denied standing. First, it acknowledged that the injury asserted by the plaintiff (non-observance of the
Incompatibility Clause) was an abstract interest “undifferentiated from
that of all other citizens”. Secondly, the USSC affirmed that the abstract
nature of the injury deprived it from casting the dispute “in a form
traditionally capable of judicial resolution”. Lastly, the USSC enounced
that requiring the injury to be concrete ensured that constitutional
adjudication does not take place unnecessarily. A concrete injury removes
the claim from the realm of speculation, limits judicial relief to a particular
factual scenario and prevents courts from “govern[ing] by injunction”.
Therefore, from its ruling in Schlesinger, one can affirm that the USSC’s
rationale rests on a very simple syllogism: an injury shared by all members
of the public has an abstract nature, abstracts injuries precludes federal court
from adjudicating, ergo a widely shared injury precludes judicial
adjudication. For the same reasons, the USSC is also reluctant to grant
standing to voters and to tax payers.

107 Lujan, 576. See also Ex parte Levitt, 302 U.S. 633 (1937), Laird v. Tatum, 408 U.S. 1
(1972); Schlesinger v. Reservists Committee to Stop the War, supra note 85, United States
108 Schlesinger, 210-11
109 See Article I, § 6, Clause 2 US Constitution in Annex
110 Schlesinger, 218
111 Ibid, 222
113 Massachusetts v Mellon, supra note 64, 486-487 (1923). However, in Flast v Cohen,
supra note 43, the USSC agree to grant standing to tax payers, provided that two conditions
were fulfilled, namely [1] the challenged congressional statute was adopted under the
Taxing and Expending Clause of the US Constitution, and [2] there has been a violation of
a constitutional provision which specifically limits the federal taxing and spending powers.
However, the USSC has subsequently interpreted this exception rather restrictively. See
United States v Richardson, supra 107, 175 and Hein v Freedom from Religion Foundation,
127 S Ct. 2553 (2007)
However, in order to have access to federal courts and though the alleged injury must be concrete and individuated, it does not need to be unique. Indeed as concurring Justice Kennedy pointed out in Lujan, “while it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way.”\textsuperscript{114} Federal Elections Committee (FEC) v Akins illustrates well this point. There, a group of voters complained to the FEC on the non-enforcement of record-keeping and disclosing obligations laid down on the Federal Elections Committee Act (FECA) against the American Israeli Public Affairs Committee (AIPAC). When the case reached the USSC, the FEC argued that respondents lacked standing to sue. It stressed that they had suffered a “generalized grievance” which barred access to federal courts. However, the USSC disagreed. First, it stated that the purpose of the FECA was to inform the general public about the contributions and expenditures of political committees. Therefore, the injury “consist(ed) of their inability [...] to obtain information that, respondent’s view of the law, the statutes require[d] that AIPAC make public”\textsuperscript{115}. The USSC then went on to affirm that even if the injury was widely shared, Congress had rendered it sufficiently concrete for judicial adjudication. Hence, the USSC ruled that persons who filed the complaint against the FEC had suffered an “injury-in-fact” sufficiently “concrete and particular” for the purposes of Article III\textsuperscript{116}. One can affirm that, in order for a claim to comply with the “injury-in-fact” requirement, the decisive criterion is not whether the injury is widely shared, but rather whether it is sufficiently concrete. Indeed, the ruling of the USSC in Akins evinces that the syllogism previously enounced in Schlesinger sometimes fails. Indeed, although “abstract” and “widely shared” “[o]ften go hand to hand”, it is not always the case “and where harm is concrete, though widely shared, the Court has

\textsuperscript{114}Lujan, supra note 32, 581
\textsuperscript{115}Akins, supra note 95, 21
\textsuperscript{116}Dissenting Justice Scalia argued that the USSC’s findings were inconsistent with its previous ruling in United States v Richardson. However, the USSC replied that, by contrast to Richardson where a “logical nexus” between the respondent status and the constitutional provision invoked was missing, Congress had made clear that the main purpose of the FECA was “to protect individual from the kind of harm they say they have suffered”. Besides, the USSC stressed that this case did not involve taxpayer standing but rather voter standing. (Ibid 22)
found injury in fact”\textsuperscript{117}. Moreover, if in \textit{Lujan} the USSC considered that Congress could erase by statutory grant the requirement of “injury-in-fact”, \textit{Akins} demonstrates that, once Congress has defined with sufficient precision the protected interest (right to information), whether the injury is widely shared becomes irrelevant. Further, by contrast to \textit{Schlesinger}\textsuperscript{118}, where the alleged injury resulted from violating a structural provision of the US Constitution, in \textit{Akins} the injury suffered by the respondent was due to a violation of a statutory right. It follows that where a breach of general directives of the US Constitution is invoked as the legal basis for an injury, the USSC is willing to defer to the political process. On the contrary, regardless of whether it is common to the general public, an injury resulting from the violation of a statutory right is sufficient to confer standing\textsuperscript{119}.

c) \textit{Concluding Remarks}

The examination of the case-law of both Courts seems to show that the test deployed by the ECJ under the \textit{Plaumann} formula is stricter than the generalized grievance exception. Provided that “the harm is concrete”, the USSC will not take into account the number of persons affected by governmental action. However, in addition to requiring a concrete injury, the ECJ will still evaluate whether the applicant’s harm presents some distinctive features absent in other parties affected.

First, this argument is demonstrated by the fact that the USSC would find an “injury-in-fact” in cases where the Community Courts rule that the applicant was individually concerned. For instance, in view of its case-law it is likely that in applying the criteria earlier described, the USSC would have granted standing to the applicants in \textit{Sofrimport} or \textit{Codorniu}\textsuperscript{120}. In both cases, applicants suffered a concrete and immediate injury. In the first case,

\begin{itemize}
  \item \textsuperscript{117} \textit{Ibid}, 24
  \item \textsuperscript{118} See also \textit{Richardson, Hein and Lance v Coffman}.
  \item \textsuperscript{119} CR SUNSTEIN, Informational Regulation and Informational Standing: Akins and Beyond, (1999) 147 \textit{U.Pa.L.Rev}, pp 613-675. He welcomes the ruling of the USSC in \textit{Akins}.
  \item \textsuperscript{120} Same applies to cases like \textit{Alpharma} and \textit{Pfizer}
\end{itemize}
the importer of Chilean apples would have lost its cargo and in the second, the Spanish company would have suffered the expropriation of its trade mark. Secondly, this argument also demonstrates that in cases where the USSC denies standing, the ECJ would most probably reach the same outcome. In effect, the ECJ would have also declared inadmissible an action like the one filed in *Lujan* or *Schlesinger*. In *Lujan*, applicant could not distinguish itself from any other environmental association or any other person interested in protecting the wild life. The same applies for *Schlesinger*. The Community Courts would not have spent much time in dismissing an action filed by EU citizens arguing that a MEP’s mandate is invalid under the EC Treaty. Finally, where the USSC grants standing, it does not follow that the ECJ would declare the action admissible. In this regard, it seems that the federal courts would have granted standing to the applicant in *Plaumann*[^121]. The injury he adduced was “distinct and palpable”, “concrete”, “certainly impeding”. Since the enquiry of the federal courts stops here, they would not have examined whether, by engaging in the same activities as the applicant, the importation of clementines was opened to other traders. In the same way, divergences between the two courts would appear where the plaintiff is an environmental association[^122]. Suffice it to juxtapose *Laidlaw* case with *Greenpeace and* 

[^121]: Same applies to cases like *Abertal, Buralux and Campo Ebro*, *supra* note 98

[^122]: One can draw the following parallelisms between “associational standing” under Article III US Constitution and under Article 230 EC. See generally, *Hunt v Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) and T-38/98 ANB v Council [1998] ECR II-4191, para 25. First, standing is granted to an association when its members had standing to sue in their own right. However, in so far as the notion of “individual concern” notoriously restricts access to the Community Courts for individuals, the same applies for associations suing on their behalf. Thus, the representational capacity of associations is broader under Article III than under article 230 EC. Secondly, an association may also bring proceedings on its behalf if it has been injured as an entity, (e.g. injuries affecting its capacity to attract members, to raise revenue or fulfil its purposes). Again, because of the notion of “individual concern”, the individual capacity of associations is more limited in the EU than in the US. Lastly, as for the capacity to represent “collective interests”, both Courts will deny standing to associations vindicating “abstract social interests” (Compare *Sierra v Morton*, op cit, 739; *Lujan*, op cit, 563 with Joined Cases 19/62 to 22/62 *Fédération nationale de la boucheurie en gros and Others v Council* [1962] ECR 491, 499; *Case 72/74 Union Syndicale and Others v Council* [1975] ECR 401, para 17; and Case 282/85 *DEFI v Commission* [1986] ECR 2469). Nevertheless, whereas the ECJ has narrowed down “collective standing” to two scenarios, [1] where association was involved in the procedure leading to the adoption of the contested act, [2] where Community law expressly granted procedural powers on trade associations. (See *Joined Cases 67/85, 68/85 and 70/85 Van der Koy and Others v Commission* [1988] ECR 219 and *Case C-313/90 CIRFS and Others v Commission* [1993] ECR I-1125; *Case 191/82 Fediol v*
other v the Commission. In the latter case, 16 individuals, two local environmental associations and Greenpeace brought an annulment action against a European Commission decision granting Spain financial assistance for the construction of two power plants in the Canary Islands. Just as in Laidlaw, most of the individual applicants were local residents who sustained that the construction of the power plants would harm their health, economic resources, quality of life and the local flora and fauna. By recalling the ECJ’s case-law, the three environmental associations argued that, since some of their members were also local residents individually concerned by the contested decision, they had standing. The CFI began by recognising that environmental protection could be considered as a “peculiar attribute” or “defining circumstance”. However, it went on to state that the fact that applicants were local residents, fishermen or farmers did not suffice to grant standing, since the measure “was likely to impinge […] any person residing or staying temporarily in the areas concerned”. As for associations, owing to the lack of standing of their members and since they were not themselves individually concerned, the CFI refused to grant standing. On appeal, referring to the ruling of the USSC in Sierra Club v Morton, applicants invited the ECJ to follow the US example by adopting more liberal standards which would guarantee an adequate level of judicial protection. However, the ECJ refused to do so, holding that indirect

Commission [1983] ECR 2913), associations litigating in the US federal jurisdiction enjoy a better position. They just have to accommodate their pleadings so as to argue that [1] one of its members is injured and that [2] they act within the scope of its founding purposes. Yet, the problem with the “atomization” of collective interests lies in that the interests of a group are sometimes more than the mere aggregation of individual ones. Often, associations are required to balance conflicting internal voices which raise admissibility questions. See N EDMONDS, Associational Standing for Associations with Internal Conflicts of Interests, (2002) 69 U.Chi.L.Rev., pp 351-377


124 Ibid, 54.
challenges ensure sufficient access to judicial relief. As opposed to the American experience, *Greenpeace* demonstrates that associations challenging a Community measure, and relying on the protection of collective interests as a basis for standing, will not have direct access to Community Courts.

Moreover, *Akins* deserves a special mention. Would the ECJ grant standing to applicants requesting a Community Institution to enforce the disclosure of documents originating with third parties? The reply must be in the affirmative. In the light of Article 255 EC, any EU citizen has the right to access to the documents of the Community institutions. Where a Community institution refuses to disclose all or part of the documents requested, its decision can be challenged under Article 230 EC. Since the challenged decision would be addressed to the applicant, the latter does not need to prove he was individually or directly concerned. Furthermore, the CFI has ruled that applicants do not need to provide any reason for their request. Accordingly, informational standing is submitted to “a special regime” which seeks to “*strengthen[…]* the democratic character of the institutions and the trust of the public in the administration”¹²⁵.

3.- Direct Concern and the Causation Requirement under Article III US Constitution

a) *Direct Concern*

This notion introduces the element of causation into standing rules. A measure is of direct concern to the applicant if his legal position is definitively defined by the challenged act, and it is not subordinated to the addressee’s discretion¹²⁶. Thus, if the challenged act does not give room for discretion, the applicant is directly concerned. This is the case of measures which are “in substance” a regulation¹²⁷ or measures whose implementation

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¹²⁶ *Enchelmaier*, Op cit, p 115
¹²⁷ *Antillean Rice Mills and Others v Commission*, supra note 38, para 63
is purely automatic. The ECJ has held that not only must the notion of discretion be assessed in relation to the wording of the contested act, but due regard must also be paid to the context of its adoption, that is, an applicant would be directly concerned if factual circumstances refrain the addressee from using its discretion. In *Piraiki-Patraiki*, Greek companies challenged a European Commission decision which authorised France to restrict the importation of Greek cotton yarn. One could argue that, owing to the fact that France could decide whether to make use of the authorisation or not, applicants were not directly concerned. However, the ECJ took a different view. It held that since, prior to the adoption of the contested measure, France had set up a system of licences which already restricted such imports, the possibility of not making use of the authorisation was “entirely theoretical”.

Furthermore, although the ECJ formally admits that private individuals may bring an annulment action against a “genuine” Directive, the truth is that *locus standi* has never been granted. One could justify such denial in that Directives are Community measures addressed to the Member States which do not impose legal obligations upon individuals and thus, their legal position cannot be affected. On the contrary, this argument could be rejected by sustaining that refusing to grant standing where Member States enjoy no discretion would render the notion of “direct concern” meaningless for Directives. The CFI has not replied to this issue openly, instead it has been rather generous in determining the degree of discretion enjoyed by the Member States when implementing a Directive.

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131 *Arnull*, supra note 39, pp 30.

In addition, recent cases demonstrate that the CFI is avoiding answering this question, by first deciding whether the applicants are individually concerned.\textsuperscript{133}

\textit{b) Causation: Traceability and Redressability.}

In addition to having suffered an “injury-in-fact”, not only must the plaintiff prove that the challenged governmental action is “fairly traceable”\textsuperscript{134} to the injury suffered, but also that the judicial relief requested “will remove the harm”\textsuperscript{135}. As Nichol Jr. indicates, traceability and redressability respond to different justifications. Whereas traceability can be understood as the inherent corollary to the requirement of injury, which necessarily entails to be attributed to the defendant; by refraining courts from becoming embroiled in purely advisory opinions, redressability ensures that judicial intervention is not futile\textsuperscript{136}. In \textit{Allen v Wright}, several parents of black students sought injunctive relief against the Internal Revenue Service (IRS), alleging that its failure to deny tax exempted status to a broader range of racially discriminatory private schools had led to a diminished ability of their children to receive a desegregated education. Although the USSC accepted that an injunction could contribute to redressing the alleged injury, it held that the injury could not be attributed to the IRS’ misapplication of tax exemptions, but “\textit{result[ed] from the independent action of some third party not before the court}”\textsuperscript{137}. Hence, standing was denied not because of a missing link between the injury and

\begin{itemize}
\item traders selling cigarettes under the trade mark “MILD SEVEN” sought to annul article 7 Directive 2001/37/EC, which from 30 September 2003 prohibited “\textit{texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others}”. From the wording of this article, one could reasonably deduce that the Directive would prohibit the use of the word “mild” for tobacco products, even more so if one bears in mind that this word was mentioned in recital 27 of the preamble of the Directive. However, the CFI understood this reference in the preamble as a mere suggestion. It stated that Member States could still give full effect to article 7, while not prohibiting the use of such word. Thus, owing to the broad drafting of article 7, the CFI concluded that it was for the national legislators, or where appropriate for national courts, to define the precise contours of the prohibition laid down therein. As a result, since the addressees of the measure retain discretionary powers, standing was denied.
\item \textsuperscript{134} Allen v Wright, supra note 45, 753 fn 19
\item \textsuperscript{135} Warth v Seldin, supra note 29,505
\item \textsuperscript{136} GR NICHOL Jr., Causation as a Standing Requirement: The Unprinciple Use of Judicial Restraint, (1981) 63 Ky. L.J., pp 185-226; 193-198
\item \textsuperscript{137} Ibid, 757
\end{itemize}
the judicial relief requested (redressability was met), but due to the fact that the injury could not be attributed to the defendant’s behaviour (traceability was not).

Further, the USSC has also refused to confer standing where the harm was not capable of being redressed. In *Linda RS v Richard D*\(^\text{138}\), a Texan statute provided that any parent failing to provide support for his or her children was subject to criminal prosecution. Nevertheless, state authorities interpreted the statute as only referring to married parents. Linda RS, the mother of an illegitimate child who was not receiving any support from the father, challenged the non enforcement of the statute on the ground that it was contrary to the Equal Protection Clause. However, the USSC ruled that were the statute enforced against the father of her child, it would only lead to his prosecution and eventual conviction, but it did not assure that her child would receive financial support from him. In the same way, in *Simon v Eastern Kentucky Welfare Rights Organization*\(^\text{139}\), several indigents sought declaratory and injunctive relief against a ruling of the IRS, pursuant to which, in order to receive tax exemptions, charitable hospitals were no longer required to treat indigents to the full extent of their financial capacities, instead offering emergency room services was enough. Nevertheless, the USSC pointed out that the judicial remedy sought did not guarantee that the plaintiffs would receive an extensive medical treatment.

The USSC pointed out that hospitals could opt to forego tax benefits, rather than to offer expanded treatments to indigents. These two judgments have been eagerly criticised on the grounds that, while assessing whether judicial relief will redress the harm, the USSC does not take into consideration the deterrent effects of legislation. In *Linda RS*, by imposing criminal penalties, the state legislator sought to reinforce the obligation to provide child support. In the same sense, the findings in *Eastern Kentucky* are also in sharp contrast with the fact that taxation aims at promoting certain private parties’ activities, while excluding others. Thus, by omitting in its reasoning the influential character of legislation on third parties’, one can suggest that

\(^\text{138}\) *Linda RS v Richard D*, 410 US 614 (1973)

the USSC’s conclusions appear to be inconsistent with the cannons of statutory interpretation. Perhaps, that is why the USSC has lately reconsidered its approach and starts to defer to congressional intent. In *Laidlaw*, the USSC allowed an environmental association to petition for civil penalties, holding that remedies seeking to abate an ongoing behaviour or prevent its recurrence provide a form of redress. Likewise, in *Massachusetts v EPA*, when discussing the probability of stopping global warming by cutting down new-car- greenhouse emissions, the USSC held that the Clean Air Act imposed upon the defendant the obligation to stop or slow it. By contrast to the requirement of “injury-in-fact” in relation to which the USSC follows a high degree of scrutiny, the empirical and complex nature of redressability demonstrates that Congress is better suited for determining the adequate correlation between legal rights and judicial remedies. Nevertheless, deference must not be confused with capitulation and where congressional general assumptions do not properly respond to the characteristics of a particular case, it is for federal court to assure the redressability of the alleged injury. A rebuttable presumption in favour of the legislature’s objectives appears to strike a proper balance between the constitutional nature of redressability and its interaction with statutory rights.

140 Nichol Jr., supra note 136, pp 204
141 Ibid, 185-86. As the dissent pointed out, this finding appears to contradict the ruling of the USSC in *Linda RS*. However, the USSC replied that the difference between this case and *Linda RS* are twofold. On the one hand, the USSC considers that in *Linda RS*, the enforcement of the statute would lead to the imprisonment of the delinquent father which would probably undermine his capacity to provide child support. On the other hand, the USSC suggested that its ruling in *Linda RS* would be different, had the dismissal of the criminal penalty been subject to the payment of child support. (see fn 4).
144 Besides, as Krent indicates, deference to congressional judgments on redressability “makes sense both as a matter of policy and formal separation of powers doctrine”. On the one hand, deference to Congress is consistent with the principle of separation of powers in that courts do not have empirical data available to determine the deterrence force of certain remedies, which varies from one statutory context to another. On the other, Krent argues that, since congressional assessments would play a pivotal role in the USSC’s assertions of redressability, deference will improve the quality of legislation and will entail a greater degree of public scrutiny. Ibid, pp 108
c) Concluding Remarks

In the US, attacking the legality of governmental action in order to correct private behaviour requires a double causal connection. First, the injury must be attributed to the government. Secondly, the injury must be capable of being redressed by judicial intervention.

Under Article 230 EC, there is no equivalent to the second limb of the causation requirement. By contrast to injunctive and declaratory relief, annulment actions normally produce *ex tunc* effects\(^{145}\). Besides, in the light of Article 233 EC, the Community institution whose act has been annulled is obliged to give full effect to the judgment of the Community judiciary. Accordingly, compliance with the judgment may require the Community Institution “to take adequate steps to restore the applicant to its original situation”\(^{146}\). By their own nature, annulment actions are capable of redressing the injury suffered by the applicant.

Moreover, would the Community judiciary have decided *Allen* in the same fashion? It is doubtful that the ECJ would have considered the parents of black public school children to be “individually” concerned. Indeed, not only the applicants but all parents of black students had an interest in bringing proceedings. But assuming they were, the reply must be in the negative. The ECJ would have first evaluated whether the IRS’ failure to cancel tax exemptions to private schools led to a change in the legal position of the applicants. In this regard, if the annulment of a Community act contributes to restoring the applicant to its original legal position, it implies *inter alia* that the contested measure had actually produced legal effects, even if third parties were also involved in the chain of causation. Conversely, if the Community act does not produce legal effects, an annulment action becomes futile since the legal position of the applicant remains intact in the first place. Said differently, the approach of the ECJ can be distinguished from *Allen* in that there is no dissociation between

\(^{145}\) *Craig & De Burca*, Op cit, pp 540-2

\(^{146}\) *Antillean Mills*, supra note 38, para 60; T-387/94 *Asia Motor France v Commission* [1996] ECR II-961
“traceability” and “redressability”. On the contrary, both are insolubly connected. This illustrated by cases like Nefarma, Phillip Morris\textsuperscript{147} and Postbank v Commission\textsuperscript{148}, on the other hand. Accordingly, had the Community judiciary found that the IRS’ failure contributed to redressing the injury of the parents of public school black children, it would have entailed that the contested omission produced legal effects vis-à-vis the applicants.

In relation to direct concern, would the USSC have granted standing to the applicants in Piraiki-Patraiki? The issue would not have been examined under the standing doctrine, but under “ripeness”, that is, federal courts would examine whether it is more suitable to adjudicate at a latter date (Needless to say, the deadline of two months to lodge an annulment action prevents the ECJ in Piraiki-Patraiki from exercising this option). In determining when a claim is ripe for review, the USSC applies a two-pronged test. On the one hand, the claim must be fit for judicial determination, no further factual development being necessary (fitness test). On the other hand, a delayed intervention would cause substantial hardship to the applicant (hardship test). Therefore, the question that arises is whether USSC would have waited for France to use its authorisation to limit Greek imports before intervening. In relation to the fitness test, no further factual inquiry was necessary. It was clear from the written procedure that, though France could decide not to use its authorisation, this possibility was purely theoretical. As for the hardship strand, the applicant had entered into contracts of sales with French customers. They argued that the adoption of a quota system would prevent them from carrying the contracts out. Thus, the applicants risked significant economic repercussions. Besides, the USSC has found hardship where the enforcement of a statute or regulation is


certain, irrespectively of delays in commencing of proceedings\textsuperscript{149}. It follows that the USSC would have declared the action ripe for review.

II. **Standing as a "Jurisdictional Shifting Strategy"**

1.- Article 234 EC, an alternative remedy?

As the previous section shows, the *Plaumann* formula operates as an important barrier to the admissibility of annulment actions brought by non-privileged applicants. It has been argued that the strictness of standing rules could cast doubt on their compatibility with the general principle of judicial protection\textsuperscript{150}. Indeed, the case-law of the Community Courts reveals that it is sufficient for the harm not to be “unique” to dismiss the application as inadmissible. However, instead of reformulating the notion of individual concern, the ECJ has replied that the Treaty lays down a complete system of remedies where judicial protection of private parties’ rights is ensured. Judicial protection must not be examined in the light of one remedy alone, but in conjunction with other remedies. Difficulties in having access to one can be redeemed by the wide availability of others. Hence, where Article 230(4) EC forecloses direct access to the Community Courts, private parties may seek indirect judicial review. It follows that compliance with the principle of judicial protection is conditioned upon the adequacy of indirect challenges. In this regard, although it has exclusive jurisdiction to review the validity of Community measures, the ECJ has paradoxically decided to shift the burden of guaranteeing the effectiveness of alternative remedies onto the national legal systems. By relying on Article 10 EC, the ECJ has compelled national legislators to adapt national procedural law so as to facilitate access to national proceedings where the validity of a Community act can be incidentally raised and referred to the ECJ\textsuperscript{151}.

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\textsuperscript{151} *UPA*, supra note 23, [2002] ECR I-6677, para 42.
a) Opinion of AG Jacobs in UPA

In *UPA v Council*, Advocate General (AG) Jacobs opined that indirect challenges are not the appropriate means of challenging the annulment of Community acts. In particular, he criticised the traditional view that the preliminary reference procedure was an adequate alternative to Article 230 EC. First, preliminary reference proceedings are not a remedy available to private parties as a matter of right. National courts enjoy discretion when referring a question to the ECJ and even if, under the third paragraph of Article 234 EC, courts of last instance are obliged to refer, they do not have to do so following the applicants’ instructions. The way in which the question referred is defined falls within the exclusive competence of the national courts. Secondly, preliminary reference proceedings entail long delays and increase costs. Thirdly, although it has been accepted by the ECJ that a national court may grant interim relief against a Community measure, the conditions to do so are notoriously strict. Therefore, difficulties with interim measures are important. Lastly, this alternative remedy fails where the Community measure challenged does not require further implementing national measures. In these cases, AG Jacobs wrote “*Individuals cannot be required to breach the law in order to gain access to justice*”\(^\text{153}\). Thus, noting that indirect challenges were ill-fitted to provide a satisfactory degree of judicial protection, the Advocate General concluded that the notion of individual concern needed to be reformulated. In this sense, he acknowledged that nothing in the Treaty precluded the ECJ from abandoning *Plaumann* and suggested that a person should be individually concerned where a Community measure has a “*substantial adverse effect on his interests*”\(^\text{154}\). This suggested test would have granted standing to the applicants in cases like *Plaumann* or *Greenpeace*\(^\text{155}\). Additionally, it is noteworthy that this test would have brought standing rules under Article 230 EC closer Article III of the US Constitution. While generalized

\(^{152}\) This “flaw” was raised again by AG Mengozzi in Case C-354/04 P *Segi v Council* [2007] ECR I- 01579, para 95

\(^{153}\) Opinion AG Jacobs in *UPA*, para 40-44

\(^{154}\) Ibid, 60.

\(^{155}\) T TRIDIMAS & S POLI, *Locus Standi of Individuals under Article 230(4) EC : The Return of Euridice?*, in *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs*, (OUP, 2008), pp 70-89
grievances seem to be left out, the AG himself stated that this test was not influenced by the number of parties injured. However, his proposal was rejected by the ECJ, consolidating, once again, its reticence towards relaxing standing rules.

But, why did the ECJ reject this new test? More than raising fears of opening the floodgates; the AG’s proposal entails accepting a radical redefinition of the roles of the Community and the national courts vis-à-vis private applicants. National courts would stop being the primary venue for remedying private injuries caused by Community legislation. Instead, it would be for the CFI to grant prospective relief. In addition, since “locus standi” would no longer serve to allocate functions between the Community and national judiciary, it would accomplish a new purpose. Perhaps, emulating the USSC, “individual concern” would be read as an implement of the principle of “inter-institutional balance”, whereby claims brought in the “mere interest of the law” would be shifted either to the political process or to proceedings brought by privileged applicants. Finally, remedying injuries caused by unlawful Community measures of general application would no longer be a marginal function of the Community Courts. Accordingly, “traditional judicial business” would not be odd to the Community Courts.

b) The CFI ruling in Jégo-Quéré

The vindications of AG Jacobs did not fall into oblivion after being rejected by the ECJ. In Jégo-Quéré, the CFI was heavily influenced by his opinion, though the new test it proposed was not so ambitious. The case involved a French fishing company which challenged a European Commission regulation defining the size of mesh for fishing nets. In applying the Plaumann formula, the CFI concluded that the applicant lacked standing. However, it stated that, since Community Law required no implementation at national level, denying standing would amount to

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156 The AG replied that an increase in the number of actions would be manageable, see paras 79-81.
depriving the applicant from any adequate remedy\textsuperscript{158}. In effect, the CFI acknowledged that the only way in which the applicant could initiate national proceedings was by infringing Community law and consequently, being subject to administrative sanctions. Since demanding this from the applicant would be contrary the principle of judicial protection, the CFI opted for reformulating the notion of individual concern. By contrast to the AG, the CFI limited its ruling to covering the remedial lacuna evinced by the facts of this case. It stated that the applicant would be regarded “as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him.”\textsuperscript{159} Hence, after indicating that this new test rendered the number of affected persons of no relevance, it concluded that the applicant had standing to seek the annulment of the contested act.

Unsurprisingly, the ECJ overruled the findings of the CFI\textsuperscript{160}. First, it repeated that Community law provided a complete system of legal remedies which ensures that the rights of private persons are judicially protected. Secondly, by virtue of Article 10 EC, it is for the Member States to secure the availability of indirect challenges before national courts\textsuperscript{161}. Last but not least, it concluded that the notion of “individual concern” could not be modified via judicial interpretation, but only by amending the Treaty. In so doing, the Community institutions and the Member States were implicitly

\textsuperscript{158} The CFI also maintained that actions for damages against the Community were not an adequate remedy to test the validity of Community Act. On the one hand, such actions cannot remove the unlawful act from the Community legal order. On the other, actions for damages have a narrower scope of application than annulment actions. Whereas the latter may censure any violation of Community law, the former only sanction on infringements which are sufficiently serious. See para 46

\textsuperscript{159} \textit{Ibid}, 51.

\textsuperscript{160} \textit{Jégo-Quéré} was not the last time the ECJ overruled the CFI. In fact, \textit{Tridimas & Poli}, Op cit, 84-89, argued that post-UPA developments show that the latter has been less restrictive than the former when applying \textit{Plaumann}. See Case C-78/03P Commission v Germany (ARE case) [2005] ECR I-10737.

\textsuperscript{161} The “\textit{Jégo-Quéré}” scenario is not possible in the United Kingdom where private applicants can seek declaratory relief against Community measures fully directly effective or the UK government’s intention to implement a Directive. See Joined Cases C-103 and 145/77 \textit{Royal Scholten-Honig v Intervention Board for Agricultural Produce}, [1978] ECR 2037. Case C-74/99, \textit{The Queen v Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others}, [2000] ECR I-8599. See C-491/01 \textit{British American Tobacco} [2002] ECR I-11453.
invited to decide whether, by liberalizing standing before the Community judiciary, a greater degree of judicial protection would be attained\textsuperscript{162}. In effect, Article 263 TFEU seems to have accepted this invitation. It codifies the ruling of the CFI in \textit{Jégo-Quéré}, but limits its application to Community administrative measures of general application. Hence, regarding legislative measures, if the Treaty of Lisbon were ratified, the situation would remain unchanged\textsuperscript{163}.

2.- “No jurisdictional shifting” strategy under US law

In \textit{ASARCO}, the USSC ruled that standing rules under Article III US Constitution do not bind state courts, even when adjudicating over federal questions\textsuperscript{164}. Provided that Due Process is complied with and in so far as state rules of procedure do not discriminate against federal causes of action\textsuperscript{165}, States are free to regulate “who” may raise constitutional issues\textsuperscript{166}. However, some commentators maintain that, though it is seldom the case, States cannot adopt stricter standing rules than those contained in Article III. The reasons given are threefold, namely a higher threshold of justiciability would be contrary to the Supremacy of Federal law\textsuperscript{167}, it would unduly burden federal rights\textsuperscript{168} and be contrary to congressional intent\textsuperscript{169}.

\textsuperscript{162} \textit{Jégo-Quéré}, supra note 23, paras. 33-36
\textsuperscript{163} \textit{Usher}, supra note 39, pp 598-600. See also A WARD, \textit{Locus Standi} under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a “Wobbly Polity”, (2003) \textit{YEL}, pp 45-77 (the author favours this distinction arguing that legislative and executive measures of the Community cannot be subject to the same standing rules. The reason is that the “status quo” for legislative measures enhances the participation of the European Parliament in the decision-making process and thus, contributes to fostering the democratic input of the Community. However, she posits that, in the absent a majoritarian argument, executive measures should be subject to an even stricter control).
\textsuperscript{164} \textit{ASARCO}, supra note 96, 617 See also \textit{Virginia v Hicks}, 539 US 113, 120 (2003)
\textsuperscript{165} \textit{Testa v Katt}, 330 US 386 (1947)
\textsuperscript{166} \textit{Mallinski v New York}, 324 U.S. 401 (1945)
\textsuperscript{167} See WA FLETCHER, the “Case or Controversy” Requirement in State Court Adjudication of Federal Questions, (1990) 78 \textit{Cal. L. Rev.}, pp 263-304; 291-293 (holding that stricter standing rules would be contrary to \textit{Testa}) N GORDON & D GROSS, Justiciability of Federal Claims in State Courts, (1984) 59 \textit{Notre Dame L. Rev.}, pp1145-1190. (holding that the Supremacy Clause obliges state courts to vindicate federal rights even if similar rights are held non-justiciable)
States, which depart from Article III standards, are often generous in allowing citizen, tax-payer and legislator standing\textsuperscript{170}. Consequently, state courts have become an alternative forum to raise federal questions\textsuperscript{171}. In particular, environmental associations, which after *Lujan* saw how access to the federal judiciary became difficult, are enthusiastic about litigating before state courts\textsuperscript{172}. This possibility, nevertheless, immediately raises questions as to the uniformity of Federal law. Since standing rules are binding upon all federal courts including the USSC, there could be cases where state court rulings deciding upon federal questions would be definitive and decisive\textsuperscript{173}.

Unsatisfied with different standards, some scholars argued in favour of applying federal standing rules in state courts, at least when ruling over federal questions\textsuperscript{174}. Others maintain that disparity should be preserved in the light of state procedural sovereignty\textsuperscript{175}. The USSC settled the debate for a half-way solution. On the one hand, rulings of state courts adjudicating over federal questions, but without fulfilling the “case and controversy” requirements of Article III, do not produce “*res judicata*” effects for federal courts as to the questions of law\textsuperscript{176}. On the other hand, *ASARCO* partially safeguards the role of the USSC as ultimate interpreter of the Constitution. In this regard, two conditions need to be fulfilled. First, it is required that the prevailing party lacked standing under Article III US Constitution\textsuperscript{177}. By contrast, where the non-Article III plaintiff looses in a state court, his claim cannot reach the USSC\textsuperscript{178}. Thus, *ASARCO* has an “asymmetric nature”. Its detractors argued that traditionally, state courts have been reluctant to

\textsuperscript{171} Virginia v Hicks, Op. Cit, 121
\textsuperscript{173} After *NIKE, Inc. v Kasky*, 539 US 654, 662 (2003) (Stevens Concurring) it appears that *ASARCO* does not apply to “interlocutory rulings that merely allows trial to proceed” in a state court.
\textsuperscript{176} *Co. of Kansas City v. Swope*, 274 U. S. 123, 130-131 (1927); *Doremus v Board of Education of Hawthorne*, 342 US 429, 434 (1952); *ASARCO*, Op cit, 621
\textsuperscript{177} *ASARCO*, 623-24
\textsuperscript{178} *Doremus*, Op cit
uphold federal law at the cost of state law and hence, the USSC’s position gives standing to the wrong party.\textsuperscript{179} Yet, as a non-Article III plaintiff does not have access to federal forum, an adverse state court decision changes nothing vis-à-vis “the world of the federal jurisdiction”\textsuperscript{180}. Additionally, along with meeting the other elements of justiciability, the USSC requires that the state court judgment “causes direct, specific and concrete injury” to the petitioner\textsuperscript{181}. Therefore, the arguments underpinning \textit{ASARCO} try to strike a proper balance between\textsuperscript{182} accepting that some state constitutions may assign a different role to their judicial department from the one attributed by Article III to the federal judiciary\textsuperscript{183}, and ensuring the uniform application of federal law.

\section*{III.- Standing before national courts: Article III US Constitution a complying example}

In the light of the principle of procedural autonomy and in the absence of Community harmonising legislation, national rules of procedure determine who is entitled to challenge national law in breach of Community law. However, national procedural rules may neither discriminate against a claim based on Community law (principle of equivalence), nor render excessively difficult or practical impossible the exercise of Community rights (principle of effectiveness).\textsuperscript{184} At the same time, nothing prevents the Member States from laying down more favourable procedural rules to the enforcement of Community rights\textsuperscript{185}. Indeed, the principle of effectiveness and equivalence are just a minimum protection.

\textsuperscript{179} \textit{Fletcher}, Op. cit, 281-282
\textsuperscript{180} \textit{Stern}, Op cit, 113
\textsuperscript{181} \textit{ASARCO}, 623-24
\textsuperscript{182} \textit{Stern}, Op Cit, p 103
\textsuperscript{183} \textit{Hershkoff}, Op. cit, pp 1905 (holding that in the light of States’ constitutional history, different separation of powers concerns and lack of federalist safeguards, the justiciability doctrine of article III cannot apply \textit{mutatis mutandis} to state courts)
\textsuperscript{185} See Joined Cases C-46/93 and C-48/93 \textit{Brasserie du Pêcheur and Factortame} [1996] ECR I-1029, para 66; \textit{Köhler, supra} note 20, para 57
Therefore, important restrictions are imposed upon the Member States when denying access to national courts\textsuperscript{186}. First, the ECJ has consistently held that parties, who are (or likely to be) injured by violations of Community law, are entitled to seek relief before national courts\textsuperscript{187}. Secondly, third party standing may be granted where otherwise the effectiveness of Community law would be undermined. For instance, in \textit{Verholen}\textsuperscript{188}, the ECJ ruled that national law should confer standing to a plaintiff who bears the effects of a breach of Community law committed against a third party. Therefore, a husband seeing his pension reduced because of national law sexually discriminating against his wife and thus breaching Community law is entitled to seek judicial review against national authorities\textsuperscript{189}. However, in \textit{Safalero}\textsuperscript{190}, the ECJ narrowed down third party standing. It held that, in so far as other equally effective remedies are available for the plaintiff, third party standing may be refused. Therefore, it is compatible with Community law to deny standing to a trader when challenging the seizure of goods sold to his retailer, if he is able, nonetheless, to bring proceedings against the fines imposed on him as the seller.

Where the plaintiff tries to enforce Community Law against a third party, account should be taken to the purpose of Community legislation\textsuperscript{191}. In \textit{Muñoz}, the ECJ ruled that, though UK law was silent, an EC regulation imposing standards on agricultural products enables a competitor to bring civil proceedings against a trader violating those standards\textsuperscript{192}. By relying on the principle of effectiveness, the ECJ held that, as a supplement to the role


\textsuperscript{188} Joined cases C-87/90, C-88/90 and C-89/90 \textit{Verholen and others v Sociale Verzekeringenbank Amsterdam} [1991] ECR I-3757

\textsuperscript{189} Ibid, paras 24-26

\textsuperscript{190} Case C-13/01 \textit{Safalero Srl v Prefetto di Genova} [2003] ECR I-8679, in the same vein see also Case C-216/02 \textit{Österreichischer Zuchtverband für Ponys, Kleinpferde und Spezialrassen v Burgenländische Landesregierung} [2004] ECR I-10683.

\textsuperscript{191} Tridimas, Op cit, 546

\textsuperscript{192} Case C-253/00 \textit{Antonio Muñoz y CIA SA and Superior Fruticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd} [2002] ECR I-7289
of national supervisory authorities, private enforcement strengthened the objectives protected by the regulation, namely the elimination of products of unsatisfactory quality from the market and fair competition. However, in Muñoz, the ECJ did not provide any guidance as to the scope of third party standing\textsuperscript{193}. In addition to having exhausted other remedies, must the plaintiff have suffered (or likely to suffer) an injury which differentiates him from the rest of economic operators, as the Advocate General suggested\textsuperscript{194}? Or should Community law impose “actio popularis” standing? Both extreme positions should be rejected. On the one hand, the extrapolation of standing rules under Article 230(4) EC to national rules of procedures is unacceptable. Not only because without any alternative forum, an analogue application of “individual concern” is clearly incompatible with the principle of judicial protection, but also due to the ECJ’s insistence on transforming the national forum into the principal venue for the vindication of Community rights\textsuperscript{195}. On the other hand, a general and unrestricted grant of standing cannot be imposed on the Member States, not because of a parallelism with Article 230 EC\textsuperscript{196}, but rather due to the fact that “actio popularis” is not related with the protection of individual rights. Accordingly, the principle of effectiveness does not require this type of standing either. On the contrary, it would appear as an undue intrusion into the Member State’s procedural autonomy. Hence, a competitor, consumer, trade union or environmental association should be entitled to enforce a Community obligation against a third party where [1] the effectiveness of EC regulations so demands it and [2] provided that the plaintiff’s interests are likely to be adversely affected.

Moreover, it is worth examining whether the case-law of USSC regarding third party standing would comply with EC standards. As a general rule, standing is denied, unless it is demonstrated that [1] there is a close relationship between the first and third party and that [2] the first party encounters difficulties in asserting his own rights. However, the USSC has

\textsuperscript{194} Against, see Opinion of AG Geelhoed in Muñoz, Op cit, para75
\textsuperscript{195} Jégo-Quéré (appeal), para 29-32
\textsuperscript{196} AG Geelhoed, Op cit, para 70
tempered these requirements by granting standing where the restrictions on the third-party’s rights lead to adversely affecting the litigant. For instance, *Eisenstadt v Baird*, the USSC agreed to grant a contraceptive distributor with standing to challenge the validity of a state law which prohibited the sales of contraceptives to unmarried couples. Likewise, in *Craig v Boren*, the USSC conferred standing to a beer seller who argued that a state law banning sales of beer with an alcohol level above 3.2% to males under 21, while permitting such sales to females above 18, was discriminatory. Indeed, these two cases demonstrate that first and third party’s right were “mutually interdependent”. Thus, if *Verholen* had been decided by the USSC, it would have reached the same outcome. Indeed, just like in *Craig*, a discriminatory law against a third party had adverse repercussions for the applicant. In *Craig*, it was the loss of customers. In *Verholen*, it was a reduction in his pension. Has the USSC adopted the approach of the ECJ in *Safalero*, by also requiring the applicant to lack other equally effective remedies before enforcing third party’s rights? The reply must be in the negative. The USSC centers its analysis in verifying that the applicant has suffered a relevant injury and that there is a “congruence of interests” between him and third party, so that the former effectively advocates for the rights of the latter. In so far as these conditions are fulfilled, it is irrelevant whether the applicant could have availed himself of other remedies. Accordingly, the USSC would have conferred standing to Mr. Safalero.

Thus, it follows that, not only do third party standing rules under Article III US Constitution seem to comply with the requirements imposed by Community law, but they are more generous. While the USSC would agree with the findings of the in *Verholen*, it has not adopted the additional requirement laid down in *Safalero*.

197 *Eisenstadt v Baird*, 405 US 438 (1976)
198 *Craig v Boren*, 429 US 190 (1976)
199 *Eisenstadt*, 446. *Craig*, 195. In addition to recognizing this bound in “vendor-vendee” relationships, there are other examples where the SC has also awarded the same treatment. E.g. “doctor-patient”: *Griswold v. Connecticut*, 381 U. S. 479 (1965); “attorney-client”: *United States Department of Labor v Triplett*, 494 US 715 (1990); criminal defendant-excluded juror: *Power v Ohio*, 499 U.S. 400 (1991). See also HP MONAGHAN, Third-Party Standing, (1984) 84 Colum. L. Rev., pp 277 – 316; 299-300. (alleging that this type of claims should be understood as first party standing cases)
IV.- Conclusion

The most salient differences between standing rules under the EC and federal legal order are twofold. On the one hand, Article III US Constitution does not distinguish between private and public applicants, while Article 230 EC does. On the other hand, private applicants approaching federal courts have easier access than they would before the Community judiciary. The reason is that the US Constitution and the EC treaty entrust standing with a different mission.

In the US, standing operates as an implement of the principle of separation of powers, that is, federal courts should be cautious not to intervene in the political process to the detriment of the Executive and Congress. At the same time, the political branches should not approach federal courts with a view to protecting their political power. That explains why the core of the standing doctrine is immune from congressional considerations. That is also why, ever since Marbury, all applicants, either private or public, are required to have suffered (or likely to) a harm. This enables the federal courts to draw the line between the realm of politics and law. In addition, the injury must be “concrete”, “real” and “impeding” as opposed to “hypothetical” and “generalized grievance”. Otherwise, the line would become blurred.

In the same way, concerns for federalism also oppose to States, acting as parens patriae, which question the validity of a federal statute. This type of action is seen as an undue interference between individuals and the United States. However, whereas States may not challenge a federal statute, they may rely on it in order to protect their citizens from illegal federal agency action. In allowing so, the USSC favours a second level of enforcement by the States. This is a welcomed development. By acting as “congressional allies”, States are brought on board of federal policy making. They also contribute to enhancing the control mechanisms for delegating congressional powers, rendering agency action more transparent and accountable. Lastly, this “special solicitude” protects individuals from
generalized grievances that they could not themselves remedy in court for lack of standing. Yet, although this new development brings American States closer to their European counterparts, they are still far from being “privileged applicants”.

In Europe, locus standi has been relied upon by the ECJ with a view to allocating judicial power between the Community and the national courts. Put simply, Article 230 EC favours constitutional debates among the Member States and the Community Institutions, while shifting the “normal judicial business”, understood as remedying individual injuries, to the national courts. View from this perspective, the Plaumann formula does make sense. This also explains why the ECJ did not think twice before rejecting the AG’s proposal in UPA. What is less clear, though, is why it reversed the unpretentious reform of the CFI in Jego-Quere. Perhaps, it is because the ECJ is overconfident in the capacity of national courts to step up. AG Jacobs is right in suggesting that the preliminary reference procedure cannot operate as a judicial remedy, but it should be treated exclusively as a tool of judicial cooperation. If the “jurisdictional shifting” strategy is flawed, it would be best for the ECJ to emulate the USSC in adopting standing rules without looking at other jurisdictions. Indeed, since it enjoys a monopoly to declare Community acts void, the ECJ would not even face the practical difficulties of its American counterpart.

Further, by looking at both legal systems, it appears that private applicants have easier access to federal courts than to Community Courts. This is not surprising if one looks at the purpose of standing in each system. The notion of “individual concern” has no equivalent under Article III. For federal courts, it suffices for an injury to be “concrete”, regardless of whether it is widely shared. However, the USSC imposes additional causation requirements than the ECJ does. Yet, this difference should not be attributed to stricter standing rules, but rather to the different nature of available remedies. When seeking declaratory or injunctive relief, one may examine “traceability” and “redressability” separately. Often, both involve an identical inquiry. If the injury is caused by the defendant, it suffices to
enjoin its conduct to stop the injury. But Allen suggests that the USSC may disagree when applicants attack the legality of public action in order to change certain private behaviour. On the contrary, for annulment actions, the two prongs of causation are indissoluble united. It suffices to prove one to meet the other. In spite of additional causation requirements, the fact that standing under Article III is significant more liberal should not be contested. First, the impact of Allen should not be overstated. In most cases, both elements of causation converge. Secondly, as opposed to “direct concern”, the insurmountable obstacle for private applicants largely remains the Plaumann formula. Last but not least, cases relating to third-party standing demonstrate that Article III goes beyond the standards of judicial protection required by the ECJ for national courts.

Finally, one more comparison deserves a few lines. Cases like Laidlaw, Massachusetts v EPA and Akins evince the willingness of the USSC to cope with changing times, while not abandoning the prominent features of the Marbury paradigm. Conversely, it appears that few jurisprudential shifts will occur under Article 230 EC. This is a pity since a moderate reform, such as the one introduced by Article 263 TFEU, would allow the ECJ to embrace continuity and change.
Chapter II

The Political Question Doctrine in the US and in the EU

Having established that standing does not operate as an implement of the principle of separation-of-powers in the EU; our comparative study now turns onto examining substantive questions that are deemed too political for judicial resolution. To this effect, this chapter aims to determine whether the European Court of Justice (ECJ) has implicitly embraced a political question doctrine along the lines of the US Supreme Court (USSC). It is divided as follows. Section I is an in-depth analysis of the conceptual foundations, normative justification and historical evolution of this doctrine. It is argued that during the last forty years, the USSC has progressively refused to find questions escaping judicial cognizance. The outcome of *Bush v Gore*\(^ {200}\) provides an excellent illustration of this. Yet, in the realm of foreign affairs, the same conclusions cannot be drawn. In Section II, it is argued that the doctrine remains important in the US when allocating external competences between Congress and the Executive. However, recent cases on international terrorism demonstrate that, despite national security interests at stake, the USSC is not willing to abandon its role as guarantor of individual rights. Section III is devoted to examining whether analogue political questions have arisen in the EU. After examining a broad range of cases, three main findings are drawn. Firstly, the framers of the Treaty of the European Union (TEU) excluded some political questions from the jurisdiction of the ECJ and the Court of First Instance (CFI) or decided that they should be governed by national law. Secondly, where Community Courts (the ECJ and the CFI) enjoy jurisdiction, their approach is analogue to the one of the USSC in *Baker v Carr*\(^ {201}\). Both the USSC and the ECJ agree that, even if located at the heart of the political process, questions do not escape review where democratic values weigh against. Thirdly, stripping the ECJ from its jurisdiction over the Common and Foreign Security Policy (CFSP or second pillar) is not an adequate solution.

\(^ {200}\) *Bush v Gore*, 531 US 98 (2000) (*Bush II*)

\(^ {201}\) *Baker v Carr*, 369 U.S. 186 (1962)
Instead, by examining recent cases on economic sanctions against terrorists, it is argued that it would be best to expand the powers of the Community Courts over the second pillar, while embracing a political question doctrine. Finally, it is maintained that it would be a mistake for the ECJ to emulate, in a near or distant future, the arrogant approach of the *Bush* Court.

I.- The Political Question Doctrine and the US Supreme Court

A.- Concept

The political question doctrine can be understood as placing outside the purview of the federal judiciary certain constitutional questions, whose final and definitive resolution is entrusted to the political branches of government, that is, to Congress and the Executive. Therefore, the political question doctrine operates as a substantive limitation on judicial review ("*ratio materiae*"), which favours the participation of the two other branches of government in interpreting the Constitution, whilst preventing the judiciary from exercising an uncontested hegemony over all constitutional provisions. It follows that where a constitutional issue is qualified as a political question, the USSC is not the final arbiter in deciding the compatibility of a federal measure with the Constitution. On the contrary, an absolute deference to the constitutional judgment of the political branches takes place. However, even if the political question doctrine can be seen as an important caveat to the powers of the judiciary, its applicability is conditioned upon judicial self-restraint. Since neither the legislature nor the executive are entitled to determine when the Constitution considers a matter political; it is for the federal judiciary to qualify and define the boundaries of a political question. Hence, a question must first be qualified as political by the federal judiciary, and only then is its resolution entrusted to the legislature or to the executive (or both).

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The roots of the political question doctrine can be traced to Marbury v Madison, where not only did Chief Justice Marshall affirm that it is “empathically the province and duty of the judicial department to say what the law is”\(^\text{203}\), but he also acknowledged that in relation to acts whose nature is political, they “can never be examinable by this court”\(^\text{204}\). Thus, from the beginning, judicial review was not unlimited. On the contrary, Marbury evinces that its substantive scope is defined by a “spectrum of deference”\(^\text{205}\) which measures the degree of discretion enjoyed by the political branches. Indeed, the less discretion is enjoyed by the political branches, the more room there is for judicial intervention. Conversely, the more discretion is enjoyed by the political branches, the less judicially reviewable the measure is. At the end of the spectrum, where the political branches enjoy full discretion, there is no room for judicial review. The political branches have the last word in determining the compatibility of a measure with the Constitution. This is where the political question doctrine lies. In Luther v Bordern\(^\text{206}\), the USSC articulated for the first time the term “political question doctrine”. There, the USSC was called upon to decide which of the two opposing governments contenting for legitimacy and possession of the State offices complied with the Guarantee Clause. According to this clause, “the United States shall guarantee to each state of this Union a Republican Form of Government”. However, by interpreting the Guarantee Clause as an absolute deference to congressional constitutional judgment\(^\text{207}\) and by noticing that a ruling favourable to the applicants would lead to the chaotic situation of replacing the charter government and annulling all its actions\(^\text{208}\), the USSC refused to adjudicate on the merits of the case and dismiss the application. Therefore, Luther proved that not all constitutional issues can be judicially cognizable. In such case, their resolution should be left to the political branches.

\(^{203}\) Marbury, 177
\(^{204}\) Ibid, 166
\(^{205}\) Barkow, supra note 202, pp 241
\(^{206}\) Luther v Borden, 48 US ( 7 How) 1 (1849)
\(^{207}\) Ibid, 42
\(^{208}\) Ibid, 39-40
B.- The Normative Justification

One could suggest that “la raison d’être” of the political question doctrine is that by virtue of the institutional characteristics of the political branches, some constitutional issues are better solved by the latter, rather than by federal courts. Besides, by contrast to the protection of individual rights or the allocation of power at federal and state level, this doctrine engages federal courts into defining the contours of their interests and strengths vis-à-vis the political branches. Accordingly, if there was no political question doctrine, the USSC would not be obliged to undertake this “healthy exercise”. On the contrary, an absolute judicial supremacy would be embraced, subjugating the political branches to the mandates of overall-reaching judicial review. It follows that, the political question doctrine helps to maintain all branches of government on an equal footing.

However, American scholars supporting a political question doctrine have disagreed over its scope and rationale. Some authors, such as Weschler, argue that judicial abdication of review powers should only be based on an explicit or implicit interpretation of the Constitution that indicates an absolute deference to a branch of government. This version of the doctrine, known as the “classical” political question doctrine, relies on the dictum of Chief Justice Marshall in *Cohens v Virginia*, pursuant to which federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given”. In other words, political questions are a residual concept, which only comes into play where interpreting the Constitution shows that federal courts lack jurisdiction. Others have affirmed, in particular Bickel, that the

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209 JS CHOPER, The Political Question Doctrine: Suggested Criteria, (2005) 54 Duke L.J., pp.1457-1523 (holding that this is the case where a constitutional issue raises questions of policy or it is conditioned upon factual findings)

210 Barkow, Op cit, pp 330-336


212 *Cohens v Virginia*, 19 US (6 Wheat) 264, 403 (1821)

213 However, since the Constitution does not expressly provides for judicial review, how can a literal interpretation of the former exclude the exercise of latter? Hence, from the express grant of power to a political branch it cannot be inferred that judicial review is precluded. Likewise, if a constitutional provision provides no judicial enforceable
political question doctrine should be based not only on an interpretation of the Constitution, but rather on “prudential” considerations. In this sense, the federal judiciary should decline to exercise its jurisdiction over cases whose resolution entails [1] a fear of disregard by the political branches, [2] the impossibility of solving the case following judicial standards or [3] the inability of the judiciary to foresee the practical impact of its rulings. In addition, one can affirm that whereas a classical construction of the political question doctrine tends to limit its application; the prudential version grants more flexibility to the Judiciary. Indeed, a classical approach would be followed by an activist court, whereas the prudential version is a suitable tool for judicial restraint.

Finally, some US commentators favour the abandonment of the political question doctrine, holding that the judiciary should be the final interpreter of all constitutional provisions. The reason is twofold. On the one hand, if one reads the US Constitution as protecting intangible structures and values from majoritarian pressures, then the judiciary is the best fitted branch for its protection. On the other hand, the decision making process of the judicial department is the most suitable for constitutional interpretation and standards, it does not follow inter alia that the political branches enjoy full discretion. Indeed, the exercise of their authority may be reviewed under the Constitutional Amendments. See MH REDISH, Judicial Review and the “Political Question”, (1985) 79:5 Nw. U. L. Rev., pp 1031-1061, 1039-1042.


By invoking the cases under the Due Process and Equal Protection Clause, Redish, Op cit, pp1046-1047 believes that if the USSC truly wants it, it can always find workable standards. A different question is whether the USSC should create standards in the absence of any constitutional hint as to how.

Bickel, Op cit, pp 184

Barkow, Op cit, pp 333-334 criticizes the prudential version of the doctrine arguing that its application by the USSC has led to unpredictable results. Indeed, the author highlights the difficulty of distinguishing the cases that are avoided on prudential grounds from the ones decided. Furthermore, there is no need for a prudential version since other judicial doctrines, such as standing and equitable discretion, may lead to the same results. See also L HENKIN, Is There a Political Question?, (1976) 85 Yale Law Journal, pp 597, 622-623; Redish, Op cit, 1045-46

E CHEMERINSKY, Why Should Not Be a Political Question Doctrine, in N MOURATADA-SABBAAH and B CAIN (eds.), The Political Doctrine Question and the Supreme Court of the United States, (Maryland, Lexington Books: 2007), pp 181-199 (holding that due to their life tenure and non-reducible salary, federal judges are best equipped to listen and respond to complaints of single persons as well as to enforce the Constitution in a hostile environment)
However, this does not mean that deference to the political branches would stop, but only that there are no “constitutional safe-heavens” for the political branches. Put simply, there is no room for judicial abdication under the US Constitution.

C.- The Rise and Fall of the Political Question Doctrine

The case law of USSC reveals three different stages in the evolution of the political question doctrine, which demonstrate its rise and fall. The first cases show that the USSC opted for a classical construction of the doctrine. As Luther elucidates, although the USSC referred to the adverse and undesirable effects of a ruling upholding the applicant’s claim, the core of its argumentation relied upon a textual interpretation of the Guarantee Clause. Secondly, the USSC progressively abandoned its classical understanding of the doctrine in favour of a more prudential foundation. The political question doctrine was used as an abstention device enabling the USSC to avoid dealing with controversial cases. In Coleman v Miller, plaintiffs contested that a State could ratify a constitutional amendment thirteen years after it was proposed by Congress, which had not specified a time limit. They argued that Article V of the Constitution compelled state legislatures to ratify within a reasonable time. Nevertheless, without making any reference to the wording of the Constitution, the USSC concluded that since a “satisfactory criteria for judicial determination” was lacking, whether the ratification process was still pending was a political question for Congress to decide. Likewise, in Colegrove v Green, Illinois voters asked the USSC to put an end to the gerrymandering of Illinois congressional election districts. However, the USSC ruled that this was beyond its competence. Justice Frankfurter, who wrote the Opinion of the USSC,

219 Ibid, 190 (opining that by contrast to the political branches, the judicial department is the only branch whose decision are based upon reasoning and arguments)
220 Ibid, 197. See also Redish, Op cit, pp 1048-1049
221 The USSC interpreted “United States” as meaning “Congress”. See Barkow, supra note 202, pp 246-257.
222 Coleman v Miller, 307 US 433 (1939)
223 Ibid, 454
224 Colegrove v Green, 328 US 549 (1946)
argued that even if the population was not fairly represented, it was not for the USSC to “enter this political thicket”\(^\text{225}\), but for state legislatures or Congress to solve unfair apportionments. He also relied on prudential grounds and affirmed that if the USSC were to render the electoral system invalid, Illinois would become undistricted and consequently, House representatives would be elected on a state-wide constituency. In his opinion, this situation would be much worse than the first one. The question that then arises is what prompted the USSC to stretch the political doctrine question. Perhaps, the attitude of the USSC responded to the lessons learned from the failed Packing-plan promoted by President Roosevelt\(^\text{226}\). Indeed, in the light of the pressing need of creating a national economy, the New Deal Court became highly deferential to congressional judgement. Accordingly, the political question doctrine found good soil from which to blossom\(^\text{227}\).

However, in \textit{Baker v Carr}\(^\text{228}\), the USSC overruled \textit{Colegrove}. In this case, plaintiffs challenged the Tennessee Reapportionment Act on the grounds that it did not give city voters a fair share of seats and, consequently, it violated the Fourteenth Amendment. Justice Brennan writing for the USSC proceeded to a thorough review of the existing case-law on the political question doctrine. He began by stating that the political question doctrine relates to separation of powers issues. Hence, he inferred that the political question doctrine only alludes to the relationships among the federal branches of government and, hence, state legislative compliance with the US Constitution does not call for such judicial deference\(^\text{229}\). Subsequently, he went on to explain the cases in which a constitutional issue had been considered as political, namely, foreign relations, dates of duration of hostilities, validity of enactments, the status of Indian tribes and the Guarantee Clause\(^\text{230}\). Justice Brennan noticed that although in these cases, the USSC deferred to the Executive or Congress, it did not do so relying on

\(^{225}\) \textit{Ibid}, 556
\(^{226}\) See \textit{infra} Chapter IV
\(^{228}\) \textit{Baker v Carr}, 369 US 186 (1962)
\(^{229}\) \textit{Ibid}, 210-211
\(^{230}\) \textit{Ibid}, 211-218
a “semantic cataloguing” of cases; but as a result of the “precise facts and posture of the particular case”. In other words, he stressed that “The doctrine of which we treat is one of “political questions, not of political cases”\(^{231}\). Hence, the USSC was not willing to reduce its jurisdiction in favour of “a blanket rule”\(^{232}\). On the contrary, Justice Brennan laid down six alternative criteria capable of defining a constitutional question as political, and whose application does not depend on the subject matter involved. He wrote:

>“Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question”\(^{233}\).

In this regard, one can affirm that by adopting this formula, the USSC embraced both versions of the political question doctrine. Whereas the “textual demonstrable constitutional commitment” requirement clearly alludes to the classical strand of the doctrine, the rest are based on prudential considerations. As Tushnet suggests, by listing the criteria under which a question is deemed political, the USSC narrowed down its application\(^{234}\). In his view, by giving political questions the form of law, Baker transformed a flexible approach advocating for judicial prudence into an ordinary question of constitutional interpretation. Besides, not only did

\(^{231}\) Ibid, 217  
\(^{232}\) Ibid, 215  
\(^{233}\) Ibid, 217  
\(^{234}\) M TUSHNET, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, in Moutarda-Sabbah and Bruce, supra note 218, pp 47-74 (opining that the “doctrinalization” of political questions as a set of rules undermined the possibility of avoiding decisions for prudential reasons)
this formula render more difficult alluding to prudence, but it is ultimately its reading by the post-\textit{Baker} Court which initiated the fall of the doctrine. Indeed, in \textit{Baker}, the USSC was not convinced by the prudential reasons previously defended by Justice Frankfurter in \textit{Colegrove}. Instead, it concluded that owing to the fact that \textit{“the consistency of state action with the Federal Constitution”} was put into question, there was no separation of powers issue and thus, the political question doctrine was not applicable. In the same way, it added that by contrast to \textit{Luther}, which involved the Guarantee Clause and where judicial standards were lacking, the Equal Protection Clause provided the USSC with enough guidance to issue a judgment. Consequently, the USSC concluded that apportionment legislation which appears to be inconsistent with a fair representation will be reviewed by the USSC.

Why did the USSC decide to adopt a more assertive approach in relation to questions so central to the operation of the political process? Delivered eight years after \textit{Brown v Board of Education\textsuperscript{236}} and only four after \textit{Cooper v Aaron\textsuperscript{237}}, \textit{Baker} can be read as a coherent development in the USSC’s quest for judicial supremacy as a method of implementing its own political agenda\textsuperscript{238}, which championed the protection of civil rights while greatly deferring to Congress for economic choices\textsuperscript{239}. Indeed, \textit{Baker} epitomises the theory of judicial review embraced by the Warren Court in \textit{Carolene Products}, whereby judicial review cannot be foregone where legislation perpetuates locked-in political power structures or discriminates against “discrete and insular minorities”\textsuperscript{240}. Thus, since the non-justiciability

\footnotesize{\textsuperscript{235} Baker, 226}
\footnotesize{\textsuperscript{236} Brown v Board of Education, 347 U.S. 483 (1954) (holding that state laws allowing school segregation violated the Equal Protection Clause of the XIV\textsuperscript{th} Amendment, since they deprived black students from equal opportunities)}
\footnotesize{\textsuperscript{237} Cooper v Aaron, 358 U.S. 1 (1958) (holding that the USSC’s precedent in Brown must be read as the supreme law of the land and consequently, state law to the contrary must be disregarded. Likewise, in the light of Article VI Clause 3, every state officer must abide by it.)}
\footnotesize{\textsuperscript{238} Tushnet, Op cit, pp 72}
of reapportionment stood in the way of population equality between electoral units (1 person = 1 vote\textsuperscript{241}) restricting its participation in the political process, the USSC decided to set it aside\textsuperscript{242}.

The fall of the political question doctrine continued in \textit{Powell v McCormack}\textsuperscript{243}. Powell was elected House Representative for the State of New York. Nevertheless, the House of Representatives did not allow him to take his seat. The House’s refusal was not due to Powell’s failure to meet the standing requirements laid down in Article I § 2 of the Constitution\textsuperscript{244}, but to an alleged misuse of congressional funds. Powell sought injunctive, declaratory and monetary relief from the House Speaker, Mr. McCormack, affirming that he had unduly been excluded. The House argued that the case raised political issues which fell under its exclusive competence. Quoting \textit{Baker}, the House considered that Article I § 2 was a “\textit{textual demonstrable constitutional commitment}”. However, the USSC disagreed. It conceded that the House alone was competent to determine whether the requirements listed in Article I § 2 were met. However, whether the House could refuse an elected congressman to take his seat relying on different grounds was for the USSC to decide\textsuperscript{245}. \textit{Powell} can be distinguished from \textit{Baker} in that whereas the latter showed that the USSC is cautious in applying the political question doctrine relying on prudential grounds, the former demonstrated that the USSC also follows very strict criteria in finding textual demonstrable constitutional commitments.

Since \textit{Baker v Carr}, the USSC has held only in few occasions that the issues presented political questions\textsuperscript{246}. Besides, in these cases, the USSC primarily

\textsuperscript{241} \textit{Reynolds v Sims}, 377 US 533 (1964)
\textsuperscript{243} \textit{Powell v McCormack}, 395 US 486 (1969)
\textsuperscript{244} See Annex
\textsuperscript{245} \textit{Powell}, supra note 243, 517-549
\textsuperscript{246} In \textit{Gilligan v Morgan}, 413 US 1 (1973), Kent University students requested the USSC to issue a remedial decree which would supervise and regulate the activities of the Ohio National Guard, whose intervention on campus in May 1970 had injured and even caused death to some students. Nevertheless, the USSC dismissed the application alleging that “establish[ing] standards for the training, kind of weapons and scope and kind of order to control the actions of the National Guard” raised a political question. Additionally, it held
followed a classical approach of the doctrine. Notwithstanding foreign policy and to some extent the Guarantee Clause\textsuperscript{247} and partisan gerrymandering\textsuperscript{248}, this situation has led many scholars to confirm that \textit{Baker} entailed the beginning of the end for the political question doctrine or, even more, the complete embracement of Judicial Supremacy. A good example fostering this statement is provided by \textit{Bush v Gore}\textsuperscript{249}, where the political question doctrine was not even mentioned by the USSC\textsuperscript{250}. The facts of the case can be summarised as follows. During the 2000 presidential elections, the votes of the electors from the State of Florida became decisive. Owing to the fact that Bush led Gore with a margin inferior to 0.5\% of the votes cast, state law required a machine recount, which proved to narrow further the differences between the two candidates. Gore requested then a manual recount in several counties which Bush opposed. The case reached the Supreme Court of Florida, which upheld Gore’s claim

\begin{footnotesize}
\textsuperscript{247} See in \textit{New York v United States}, 505 US 144, 185 (1992) the USSC declared that “not all claims under the Guarantee Clause present nonjusticiable political questions”

\textsuperscript{248} \textit{Vieth v. Jubelirer}, Op cit.

\textsuperscript{249} \textit{Bush v Gore}, 531 US 98 (2000) (\textit{Bush II})

\textsuperscript{250} It was nevertheless invoked by dissenting Justice Breyer. See \textit{Bush v Gore}, 144-158
\end{footnotesize}
and ordered a manual recount. Bush filed a writ of certiorari to the USSC, urging the latter to stop it. He argued that, since the Supreme Court of Florida did not comply with Florida’s electoral legislation, its ruling was in breach of the 3 USC § 5, Article II § 1 Clause 2 and the XIVth Amendment. Despite the fact that this case seemed to involve matters of state law alone\textsuperscript{251}, the USSC granted certiorari. The USSC first acknowledged that state legislatures have been vested with plenary powers in choosing how electors for presidential elections are appointed, that is, state legislatures can opt between appointing electors directly or call for elections\textsuperscript{252}. However, the USSC pointed out that if a State decides to confer on citizens the right to vote, it must do so avoiding “arbitrary and disparate treatment of the members of its electorate”\textsuperscript{253}. Hence, it deduced that an unequal treatment of ballots would be in breach of the Equal Protection Clause. As for the case at issue, the USSC noticed that the Supreme Court of Florida had failed to indicate adequate standards capable of ensuring that a manual recount would not entail disparities among the different counties in accepting or rejecting contested ballots. In accordance with the USSC’s opinion, identifying “voters’ intent” does not prove to be sufficient to make sure that all the contested ballots would be equally treated. As a result, the USSC quashed the decision of the Supreme Court of Florida, ordering the manual recount to stop\textsuperscript{254}.

Whereas it is difficult to argue that the equal protection claim presented a political question\textsuperscript{255}, concurring Justices Rehnquist, Scalia and Thomas also based their decision on Article II. They maintained that the interpretation of the Supreme Court of Florida was so peculiar that clearly departed from Florida statutes regulating elections\textsuperscript{256}.

However, Article II § 1 Clause 2 read in conjunction with the Twelfth Amendment appears as vesting Congress with a prominent role in the


\textsuperscript{252} Ibid, 104 (Justice Souter dissenting)

\textsuperscript{253} Ibid, 105

\textsuperscript{254} Ibid, 107-109

\textsuperscript{255} Tushnet, Op cit, pp 66

\textsuperscript{256} Bush v Gore, 111-122 (Justices Rehnquist, Scalia and Thomas concurring)
election of the President. Indeed, in pursuance with these Articles, it is for the President of the Senate, “in the presence of the Senate and the House of Representatives, to open all the certificates and the votes shall be counted”. The Twelfth Amendment also states that if no majority can be found, it is for the House of Representatives to choose among the first three candidates. There appears thus to be a solid textual argument demonstrating that the Constitution leaves to Congress the resolution of presidential elections disputes. In the same way, prudential considerations also point in the same direction. First, the USSC knew that its ruling would determine the outcome of the 2000 presidential elections. As Calabresi indicates, it is difficult to think of any other highly political question than the election of the US President. Secondly, in relation to Article II, it is difficult to see which judicial standards were followed by the USSC. There is no constitutional provision, nor precedent giving guidance as to whether a state court had unduly interfered with state legislation directing the appointment of presidential electors. Lastly, the USSC intervention in this case certainly undermined its legitimacy vis-à-vis a large part of the electorate. Since the five Justices nominated by Republican Presidents voted in favour of Bush, a popular perception of partisanship could arise. Indeed, as dissenting Justice Stevens emphatically concluded, “[a]lthough we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law”.

As the Warren Court did in Baker, was the Rehnquist Court also trying to promote larger political principles and ideological goals in Bush v Gore? The reply must be in the negative. Bush v Gore is at odds with the Rehnquist Court’s conservative agenda, whereby state rights are enhanced

257 Barkow, supra note 202, pp 277-295
260 Bush v Gore, 128-129 (Justice Stevens dissenting)
261 Tushnet, Op cit, p 70; Balkin & Levinson, Op cit, 1083-1086
and justiciability is restrictively interpreted\textsuperscript{262}. Besides, since its “considerations [were] limited to the present circumstances”\textsuperscript{263}, the Bush Court was not pursuing a substantive change in the law of Equal Protection. What was the Bush Court aiming at then? Some authors suggest that the USSC pursued the perpetuation of its ideology by abusing the political process. By ruling in favour of the republican candidate, the USSC made sure that nominations of future Justices would better fit the predilections of the conservative majority\textsuperscript{264}. Most importantly, while in Baker, the Warren Court intervened in order to solve the entrenchment of political power and to protect minorities, in Bush \textit{v} Gore those interests were not at stake. Instead, the USSC intervened as the “protector of majority preferences”\textsuperscript{265}, which are better represented by Congress\textsuperscript{266}. Hence, by lacking any spirit of reluctance to decide cases close to the political process, Bush \textit{v} Gore can be read a step away from the political question doctrine. As Tushnet indicates, it also reflects the consolidation of judicial supremacy in the American legal culture. Nowadays, the only fear of the American people is that “the nation will not comply with the Court’s decisions”\textsuperscript{267}, no matter how political charged those are. In a similar vein, drawing on the Rehnquist’s federalist revolution, Barkow argues that the decline of the doctrine is “part and parcel” of a larger trend refusing to defer to the political branches in cases where the USSC has plainly jurisdiction. Since the USSC seems to pay little homage to congressional findings, intent and policy assessments when examining respectively the Commerce Clause\textsuperscript{268}, substantive cannons of statutory interpretation and §5 XIV\textsuperscript{th} Amendment\textsuperscript{269}, it has just extrapolated its overconfidence on its institutional capacities when exploring political questions\textsuperscript{270}.

\textsuperscript{262} E CHEMERINSKY, \textit{Bush v Gore Was not Justiciable}, (2001) 76 Notre Dame L.Rev., 1093 - 1112. See also Bragaw and Perry, Op cit (highlighting the irony of Bush \textit{v} Gore)
\textsuperscript{263} Bush \textit{v} Gore, 109
\textsuperscript{264} Balkin \textit{v} Levinson, Op cit, 1102-1109
\textsuperscript{265} S ISSACHAROFF, Political Judgments, (2001) 68 U.Chi.L.Rev., 637-656
\textsuperscript{267} Tushnet, Op cit, 70
\textsuperscript{268} See infra Chapter IV
\textsuperscript{269} See infra Chapter V
\textsuperscript{270} Barkow, supra note 202, pp 300-316
To sum-up, the political question doctrine is a substantive limit to judicial review. It is based on both constitutional and prudential considerations. Nevertheless, since Baker, one can argue that the doctrine has been declining in favour of a more activist and far-reaching judicial review. Indeed, Bush v Gore suggests that the political question doctrine is at its nadir.

II. The Political Question Doctrine and Foreign Policy

By contrast to its general decline in domestic affairs, in realm of foreign policy, the political question doctrine remains good-law. Traditionally, foreign affairs have been considered as “the core of political question cases” and, in particular war powers, “the nub of the core”. For example, the constitutionality of the Vietnamese War was never decided. Recently, the First Circuit refused to adjudicate over the validity of the War in Iraq alluding to the political question doctrine.

Often, applicants contest the validity of the Executive’s foreign action on the ground that it has encroached upon the competences of Congress. In Goldwater v Carter, US Senators urged the USSC to declare that President Carter’s decision to unilaterally withdraw the Unites States from the Sino-American Mutual Defense Treaty was unconstitutional. They argued that since senatorial approval was necessary for its ratification, the same applied for its withdrawal. Likewise, relying on the absence of congressional declaration of war, applicants contended the unconstitutionality of the Vietnam War. However, the USSC and lower courts disagreed, putting forward two grounds. Firstly, judicial abstinence

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273 Doe v Bush, 322 F.3d 109 (1st Cir. 2003)  
274 Goldwater v Carter, 444 US 996 (1979)  
275 E.g. Mitchell v Laird, 488 F.2d 611, ( DC Cir. 1973), DaCosta v Laird, 471 F.2d 1146 (2d Cir. 1973) and Orlando v Laird, 443 F.2d 1039 (2d Cir.) Certiorari denied in Orlando v Laird, 404 US 869 (1971).
was justified in “dispute[s] between coequal branches of our Government, each of which has resources available to protect and assert its interests” \(^{276}\). Indeed, under the US Constitution, the President is the Commander in Chief of all armed forces and, thus, he has constitutional authority to direct external relations \(^{277}\). Secondly, it is exclusively for Congress to allocate funds to finance foreign operations \(^{278}\). Thus, if the President decides to carry out operations abroad without congressional approval, Congress may in turn decide to reduce financing these operations, forcing the Executive to request it \(^{279}\). Further, the USSC has indicated that, in foreign policy, courts lack capacity to coin discoverable and manageable standards. Besides, as Goldwater demonstrates \(^{280}\), it is common for the Constitution not to give an answer (or to give more than one) to a legal issue. Consequently, the resolution of questions relating to foreign policy should fall within the competences of the political branches.

Another line of cases stresses the paramount importance for the US of “speaking with one single voice” in the realm of foreign affairs. Accordingly, the federal judiciary should abstain from putting at risk the consistency and coherence of the US President’s action. That is why the duration of hostilities \(^{281}\), the recognition of foreign nations \(^{282}\), the diplomatic status of foreigners claiming immunity \(^{283}\) and the interpretation of treaties have been qualified as political questions \(^{284}\). In the same vein, if courts were to get too involved, this would undermine their legitimacy vis-à-vis the general public \(^{285}\).

\(^{276}\) Goldwater, 1004
\(^{277}\) US Constitution Article II § 2.
\(^{278}\) US Constitution Article I § 8
\(^{279}\) J Choper, Judicial Review and the National Political Process, (Chicago, University of Chicago Press:1980) pp 295-297. In the same way, Prof. Yoo indicates that by contrast to appointments and Treaties ratification, the Constitution does not lay down “a constitutionally required process for making the war”, instead the framers opted for a “flexible system […] in which the president can initiate hostilities unilaterally, subject to congressional funding”. JC Yoo, Judicial Review and the War on Terrorism, (2003) 72 Geo. Wash. L. Rev., pp 427-451
\(^{280}\) Goldwater, 1001-1006
\(^{281}\) Commercial Trust v Miller, 262 US 51 (1923)
\(^{282}\) United States v Belmont, 301 US 324 (1937)
\(^{283}\) In re Buitz, 135 US 403 (1890)
\(^{284}\) Terlinder v Ames, 444 US 996 (1979)
\(^{285}\) Glennon, supra note 271, pp 817-818.
In *Johnson v Eisentrager*[^286], where German war criminals argued that the American military commission had violated several constitutional provisions and the Geneva War Conventions, the USSC held that it lacked jurisdiction to entertain this claim and pointed out that “Such trials would hamper the war effort and bring aid and comfort to the enemy. […] It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.”[^287]

Moreover, the realm of foreign policy may be distinguished from the rest of political question cases in that this doctrine is relied upon in order to prevent the US Government from being caught in double loyalty, namely, compliance with judicial process and international responsibility[^288]. Indeed, if the courts were to annul a treaty, a declaration of war or military operations, foreign governments would not be amenable to the American judicial process, and the consequences of such ruling would be overwhelming for the US Government. Besides, since the federal judiciary is precluded from rendering advisory opinions, it has chosen to defer to the Executive where a declaration of unconstitutionality would adversely affect American interests or undermine the American capacities in the international scene.

It follows from the foregoing that the USSC is reluctant to allocate competences in the field of foreign policy. A “political clash” or a dialogue should draw the division of foreign affairs powers. The same reluctance to judicial action applies when it would impinge on the unity of the US foreign policy. However, as Brennan advanced in *Baker*, “it is error to suppose that

[^286]: *Johnson v Eisentrager*, 339 US 763 (1950)
[^287]: *Ibid*, 779
every case or controversy which touches foreign relations lies beyond judicial cognizance\(^\text{289}\). Indeed, recent developments in the case law of the USSC demonstrate that where, by affecting civil liberties, foreign affairs have domestic implications, the judiciary is less favorable to abdicate its review powers\(^\text{290}\). In this regard, the war on terror has come to demonstrate that the federal judiciary has an important role in deciding the proper balance between the general interest of preventing further terrorist attacks and an adequate level of protection of constitutional rights, while refusing an absolute deference to the Executive. Two cases evince this new proactive attitude of the USSC, namely \textit{Hamdi v Rumsfeld}\(^\text{291}\) and \textit{Hamdan v Rumsfeld}\(^\text{292}\).

In \textit{Hamdi}, the USSC was asked whether the status of \textit{“enemy combatant”}\(^\text{293}\) imposed on an American citizen and Guantanamo detainee could be judicially second-guessed or whether absolute judicial deference would take place. Thus, by contrast to \textit{Goldwater}, this case was not about whether the President had gone beyond his constitutional powers to the detriment of Congress\(^\text{294}\). The petitioner argued that a detention based on a statement of an official of the Justice Department (“The Mobbs Declaration”) as the sole evidentiary piece submitted by the Government to the courts was contrary to the Fifth and Fourteenth Amendments of the US Constitution. Conversely, in the light of its war powers, the US Government pointed out that the Mobbs Declaration provided the constitutionally required factual background and urged the USSC to dismiss any further inquiry since it would be both unworkable and undesirable. The US Government stressed that it was undisputed that Hamdi had been captured in a combat zone.

\(^{289}\) \textit{Baker, supra} note 228,211


\(^{293}\) It justifies an indefinite detention without formal charges or proceedings

\(^{294}\) The President had obtained Congressional approval to wage the war on terror. See the \textit{“Authorization for the Use of Military Force”} Pub. L. 107-40 [S. J. RES. 23] (the AUMF), authorizing the President to “use all necessary and appropriate force against those nations, organizations or persons he determined planned, authorized, committed or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any further acts of terrorism against the United States by such nations, organizations or persons”.
Additionally, further factual exploration would put national security interests at stake. Justice O’Connor, who delivered the Opinion of the USSC, sided with the petitioner. She stated that from the fact that Hamdi had been captured in a country where military operations were taking place, it did not follow that the petitioner was supporting hostile forces to or engaging in a conflict against the US. As for the second argument, the USSC recognised the “tension [...] between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right”\(^{295}\), but it was not willing to abdicate its role as the guarantor of individual rights. Unless Congress suspended the writ of habeas corpus, the USSC ruled that precluding a petitioner from the possibility to rebut the Executive’s factual assertion of his detention before a neutral decision maker “would turn our system of checks and balances on its head”\(^{296}\). In this sense, the USSC rejected an absolute deference, preferring instead to strike a balance between the national security interests and the petitioner’s civil liberties\(^{297}\) as provided by Mathews v Eldridge. There, the USSC held that the process due in any given instance is determined by [1] “the private interest affected by official action, [2] the risk of an erroneous deprivation of that interest through the current procedures used, including the probable value of additional safeguards and [3] the government’s interests, including the additional administrative burdens the Government would face in providing greater process”\(^{298}\). Firstly, Hamdi’s physical indefinite detention as “enemy combatant” evinced a private interest which was jeopardised by governmental action. Secondly, the USSC held that an “unchecked system of detention carries the potential to become a means for oppression and abuse” and hence, a procedure precluding a citizen from challenging factual findings presented a risk of an erroneous detention. Thirdly, the USSC also recognised that the government interests’ in preventing those who have fought against the US from returning to battle was legitimate. However, the USSC considered that further procedural

\(^{295}\) Hamdi, 27  
\(^{296}\) Ibid, 36  
\(^{297}\) Ibid, 28  
\(^{298}\) Mathews v Eldridge, 424 US 319, 335 (1976)
requirements did not adversely affect the war-making capacities of the US Government. It stated that handing over summaries of the documentation regarding battlefield detainees was a minimal imposition. Besides, in the same way as the judiciary is respectful of the functions of the military, the latter should also facilitate the constitutionally assigned duties of the federal judiciary. It insisted that striking the proper balance between these two compelling interests was of paramount importance. Therefore the USSC concluded that, while Due Process requires that the citizen-detainee receives a notice of the factual basis for his classification and a fair opportunity to rebut the government’s factual assertion before a neutral decision-maker, it is also constitutionally admissible to uphold a rebuttable presumption in favour of the Government’s evidence. As a result, the USSC vacated the judgment of the Court of Appeal and remanded for further proceedings.

In the same way, in *Hamdan*, two questions were submitted to the USSC, namely [1] whether the Executive had made a valid use of trial by Military Commission when charging Guantanamo detainee of conspiracy against the US and [2] whether its procedures and structures were in breach of federal law, in particular, 36 of the Uniform Code of Military Justice (UCMJ). In accordance with this provision, Military Commissions must afford detainees the same procedural guarantees as the ones applied by Courts-Martial (the procedural parity principle). Nevertheless, this Article also indicates that uniformity must be followed “insofar as practicable”. Regarding the first question, the USSC could not reach an agreement. As for the second question, the USSC concluded that, even if the military commission could try Hamdan, its procedures and structures were in breach of “the procedural parity principle”. One could argue that determining the practicability of the Courts-Martial’s rules of procedure should fall within

299 *Ibid.*, 534
300 *Ibid.*, 535
301 See *Hamdan*, 581 (Justice Stevens writing for the USSC began by indicating that Military Commissions were neither constitutionally provided nor created by congressional statute, instead they were “born of military necessity”. Thus, the USSC affirmed that an executive order creating a military commission could only be lawful either by obtaining a congressional sanction or “in cases of controlling necessity”. The USSC agreed that congressional sanction had not been granted, but it could not agree on whether Hamdan’s case was of controlling necessity.)
the competences of the Executive and that federal courts should follow a self-restrained approach. However, the USSC took a different view. It considered that, though the uniformity principle is not an inflexible one, it must be “tailored to the exigency that necessitates it”\(^{302}\). It indicated that practicability of the uniform principle cannot be confused with “convenience or expediency”. Accordingly, it held that, since the US Government did not justify its departure from the uniformity principle, the military commission should follow the same procedure as Courts-Martial. In this regard, in the light of Article 21 UCMJ, the President’s authority should comply with “the law of war”. To this effect, regardless of whether the Geneva Conventions were self-executing, their congressional ratification signaled that they belong to that body of law. Hence, when the USSC found that the military commissions created to trial Hamdan did not comply with Article 3 of the Third Geneva Convention\(^{303}\), it had no choice but to declare trials by Military Commission unlawful. One can affirm that in *Hamdan*, the USSC embraced “the clear statement principle”, pursuant to which, unless there is an unambiguous congressional authorisation, the Executive cannot rely on its war powers to deprive criminals from their rights to a fair trial\(^{304}\).

The implications that flow from *Hamdi* and *Hamdan* are twofold. First, the two cases dealt with the interpretation and application of concepts drafted in very broad terms (“enemy combatant” and “insofar as practicable”), in relation to which the USSC could have agreed with the interpretation sustained by the Executive. However, in order to defend civil liberties, the USSC decided to intervene. Thus, not only did the USSC assess whether the political branches had crossed the boundaries of their constitutional powers, but it also reviewed their compliance with individual rights. Secondly, the USSC’s intervention in the realm of foreign policy is not cost free. Its reluctance to fully defer to the Executive on the interpretation of statutes or conclusive factual findings may interfere with the political dialogue between Congress and the Executive, prompting their negative reaction. Indeed, not

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\(^{302}\) Ibid, 112  
\(^{303}\) See Annex  
only was *Hamdan’s* ruling overruled when Congress passed the Military Commission Act (MCA)\(^{305}\), but the latter stripped federal courts from “hear[ing] or consider[ing] an application for writ of habeas corpus filed by or on behalf of an alien detained in the United States who was been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”\(^{306}\). Thus, one could argue that the USSC should have made use of its “passives virtues”\(^{307}\) and abdicate in favour of the political branches\(^{308}\). On the contrary, one could defend *Hamdan*, holding that the USSC would have the chance to reply when evaluating the constitutionality of the MCA. As a matter of fact, this is precisely what happened in 2008 when the USSC delivered *Boumediene v Bush*. There, the USSC ruled that suspending the writ of habeas corpus without providing an equivalent remedy was in breach of the Constitution\(^{309}\).

III.- Political Questions in the EU

By drawing some parallelisms with the American jurisprudence, this section studies whether in the EU, political questions have arisen regarding a republican form of government, judicial review of the electoral process, parliamentary self-governance and treaty amendments. A special attention is paid to examining foreign policy cases. When the answer is in the affirmative, this section also attempts to identify whether the “classical” or “prudential” strand of the doctrine has been applied.

A.- Article 7 TEU and the Guarantee Clause

\(^{306}\) 28 U.S.C. § 2241
\(^{307}\) *Bickel*, supra note 214, pp 111-183.
Included by the Treaty of Amsterdam\textsuperscript{310}, Article 7 TEU is the EU equivalent to the Guarantee Clause under the US Constitution\textsuperscript{311}. Both provisions authorise the central government to monitor state compliance with fundamental constitutional values, and to react when these values are in danger. That would be the case where a dictatorship came to power or a civil war broke out in one of the component States. Nevertheless, neither the scope of these provisions nor the degree of intervention authorised to the central government overlap. First, it appears that the Guarantee Clause in the US opposes certain types of lawmaking initiatives\textsuperscript{312}. By contrast, provided that human rights are respected, this would not be the case for Article 7 TEU\textsuperscript{313}. Secondly, while the EU may only adopt sanctions against the infringing Member State\textsuperscript{314}, Congress may itself put an end to the situation\textsuperscript{315}. Finally, the Guarantee Clause can also be read as a check on the US Federal Government\textsuperscript{316}. Since Congress must “guarantee a republican form of government”, federal legislation may not become a threat to the States’ institutional autonomy. On the contrary, though Article 6(1) TEU also binds the EU, Article 7 TEU is only addressed to the Member States\textsuperscript{317}.

\textsuperscript{310} Article 7 TEU was meant to be “a safeguard clause to provide urgent action should one of the newer [and fragile eastern European] democracies, after accession, collapse or significantly fail to meet the standards asserted by the EU”. See G de BURCA, “Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union” (2004) 27 Fordham Int’l L.J., pp 679-714; A WILLIAMS, The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s invasion of Iraq, (2006) 31 E. L. Rev., p 3-27; Communication from the Commission to the Council and the European Parliament on Art. 7 TEU: Respect for and promotion of values on which the Union is based, COM(2003)606 final.

\textsuperscript{311} The Treaty of Lisbon leaves Article 7 TEU as it is.

\textsuperscript{312} H LINDE, Who is Responsible for Republican Government, 65 U. Colo. L. Rev., 709-31(holding that a constitutional amendment by referenda runs counter the Guarantee Clause when it seeks to govern private relationships, sanctions or imposes burdens on individuals. Thus, laws such as the California’s Proposition 13 (a popular initiative amending the California Constitution and limiting property tax rates) is incompatible with a “Republican” form of government.)

\textsuperscript{313} M SOUSA FERRO, Popular Legislative Initiative in the EU, (2007) YEL, pp 355-385

\textsuperscript{314} de Burca, Op cit, 713; Williams, Op cit, pp 9 ( defining Article 7 TEU as a “pressure-system”)

\textsuperscript{315} R HASEN, Leaving the Empty Vessel of “Republicanism” Unfilled: An Argument for the Continued Nonjusticiability of Guarantee Clause Cases, in Mourtada-Sabbah & Cain, supra note 218, pp 89-126


\textsuperscript{317} Commission Com. on Art 7 TEU, Op cit,
Next, as discussed above, in *Luther*, the USSC announced the non-justiciability of the Guarantee Clause, adducing to both textual and prudential grounds. Does Article 7 TEU also involve non-justiciable political questions? In accordance with Article 46(e) TEU, it is only the Member State concerned which may bring an action against measures adopted under Article 7 TEU. Additionally, the jurisdiction of the ECJ is limited to “purely procedural stipulations”. For instance, the ECJ would only verify that the necessary majorities have been gathered and that the Member State concerned has been allowed to submit its observations. As the Commission indicates, judicial review is limited to guaranteeing that “the relevant State’s rights of defence are respected”. Conversely, there is an absolute deference to the Council when determining the existence of a “serious and persistent breach of the principles mentioned in Article 6(1) TEU”. Hence, Article 7 TEU may be read, with the exception of procedural stipulations, as a political question. The reason lies in that the drafters of the Treaty of Amsterdam considered that, outside the scope of Community law, it was for the political process to ensure Member States’ compliance with the European Union’s founding principles. Due to the highly sensitive issues involved, the flexibility of diplomatic dialogue was preferred to the rigidity of the judicial process.

A less straightforward scenario takes place under Article 7(4) TEU, whereby in response to changes in the situation leading to the imposition of sanctions, the Council may revoke or modify them. After rectifying its behaviour, could the infringing Member State bring an action against the Council for failing to act? Arguably, the Council’s omission could be read as a procedural flaw. After all, the last paragraph of Article 7(1) TEU compels the Council to check on a regular basis whether the determination for the sanctions continues to apply. Thus, neither the wording of Article 46 (e) TEU nor the wording of Article 7 TEU is conclusive. Unfortunately, the ECJ has not yet had a chance to define its jurisdiction under Article 7 TEU.

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318 Supra pp 3
319 See Article 269 TFEU
320 Commission Com. on Art 7 TEU, Op cit, p 6 ; Williams, Op cit, p 11
Perhaps, the prudential criteria listed in *Baker* could provide some inspiration for future cases. If the Council fails to act, the infringing Member State would not know how to amend its behaviour so that the sanctions are repealed. Thus, a ECJ’s ruling obliging the Council to act would end the legal uncertainty in which the infringing Member State is immersed. Besides, the ECJ would not examine the appropriateness or accuracy of the sanctions in question, respecting the limits on judicial review set by Article 46 (e) TEU. Hence, the prudential considerations enounced in *Baker* would not advise against an action for failure to act against the Council.

B.- Judicial Review and European Elections

As mentioned above, the ruling in *Baker* initiated the re-drawing of electoral districts throughout the United States. To a large extent, the “one person/one vote” rule changed American politics. Locked-up majorities were dissolved and neglected minorities were injected into the political process. Even though apportionment lies at the epicentre of the political process, the USSC decided to intervene. Has the ECJ emulated its American counterpart or instead, considered that electoral questions were too political for judicial resolution?

The first case that comes to mind is *Les Verts*.\(^{321}\) Despite the original version of the EC Treaty only provided for judicial review of acts of the Commission and the Council, the ECJ declared that acts of the European Parliament which had effects on third parties could not escape judicial control\(^{322}\). The ECJ based its determination on the rule of law and the principle of inter-institutional balance. Still, the merits of the case are also an important contribution to the democratic development of the

\(^{321}\) Case 294/83 *Parti écologiste "Les Verts" v Parliament* [1986] ECR 1339

Community. For the 1984 elections, the European Parliament had provided funds for an “information campaign” on European elections. These funds were to be allocated among the parties already represented at the European Parliament, while only leaving a limited proportion of funds to parties participating for the first time. Acting as the plaintiff, the French environmentally-friendly party argued that the system discriminated against new parties and, accordingly, was contrary to Community law. In other words, the system could be seen as entrenching already established political groups. Besides, the system also blurred the distinction between the information campaign on the European Parliament and campaign finances, the first falling within the competence of the Parliament, while the latter within the competences of the Member States. Thus, as a way of protecting the electoral process, the ECJ decided to intervene. It annulled the Parliament’s decision, holding that it laid down a scheme for reimbursing election campaign expenses which, back then, was for the Member States to decide. As provided in footnote four of Carolene Products, this ruling also epitomises the link between judicial review and legitimacy. In les Verts, judicial review was employed in order to enhance the democratic process in European elections. The ECJ was willing to surmount procedural obstacles in order to prevent incumbent political parties from obtaining an advantage in the electoral run.

As for national laws regulating local and European elections, the role of the ECJ is confined to determining their compliance with Articles 19, 190(4) EC as well as with the 1976 Act. Firstly, via a preliminary reference procedure, the ECJ would declare incompatible with the EC Treaty national legislations discriminating against candidates or voters residing in a Member State of which they are not nationals. Secondly, it would be contrary to Article 190(4) EC and to the 1976 Act for a national

324 Ibid, 34
law to lay down a non-proportional voting system when electing Members
of the European Parliament (MEPs). Finally, the 1976 Act binds Member
States when defining the term of office, incompatibility in relation to elected
members, the period in which elections are to be held and the time when
counting is to begin. Hence, once these conditions are met, the electoral
process is largely governed by national law. For instance, provided that
the proportional nature of the voting system is complied with, it is for
Member States to define the constituency for European elections. Further,
the ECJ has held that it falls within the national legislatures’ discretion to
extend the right to vote and to stand as a candidate in European elections to
non-EU citizens residing in Europe. Likewise, it is up to the Member States
to decide whether nationals residing outside the EU may participate in the
European elections. Can this deference to the national legislature when
defining the electorate be understood as a political question? I would
suggest a reply in the negative. The ECJ’s limited role is due to a division of
competence between the EU and the Member States rather than to
prudential considerations. “In the current state of Community law” resulting from the Council’s failure to adopt a uniform procedure, many of
the electoral questions are decided by the national parliaments. In any event,
the ECJ still exercises an important, albeit limited, control by applying the
principle of equal treatment. In *Eman and Sevinger*, the ECJ indicated that
Member States enjoy discretion in conditioning the right to vote upon the
criterion of residence. However, it also pointed out that in exercising such
discretion, the Member States may not discriminate. Hence, the ECJ ruled
that a Dutch law precluding Dutch nationals residing in Aruba from voting
in the European elections, while allowing Dutch nationals residing in a non-
member country to do so, violated the principle of equal treatment.

327 *Jacobs*, Op cit, 1053
328 *Spain v UK*, paragraph 78; *Eman & Sevinger*, paragraph 45
329 *Eman & Sevinger*, paragraph 55
C.- Self-governance of the European Parliament

In *Powell v McCormack*, the USSC denied the application of the political question doctrine in relation to internal congressional decisions, in so far as there is no textually demonstrable constitutional commitment\(^\text{330}\). For instance, Congress would enjoy absolute discretion to determine if a member met the qualifications stated in Article I § 2 US Constitution, to expel a congressman\(^\text{331}\) or to conduce impeachment proceedings\(^\text{332}\). However, as *Powell* indicates, if Congress refuses to seat a representative on different grounds, it is for the federal judiciary to verify that such refusal complies with the Constitution. The USSC is thus rejecting a prudential approach according to which simply because Congress sustained a variant interpretation of Article I §2, “*the courts’ [should] avoid[...] their constitutional responsibility of interpreting the constitution*”\(^\text{333}\). Besides, the USSC justified its review in the light of protecting the “*fundamental principle of our representative democracy [...] that the people should choose whom they please to govern them*”\(^\text{334}\). In the same way, since congressional internal mechanisms failed to protect Mr. Powell’s and his constituents’ interests, the USSC opined it had sound reasons to intervene\(^\text{335}\). Thus, all seems to indicate that in the absence of textually constitutional commitment or of sufficient internal remedies\(^\text{336}\), all congressional self-governing acts may not be regarded as political questions\(^\text{337}\).


\(^{331}\) Article I § 5 US Constitution

\(^{332}\) See *Nixon v United States*, *supra* note 246

\(^{333}\) *Powell*, Op cit, 549

\(^{334}\) *Ibid*, 548


\(^{336}\) However, *Chemerinsky & Fisk*, Op cit, pp 230-231 argue that the presence of Article I textually demonstrable commitment does not exclude Congress from complying with other constitutional provisions, in particular, basic constitutional values as the one enshrined in the Equal Protection Clause.

\(^{337}\) Still, as indicated in the previous Chapter, the justiciability of these claims would also have to surmount standing requirements. Notably, applicants arguing they have suffered an injury resulting from the “*dilution of the political power*” will not have standing.
Would the ECJ intervene in an analogue situation to one suffered by Mr. Powell? Before answering this question, it must be pointed out that the powers of Congress and the European Parliament differ in relation the exclusion and expulsion of its members. In pursuance with the 1976 Act and its rules of procedure, the European Parliament may verify the credentials of representatives and take note when a vacancy arises. However, by contrast to US Congress, the European Parliament may not expel a MEP. It may only impose sanctions on him or her as a result of non-compliance with standards of conduct. Furthermore, in the absence of a uniform electoral procedure, it is largely for Member States to design the winner of the European elections, as well as rule on the disqualification of a MEP. Accordingly, just as it occurs in the previous section, the ECJ has a minor role in adjudicating over these two matters, being for the national courts and the ECtHR to verify that national procedures comply with human rights. The case of *Le Pen v Parliament* is particularly illustrative. There, a criminal conviction was imposed on Mr. Le Pen, a French MEP. By way of further sentence, the French court withdrew for a year his right to be eligible for public office. The French Government notified this sentence to the President of European Parliament who, in accordance with Article 12(2) of the 1976 Act, disqualified Mr. Le Pen from holding office. Reluctant to abandon his seat, the latter brought proceedings against this decision. However, first the CFI and later the ECJ on appeal dismissed the application, declaring that the decision of the President of the European Parliament did not produce any legal binding effects. Indeed, they ruled that the European Parliament did not enjoy any discretion to review the decision of the French authorities, but it merely took notice of a “pre-existing legal situation”. Said differently, the challenged act was merely confirmatory. Although the ECJ has not ruled on the powers of the Parliament to verify the credential of MEPs, it can be maintained that the same holds true. It follows that the Community judiciary would not review the validity of these two acts. However, it is not

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338 Rules 146-148
340 T-353/00, Op cit, paragraph 90
341 Case T-215/07R *Donnici v Parliament*, Order of the 13 December 2007 (Joint Cases pending C-393/07 and C-9/08)
due to a “political question”, since the ECJ notes that it is a competence to be exercised by national courts and the ECtHR\textsuperscript{342}. Instead, absence of judicial review by the Community Courts is due to the lack of EU competences. Hence, a case like \textit{Powell v McCormack} would not be reviewed by the ECJ, but by the national judiciary.

However, where the European Parliament does enjoy competences, is the ECJ willing to review the validity of their acts? As a starting point, the ECJ has consistently held that, unless an internal act of the European Parliament has effects vis-à-vis third parties, the Community Judiciary will not intervene\textsuperscript{343}. As Professor Hartley suggests, the reason of its reluctance to extend judicial review to internal acts of the European Parliament may be explained by the fact that the ECJ pays homage to the traditionally established organisational sovereignty or autonomy of legislative assemblies\textsuperscript{344}. In the same way, the non-reviewability of internal acts is due to the ECJ’s efforts to preserve the inter-institutional balance\textsuperscript{345}. Indeed, if the ECJ dictated how the European Parliament must organise itself, the former would be clearly impinging upon the latter’s prerogatives, violating the principle of inter-institutional balance. But, when a measure affects third parties and involves parliamentary self-governance alike, would it not be for the ECJ to defer to the EU Parliament’s political judgement, and only later decide over the third party’s rights? \textit{Martinez & Others v European Parliament}\textsuperscript{346} provides helpful insights to this question. There, in order to enjoy the benefits of forming a political group, the applicants, right-wing MEPs, had decided to create “Le Groupe Technique des Deputes Indepeands” (TDI). By contrast to traditional groups, the members of the TDI publicly stated they shared no political affiliation with each other. In accordance with Rule 29 of the Rules of Procedure, the plenum of the

\textsuperscript{342} T-353/00, Op cit, paragraph 91


\textsuperscript{344} TC HARTLEY, \textit{The Foundations of European Community Law} (Oxford, OUP: 2003), pp 80-81

\textsuperscript{345} \textit{Les Verts}, Op cit, 25-28

Parliament opined that “political affiliation” is a *condicio sine qua non* for the creation of a parliamentary group. Accordingly, it considered the TDI to be non-existent *ex tunc*, reducing its members to being non-attached MEPs. Before the CFI, the Parliament raised the inadmissibility of the application brought by some members of the TDI, alleging that the challenged act did not produce any legal effects. However, the CFI shared a different view, holding that the challenged decision adversely affected the parliamentary functions of the applicants. It proceeded then to thoroughly examine the notion of “political affinity”. The CFI noted that this requirement was not optional, but all groups had to be of a political nature. It also indicated that MEPs creating a group were presumed to share political affinities, however minimal. Hence, only in so far as there is a patent, open and deliberate denial of political affinities by the members of a group, may the European Parliament order its dissolution. On the contrary, the Parliament would exceed its discretion, if it applied Rule 29(1) when members of a group retain their voting freedom or declare their political independence from each other. Therefore, the CFI agreed with the Parliament, indicating that the TDI itself had rebutted the presumption of political affinity by issuing such a public statement. Some scholars have qualified this point as disturbing. Simon maintains that it would have been better for the CFI to defer to the “sovereign” judgment of the Parliament, when interpreting the concept of “political affinity”, given that the CFI itself highlighted the “subjective nature of the concept”. Following Baker, Simons seems correct, since the interpretation of this concept entails “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”. However, as in the Powell case, the CFI’s intervention may be underpinned by democratic reasons, in particular, the principle of independent mandate. The ruling of the CFI reflects a balance between the principle of institutional self-governance and the principle of democratic functioning. Had the CFI abdicated in favour of the Parliament, the latter

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347 *Ibid*, 104
349 *Martinez v Parliament*, 105
350 *Baker, supra* note 233
would have been free to dictate what constitutes a political group. Accordingly, the voting freedom of MEPs could have been undermined. Political majorities could have impinged on the rights of individual MEPs to create “non-majoritarian” political groups.

D.- Treaty Amendments

In Coleman v Miller, the USSC ruled that determining whether the period for ratifying a constitutional amendment had elapsed was a political question for Congress to decide. However, Coleman pre-dates Baker. Accordingly, as the doctrine stands today, the USSC would be very likely to intervene. Yet, since the USSC has not given a definitive answer\textsuperscript{351}, American scholars remain divided. On the one hand, the USSC’s impartiality would be put at stake if it intercedes when a constitutional amendment seeks substantial overruling\textsuperscript{352}. On the other hand, the normative force of Article V US Constitution would be weakened without checks on its procedural requirements\textsuperscript{353}.

Is the ECJ in an analogue position? In accordance with Article 46 TEU, the ECJ has jurisdiction over provisions regulating the amendment of the TEU and EC Treaty. For instance, the ECJ could annul the opinion of the Council calling for an intergovernmental conference if it fails to consult the European Parliament. However, by contrast to Coleman, it is not for the Community judiciary to assess the validity of each national ratifying process. Article 48 TEU clearly defers to the national constitutions. Hence, it is for national courts to check that the ratification process complies with “their respective constitutional requirements”. As a result, amending the

\textsuperscript{352} LH TRIBE, Constitutional Choices (Cambridge, Harvard University Press: 1983), pp22-23
TEU and the EC Treaty is not a political question, but a vertical division of competences between the Community and national judiciary\(^{354}\).

E. Foreign Policy

In the EU foreign affairs, not only does the allocation of powers have a horizontal dimension, but also a vertical one. Horizontally, external relations may be undertaken either by the Community or fall within the scope of the Common and Foreign Security Policy (CFSP)\(^{355}\). Vertically, it is important to draw the line between foreign affairs whose competence has been assumed by the Community and foreign affairs retained by national sovereignty. The EU “external” complexity is further intensified by Article 3 TEU according to which, despite this vertical and horizontal distribution of powers, the EU’s action must be coherent so that third parties may rely upon the fact that their counterpart speaks with one single voice\(^{356}\).

As for comparing the political question doctrine, this double dimension renders the EU constitutional framework substantially different from the American one. Horizontally, one could draw some analogies between the US inter-branch and the EU inter-pillar and inter-institutional conflicts. However, whereas Community Courts are called upon to determine the level of judicial scrutiny allowed when Member States derogate from Community law invoking national security or foreign policy considerations, the same cannot be said for the American States. Said differently, US foreign affairs take place at federal level, not vertically\(^{357}\). Bearing in mind this structural difference, this section is divided into three parts. The first sub-section is

\(^{354}\) Article 48(7) TEU as amended by the Treaty of Lisbon provides for a simplified revision procedure, whereby the European Council acting unanimously after having obtained the consent of the Parliament may amend the voting rules from unanimity to qualified majority as well as modify the legislative procedure from special to ordinary. However, if within six months after the notification of this initiative a national government opposes it, the decision cannot be adopted. It is clear that in this case, the ECJ will play a major role.


\(^{356}\) Wessel, Op cit, pp 1137

devoted to studying whether there is a “political question doctrine” when inter-institutional and inter-pillars conflicts arise in the realm of foreign affairs. The second sub-section advocates the expansion of the ECJ’s jurisdiction over the CFSP, while adopting a political question doctrine. The third sub-section looks at the degree of discretion enjoyed by the Member States when invoking foreign policy or national security derogations.

1.- Horizontal dimension

As Goldwater v Carter evinces, the USSC has consistently refused to adjudicate over the allocation of foreign affairs competences between Congress and the US President. It justified its finding by stating that the equality of arms between the political branches rendered judicial intervention unnecessary. It also added that there were no manageable judicial standards for such determinations. In the EU, it is precisely the opposite. Not only is the Community judiciary empowered to annul a Community measure impinging on the prerogatives of one of the political institutions\(^{358}\), but the ECJ also has jurisdiction to prevent the CFSP from encroaching upon Community competences\(^{359}\).

However, within the Community pillar, the “foreign affairs” factor is not decisive. Community Courts adjudicate over inter-institutional disputes involving external measures just like they do when they examine internal measures adopted in the same area of law. In effect, the ECJ has held that the degree of judicial scrutiny is not conditioned upon determining whether a competence is being internally or externally exercised, but upon ascertaining whether the substantive area of law, in which the measure was adopted, vests Community Institutions with broad discretionary powers\(^{360}\). Hence, the question that must be answered is not why inter-institutional conflicts fall within the province of the Community judicial department in

\(^{358}\) Case C-189/97, Parliament v Council, [1999] ECR I-4741
the realm of foreign affairs, but why they generally do so in the first place. As opposed to the US political branches, Community Institutions did not possess equal arms when they were first created. Originally, there were no checks and balances preventing the Council (allied with the Commission) from encroaching upon the prerogatives of the Parliament. The case of Chernobyl provides a clear example. There, the ECJ concluded that, in order to preserve the inter-institutional balance, disputes among Community Institutions had to be submitted to judicial review. Besides, today an additional explanation may be that, whereas the USSC is reluctant to confer standing in inter and intra-branch disputes which are deferred to the political process, in the EU, Community Institutions and Member States are seen as guardians of rule-of-law. Since a Community Institution may bring proceedings solely alleging the violation of the law by another Institution, a fortiori they may as well act to defend their prerogatives.

The situation changes radically in the CFSP. In accordance with Articles 46 and 47 TEU, the jurisdiction of ECJ is limited to “policing the boundaries” between the first and the other two pillars. Traditionally, there have been two reasons for excluding the CFSP from the purview of the Community judiciary. Not only did Member States fear that conferring jurisdiction to the ECJ would amount to eroding highly sensitive areas of national sovereignty, but also owing to their scope and nature, CFSP measures were deemed unfitted for judicial review. In the field of foreign policy, no permanent legal framework between the Member States is created. On the contrary, it is suggested that international conflicts often require a prompt and non-permanent reaction free from “rampant” interventions of the judiciary. However, some European scholars have

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363 See supra Chapter I
364 Wessel, Op cit, pp1151.
365 See Case C-170/96, Commission v Council, (Airport Transit Visa) [1998] ECR I-2763, see also Case C-176/03, Commission v Council, (Criminal Penalties Case) [2005] ECR I-7879. These two cases dealt with the division of powers between the first and the third pillar. For the allocation of competences between the first and second pillar see Case C-91/05, Commission v Council, 20 May 2008, n.y.r.
366 See generally E Denza, The Intergovernmental Pillars of the European Union (OUP Oxford 2002); Ketvel, Op cit, pp 79-80
contested these two settled assumptions. For instance, after examining wide range of CFSP measures, Eeckhout argues that CFSP involves more than “foreign-policy positions and the making of diplomatic demarches”. In his view, albeit creating rights for and imposing obligations of citizens, “the ill-defined nature of joint actions and common positions therefore appears to permit virtually any type of governmental action”, going from measures involving financial expenditure to setting up military missions. Why should some of CFSP measures, being no substantively different from Community measures, be excluded from judicial control? Besides, he posits that where there is a democratic deficit, courts should step forward to ensure the Executive is confined by the rule of law.

To sum-up, cases such as Goldwater v Carter would be examined by the Community judiciary. The ECJ does not hesitate to solve inter-institutional disputes. On the one hand, the original institutional design did not possess sufficient political checks and balances ensuring that one Community Institution did not encroach upon the competences of the other. On the other hand, the EU legal system has evolved so as to grant the Council, the Commission and the European Parliament with general standing. The ECJ also has jurisdiction to police the boundaries between the Community and the CFSP pillars.

2. US Flexibility vs. EU Rigidity: Expanding judicial control over the CFSP

To some extent, the “natural” exclusion of CFSP from the purview of the ECJ mirrors the pre-Baker conservative case-law of the USSC. For instance, when asked as to review the President’s opposition to an application to engage in air carrier transportation overseas, the USSC replied “the very nature of executive decisions as to foreign policy is political, not judicial Such decisions […] are delicate, complex, and involve

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368 Ibid, p 20
large elements of prophecy […]. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.”\(^{369}\) Still, cases such as Hamdi and Hamdan demonstrate that the USSC may subsequently shifts its views by embracing an assertive approach in defence of civil liberties. As opposed to the legal EU system, the USSC is not confined by constitutional walls insulating foreign policy from judicial checks\(^{370}\). As Justice O’Connor indicated, the USSC may opt for a balanced approach.

By contrast to the American flexibility, the rigidity of the EU legal system prevents applicants from challenging the validity of a CFSP measure no matter how serious violations of EU law may be. This situation is not so alarming when CFSP measures are implemented by the Community. OMPI v Council provides a good illustration\(^{371}\). There, the applicant challenged both a CFSP Common Position listing the name of the persons whose assets had to be frozen by the European Community and the Council Decision implementing it. The CFI did not spend much time declaring the inadmissibility of the action against the Common Position, by acknowledging that no encroachment upon Community competences had taken place. It then rejected the claim alleging that the non-justiciability of the CFSP measure would amount to “a denial of justice”. It held that, since it enjoyed jurisdiction to assess the validity of the Community implementing measure\(^{372}\), its judicial review entailed an indirect review of the Common Position. Notwithstanding that the ruling of the CFI diminishes the consistency in the EU external action, OMPI evinces that whenever a CFSP measure is implemented by Community legislation, expanding the jurisdiction of the Community Courts does not appear to be so urgent. Nonetheless, serious human rights concerns arise when CFSP measures need no further implementation. Cases such as Segi and Gestora Pro-

\(^{369}\) C & S. Air Lines v Waterman S.S. Corp., 333 U.S. 103, 111 (1948)

\(^{370}\) It is true that it faces the risks of jurisdictional stripping by Congress. However, it is the federal judiciary which will ultimately has the last word. See supra Chapter I.

\(^{371}\) Case T-228/02 Organisation des Modjahedines du peuple d'Iran v Council [2006] ECR II-04665

\(^{372}\) OMPI, Op cit, paragraphs 55-60
Amnistía provide a good example. Although the measures challenged pertained to the Police and Judicial Cooperation in Criminal Matters (PJCC or third pillar), the underlying legal problem was the same, namely the absence of judicial review. In these cases, applicants brought proceedings claiming damages against the Council. They argued that including their names on a terrorist blacklist for the purposes of judicial and police cooperation caused them serious harm. The CFI ruled that it would declare admissible an action for damages against a PJCC Common Position, provided that it had encroached upon Community competences as provided by Articles 46 and 47 TEU. Noticing that there was no encroachment, the CFI had no choice but dismiss the application, admitting nevertheless that, since no further implementation was required, no remedy was available to applicants. However, it held that “the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 TEU.”

On appeal, AG Mengozzi largely agreed with this last statement of CFI, suggesting that national courts should review the validity of PJCC Common Positions, where the EU legal order failed to do so. However, the ECJ rejected these last observations. Forcing the adaptation of its UPA and Jégo-Quére case-law, it ruled that [1] ascertaining the true nature of a PJCC Common Position, [2] annulment actions brought by the Member States and the Commission, and [3] the preliminary reference procedure did ensure “a complete system of remedies.” The decision of the ECJ in Segi has been largely criticised elsewhere. Suffice to say that the preliminary reference procedure is not, properly speaking, a remedy. Nor does it give rise to compensation. As a result, since there were no implementing measures, applicants were deprived of all remedies.

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373 Case T-333/02 Gestoras Pro Amnistía and Others v Council, not published in the ECR; Case T-338/02 Segi and Others v Council [2004] ECR II-1647
374 Segi, Op cit, paragraphs 38
377 Segi (appeal), Op cit, paragraphs 50-54
With the entry into force of the Treaty of Lisbon, the remedial gap will be partially solved. Article 275 TFEU will enable natural and legal persons adversely affected by a CFSP measure to initiate annulment proceedings before the Union (now Community) Judiciary. Still, this grant of jurisdiction must be read as an exception to the general non-justiciability of the CFSP measures. Therefore, applicants may not seek damages against the EU. Nor may they indirectly challenge a CFSP measure via the preliminary reference procedure. Article 275 TFEU provides for a direct, prospective and non-monetary remedy.

The rigidity of the EU legal system can be contrasted with the flexibility the political question doctrine provides to the USSC. By comparing cases like Hamdi with Segi, both dealing with terrorism, one may wonder whether a policy of self-restraint would be preferable to constitutional walls impossible for the judiciary to climb. Arguably, it could be sustained that a political question doctrine would fail both ways, either by over-deferring to or excessively mistrusting the political branches. However, where they enjoy jurisdiction, the rulings of the CFI and the ECJ on the fight against terrorism suggest otherwise. For instance, in OMPI, the CFI ruled that because of the Council’s broad discretion in adopting economic sanctions implementing a CFSP common position, “the Community Courts may not, in particular, substitute their assessment of evidence, facts and circumstances justifying the adoption of such measures for that of the Council”\textsuperscript{379}. The prudential rationale underpinning Baker seems to appear. Both the USSC and the CFI will not adjudicate over matters involving “an initial policy determination of a kind clearly for non judicial discretion”. Said differently, the CFI is not willing to replace the Council’s political judgment by its own. However, it does not follow that economic sanctions become a “blank cheque” in favour of the Council. In particular, just as in Hamdi where the USSC did not abdicate its role as

guarantor of fundamental rights, so too have the Community Courts taken the same stand. It suffices to read at the Opinion of AG Maduro in *Kadi*, later endorsed by the ECJ on appeal. There, after rejecting the primacy of UN law over EU law, Maduro urged the ECJ to annul the EC Regulation for breach of fundamental procedural rights. Before examining the Community Regulation, he evaluated the level of judicial involvement that was required. AG Maduro disagreed with respondents who had argued that the fight against terrorism was a “political question” unfitted for judicial determination. In their view, unlike the Security Council, not only did the Community judiciary lack the expertise to evaluate which measures are appropriate to prevent international terrorism, but judicial intervention might also disrupt a “globally coordinated effort to combat” this threat. Although AG Maduro conceded that the ECJ should not ignore that it operates in an increasingly interdependent world where the authority of other International bodies must be, as far as possible, recognised, he stressed that the Community Courts could “turn its back on the fundamental values” which they are bound to protect. Measures intended to suppress international terrorism could not be seen as a political question excluding any type of judicial second-guessing. The reason lies in that “the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few”. Hence, in embracing a classical conception of the judicial function echoing a Post-Baker rationale, the Advocate General posited that compliance with the rule of law commands Community Courts to follow judicial review. Even if it is true that the prevention of international terrorism may be read as a novel question, it is not the standard of judicial scrutiny that needs to be accommodated, but the balance resulting from weighing new threats to the general interest against fundamental rights.

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382 Para. 45
Therefore, *OMPI* and *Kadi* reveal that the Community Courts are aware of their institutional limitations when second-guessing the adequacy of measures adopted to fight terrorism, while still not giving away judicial protection of human rights. Since the Community judiciary has proved capable of striking the right balance between “liberty and security”, nothing suggests that they could not do so in other areas of foreign affairs. Traditional fears no longer justify the exclusion of the ECJ from the CFSP.

3.- Vertical Dimension

In the realm of foreign affairs, the degree of centralisation attained under the US Constitution is greater than the one laid down by the EU legal system. Article I § 10 US Constitution precludes States from entering into any treaties, declaring wars or levying duties on exports without congressional approval. In the same way, the USSC has built its case-law favouring the exclusivity of the federal government in the realm of foreign affairs. American States may not invoke external policy considerations in order to derogate from federal law, nor may they adopt discriminatory measures alluding to their own security. It is precisely the opposite. States must ensure that their domestic policies do not hinder the Executive when conducting the foreign or security affairs of the Nation. In *Crosby*, the USSC ruled that a Massachusetts law banning state entities from buying goods or services from companies doing business in Burma was pre-empted by federal law setting up a less restrictive regime. In addition to declaring state law pre-empted by congressional legislation, the USSC has also struck down state measures which adversely affects the capacity of the federal government to deal with foreign affairs. In *Japan Lines*, the USSC ruled that, in addition to the restrictions stemming from the Dormant Interstate Commerce Clause, foreign commerce impose additional


restrictions on state regulatory powers, namely state law would be displaced if it interferes with the US Government’s capacity to “speak with one voice”. More recently in Garamendi, the USSC held that a Californian law requiring insurance companies doing business in California to provide information about the insurance policies they sold in Europe during the Nazi regime, was pre-empted by an executive agreement concluded with Germany.

Conversely, defence and foreign policy largely remain within the sovereignty of the EU Member States. Does it mean that all measures touching upon these domains fall outside the scope of Community law? In the light of Centro-Com\textsuperscript{385}, the reply must be in the negative. The ECJ has expressed that, though Member States remain sovereign over foreign affairs and national security, “the powers retained by [them] must be exercised in a manner consistent with Community law”. Thus, even if the UK had a legitimate interest in complying with its international obligations under UN law, it was precluded from adopting measures pursuing objectives already protected by the Community legislator. Hence, simply because a national measure has a foreign or national security dimension, it does not fall outside the scope of Community law. Nor does it escape judicial scrutiny\textsuperscript{386}. However, it does not follow that Member States’ concerns in these sensitive areas are not taken into account by the ECJ. As Trybus indicates, the case-law of the ECJ reveals that “the weaker the commercial link and the stronger the security link of a provision, the lower the degree of intensity” in applying the proportionality test\textsuperscript{387}. In other words, there is a “spectrum of deference” going from Article 30 EC to Article 297 EC. First, national measures adopted under Article 30 EC\textsuperscript{388} must be [1] suitable to promote the objectives of public security, [2] the least restrictive alternative on free


\textsuperscript{388} See Article 36 TFEU
movement capable of attaining the same objective, and [3] the public security reasons must outweigh free movement interests. Cases such as Campus Oil, Commission v Greece or Albore provide a good illustration. In an intermediate position lies Article 296 EC. There, the allusion to the concept of “necessity” implies that only clearly unsuitable, arbitrary or manifestly inappropriate measures will be set aside. Finally at the end of the spectrum, Article 297 EC provides the widest margin of appreciation to the Member States, but is there room for a political question?

It is difficult to answer this question, since the ECJ has been reluctant to deal with this provision. The FYROM case is perhaps the only case shedding light on its meaning. By invoking this provision, Greece sought to unilaterally interrupt trade with FYROM alleging that the use of the name “Macedonia” threatened its territorial integrity. However, the Commission disagreed and brought an enforcement action under Article 298 EC on the ground that Greece had unjustifiably violated EC trade law. For some scholars, Article 297 is an “un-interpretable” provision securing a “reserve of national sovereignty”. Accordingly, in order to protect their national security, not only does Article 297 entitle Member States to adopt measures which would run against the proper functioning of the common market, but it also prevents both national and Community judiciaries from reviewing the validity of state measures adopted thereunder. Although the case became moot for review before the ECJ could issue a ruling, the Opinion of AG Jacobs is an important contribution. He acknowledged that the ECJ, or any other court, lacks judicial standards to ascertain “whether serious international tension existed and whether such tension constituted a threat

390 Case C-414/97 Commission v Spain [1999] ECR I-5585
391 Trybus, Op cit, pp 1368
of war”\(^{395}\). This matter is left to the subjective considerations of the Member State concerned, which is in the best position to assess the adverse impact that the conduct of a third State would have on its national security. As the USSC previously held\(^{396}\), determining the existence of belligerent confrontation was for the Member State’s executive to determine. Indeed, the parallelisms with Baker are clear. Both AG Jacobs and the USSC are willing to defer to the political branches in the absence of “workable judicial standards”. Arguably, courts may always find or even create judicial enforceable parameters\(^{397}\). However, a different question is whether they should. Clearly, due to the exceptional character of Article 297 EC, the reply must be in the negative.

Nevertheless, since this provision has been qualified by the ECJ as “wholly exceptional”\(^{398}\), the paucity of judicial criteria regarding the substantive conditions provided in Article 297 EC does not imply that Member States are granted “carte blanche”\(^{399}\). Firstly, the case-law reveals that the ECJ will not apply Article 297 as way of circumventing other treaty provision, in particular Article 30 EC\(^{400}\). Secondly, national and Community Courts will focus on verifying that this Article is not used to protect the economy of the Member State concerned, thus, ensuring that a misuse of powers does not take place\(^{401}\). Thirdly, AG Jacobs stated that invoking this provision does not preclude compliance with either the principle of proportionality or the principle of equal treatment\(^{402}\). Although proportionality would not be used to determine whether the challenged national measure is adequate to put an end to the risk or threat invoked by the Member State, Community and national courts are entitled to assess

\(^{395}\) Opinion AG Jacobs in FYROM case, supra note 393, 50. In the same vein, Opinion of AG Comas in Albore, supra note 389, 29. Koutrakos, Op cit, pp 1355-56

\(^{396}\) Martin v Mott, 25 US (12 Wheat.) 19, 30 (1827)

\(^{397}\) Trybus, Op cit, pp 1365 disagrees, arguing that the concepts listed in Article 297 EC can be subject to judicial interpretation. For instance, “war” is a category of international law that has been interpreted by the International Court of Justice.

\(^{398}\) Jonhston, Sirdar, and Kreil, Op cit

\(^{399}\) Koutrakos, Op cit, 1361

\(^{400}\) See supra note 392

\(^{401}\) Opinion AG Jacobs in FYROM case, supra note 393, 67. See also Koutrakos, supra note 399, pp1350

\(^{402}\) Ibid, 69.
whether the impact of the state measure on the common market is proportional.\footnote{Ibid, 72. In the case at issue, AG Jacobs considered that the Greek measure was proportional since the adverse repercussions on the common market were “slight”.} Finally, Article 297 EC also imposes certain procedural requirements on the invoking Member State, e.g., it is required to consult other Member States prior to adopting measures deviating from the common market.\footnote{Koutrakos, Op cit, pp 1356-1359} If Article 297 EC were a provision calling for absolute judicial deference, Article 298 EC which introduces an expedite procedure for enforcement actions would be devoid of purpose. Thus, the whole of Article 297 EC cannot be read as precluding judicial control. It is only in relation to the internal consistency of the measure that the Community judiciary will not intervene. However, its impact upon the common market will be examined.

IV.- Concluding Remarks

Either because some textual provisions are clearly committed to the political branches or because “prudential considerations” advise against judicial intervention, the political question doctrine recognises that the province of the judicial department does not cover the entire constitutional landscape. Some constitutional questions escape judicial cognizance. Yet, accepting that the institution of judicial review is not constitutionally all-embracing does not imply a devalued role for the judiciary. On the contrary, it reveals that the judiciary undertakes the “healthy exercise” of defining the contours of its interests and strengths vis-à-vis the political branches. Accordingly, the viability of this doctrine presupposes that the federal judiciary trusts the institutional capacity of the legislature and executive, when dealing with questions unfit for judicial resolution. However, even after accepting the institutional superiority of the legislature and the executive, it does not follow that the judiciary will abdicate its role when fundamental constitutional values are at risk. Ever since Baker, the USSC has pointed out that, even if questions lie at the epicentre of the political process or fall within their field of expertise, the political branches will
break the judiciary’s trust, if they fail to protect or causes themselves the violation of basic constitutional tenets (e.g. Due Process Clause or Equal Protection Clause). In such cases, the judicial department is ready to assume leadership monopolising the interpretation of the Constitution. Still, the fact that the vow of confidence may be withdrawn does not entail per se a constant mistrust of the political branches. As demonstrated by Bush v Gore, embracing absolute judicial supremacy without pursuing larger constitutional principles and goals may severely damage the USSC’s legitimacy and reputation vis-à-vis the nation. It follows that the success of this doctrine is conditioned upon constantly adopting a “balanced approach”. First, when applying the doctrine, federal courts must not refer to an abstract catalogue of cases, but proceed to outweigh political considerations on a case-by-case basis. Secondly, the federal judiciary must be guided by openness to deference. The federal judiciary must not be overconfident of its own institutional capacities, but must recognise that some areas of law are better fitted to political discussion. Nevertheless, if, on the merits, the courts are always reluctant to defer to political branches when exploring factual findings, intent or policy assessments, they are less inclined to do so when applying jurisdictional limits. As shown in the following chapters, there appears to be a symmetrical momentum in the USSC’s attitude when examining jurisdictional and federal boundaries. Finally, the added value of the doctrine lies in its prudential foundation rather than on its classical construction. While the latter can be recast as an ordinary question of constitutional interpretation, the notion of “prudence” brings flexibility and dynamism into the doctrine. It is true that this strand of the doctrine renders outcomes more difficult to predict, reducing legal certainty. However, this flaw results from its virtue. By contrast to the classical approach creating immutable “safe-heavens” for the political branches, prudential considerations favour constitutional innovation, by adapting the doctrine to changing times. Most importantly, they are the only ones capable of striking the proper balance between “reckless confidence” and “excessive distrust” on the political branches.
In the EU, the ECJ has not formally coined a doctrine excluding political questions from its purview. The reason is twofold. On the one hand, the drafters of the Treaty have already subtracted political questions from the jurisdiction of the Community Courts. Article 7 TEU and the CFSP are paradigmatic examples. On the other hand, the EU has not assumed competences in matters located close to the operation of the political process, which largely remain for the national parliaments to decide. For instance, the European electoral process, the disqualification and seating of MEPs and the ratification process of treaty amendments are largely governed by national law. Indeed, cases such as *Powell v McCormack* or *Coleman v Miller* would fall outside the scope of the EU legal order. However, it does not follow *inter alia* that these questions are seen as political. The ECJ has suggested that it is a matter for the national courts and, where appropriate, for the ECtHR to decide. Said differently, it is not an automatic deference to the political process, but a vertical distribution of jurisdictional competences between the Community Courts and the national courts. Of course, national courts may, in turn, consider whether these questions raise political questions. Nevertheless, their ruling will be based on their national constitution and not the TEU or EC Treaty, just like when, in exercising their jurisdiction, state courts in the US are not bound by Article III of the US Constitution. Still, in areas where the Community Courts enjoy jurisdiction, have they applied a political question doctrine? I would suggest that the Community Courts have followed an approach relatively close to the post-*Baker* era, that is, judicial intervention was underpinned by democratic principles. In *Les Verts*, the ECJ surmounted jurisdictional limitations in order to prevent already represented political parties from taking an advantage in the electoral run, eventually leading to the locking-up of settled majorities. In the same way, in *Martinez v European Parliament*, the CFI did not hesitate to thoroughly examine the concept of “political affinity”. In its view, an absolute deference to the benefit of the European Parliament would have become an obstacle to the democratic principle of an independent mandate. Hence, in both cases the Community Courts emerged as guarantors of the democratic process, even if it resulted detrimental to parliamentary self-governance. Additionally, just
as in *Baker*, in *Eman v Sevinger*, the ECJ also alluded to the principle of non-discrimination to curtail the discretion of national legislatures when adopting electoral laws.

In the realm of foreign affairs, the political question doctrine remains good law. The USSC is reluctant to solve inter-branch disputes regarding the allocation of foreign affairs powers, by holding that both political branches stand on an equal footing to defend themselves and that there are insufficient judicial tools to solve these disputes. To a large extend, the USSC’s refusal mirrors its doctrine on representational standing. Likewise, the USSC is also keen on deferring to the US President in order to enhance the consistency and unity of foreign policy. However, in the light of *Hamdi* and *Hamdan*, it does not follow that the whole of foreign policy is non-justiciable. As a flexible judicially-created instrument, the political doctrine question allows a balanced intervention when civil liberties are at stake.

In the EU, in addition to the horizontal allocation of powers, foreign policy presents a vertical dimension absent in America where States have almost no say. Horizontally, the ECJ has not refused to adjudicate over inter-institutional disputes. Without “the foreign affairs factor” being decisive, the reason explaining why the ECJ has adopted an approach different from *Goldwater v Carter* is twofold. Firstly, the original version of the Treaty did not provide for co-equal branches, but a weaker European Parliament. Secondly, the EC Treaty has evolved so as to grant Community Institutions with a general standing. As for the CFSP, with the exception of the limited role of “policing the boundaries”, judicial review is precluded. This judicial exclusion rests on traditional assumptions over protecting national sovereignty and the non-justiciable nature of foreign affairs, which arguably no longer hold true. Besides, the rigidity of the EU legal system falls short of providing a satisfactory level of human rights protection. As *Segi* and *Gestoras* demonstrate, this situation is particularly alarming when a CFSP measure requires no further implementation. Although the Treaty of Lisbon will provide for a direct, prospective and non-monetary remedy, it is
only a partial solution. Constitutional walls insulating the CFSP from judicial review should be torn down. A policy of self-restraint along the lines of the political question doctrine should then be embraced. But is the ECJ ready or are traditional fears still valid? OMPI demonstrates that where the Community Courts enjoy jurisdiction, they have proved able to strike a proper balance between the need to combat terrorism and human rights, while paying due account to the Council’s findings. Accordingly, the Community Judiciary appears to be mature enough to assume the greater responsibility in defining its institutional position vis-à-vis the Community political institutions. Vertically, when called upon to determine the level of discretion allowed to Member States invoking national security or foreign policy considerations, the same applies. Community Courts have designed a “spectrum of deference”, whereby the weaker the commercial link is, the softer the proportionality test becomes. Located at the end of the spectrum, Article 297 EC raises a political question namely “whether serious international tension existed and whether such tension constituted a threat of war”. As Baker indicates, judicial deference takes place because of the lack of judicially workable standards. Nevertheless, this provision cannot be considered as “blanket rule” or “a reserve of national sovereignty”. The Community Courts will still examine compliance with the principle of proportionality and equal treatment, as well as the procedural requirements laid down in Article 298 EC. As in OMPI, it appears that the ECJ also strikes a right balance between national fundamental interests and the proper function of the common market.

Finally, with an expanded jurisdiction, there is always the risk that the Community judiciary might lean towards an approach close to Bush v Gore, that is, a judicial supremacy which not only protects minorities from political abuses, but directly injects federal courts into the heart of the political process. Should the Treaty of Lisbon enter into force, the Community judiciary will have then completed its transformation “from a trade and tax law into a human rights court”. Accordingly, cleavages

405 D CHALMERS, Judicial Authority and the Constitutional Treaty, (2005) 3 ICON., pp 448-472
with the political branches might become more common. The adoption of a political question doctrine, along the lines described above, appears to be a good solution. Otherwise, a total lack of deference to the political branches would lead to Community Courts committing the same mistakes as its American counterpart.
Chapter III

Negative Integration: The Dormant Commerce Clause And Article 28 EC

One of the primary objectives of the founding fathers of the US Constitution and of the drafters of the EC Treaty was to integrate different national markets into a single one. Accurately, they believed that a single market would enhance economics of scale, maximise efficiency and competition and thus, it would increase the general welfare while ending commercial balkanisation among sister States. Accordingly, when drafting the US Constitution, “no other federal power was so universally assumed to be necessary, no other state power was so readily relinquished”\(^{406}\), Justice Jackson wrote. Likewise, Article 2 EC understands the establishment of the common market as the mean to bring prosperity to the Peoples of Europe. The constitutional legitimacy of this objective being indisputable, how can it be achieved? The EC Treaty and the US Constitution point out two different, albeit complementary, ways of tearing down barriers to interstate trade. On the one hand, when a supranational legislative body adopts common standards pre-empting contradictory national regulatory laws, “Positive integration” takes then place. On the other hand, the judiciary may also be entrusted with enforcing constitutional provisions guaranteeing free movement of the factors of production. This institution is known as “Negative integration”. It follows that, while the first type of integration relies on the supranational legislature, the latter considers that, in order to establish a common market, the judicial protection of commercial rights is vital. These two types of market-building devices can be found in America and in Europe. The Commerce Clause and Article 95 EC empower Congress and the Community legislature to enact commercial legislation that will facilitate interstate commerce, while Article 28 EC and the Dormant Commerce Clause (DCC) compel the judiciary to strike down national measures unduly impinging upon interstate transactions.

\(^{406}\) Hood & Sons, Inc v Du Mond, 336 US 525, 534 (1949)
However, in the United States and in the European Union, the powers of the Federal Government or the Community are not infinite, but limited to the ones vested upon them by the US Constitution and the Founding Treaty respectively. The principle of “Enumerated Powers” under American law is enshrined in Article I § 8 US Constitution, which lays down an exhaustive list of subject matters upon which Congress has the power to legislate.\(^{407}\) Additionally, the X\(^{th}\) Amendment also provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”. In the same way, though the Treaty does not contain a catalogue of Community competences\(^{408}\), Article 5 EC lays down the principle of “Attribution”, pursuant to which “[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. Therefore, one may affirm that, in both constitutional orders, the legislative powers of the Federal Government or the Community are valid in so far as they take, explicit or implicitly, as their legal basis a constitutional or treaty provision. In the light of these principles, the creation and functioning of the internal market cannot amount to eroding all legislative competences of the States. It is true that, in order to free interstate trade from illegitimate and protectionist interventions, States agreed to transfer power to the US Government and the Community respectively. However, under any circumstance, they acquiesced to giving away all aspects of market regulation. The “Market” not only involves economic operators, but also other interests, such as environment, consumer protection, social policy and so on. The question that then arises is how national markets can be coordinated without depriving States from all their regulatory competences affecting it. Put simply, it is for the US Supreme Court (USSC) and the European Court of Justice (ECJ) “to identify a mode of analysis that allows Congress (and the

\(^{407}\) Indeed, as Professor Tribe indicates, Article I§1 does not state that Congress is vested with “all legislative power”, but with the legislative power “herein granted”. See LH TRIBE, American Constitutional Law Volume I, (Foundation 3\(^{rd}\) Ed. 2000), pp. 789-90.

\(^{408}\) This was one of the most important innovations introduced by the European Constitution. Its Title III introduces a catalogue of competences, which distinguishes between exclusive, shared and coordinated competences. In the same vein, see also Part One, Title I TFEU. In particular, Article 4.2. (a) TFEU states that the regulation of the internal market is a shared competence.
Community Legislature) to *regulate more than nothing [...] and less than everything [...]*.409

Nevertheless, both the federal and the Community judiciary have struggled to allocate legislative powers to regulate the commerce between these two levels of governance. The reason is that, not only is the regulation of commercial activity the key stone of an integrationist process, but it is also a very complex matter. The regulation of commerce among the different component States is subject to constant changes. What could be considered as a non commercial activity in the past may be considered as commerce in the future. In the same way, progress in communications, transports and technologies has rendered more difficult to ascertain what is purely local from what may affect interstate trade. Thus, the definition of commerce and determining when interstate elements are involved, are a constant challenge to constitutional adjudication. Indeed, important shifts in the case-law of both Courts have been undertaken in the realm of the internal market law. Both Courts have introduced different tests aiming at fostering legal certainty and coherence, against an increasing body of law which threatened to erode all state commercial legislation. Either based on structural or substantial principles, these tests encapsulate a judicial effort to find the appropriate “constitutional equilibrium” between what ought to be regulated by supranational bodies and what is better kept in the hands of local authorities.

The purpose of the following two chapters is thus to examine and compare the “mode of analysis” coined by both Courts. While the next chapter will look at “Positive integration”, the following paragraphs are devoted to studying constitutional provisions limiting States’ regulatory powers. The first section examines the place of the DCC and Article 28 EC in their respective constitutional text. Section II outlines the constitutional foundation and the normative evolution of these provisions. Section III looks at judicial review of discriminatory state measures, while Section IV

409 *Gonzales v Raich*, 545 U.S. 1, (2005) (O’Connor dissenting)
examines cases beyond discrimination. In Section V, it is determined whether, when assessing the validity of state legislation, the ECJ takes into account its extraterritorial effects. Section VI underlines and explains the convergences and divergences of both the USSC and the ECJ when limiting state regulatory powers. Finally, the chapter concludes by briefly examining the application of a “process-oriented” review to overcome the shortcomings of Keck.

I. Constitutional Limits on State Regulatory Powers

The DCC is not the only provision which limits state regulatory and taxing powers. Firstly, “Economic Substantive Due Process”\(^{410}\) protects the ability to enter into and enforce contracts, to pursue a trade or profession and to acquire, posses or convey property. However, since 1937 when the Lochner era came to an end, the USSC has not declared void either state or federal regulations on the ground that they unduly hinder economic liberties\(^{411}\). Secondly, the “Equal Protection Clause”\(^{412}\) embodies a general prohibition of discrimination. Nonetheless, by contrast to the DCC, it does not prohibit the discriminatory effects of facially neutral laws, unless there is a discriminatory purpose behind\(^{413}\). Thirdly, the USSC has recognised that there is a fundamental right to travel and to interstate migration within the United States\(^{414}\). Finally, the “Privileges and Immunities Clause”\(^{415}\) bans state discriminatory measures against citizens of other States. The USSC has recognised that the DCC and Article VI§2 substantially overlap. They are in a “mutually reinforcing relationship”\(^{416}\). However, the scope of Article VI§2 is narrower than the one of the DCC. Firstly, it does not apply to corporate entities\(^{417}\). Secondly, it only protects constitutional rights and

\(^{410}\) XIX\(^{\text{th}}\) Amendment US Constitution


\(^{412}\) XIX\(^{\text{th}}\) Amendment US Constitution

\(^{413}\) Washington v Davis, 426 US 229 (1976); see JL LARSEN, Discrimination in the Dormant Commerce Clause, (2004) 49 S.D.L.Rev., 845-866. (arguing that the notion of discrimination applied in the realm of the Commerce Clause is broader than in other areas of constitutional law, particularly with regards to the Equal Protection doctrine)

\(^{414}\) United States v Guest, 383 US 745 (1966)

\(^{415}\) Article VI§2 US Constitution

\(^{416}\) Hicklin v Orbeck, 437 US 518, 531 (1978)

\(^{417}\) Paul v Virginia, 75 US (8 Wall) 168 (1868)
important economic activities. For instance, access to recreational facilities is not included\(^\text{418}\). Finally, it only targets discrimination against out-of-state citizens. Thus, there is no equivalent to the *Pike* test under Article VI. Nonetheless, by contrast to the DCC, Article VI cannot be superseded by federal statute. Nor does it recognise the market participant exception\(^\text{419}\).

Established in order to create a common market, it is not surprising that the EC Treaty contains specific provisions prohibiting States from erecting custom\(^\text{420}\), fiscal\(^\text{421}\) and technical barriers\(^\text{422}\) to interstate trade. Respectively and with the exception of custom duties\(^\text{423}\), the Treaty also lays down a list of derogations for each type of barrier. The free movement provisions are “*lex specialis*” of Article 12 EC, which enshrines the General Principle of non-discrimination on grounds of nationality. Indeed, when laying down the foundations of an incipient common market, integration unavoidably requires compliance with the principle of non-discrimination. However, notwithstanding *Keck*, the law of the free movement has moved beyond the “non-discrimination paradigm”, by adopting a further-reaching “access to market test”. It follows that law of free movement has developed so as to surpass the scope Article 12 EC. Additionally, since each of the free movement provisions covers a specific aspect of the European internal market, the ECJ has ruled that they are, albeit exceptional cases\(^\text{424}\), “mutually exclusive”\(^\text{425}\). In effect, the piecemeal categorisation of state measures has enabled the ECJ to follow a different approach distinguishing between the free movement of goods and the free movement of persons\(^\text{426}\).

\(^{418}\) *Baldwin v Montana Fish and Game Commission*, 436 US 371 (1978)


\(^{420}\) See Articles 23 EC.

\(^{421}\) See Articles 28; 29; 30 EC. See also for the free movement of persons: Article 39 to 42 EC (workers), 43 to 48 EC (establishment) and 49-55 EC (services). For a comprehensive and detailed overview, see C BARNARD, *The Substantive Law of the EU*, (OUP, 2004)

\(^{422}\) Case 7/68 *Commission v Italy* [1968] ECR 423.

\(^{423}\) This would be the case for advertising bans: e.g. Case C-405/98, *Gourmet* [2001] ECR I-1795.


\(^{425}\) C BARNARD, “Fitting the remaining pieces into the goods and persons jigsaw”, (2001) 26 E. L. Rev., pp 35 - 54
Finally, not only are economic operators protected by Community law, but since the entry into force of the Treaty of Maastricht, the concept of “European citizenship” also allows non-economically active EU citizens “to move and reside freely” within the territory of the Member States\textsuperscript{427}.

Article 28 EC applies to quantitative restrictions on trade of goods and measures having equivalent effects (MEE). Its substantive scope is thus narrower than the DCC, which in addition covers custom duties, taxation as well as the three other freedoms. In spite of this difference, this chapter will focus on Article 28 EC and the DCC for two reasons. Firstly, in both the US and the EU, trade in goods has been pivotal in developing free movement law. Secondly, it has been the area of the internal market where the case-law has encountered major “revirements”.

\section*{II.- Constitutional Foundation and Normative Evolution}

Created via judicial interpretation, the DCC can be defined as the negative implications flowing from Congress’ powers to regulate interstate commerce. However, despite being enforced for almost 150 years, its constitutional foundations are still unclear. For instance, Redish and Dugent reckon that neither the history nor structure nor a literalist interpretation of the Constitution supports the DCC\textsuperscript{428}. Even inside of the USSC, criticism has arisen. Justices Scalia and Thomas have urged the USSC to abandon the DCC\textsuperscript{429}, alleging that, in the absence of any constitutional provision

\begin{footnotesize}
\textsuperscript{429} See \textit{Tyler Pipe Indus., Inc v Washington State Department of Revenue}, 483 US 232, 260-62 (1987) (Scalia J, concurring in part and dissenting in part). See also \textit{West Lynn Creamery, Inc v Healy}, 512 US 186, 210 (1994) (Scalia J, concurring in the judgment), arguing that the Commerce Clause should only be interpreted as an authorisation for Congress to regulate commerce and nothing else. In any case, the DCC should only be invoked in two rather exceptional cases, namely (1) against facially discriminatory state statutes and (2) against statutes which are indistinguishable from a type of law previously found unconstitutional by the USSC. See also \textit{Camps Newfound/Owatonna, Inc v Town of Harrison}, 520 US 564, 612-14. (1997) (Thomas J, dissenting) More recently, see \textit{United Haulers Assoc., Inc v Oneida-Herkimer Solid Waste Management Authority}, 127 S.Ct. 1786,
\end{footnotesize}
precluding states from impinging on interstate commerce, constitutional silence cannot be interpreted as a unionist device, but just as silence\(^{430}\).

Partially, the fact that the USSC has time and again revisited the test applied when limiting state regulatory powers may explain its unstable constitutional foundations. At first, in *Gibbons v Odgen*\(^{431}\), the USSC maintained that the DCC rested on Congress’ exclusive powers to regulate interstate commerce. *A priori*, this approach would suggest that Congress’ regulatory silence amounted to its desire to leave certain areas of the market totally unregulated. Nevertheless, Marshall indicated that States could still rely on their “police powers” to pass legislation having a “considerable influence on commerce”\(^{432}\). Thus, the validity of state law was conditioned upon distinguishing between commercial regulation and decisions based on public policy. However, not only did this approach fail to acknowledge that these two categories are intertwined, but police powers could also seriously burden interstate trade\(^{433}\). Next, aware of these shortcomings, the USSC took a new approach. Although it also categorised state measures according to subject matter, the USSC sought to clarify its doctrine by distinguishing between “local” and “national activities”\(^{434}\). The former were for the States to regulate, the latter for Congress. However, the progressive integration of the American economy rendered more and more difficult to draw clear-cut lines between these two types of activities. Besides, this test rested on arbitrary criteria\(^{435}\). The USSC limited itself to imposing labels on state activity without following any accurate formula giving rise to judicial predictability. Subsequently, the USSC decided to abandon any tests based on a subject matter classification, and opted for observing the effects of

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\(^{430}\) Tyler Pipe, Op cit

\(^{431}\) *Gibbons v Ogden*, 22 US (9 Wheat.) 1 (1824).

\(^{432}\) Ibid, 203

\(^{433}\) This could be the case for measures guised as “inspections laws, quarantine laws [and] health laws of every description” with protectionist intent.

\(^{434}\) See also *Cooley v Board of Wardens of Port of Philadelphia ex rel.Soc. for Relief of Distressed Pilots*, 12 How. 299, 320 (1852)

\(^{435}\) Tribe, *supra* note 407, p. 1049
state measures. Direct effects on commerce were for Congress to regulate, whereas States could only adopt measures whose effects were indirect. Nonetheless, once again, not only did this test not fit with the New Deal expansive interpretation of the Commerce Clause, but it also was “too mechanical, too uncertain in its application, and too remote from actualities, to be of value”\(^\text{436}\).

Convinced that its attempt to draw rigid categories of measures would lead to a new doctrinal failure, the USSC finally embraced the DCC as a safeguard against state economic protectionism\(^\text{437}\). Currently, the USSC reads the DCC as preventing States from transferring costs to out-of-state traders in order to benefit local industries. As Justice Cardozo famously stated when striking down New York discriminatory regulations, the Commerce Clause “was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division”\(^\text{438}\). At least formally, the USSC has not limited itself to embracing “the principle of non-discrimination”. In addition, even if applied even-handedly, state measures excessively burdening interstate commerce are also deemed incompatible with the DCC. This second prone of the DCC, known as “balancing”, does not rest on barring protectionism, since it clearly goes beyond. Instead, its normative foundation is enshrined in a “virtual representation” or “inner political check” argument\(^\text{439}\), according to which, while in-state citizens may rely on the political process to defend their interests, out-of-state parties cannot. Therefore, it is for the courts to ensure that foreign interests are well represented in domestic political processes\(^\text{440}\).

\(^{436}\) *DiSanto v Pennsylvania*, 273 US 34, 44 (1927) (Stone, dissenting)
In the same way, this “political” reading of the DCC is consistent with the theory of judicial review expounded in footnote 4 of Carolene Products. Indeed, not only does the DCC operate as a “representation-reinforcing” mechanism by contributing to solving defaults in the state political process, but it also helps to minorities deprived of political means to defend themselves (foreign traders)\(^\text{441}\).

By contrast to the DCC, determining whether the EC Treaties provided for the judicial enforcement of provisions guaranteeing free movement has never been in an issue; instead the debate has exclusively focussed on defining their underlying principles and scope. In this regard, it has been suggested that when reviewing the validity of state measures, perhaps inspired by the US experience, the ECJ took short-cuts discarding a “police powers”, “local/ national”, and “direct/indirect burdens” test\(^\text{442}\). Indeed, the test applied by the ECJ has always taken the prohibition of discrimination on grounds of nationality as a minimum threshold. This is not surprising since this principle is omnipresent throughout all free movement provisions. Having a constitutional nature and being intrinsically linked to the very existence of Community law, it is thus a basic tenet in the building-up of market integration\(^\text{443}\). However, the question that has constantly puzzled the ECJ and scholars is whether free movement law, in particular Article 28 EC, extends beyond the prohibition of discrimination.

Admittedly, the difficulty in defining the contours of Article 28 EC is partially due to the breadth of the \textit{Dassonville}\(^\text{444}\) formula by which the ECJ defined the concept of MEE. There, the ECJ stated that “\textit{all trade measures or trading rules enacted by the Member States which are capable of hindering, directly or indirectly, actually or potentially, into community trade are to be considered as measures having and effect equivalent to}\footnote{See e.g. J O’FALLON, The Commerce Clause: A Theoretical Comment, (1982) 61 \textit{Or. L. Rev.}, pp 395-420.}


quantitative restrictions”\textsuperscript{445}. As Barnard suggests, the scope of the Dassonville Formula is striking\textsuperscript{446}, including state measures which, for example, may only indistinctly and potentially affect intra-community trade. Additionally, not only is this formula drafted in broad terms, but it has also been interpreted by the ECJ extensively. For instance, under the notion of “measures or trading rules enacted by the Member States”, the ECJ has followed a substantive, instead of a formal, approach, so that even measures adopted by private bodies enjoying state support or recognition are considered as MEE\textsuperscript{447}. In the same way, “community trade” has been understood as to also include cases where both parties were located and their trade took place in one single Member State\textsuperscript{448}. Moreover, the Dassonville formula does not provide for a de minimis rule, nor is its application conditioned upon substantial repercussions on inter-state trade\textsuperscript{449}. Further, in stating that both “distinctly and indistinctly applicable” measures may be considered as MEE, the ECJ seemed to have expanded the scope of Article 28 beyond the non-discrimination principle\textsuperscript{450}. Indeed, the facts of the case suggest that what really mattered was access to the market. There, Belgian authorities prohibited the importation of whisky without a certificate of origin issued by the authorities of the origin State. Consequently, the state measure did not discriminate between imports and domestic products. It simply was issued to render more difficult parallel imports. (As a matter of fact, traders who had imported Scotch from France alleged that they would have more difficulties in obtaining a certificate of origin than traders importing whiskey directly from the UK to Belgium). Hence, one could argue that, in Dassonville, the ECJ declared a non-

\textsuperscript{445} Ibid, 5
\textsuperscript{446} Barnard, supra note 426, pp. 87
\textsuperscript{447} Case 249/81, Commission v Ireland (Buy Irish), [1982] ECR 4005. See also Case 222/82, Apple and Pear Development Council v Lewis, [1983] ECR 4083. More recently, C-325/00, Commission v Germany, [2002] ECR I-9977
\textsuperscript{450} LW GORMLEY, Actually or Potentially, Directly or Indirectly? Obstacles to the Free Movement of Goods, (1990) YEL, pp 197.
discriminatory state measure incompatible with Article 28 EC\textsuperscript{451}. As discussed below, in Cassis the ECJ confirmed this reading of Dassonville holding that non-discriminatory measures fell within the scope of Article 28 EC. However, in Keck, the ECJ reconsidered its approach and ruled that non-discriminatory “selling arrangements” cannot be defined as MEE. Thus, without entailing a total overruling of the previous case-law, Keck introduced a significant reform in the free movement of goods.

III.- Discriminatory State Measures

A.- Facial and Material Discrimination

Both the DCC and Article 28 EC prohibit discriminatory state measures. Besides, for both Courts, the notion of discrimination includes statutes which facially discriminate against out-of-state commerce, as well as those being facially neutral, but whose effects are discriminatory.

As for facially discriminatory measures, a comparison between Great A & P. Tea Co v Cottrell\textsuperscript{452} and Commission v UK (UHT Milk Case)\textsuperscript{453} provides a good illustration. In the American case, Mississippi law conditioned the importation of milk from other States to [1] a public health certificate and [2] to a reciprocal acceptance of Mississippi milk exported to other States. In the same way, the European case involved British law which banned the importation of milk upon without an import licence. In both cases, the Courts consider local measures to be discriminatory.

As for material discrimination, both Courts agree that it takes place where a state measure is formally applied to domestic and import products alike, but in reality import products suffer a competitive disadvantage. Put differently, discrimination does not arise from the wording of the regulatory

\textsuperscript{451} Conversely, one could counter-argue that unequal treatment among different channels of trade (in the case at issue, between direct and indirect imports) is also a form of discrimination. Be as it may, perhaps the ECJ did not reply to this question in Dassonville, but it surely did not foreclose this possibility either. In any case, Cassis de Dijon (see below) confirmed a broad reading of MEE.

\textsuperscript{452} Great A & P. Tea Co v Cottrell, 424 US 366 (1976)

\textsuperscript{453} Case 124/81, Commission v United Kingdom (UHT Milk), [1983] ECR 203
measure, but from the factual context where its effects develop. For instance, in *Hunt v Washington State Apple Advertising Commission*\(^{454}\), the USSC declared invalid a North Carolina statute on the ground that its effects were discriminatory. The statute required all apples sold or shipped into its territory to be identified by no other grade than the applicable by the United States Department of Agriculture (USDA) or to bear no classification at all. Washington’s apples producers claimed that the statute adversely affected them, since re-labelling would increase their costs. Additionally, by prohibiting the marketing of apples displaying Washington’s grade, applicants argued that they would suffer a competitive disadvantage, due to the fact that their products were submitted to higher standards than the ones imposed by the USDA. Conversely, North Carolina replied that its statute aimed at protecting consumers by avoiding confusion created by a multitude of state grades. Besides, it sustained that the statute applied even-handedly. However, the USSC rejected these arguments. Firstly, while compliance with the statute did no require local producers to alter their market practices, Washington’s apple producers saw their costs increase. Secondly, the USSC held that “[…] downgrading (Washington’s apples to inferior standards) offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit”\(^{455}\). Thirdly, the USSC opined that, by allowing the marketing of apples with no grades at all, not only did the contested statute fail to prevent consumers from being confused, but it magnified the evil it intended to eliminate. In effect, consumers would not be able to identify the origin and the producer of the apples bearing no classification. Lastly, the USSC gave some examples of non-discriminatory alternatives which would protect consumers’ interests, while being compatible with the Commerce Clause, namely a joint use of the federal and state labels or banning all products whose quality was inferior to the one mandated by the USDA. Thus, despite the statute’s facial neutrality, the USSC revealed its underlining discriminatory effects. Likewise, in


\(^{455}\) *Ibid*, 352
Commission v UK (Origin Marking)\textsuperscript{456}, the ECJ followed a similar approach. There, British authorities required an indication of origin for goods to be sold in the retail market. The UK argued that the contested measure was non-discriminatory, since it was equally applicable to import and domestic products. The ECJ rejected this argument. It found that the contested measure was applicable without distinction \textit{“only in form”}, since \textit{“by its very nature”} requiring goods to bear an indication of origin would enable consumers to distinguish between domestic and import products, giving rise to prejudices against the latter. As a result, importations would become more difficult, \textit{“slowing down the economic interpenetration in the Community”}\textsuperscript{457}. The Origin Marking case clearly resembles to Hunt v Washington State Apple Advertising. In both cases, the facial neutrality of the challenged statute did not stop both Courts from reviewing its underlying discriminatory effects.

Moreover, for both the USSC and the ECJ, in so far as a state or local measure is found to discriminate against interstate commerce, whether the state legislature acted in good faith\textsuperscript{458}, whether the number of parties affected is minimal\textsuperscript{459} or, whether in-state citizens are also adversely affected,\textsuperscript{460} is completely irrelevant\textsuperscript{461}. It follows that the notion of discrimination embraced by both Courts is a very broad one, comprising any \textit{“differential treatment of in-state and out-of-state economic interests that benefits the latter and burdens the former”}\textsuperscript{462}.

\textsuperscript{456} Case 207/83, Commission v UK (Origin Marking), [1985] ECR 1202
\textsuperscript{457} Ibid, paragraphs 17-20
\textsuperscript{458} Associated Indus. of Missouri v Loham, 511 US 641, 653 (1994); Philadelphia v New Jersey, 437 U.S. 617 (1978)
\textsuperscript{459} New Energy Co. of Indiana v Limbach, supra note 437
\textsuperscript{460} Fort Gartior Sanitary Landfill, Inc. v Michigan Department of Natural Resources, 504 US 353 (1992); Dean Milk Co v City of Madison, 340 US 349 (1951); C&Carbone, Inc. v Town of Clarkstown, 511 US 383, 391 (1994)
\textsuperscript{462} Oregon Waste, supra note 437, 99
B. The American “Virtually per se rule of invalidity” and Article 30 EC

Although the approach of both Courts converges in defining the notion of “discrimination”, they adopt diverging views when examining the validity of state discriminatory measures. While the USSC has only once ruled that a discriminatory state measure was compatible with the DCC, the EU Member States may recourse to Article 30 EC in order to justify a discriminatory measure. Thus, the USSC’s intolerance towards discrimination is greater than the one of its European counterpart. As the USSC recently articulated, “state laws that discriminate against interstate commerce face a virtually per se rule of invalidity.”

The only case where a state discriminatory measure survived the DCC is *Maine v Taylor*[^464]. There, criminal proceedings were brought against a bait-dealer who had imported live baitfish into Maine, in breach of a Maine statute prohibiting it so. The USSC accepted that this statute sought to protect the wild fish in Maine, by preventing its exposure to parasites prevalent in out-of-state species, which would also disturb Maine’s fragile ecological balance in competing for habitat and food. The USSC also recognised that Maine could not avail itself of non-discriminatory means. Firstly, inspections and sampling techniques were physically impossible, since they would amount to the destruction of the imported fish. Secondly, no standardised examination of the imported fish had been developed[^465]. Lastly, even if the risks prove to be negligible, the USSC sustained the Commerce Clause did not compel Maine to affront a “potentially irreversible environmental damage”[^466]. Thus, the USSC concluded that, though the measure “restricted trade in the most direct manner possible”[^467], Maine legitimately relied on its police powers. The question that then arises is how *Maine v Taylor* can be differentiated from

[^463]: *Granholm v Heald*, 544 US 460 (2005)
[^465]: Ibid, 141
[^466]: Ibid, 148
[^467]: Ibid, 137
other cases. As Tribes suggests, discrimination was allowed because “out-of-state products pose unique harms to the State”\textsuperscript{468}.

\textit{Taylor} is almost identical to \textit{Bluhme}, where the ECJ ruled that a Danish law prohibiting the importation of any bees onto the Island of Laeso other than the Laeso brown bee was a MEE\textsuperscript{469}. Nevertheless, as the USSC recognised in \textit{Maine v Taylor}, the ECJ considered that, under Article 30 EC, the maintenance of biodiversity justified the ban. However, \textit{Bluhme} is not an isolated case. Although the conditions of Article 30 EC are difficult to meet, States have occasionally managed. For instance, in \textit{Campus Oil}, the ECJ ruled that an Irish law obliging oil traders to purchase a proportion of their imports from a state-own refinery was justified on public security grounds, namely the importance of ensuring that energy supply was not interrupted\textsuperscript{470}. Likewise, when examining national laws prohibiting the importation of pornographic material, the ECJ held that “it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirement of public morality within its territory”\textsuperscript{471}.

Article 30 EC is only applicable in the absence of Community harmonization. It must be interpreted restrictively and cannot serve any state economic interests. In addition, states measures relying on Article 30 EC must, on the one hand, comply with the principle of proportionality and, on the other hand, not be means of arbitrary discrimination or a disguised restriction on trade. By contrast to judicial review of Community measures, the proportionality test applied by the ECJ when reviewing the compatibility of national measures with Article 28 EC is a very strict one. A state measure is deemed proportional, when (1) it is necessary to achieve the declared objective, which (2) cannot be attained by “less restrictive means”. For instance, in \textit{Campus Oil}, the Irish measure was proportionate, provided that

\textsuperscript{468} Tribe, supra note 407, pp 1064. One can also draw an analogy between the holding in \textit{Maine v Taylor} and the state quarantine cases: \textit{Kimmish v Ball}, 129 US 217 (1889); \textit{Mintz v Baldwin}, 289 US 346 (1933).
\textsuperscript{469} Bluhme, supra 449
\textsuperscript{470} Case 72/83, \textit{Campus Oil}, [1984] ECR 2727
the purchase obligation was strictly limited to ensuring national security. By contrast, in the *UHT milk case*, British authorities justified their scheme alleging that it would allow them to trace contaminated consignments, and to prevent these consignments from entering the market immediately after being alerted by the exporting State. However, the ECJ rejected these arguments, holding that less onerous restrictions on interstate trade were available, namely a system of signed declaration or, where appropriate, certification\(^{472}\). Moreover, reliance on Article 30 EC as a mean of arbitrary discrimination occurs where state measures lack external consistency, that is, the reasons supporting restrictions on interstate trade are not taken into consideration when it comes to regulating domestic products\(^{473}\).

Finally, the ECJ is not always consistent when qualifying a measure as discriminatory and limiting its justification to the grounds listed in Article 30 EC\(^{474}\). A clear example is provided by the *Wallonia Waste case*\(^{475}\). There, the Commission brought infringement proceedings against Belgium, arguing that a Wallonia regulation prohibiting the disposal of waste generated outside the region of Wallonia was contrary to Article 28 EC. Belgium defended the Wallonia measure holding that it complied with the environmental principle of disposing the waste as close as possible to the place where it is produced. Clearly, this measure is discriminatory. Waste generated outside Wallonia (consequently, originated in other Member States) cannot be disposed therein, by contrast waste generated inside of Wallonia had access to its disposal sites. As a matter of fact, this was the approach followed by the USSC in *Philadelphia v New Jersey*\(^{476}\), where it struck down New Jersey regulations prohibiting the importation of out-of-state waste. After declaring that the measures were facially discriminatory, the USSC held that the defendant’s “attempt to isolate itself from a problem common to many by erecting a barrier against the movement of interstate

\(^{472}\) Commission v United Kingdom (UHT Milk), *supra* note 453

\(^{473}\) Case 40/82, Commission v United Kingdom, [1984] ECR 2793


\(^{475}\) Case C-2/90, Commission v Belgium, [1992] ECR I-4431

\(^{476}\) *Philadelphia v New Jersey*, *Op cit*
trade” was clearly contrary to the Commerce Clause. Consequently, since environmental protection is not laid down in Article 30 EC, the contested measure could not be justified on this ground and hence, it was in breach of Article 28 EC. However, the ECJ took a different view. In referring to the “particular nature of waste”, it ruled that Belgium could rely on an environmental protection justification. In this regard, this inconsistency has led some authors to unsuccessfully argue that limiting the grounds of justification pursuant to the discriminatory (or not) nature of the measure is an artificial distinction which should be abolished.

C.- Special Provisions

Even if the US Constitution vests on the States the power to limit (or even prohibit) the commerce of certain goods within their territory, it does not follow that they may do so in a discriminatory fashion. In this sense, the XXIst Amendment in its Section § 2 states that: “The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited”. The question that then arises is whether States may rely thereon to enact discriminatory legislation, where the commercial product at issue is liquor. In Granholm v Heald, the USSC answered in the negative. It maintained that, though States could ban the sales of all liquors, allowing discriminatory treatment in their marketing could spill over other areas of law, depriving the Commerce Clause from its purpose. In addition, the USSC relied on the history preceding and postdating the ratification of the XXIst Amendment, to stress that a discriminatory treatment had never been allowed.

Just like the XXIst Amendment US Constitution, Article 296 (1) (b) EC also lays down a special regime authorising Member States to restrict the production and trade in arm munitions or war materials intended for specifically military purposes, in order to protect essential security interests.

477 Ibid, 628.
Can the Member States adopt any measures on the basis of this treaty provision or has the ECJ adopted an approach similar to Granholm? In *Commission v Spain*[^480^], a Spanish law exempted imports and intra-Community transfers of arm materials from VAT. Spain argued that the exemptions were “necessary” in order to ensure the effectiveness of its armed forces. However, the ECJ rejected this argument, holding that, since most of the income from payments of VAT would flow into the State’s treasury, the exemption was not necessary in order to achieve this objective. It is true that, by contrast to Granholm, the ECJ did not review whether the Spanish measure was discriminatory, but limited itself to applying the principle of proportionality. Still, the ultimate rationale underpinning these two cases is the same, namely in spite of enjoying a large margin of manoeuvre in regulating the trade of certain goods, States may not adopt measures disturbing or affecting significantly the proper functioning of interstate commerce.

D.- Discrimination to the benefit of one single operator

Perhaps, the case where the USSC pushed the boundaries of discrimination to the outmost was in *C&A Carbone, Inc v Town of Clarkstown, New York*[^481^]. There, it held that a “flow control” ordinance, requiring all solid waste produced within the city of Clarkstown to be processed by a private facility before being shipped away, was contrary to the Commerce Clause. Whereas the majority concluded that the regulation was discriminatory on the ground that it compelled haulers to undertake part of their market activities within the State[^482^], concurring Justice O’Connor considered that granting a waste processing monopoly to a private operator was not[^483^]. Since “all waste originated” within the city was required to be treated at the designed transfer facility, she argued that the contested ordinance was not discriminatory. In particular, she opined that the ordinance did not discriminate on a geographical basis, nor did it give local businesses a competitive advantage. It only benefited a chosen

[^480^]: Case C-414/97 *Commission v Spain* [1999] ECR I- 5585
[^481^]: *C&A Carbone, Inc v Town of Clarkstown, supra* note 460
[^482^]: *Ibid*, 391-392
operator, while putting on an equal footing the rest of in and out-of-state competitors. However, for the majority in Carbone, a state statute is discriminatory where it benefits one chosen local operator.

Subsequently, in United Haulers Assoc., Inc v Oneida-Herkimer Solid Waste Management Authority, the USSC was invited to revisit its ruling in Carbone. The facts of the case were similar, but this time the beneficiary of the processing waste monopoly was a public entity. As dissenting judges sustained, it appears that this new feature is not sufficient for the USSC to depart from Carbone. Just as it occurred in Carbone, in this case, haulers were also obliged to use the services of the chosen operator before shipping away the waste. Nevertheless, the USSC took a different view. In holding that “the Dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition”, the USSC concluded that the Counties’ flow ordinances were not discriminatory. It follows that States can discriminate in their own benefit, whereas they cannot do so to benefit a private party. Even if this distinction seems to be artificial and illusory (even more so if one bears in mind that in Carbone, the operator was subject to strict and detailed contractual obligations), it may however indicate the USSC’s efforts to prevent the devastating consequences of declaring a statute discriminatory. Indeed, expanding the notion of discrimination may amount to “an unbounded [judicial] interference with state and local government”, since, almost certainly, state or local legislation would be struck down. Conversely, introducing caveats into the notion of discrimination allows more room for the States and their subdivisions to operate. Thus, the ruling of the USSC in United Haulers Assoc., Inc v OHSWMA may illustrate the USSC’s intention to reverse (or

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484 After affirming that the contested ordinance was not discriminatory, Concurring Justice O’Connor applied the Pike balancing test (see infra on page 3), concluding that the contested measure excessively burdened interstate commerce and thus, was unconstitutional. Ibid, 405-407
485 United Haulers Assoc., Inc v Oneida-Herkimer, supra note 429
486 Ibid, 1796
487 Ibid, 1789
to put an end to) the expansionist trend in applying the notion of discrimination.

These two American cases involved respectively the grant of exclusive rights to third parties and the creation of public commercial monopolies. While in the first case, the DCC opposed to its creation, in the latter it did not. In a similar scenario, would the ECJ follow its American counterpart’s approach in Carbone or OHSWMA? The answer is actually neither of them. The case-law of the ECJ is more nuanced and elaborated.

The ECJ distinguishes between rules related to the “existence and operation” of commercial monopolies and rules “directly bearing upon” their operation. The first set of rules falls within the scope of Article 31 EC, while the latter within 28 EC. By contrast to the American case-law, Article 31 EC does not distinguish between monopolies and the conferral of exclusive rights to private parties remaining under state supervision. Article 31 EC does not oppose either to state monopolies as such, but it only requires their reconciliation with free movement law. Said differently, the existence and operation of monopolies must not give rise to discrimination between Member States as regards conditions of supply and demand. For instance, in Hanner, the ECJ declared incompatible with Community law the Swedish monopoly on the retail sale of medical preparations. Given the lack of transparent criteria when selecting medical preparations to be sold in the retail market, the ECJ held that the monopoly could put at disadvantage foreign goods vis-à-vis Swedish products. As for rules having a direct bearing upon monopolies, Rosengren is very illustrative. There, the ECJ was asked to determine whether the Swedish ban on direct alcohol imports from other Member States was contrary to the EC Treaty. Firstly, the ECJ acknowledged that the ban did not pertain to rules related to the existence

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489 Case C-387/93 Banchero [1995] ECR I-4663, paragraph 26
490 Case 59/75 Pubblico Ministero v Manghera [1976] ECR 91, paragraph 5
491 Case C-438/02 Hanner [2005] ECR I-04551
492 Case C-170/04 Rosengren [2007] ECR I-04071
and operation of the Swedish retail monopoly of alcoholic beverages. Secondly, the ECJ ruled that preventing the importation of alcoholic beverages by individuals without imposing a counter-balancing obligation to import them on the holder of the monopoly, was a quantitative restriction prohibited under Article 28 EC. Finally, though the ECJ agreed with Sweden in so far as the ban could be justified on the ground that it protected younger persons from the harmful effects of alcohol consumption, it considered the ban to be disproportionate since it applied to everyone regardless of age.

As a result, had the ECJ ruled in a case like Carbone or OHSWMA, it would not have held that the waste processing monopoly gave rise as such to discrimination. Nor would it have reached a different outcome depending on whether the monopoly is directly exercised by public authorities or delegated to a private contractor. Instead, the ECJ would have first focussed on whether the creation of a monopoly ensured equal access to out-of-state haulers transporting local waste to the processing facility. Secondly, the ECJ would have proceeded to examine whether the local ordinance preventing haulers from using other waste processing facilities was in breach of free movement provisions.


There are only two exceptions where the USSC has ruled that a discriminatory state statute may be compatible with the DCC, namely where a State operates as a private market actor, and where Congress enacts federal legislation validating otherwise unconstitutional state activity. When a State invokes the private market-participant exception,

493 Indeed, neither the system for selection of goods by the monopoly nor its sales network nor the organisation of the marketing nor advertising of goods distributed by that monopoly was involved. Consequently, article 31 EC was not applicable. Ibid, paragraph 24
494 The ECJ would have examined the ban under article 29 EC for the haulers, and under article 49 EC for out-of-state waste processing facilities.
495 Hughes v Alexandria Scrap Corp., 426 US 794, 810 (1976)
496 Hillside Diary Inc, v Lyons, 539 US 59,66 (2003); Camps Newfound/Owatonna, 520 US 564, 572 (1997), Maine v Taylor, supra note 464, 138, South-Central Timber Development,
the USSC will focus on ascertaining whether the State participated in the market or instead intervened as a regulator. For instance, in *Alexandria Scrap Corp*[^497] with a view to eliminating derelict cars, Maryland introduced a state-purchase scheme of crushed automobile hulks, granting in-state scrap processors with a premium price. Out-of-state scrap processors challenged the validity of the scheme on the ground that Maryland refused to conduct businesses with them. However, the USSC rejected their claim, holding that the respondent was merely participating in the scrap-car market as a purchaser and thus, could choose from whom to buy. Likewise, *Reeves Inc, v Stake*[^498], the USSC held that a cement plant owned by South Dakota could give a preferential sales treatment to its residents during periods of shortage. The USSC concluded that there was no constitutional ground precluding the States from engaging freely in the market. However, in *South-Central Timber Development, Inc v Wunnicke*[^499], the USSC refused to apply the market-participant exception to an Alaskan statute requiring all timber taken from its forests to be processed before being exported. Indeed, according to the contested statute, after purchasing timber from Alaska, buyers could not do with it as they pleased. By contrast to *Alexandria Scrap* and *Reeves*, the USSC held that Alaska had laid down rules which went beyond its own dealings as a market operator and hence, had intervened as a regulator in the market. It follows that, in order to rely on the market-participant exception, “*[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.*”[^500]

Does the ECJ distinguish between States acting as regulator and States acting as a market participant? The reply must be in the negative. Cases like *Alexandria Scrap* and *Reeves* would not have been decided in the same way by the ECJ. Indeed, a brief look at public procurement cases

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[^497]: *Supra* note 495
[^499]: *Wunnicke*, *supra* note 496.
[^500]: Ibid, 97-98.
demonstrates that Member States engaged into market activities are still bound by the principles of non-discrimination, transparency and objectivity\textsuperscript{501}. In \textit{Dundalk Waters}, the ECJ ruled that “grandfather” clauses imposing national standards for the construction of water pipes were contrary to Article 28 EC\textsuperscript{502}. In the same way, in \textit{Dupont de Nemours}, the ECJ ruled that, unless justified under Article 30 EC, preference purchasing schemes to the benefit of local companies are incompatible with Article 28 EC\textsuperscript{503}. It follows that the principle of non-discrimination applies even when Member States engage in market activities.

Moreover, Congress may validate state statutes previously declared incompatible with the Commerce Clause by the judiciary\textsuperscript{504}. In this regard, in \textit{Prudential Insurance Co v Benjamin}\textsuperscript{505}, the USSC held that a South Carolinian statute discriminating against out-of-state insurance companies by imposing a 3\% tax on all insurance premiums collected, while having beforehand exempted in-states companies, did not violate the Commerce Clause. The justification given by the USSC was that, by enacting the McCarran-Fergusson Act\textsuperscript{506}, Congress had rendered valid discriminatory insurance taxes. Thus, these cases demonstrate that Congress may supersede the case-law of the USSC under the DCC, no matter how flagrantly discriminatory state law is.

Although fundamental freedoms address the Member States, the ECJ has consistently held that they also bound the Community legislature\textsuperscript{507}. Neither the Council nor the Parliament may validate state action which

\textsuperscript{502} C-45/87 Commission v Ireland (Dundalk Waters) [1988] ECR 4929
\textsuperscript{503} C-21/88 Du Pont de Nemours Italiana [1990] ECR I-889
\textsuperscript{504} The USSC, nevertheless, requires an “unambiguous” indication of congressional intent. See \textit{Maine v Taylor}, supra note 464, 139-140. See also \textit{Wunnicke}, supra 496 note 92.
\textsuperscript{505} McCarran-Fergusson Act, 15 USC §§ 1011-1015 (2000)
\textsuperscript{506} \textit{Prudential Insurance Co. v Benjamin}, 328 US 408 (1946)
would otherwise be in breach of the Treaty. Fundamental freedoms have a constitutional ranking binding both the Community and national legislature.

IV.- Non-Discriminatory State Measures

A.- The *Pike* Balancing Test

In the US, where a state measure is found to be non-discriminatory, then a less stringent test applies. A state measure applied “even-handedly” will be upheld, provided that it pursues [1] a “legitimate local public interest” and, [2] it is demonstrated that its burdens on interstate commerce are not “clearly excessive in relation to putative local benefits”\(^{508}\). By contrast to discriminatory measures, the presumption of validity favours States. It is for the interested party to prove that the measure unduly burdens interstate commerce. Hence, the question of whether a state measure is declared unconstitutional “becomes one of degree”\(^{509}\). The more important local interests are, the heavier the burden on interstate commerce may be. The “undue burden standard” was firstly articulated by the USSC in *Pike v Bruce Church Inc*. In this case, Bruce Church Inc, a producer of cantaloupes in Arizona, filed an injunction against an Arizonan order banning its products from being shipped out of the State, unless they were previously packaged and stored in compliance with the conditions laid down in the Arizona Fruit and Vegetable Standardization Act. As a result, Bruce Church was deprived from using its packing shed facilities located in the neighbouring California. Arizona justified its decision on the ground that it sought to enhance the reputation of its products, by incorporating high quality crops, such as the one of Bruce Church, into its agricultural reputation. Although the USSC acknowledged that Arizona intentions were legitimate, it maintained that Arizona could not impose on Bruce Church “a straitjacket with respect to the allocation of its interstate resources”\(^{510}\). It held that, in comparison with the burdens suffered by the affected

\(^{508}\) *Pike v Bruce Church Inc.*, 397 US 137, 142 (1970)

\(^{509}\) *Idem*

\(^{510}\) *Ibid*, 144
company, state interests were “tenuous” and could have been protected through less onerous means. For instance, Arizona could have required a second packaging notice certifying the cantaloupes were “grown” in Arizona, or alternatively it could have granted Bruce Church with a construction subsidy. Thus, the USSC concluded the order was unconstitutional. Curiously enough, albeit an allusion to non-discriminatory taxation, the USSC did not make any reference to the concept of discrimination, nor did it explain why the contested order was not discriminatory. It simply assumed it was applied “even-handedly”. However, it seems that the contested decision favoured in-state packing facilities to the detriment of out-of-state ones. Indeed, as the USSC itself acknowledged, from the moment States require certain market activities to be undertaken within its borders, discrimination arises. Hence, though in *Pike* the theoretical framework of balancing test was clearly expounded, its application to the facts seems somewhat puzzling.

Possibly, *Minnesota v Clover Leaf Creamy* provides a better illustration. With a view to promoting resource conservation, Minnesota enacted a statute whereby the sale of milk in non-refillable, non-returnable plastic containers was prohibited. However, the sale of milk in non-refillable, non-returnable containers made of materials other than plastic was permitted (e.g. paperboard cartons). The USSC found that the statute was not discriminatory, since it applied regardless of the origin of the milk, seller or container. In applying the *Pike* balancing test, the USSC found that the “inconvenience of having to conform to different packaging requirements in Minnesota and in the surrounding State should be slight”. Additionally, even if the out-of-state plastic industry was more adversely affected than the Minnesota pulpwood industry, the USSC maintained that, in the light of the objectives pursued, such burdens were not “clearly excessive”. Finally, the USSC found that alternative solutions (such as prohibiting all non-returnable containers) would not have a “lesser

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511 *Ibid*, 145. The USSC even affirmed that “this particular burden on commerce has been declared to be virtually per se illegal”.
513 *Ibid*, 472-474
impact on interstate activities”. As a result, the Minnesota scheme was upheld.

In most cases, the balancing test tends to favoured state regulations. In effect, since 1990, only in one case has the USSC annulled a non-discriminatory state measure. This circumstance has led some authors to suggest that the balancing tier of the doctrine has been abandoned by the USSC. At the same time, this also indicates that the USSC prefers to construe the DCC as doctrine forged upon the notion of economic protectionism, rather than upon a model based on the judicial defence of economic liberties threatened by public intervention. As Scalia sustains, the USSC’s cautionary approach towards “balancing” may evince that it feels more institutionally confident when reacting against discriminatory legislation than in waging the value of trade against other policies, which is better left to the legislature. Further, Regan also welcomes this development, holding that, given the doctrinal flaw of the “inner political check”, balancing should be abandoned altogether. In his view, if the state legislator takes into account all local interests without incurring into protectionism, then all global interests will be protected too, resulting in a general gain of efficiency (the so-called “local/global equivalence”). Indeed, there is no need to adopt measures with a view to protecting foreign producers’ interests. Given their direct or indirect market relationship with local actors, their interests have already been represented by the latter. Thus, courts must only intervene when not all local interests are accounted for. Yet, this often occurs when regulation is not efficient, but aims at fulfilling

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514 Edgar v MITE Corp, 457 US 624 (1982) Although in this case the Pike test was applied, the USSC only did so in order to support the prohibition of extraterritorial regulation. It follows that, even in this case, the Pike argument was ancillary.


516 Supra note 429
the special interests of a commercial group, that is, when legislation is protectionist.  

B.- The Principle of Mutual Recognition and Mandatory Requirements

In the landmark case Cassis de Dijon, the ECJ broadened up the scope of Article 28 EC to its outmost. There, a French company was precluded from selling “Cassis de Dijon” in Germany, since the alcohol content of this product did not attain the minimum of 25% required by German Law for marketing fruity liqueurs. The German authorities justified their decision on two grounds. Firstly, they sustained that, by precluding the sale of spirits with a low alcohol content, consumer tolerance towards alcohol was rendered more difficult. Secondly, the ban protected consumers from unfair commercial practices. Due to the fact that producers of beverages with low alcohol content would pay fewer taxes than producers selling spirits with high levels of alcohol, the former would enjoy a competitive advantage at the expense of uninformed consumers. When the ECJ was questioned on the compatibility of this measure with Article 28 EC, the ECJ replied that “(o)bstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.”

It follows that, even in the absence of discrimination between import and domestic products, the imposition of national standards to importers must be justified. By virtue of the principle of mutual recognition, disparities among legislations are accepted, unless state legitimate interests are put at risk. Indeed, by stating that non-discriminatory state measures may violate free movement

\[517\] Regan, supra note 440, pp 1853-1857.
\[518\] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), [1979] ECR I-649
\[519\] Ibid, 8
provisions, the application of Article 28 EC was no longer conditioned upon determining whether there was an unequal treatment between imports and domestic products. Instead, the ECJ decided to undertake a balancing exercise between, on the one hand, freedom to pursue an economic activity and, on the other hand, state intervention to protect legitimate public interests. Put differently, the Cassis ruling supposes that not only must Member States regulate the market in a non-discriminatory fashion, but Article 28 EC also draws the line between lawful and excessive regulation of the market. As Maduro suggests, one possible reading of Cassis would award traders an “Economic Due Process” right\(^{520}\), that is, the right to pursue trade in the individual Member States free from excessive public regulation.

Regarding the facts of the case, in order to qualify a state measure requiring a minimum alcohol content for fruity liqueurs as a MEE, the ECJ did no longer need to undertake a comparative assessment between national and import products. The balancing exercise would be carried out between, on the one hand, the general interests protected by the challenged measure and, on the other hand, the commercial burden imposed on the importer. As a result, Cassis entailed a serious setback in state powers to regulate the market. Perhaps aware that this new approach would not be accepted by the Member States unless the justifications contained in Article 30 EC were expanded, the ECJ opted for compensating the States by advancing the notion of “mandatory requirements”. In effect, the lawfulness of non-discriminatory state measures can be based not only on Article 30 EC, but also by relying on an open-ended list of general interests, such as “the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”\(^{521}\),

\(^{520}\) M POIARES MADURO, We, the Court, The European Court of Justice and the European Economic Constitution, (Oxford: Hart Publishing, 1998) pp 63
\(^{521}\) Cassis, supra note 518
environmental protection\(^{522}\), working conditions\(^{523}\), the protection of cultural expression\(^{524}\), press diversity\(^{525}\) or fundamental rights\(^{526}\).

Moreover, whereas the number of justifications for non-discriminatory state measures is larger than the grounds justifying discriminatory treatment, the principle of proportionality applies on an equal fashion\(^{527}\). For instance, in *Cassis*, the ECJ held that the public health consideration put forward by the German authorities was not sustainable. It ruled that a broad range of low alcohol beverages was available to German consumers. Furthermore, beverages with a high alcohol content were often consumed in a diluted form. Thus, the measure did not protect consumers from becoming tolerant towards alcohol. In the same way, unfair commercial practices could be deterred by less burdensome alternatives on interstate trade, e.g. informing consumers through displaying an indication of the alcohol content on the packaging products.

Both the *Pike* test and the principle of mutual recognition examine the effects of non-discriminatory measures upon interstate trade. Suffice it to compare *Minnesota v Clover Leaf Creamy* with *Commission v Denmark* (*Recycle Bottles*). Concurring with the previous ruling of its American counterpart, the ECJ ruled that a Danish system of deposit-and-return, which required containers for beer and soft drinks to be reusable, was in breach of Article 28 EC. However, after recognising that environmental protection was a legitimate concern, the ECJ ruled that the system of deposit-and-return was an indispensable element to ensure that containers were re-used. Hence, the Danish law was proportionate. However, *Cassis* supposes a greater intrusion upon state regulatory powers than *Pike*. On the one hand, while American applicants must prove that a non-discriminatory state measure unduly burdens interstate commerce, it is for the host Member State to justify why goods complying with the standards of the Member

\(^{524}\) Joined cases 60 and 61/84, *Cinéthèque*, [1985] ECR 2605  
\(^{525}\) Case C- 368/95, *Familiapress*, [1997] ECR I-3689  
\(^{526}\) Schmidberger, supra note 474  
State of origin cannot be marketed within its territory. On the other hand, while the ECJ demands non-discriminatory state measures to be the “least restrictive alternative”, the same cannot be said in the US. It is true that Pike and Minnesota v Clover Leaf Creamy seemed to follow this criterion. However, the USSC has never invalidated non-discriminatory state law because there were less burdensome means. Chemerinsky suggests that the “least restrictive alternative” test involves the most intensive type of judicial scrutiny. This type of review has been used by the USSC when evaluating discrimination based on race, origin or gender, or when examining fundamental rights. Nevertheless, he questions its reliance when reviewing non-discriminatory commercial state laws.

C.- Keck: non-discriminatory selling arrangements fall outside Article 28 EC.

By following a broad reading of the Dassonville formula, and by embracing the principle of mutual recognition, the ECJ encouraged commercial litigation. Indeed, traders started conceiving Article 28 EC as compelling national legislators to justify all commercial regulatory measures. Put simply, in their opinion, Article 28 EC was equated to freedom to trade. Even if the impact on interstate trade was incidental, traders were confident that the validity of state regulation would be scrutinised under a strict proportionality test. This situation was stressed by some commentators who invited the ECJ to revisit its case-law, in particular regarding rules on market circumstances. Indeed, in relation to this type of measures, the ECJ proved to be inconsistent and contradictory. In some cases, it followed a narrow reading of Article 28 EC, whereas in others, it applied Cassis automatically. These contradictions were acknowledged

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528 Chemerinsky, supra note 411, pp 439-440
530 Holding that article 28 EC was not applicable: Oebel, Op cit; Case 75/81, Joseph Henri Thomas Biesgen v Belgian State, [1982] ECR 1211 ; Case C-23/89, Quietlynn Limited and Brian James Richards v Southend Borough Council, [1990] ECR I-3059.
531 Case 286/81 Oosthoek, [1982] ECR 4575; Case 382/87 Buet [1989] ECR 1235; Aragonesa de Publicidad, supra note 461
by AG Tesauro in Hünermund532, who urged the ECJ to reply to the following question: “Is Article (28) of the Treaty a provision intended to liberalize intra-Community trade or is it intended more generally to encourage the unhindered pursuit of commerce in individual Member States?”

In Keck533, the ECJ took this step and, in a clear departure from precedent, it held that non-discriminatory selling arrangements escape the definition of MEE. In this case, criminal proceedings were brought against two French nationals who were selling goods at loss. Before the criminal court, the defendants argued that French Law was contrary to Article 28 EC, holding that it deprived them from a method of promoting their goods and restricted the volume of imports. However, the ECJ rejected these arguments. It held that: “By contrast, contrary to what has previously been decided the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not [a MEE], so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States”534. Accordingly, the ECJ concluded that French legislation prohibiting the resale at loss fell outside the scope of Article 28 EC.

The immediate implications flowing from the Keck ruling are fourfold. Firstly, the ECJ curtailed the scope of the Dansonville Formula. Selling arrangements which do not discriminate against imports fall outside the scope of Article 28 EC. However, in relation to “rules that lay down requirements to be met by goods”535 Cassis remains good law. Thus, Keck must not been seen as a revolution overruling all previous case-law, but as a

534 Ibid, paragraph 16.
535 Ibid, paragraph 15.
substantial reform. In addition, though one of the big flaws of the judgment is that the ECJ failed to provide a definition of “selling arrangements”, subsequent cases indicate that they are measures which restrict when, where, or by whom goods can be sold, as well as advertising restrictions and price controls. Secondly, the ECJ justifies the departure from its case-law on the need to curve down the flood of cases invoking Article 28 EC. However, this reason does not appear to be entirely convincing. The interpretation of core substantive provisions of the Treaty, such as Article 28 EC, cannot be conditioned upon administrative costs incurred by the Community judiciary. Thirdly, in replacing a judicially manageable standard with a formal rule, Keck enhances legal certainty. Indeed, by contrast to Cassis, when assessing the validity of selling arrangements, balancing is delayed at a later stage. Before, the interested party must demonstrate that the challenged measure is a discriminatory selling arrangement and only then, the national court (or, where appropriate, the ECJ) will embark upon a balancing exercise. In other words, by delaying the application of the principle of proportionality to the benefit of a discrimination-based test, the ECJ embraces a formalistic approach reinforcing judicial predictability. Thus, Keck restricts the creative role of the ECJ in determining the legitimate degree of public intervention in the market. Finally, as for state regulatory powers, Keck reinsures the Member States that, provided there is no discrimination, the latter are free to regulate any circumstance governing the market. Thus, Keck devolves power to the Member States. Keck is a prove of judicial restraint and a hold-back in the integration process.

536 Maduro, supra note 520, pp 78-79
537 Case C-69/93, Punto Casa [1994] ECR I-2355
538 Case C-319/92, Commission v Greece (Baby Milk), [1996] ECR I-1621
539 Banchero, supra note 489; Franzén, supra note 488
Moreover, the ECJ did not have to wait long before the first criticisms arose, among which the most famous one is the Opinion of AG Jacobs in *Leclerc-Siplec*. There, he argued that applying different tests according to whether the contested measure is a product requirement or a selling arrangement is inappropriate, since both categories may impose serious obstacles to trade. In addition, he maintained that the objective of the free movement provisions is to eliminate unjustified obstacles to trade, regardless of whether these obstacles also adversely affect domestic products. To this effect, he affirmed that the adoption of a “discrimination test would lead to the fragmentation of the internal market”, owing to the fact that importers would have to accommodate to the market circumstances defined in each Member State. Instead, he proposed an alternative test declaring invalid all state measures which substantially restrict access to market. He acknowledged that a *de minimis* rule would be required in order to determine the validity of measures which, while not being discriminatory, substantially restrict access to market. More recently, other Advocate Generals have also invited the ECJ to abandon (or modify) the *Keck* solution, suggesting alternative tests. For instance, in *Alfa-Vita*, AG Maduro argued that not only is it sometimes difficult to draw the distinction between product requirements and selling arrangements, but also some

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543 Opinion of AG Jacobs in *Leclerc-Siplec*, supra note 540.

544 Opinion of AG Greenhold in Case C-239/02, *Douwe Egberts*, [2004] ECR I-7007 (urging the ECJ to follow a different approach in relation to advertising restrictions), Opinion of AG Maduro in Joined Cases C-158 and 159/04, *Alfa-Vita*, [2006] ECR I-8135 (see below) and Opinion of AG Kokott in Case C-142/05 (pending), *Mickelsson and Roos*, 14 December 2006, n.y.r.,(by contrast to the previous Opinions, she proposes expanding *Keck* so that, by analogy to selling arrangements, non-discriminatory “arrangements for use” or national measures prohibiting a “marginal use of a good” should fall outside the scope of article 28 EC. For instance, the lawfulness of a non-discriminatory measure prohibiting driving cross-country vehicles off the roads should not be tested under article 28 EC)

545 See supra note

measures do not fit in either of the two categories\textsuperscript{547}. These complexities are worsened by the fact that the ECJ often refers back to the national courts “the responsibility of ascertaining the character and scope of the rule in question”. In addition, the Keck ruling appears to be inconsistent with the approach followed by the ECJ in realm of other freedoms, where “all measures which prohibit, impede or render less attractive the exercise of that freedom” need to be justified. This inconsistency seems even more alarming where a case can be examined under the scope of different freedoms\textsuperscript{548}. To this end, by linking the free movement of goods to the concept of European citizenship, AG Maduro argues in favour of expanding Article 28 EC beyond the notion of discrimination. Influenced by the “inner political check” doctrine\textsuperscript{549}, he posits that this Article should be applicable where “cross-border situations are treated less favourably than purely internal situations”, that is, his proposed test would prohibit: (1) discriminatory measures, (2) measures imposing supplementary costs on imports without taking into account their particular situation and (3) measures constituting a barrier to market access\textsuperscript{550}. However, these alternatives to Keck also present some weak points. The introduction of a \textit{de minimis} test would entail an economic assessment of the relevant market, which the ECJ is not willing to undertake\textsuperscript{551}. Further, as for the test proposed by AG Maduro, it appears to raise more questions than answers, since it does not specify the circumstances to take into account when imports are submitted to additional costs\textsuperscript{552}.

Despite these detracting voices, it appears that, since Keck was delivered, the case-law in the area of free movement of goods has been

\textsuperscript{547} \textit{Ibid}, paragraph 31. This assertion is correct, for instance public procurement cases or cases involving state commercial monopolies seem to belong to a different category of measures.
\textsuperscript{548} \textit{Ibid}, paragraph 33.
\textsuperscript{550} \textit{Ibid}, paragraphs 40-46.
\textsuperscript{551} Perhaps, the reason lies in that, by contrast to competition cases where the Commission takes the leading role in examining complex economic issues involving the application of a \textit{di minimis} test, when parties invoke article 28 EC, the ECJ has no assistance.
rather stable\textsuperscript{553}. As a matter of fact, in replacing the dichotomy between product requirements and selling arrangements by distinguishing between selling arrangements and other type of measures, the ECJ appears to overcome one of Keck’s major defaults\textsuperscript{554}. As a result, it seems that, for the sake of its credibility, it is very unlikely that, in the near future, the ECJ will overrule Keck.

What is the approach of the USSC towards non-discriminatory selling arrangements? A good American example answering this question is provided by Exxon Corp. Governor of Maryland\textsuperscript{555}. During the 1973 petroleum shortage, Maryland state authorities noticed that producers and refiners gave a preferential treatment to their own gasoline stations. Taking the view that this market practice put at risk sound competition, Maryland passed a statute precluding producers and refiners of petroleum products from operating any retail service station within its territory. Additionally, it also banned producers and refiners from entering into discriminatory supply and price practices. Shortly after, Exxon and six other interstate oil companies, which not only supplied to independent dealers in Maryland but also sold directly to the consuming public, challenged the constitutionality of the statute, arguing that it violated the Commerce Clause. To this end, applicants put forward three arguments. Firstly, they claimed that the statute was discriminatory, since the contested measure aimed to protect local independent dealers. However, the USSC took a different view. It held that, since there were no local producer or refiners in Maryland, but all petroleum was supplied from out-of-state sources, the contested measure could not be discriminatory. The USSC also denied the statute benefited local independent dealers, since it did not created any barriers against interstate independent dealers. (Neither did it prohibit the flow of interstate goods nor impose additional cost upon them nor favour an unequal treatment between in-sate and out-of-state companies). Thus, the USSC

\addcontentsline{toc}{section}{References}
\begin{thebibliography}{99}
  \bibitem{}\textit{Ibid}, pp 704.
  \bibitem{}\textit{Canal Satélite Digital, supra} note 425, paragraph 35; \textit{Alfa-Vita, Op cit}, paragraph 19
  \bibitem{}\textit{Exxon Corp. v Governor of Maryland}, 437 US 117 (1978)
\end{thebibliography}
concluded that “the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce”\textsuperscript{556}. Secondly, even if the statute is non-discriminatory, applicants pointed out that at least three refiners would withdraw from the Maryland market and hence, it would deprive consumers from certain special services. Nonetheless, the USSC held that injuries on the consuming public cannot be identified with burdens on interstate commerce, but relate to the wisdom of the statute\textsuperscript{557}. Lastly, they maintained that owing to the nation-wide nature of the petroleum products market, States lacked the power to adopt regulatory measures. Nevertheless, the USSC replied that only where a lack of uniformity impedes the flow of interstate goods, would States be deprived from their regulatory powers. To this effect, the USSC found that the contested measures did not adversely affect the flow of interstate goods but only “a particular structure or method of operation in a retail market” and hence, the lack of regulatory uniformity was not precluded by the Commerce Clause. As a result, one may conclude that Exxon is a valuable contribution to the case-law of the USSC. It demonstrates that, in so far as there is no discrimination, the Commerce Clause does not prevent states from opting for a particular market structure or methods of operations to the detriment of others. As Justice Stevens wrote, “the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations”\textsuperscript{558}.

It is very likely that in a case similar to Exxon the ECJ would have reached the same outcome. However, its rationale would have differed. The ECJ would have ruled that, since the challenged statute involved non-discriminatory selling arrangements, the latter fall outside of the scope of Article 28 EC. By contrast, the Exxon Court followed a soft balanced approach. It was not after discarding that the effects of the Maryland statute upon interstate commerce were benign, that the USSC sided with the State.

\textsuperscript{556} Ibid, 127
\textsuperscript{557} Ibid, 128.
\textsuperscript{558} Ibid, 127-129. Quoting Alexandria Scarp, supra note 495, 806
Said differently, the approach of the USSC in *Exxon* is just the application of the *Pike* test to certain market techniques.

V.- Extraterritorial and inconsistent state regulations: An example, the Internet

From the findings of the USSC in *Exxon*, it seems that States retain regulatory powers to limit (or even ban) certain market techniques, while favouring others. Indeed, in the light of *Exxon*, one could suggest that, for example, in the absence of federal legislation, non-discriminatory state legislation forbidding the sale of certain goods over the Internet complies with the DCC. However, recent rulings of lower courts demonstrate that the judiciary has struggled to define the negative limits of the DCC in the cyberspace. On the one hand, some courts have ruled that, when States regulate the Internet, they may impinge on wholly external conducts, incurring into regulatory “extraterritoriality”, prohibited under the DCC. To this effect, it has also been maintained that state intervention would amount to “adversely affect[ing] interstate commerce by subjecting [Internet] activities to inconsistent regulations”. On the other hand, other courts have followed the *Exxon* rationale, holding that States may regulate the way in which operators pursue their market activities. Two cases illustrate these opposite views.

In *American Libraries Associations v Pataki*, a US District Court annulled a New York law which criminalised the intentional use of the Internet to disseminate pornographic materials to minors. The District Court judge noticed that it was extremely difficult for content providers to place age and geographical restrictions when accessing their websites. Hence, in his opinion, the contested measure would chill the commercial

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559 In *Healy v Beer Institute*, 491 US 324, 339 (1989); *Brown-Forman Distiller Corp. v NY State Liquor Authority*, 476 US 573 (1986) and *Edgar v MITE Corp.*, supra note 514
560 *CTS Corp. v Dynamics Corp. of America*, 481 US 69, 88 (1987)
activities of content providers located in other States with more permissible legislations. Additionally, though protecting minors from exposure to pornographic materials was legitimate, these local benefits did not outweigh the burdens on interstate commerce. Since the statute did not regulate either textual information or communications originated overseas, it did not attain the objectives it sought to pursue. Further, the District Court judge considered that, with regards to the legislative disparity among States, “a single actor might be subject to haphazard, uncoordinated and even outright inconsistent regulation by states that the actor never intended to reach and possible was unaware were being accessed”\(^{562}\). Lastly, in holding that the Internet was a nation-wide market, the District Court judge concluded that state regulation was precluded and consequently, he urged Congress to take action\(^{563}\). However, the reasons given by the District Court judge do not appear to be entirely convincing. In their influential article, Goldsmith and Sykes argue that the extraterritorial and inconsistent effects of state regulations cannot lead *inter alia* to their annulment\(^{564}\). On the contrary, as it occurs in other communication sectors, courts should undertake a balancing exercise between the protection of local interests and interstate commerce\(^{565}\). In this regard, they maintained that *American Libraries Assoc* could be based on flawed factual premises. For example,

\(^{562}\) *Ibid*, 168-169

\(^{563}\) *Ibid*, 181. The ruling in Pataki has been subsequently followed by other courts when annulling state law criminalising the diffusion of pornographic material. See *ACLU v Johnson*, 194 F.3d 1149 (10th Cir. 1999); *PSINet, Inc v Chapman*, 108 F Supp 2d 611 (WD Va 2000); *Cyberspace Communications, Inc v Engler*, 55 F Supp. 2d 737 (ED Mich. 1999) In the same way, anti-spam statutes have been struck down. See *State v. Heckel*, 143 Wash. 2d 824, 24 P.3d 404 (2001).

\(^{564}\) Goldsmith and Sykes, *supra* note 515, pp 785-828.

\(^{565}\) Basing their analysis on the economics of regulation, they maintained that, in adopting anti-pornography and anti-spam statues, States aim to redress the harm caused by “non-pecuniary externalities” (which affect third parties not involved in the transaction originating the harm). In their opinion, the main characteristic of the Internet lies in that these externalities are located outside of the regulating jurisdiction. However, this distinctive feature should not prevent courts from undertaking a balancing exercise. On the one hand, they considered that state legislation redressing the harm, while not exceeding the losses incurred by those participating in interstate commerce, should be allowed. Since the in-state benefits outweigh out-of-state burdens, state legislation contributes to the general economic welfare. Conversely, when state legislation impinges on interstate commerce beyond what is necessary to amend the harm, it should then be annulled. Indeed, in these cases, the economic welfare will decline below the situation with no corrective measures. Thus, they criticise courts which quash state regulation solely on the ground that it produces external and inconsistent effects, without taking into account the benefits it produces.
contrary to the opinion of the District Court judge, geographical and age identification technologies could enable content providers to avoid criminal liability at non-excessive cost. Moreover, they stress that regulatory uniformity should only take place when inconsistent state regulations render impracticable the exercise of commercial activities by multi-jurisdictional firms. Thus, with a view to departing from American Libraries Assoc, they invite courts to strike a balance between, on the one hand, the extraterritorial and inconsistent effects of state regulation and, on the other, the benefits it produces.

In this sense, in *Ford Motor Company v Texas Department of Transportation*\(^\text{566}\), the Court of Appeals for the Fifth Circuit took a different view. This case involved the validity of § 5.02 (c) of the Texas Motor Vehicle Commission Code (the Texas Code), which precluded car manufacturers and distributors from owning a dealership. Since the Texas Code required a dealer’s licence in order to sell vehicles to consumers residing in Texas, the applicant was precluded from retailing cars over the Internet. Texas heavily relied on *Exxon*, maintaining that there was no significant legal or factual difference between the case at issue and the latter. Conversely, Ford put into question the dicta of the USSC in *Exxon*, claiming that it was an anomaly which should be read in the context of the 1973 petroleum crisis. It instead urged the Court of Appeals to follow *Hunt v Washington Advertising Commission*\(^\text{567}\) and *Lewis v BT Invest. Managers Inc.*\(^\text{568}\), where the USSC found the challenged provisions to be discriminatory. However, the Court of Appeals rejected this claim. It considered that, by contrast to *Hunt* and *Lewis*, there was no discrimination between in-state and out-of-state manufacturers\(^\text{569}\). Indeed, the applicant

\(^{566}\) *Ford Motor Company v Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001)

\(^{567}\) *Hunt*, supra note 454


\(^{569}\) In accordance with the Court of Appeals, whereas in *Hunt*, North Carolinian regulations favoured in-state apple producers to the detriment of Washington’s apple producers (see pp 3) and in *Lewis*, a Florida statute prohibited out-of-state financial entities from operating branches or giving investment advise but not extending the ban to in-state entities; the Texas Code only precluded all car manufacturers from using their superior market position against dealers in the retail car market.
was adversely affected not because he was an *out-of-state* manufacturer, but just because he was a manufacturer. The contested statute only protected in-state dealers from manufacturers’ competition, but not from out-of-state independent dealers. Thus, the Court of Appeals concluded that forbidding vertical integration of car manufacturers was not discriminatory. Likewise, in applying the *Pike* balancing test, the Court of Appeals recalled *Exxon* and held that injuries to consumer’s welfare resulting from the statute was not relevant for the Commerce Clause, but it related to its “economic efficacy”. Finally, in relying on *American Assoc. v Pataki*, the applicant argued that e-commerce “demand[ed] consistent treatment and [is] therefore susceptible to regulation only on a national level”. Nevertheless, the Court of Appeals opined differently. Were the argument of the applicant upheld, parties could circumvent valid state regulations by simply connecting their activities to the Internet. Indeed, since the Texas Code banned manufacturers from all retailing activities, its effects on the Internet were only incidental. Consequently, the Court of Appeal ruled that the Texas Code complied with the Commerce Clause.

The different outcome in these two cases may be explained by the nature of the goods involved. Whereas in *American Libraries Assoc.*, the diffusion of pornographic images has a “digital” nature, in *Ford Motor Comp v Texas Dept. of Transp.*, Texas regulated the sale and transmission of “real-space” goods, namely cars. Likewise, while in *American Libraries Assoc* state regulation focussed on regulating the content of the services provided, in *Ford Motor Comp v Texas Dept of Transp* the Court of Appeal centred its analysis on the Texan retail car market. Put differently, whereas the first case involved the regulation of a service, the latter dealt with regulating the sales of goods. It follows that this distinction appears to be important owing to the fact that, where a digital good, that is, regulating an online service is

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570 The ruling of the Court of Appeals has also been followed in other cases: *Santa Fe Natural Tobacco Co. v Spitzer*, No. 00 Civ. 7274, 2000 WL 1694307 (SDNY Nov. 13, 2000). See also L. VANDERSTAPPEN, Internet Pharmacies and the Specter of the Dormant Commerce Clause, (2006) 22 *J.L. & Pol’y*, 619-644, (who supports the holding in *Ford Motor Company*. She rejects the blanket invalidation of all state regulations of the Internet).
primarily involved, it is more costly for content providers to “identify and filter their communications and deliveries by geography”\textsuperscript{571}.

Has the ECJ opted for an approach similar to American Libraries Assoc., or instead adopted Ford Motor Comp v Texas Dept. of Transp? First of all, the legislation at issue in American Libraries Assoc. would not have been reviewed by the ECJ under 28 EC, but rather under Article 49 EC. The reason is that the New York law targeted cross-border services rather than the market techniques for the sale of goods. In the light of cases like Alpine Investments, Schindler and Gambelli\textsuperscript{572}, the ECJ would have ruled that criminalising the intentional diffusion of pornographic material to minors hindered access to market to contain providers based in other Member States. The ECJ would have also recognised the legitimate interest at stake. However, if the objections of Goldsmith and Sykes were upheld, the ECJ would have ruled that the challenged regulation did not comply with the principle of proportionality, since there were less restrictive alternatives available. Still, though attaining the same outcome, the rationale of both Courts would differ. The ECJ does not pay attention to the extraterritorial effects of legislation. This is largely because these effects are already prohibited by Article 49 EC.

As for Ford Motor Comp v Texas Dept. of Transp, the ECJ replied to a similar question in DocMorris\textsuperscript{573}. There, the German Association of Pharmacists (GAP) sought to prevent DocMorris, a pharmacy based in the Netherlands, from offering non-prescription and prescription-only medicines for sale over the Internet. The GAP invoked German legislation banning the sale by mail order of medical products. Conversely, the DocMorris claimed that German legislation was in breach of Article 28 EC. The ECJ began by noting that German legislation involved selling arrangements. Accordingly, it proceeded to examine whether German legislation failed to [1] apply to all relevant traders operating in Germany.

\textsuperscript{571} Goldsmith and Sykes, supra note 564, pp 824-825
\textsuperscript{573} Case C-322/01 DocMorris [2003] ECR I-14887
and [2] to affect in the same manner, in law and in fact, domestic and import products. Whereas the first condition was met, the ECJ held that German legislation had a greater impact on pharmacies established outside of Germany. Indeed, German pharmacies could still sell their products over the counter. On the contrary, Internet was the only significant way to gain access to the German market. Since German legislation involved discriminatory selling arrangements, a justification was required. Given the risks attached to prescription-only medicines, the need to verify the authenticity of the prescription and the identity of the customer, the ECJ accepted that the ban was justified under Article 30 EC. However, it ruled that it was not the case for non-prescription medicines. Following cases like *Gourmet* and *De Agostini*, *DocMorris* demonstrates that a selling arrangement is deemed discriminatory when it bans the only significant way for import products to penetrate the market. Accordingly, it will need to be justified. As result, had the ECJ examined a case like *Ford Motor*, it would have evaluated whether prohibiting the retail sale of cars over the Internet by manufacturers was a discriminatory selling arrangement, particularly whether this was the only significant way for out-of-state manufacturers to penetrate the market. I would suggest a reply in the negative. Since neither in-state nor out-of-state manufacturers could access the retail market, the ECJ would have found that the Texan law was not discriminatory. In addition, both out-of-state and in-state manufacturers could access the Texas market by recurring to independent dealers.

VI.- A Comparison: Beyond discrimination?

The case-law of both Courts evinces that the shadow of invalidity surrounds discriminatory state measures. The prohibition of discrimination is seen by USSC as “*a rule essential to the foundation of the Union*”, from which, in “*all but in the narrowest of the circumstances*”, states may not derogate. Likewise, the principle of non-discrimination is the keystone of

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574 *Gourmet, supra* note 424; *De Agostini, supra* note 540
575 *Granholm, supra* note 463, 472
all free movement provisions and hence, derogations therefrom are submitted to very strict conditions. Additionally, the notion of discrimination embraced by both Courts is a very broad one, including facial (formal) discrimination, as well as effective (material) discrimination. Further, both Courts would not be deterred from qualifying a state measure as discriminatory where the number of parties affected is minimal, domestic interests are also affected, or a protectionist intend is missing. However, there a three major differences when evaluating discriminatory measures. Firstly, contrary to the holdings of the USSC in Carbone, the ECJ does not consider that granting exclusive rights to a commercial operator violates inter alia free movement law. Nor would the ECJ concur with OHSWMA in accepting that state monopolies are not barriers to interstate trade. Instead of giving a “yes-or-no” reply, the ECJ carefully applies a two-tier-balanced examination. At first stage, it evaluates whether the creation and operation of a monopoly produces discriminatory effects. It then reviews whether rules having a direct bearing upon monopolies give rise to discrimination. Secondly, in the case-law of the ECJ, there is no equivalent either to the market-participant exemption or congressional superseding legislation. Last but not least, whereas only once has the USSC upheld a discriminatory state measure, implying their virtually per se invalidity, under Article 30 EC, Member States still have an opportunity to justify their adoption.

Moreover, both Courts have tried to expand the scope of the DCC and Article 28 EC beyond the principle of non-discrimination. As Cassis and Pike show, the ECJ and the USSC were ready to strike down state measures which, while awarding an equal treatment to in-state and out-of-state interests, constituted an undue burden on interstate trade. Nevertheless, the balance undertaken by both Courts differs. Even if one assumes that the Pike test has not been entirely abandoned by the USSC, the balancing exercise thereof clearly favours States. Only where burdens upon interstate commerce are “clearly excessive” to the protection of putative local benefits, a state regulation will be struck down. In addition, it is for applicants to prove that non-discriminatory measures unduly burden
interstate trade. On the contrary, *Cassis* submitted all types of commercial regulation to a strict scrutiny. It is true that, in introducing the notion of mandatory requirements, the ECJ enlarged the number of derogations available to the Member States. However, the fact that it is for the host Member State to justify why goods complying with standards of the Member State of origin cannot be marketed in its territory, and the fact that the principle of proportionality applies in the same manner to all state measures, regardless of the presence of discrimination; operated in favour of Community integration. Thus, *Cassis* entailed a substantial erosion of state regulatory powers. Indeed, since both discriminatory and non-discriminatory measures would be subjected to the same “rule of reason”, ascertaining this distinction was pushed to the background. Thus, *Cassis* supposes a bigger intrusion on state powers to regulate the market than *Pike* does (or ever did).

Why is balancing stricter under Article 28 EC than under the DCC? Firstly, the adoption of a high level of judicial scrutiny when examining economic state regulations would resurrect the ghosts of *Lochner*. As Tushnet indicates, both balancing and economic due process examine whether economic regulation imposes unreasonable burdens on private traders. Accordingly, in order not to repeat past mistakes, the constitutional viability of *Pike* calls for a soft review. Otherwise, the legitimacy of the federal judiciary would be seriously undermined, by being accused of incurring into policy making. Secondly, as Maduro suggests, the EU and the US markets had reached different levels of integration that required different degrees of judicial activism. In the EU, the institutional impasse of the time, the incapacity of national markets for self-integration, the need to break the path-dependence of actors from national systems left the ECJ no choice but to embrace a more assertive approach in favour of market integration. Thus, *Cassis* was relied upon by the ECJ in order to set the foundations of an incipient market, that is, as a “market-building” device. Conversely, in the US, the market had reached a “point of no return”.

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576 M TUSHNET, Rethinking the Dormant Commerce Clause, (1979) *Wis. L. Rev.*, 125-165
Political and economic integration diminished the risks of obstacles to the free movement. The barriers that may appear are more the result of innovation and experimentation than protectionism. To this effect, the USSC has focussed on coining rules that bring certainty and clarity to market operators (the principle of “non-discrimination”), rather than on the elimination of all conflicting standards. Put simply, the USSC reads the DCC as a “market-maintenance” device\textsuperscript{577}.

It follows from the foregoing that, when applying the DCC doctrine, the validity of a state measure is examined under a dualistic approach: Either a measure is deemed discriminatory and hence, it is annulled; or it is qualified as non-discriminatory and, due to the low risk represented by \textit{Pike}, it is certainly upheld. These two binomials (discrimination = invalidity) and (non-discrimination = validity) have compelled the USSC to revisit the notion of “discriminatory treatment”. As \textit{OHSWMA} evinces, the narrower discrimination is defined, the more room there is for state regulatory intervention. Conversely, a broad notion of discrimination would be a “\textit{an unbounded [judicial] interference with state and local government}”\textsuperscript{578}. Thus, in America, the cannon of validity for state measures is that they do no discriminate between in-state and out-of-state interests.

Until \textit{Keck} was delivered, \textit{Cassis} prevented the extrapolation of this approach to the other side of the Atlantic. Discrimination or not, all commercial measures were submitted to the principle of mutual recognition. Thus, \textit{Keck} also brings, albeit in a limited fashion, a “clarifying” dualist approach into the realm of the free movement of goods, epitomising maturity in market integration. It is a step towards “market maintenance”. However, as \textit{Exxon} demonstrates, it is only regarding non-discriminatory selling arrangements that the outcome of both Courts converged. However, \textit{Exxon} did not reform the foundations of the DCC. It was one more step away from “balancing” and towards a “discrimination only rule”.

\textsuperscript{577} \textit{Maduro}, supra note 520, pp- 88-102
\textsuperscript{578} \textit{OHSWMA}, supra note 485, 1789
VII.- Conclusions

The “discrimination-only” approach followed by the USSC shows that access to market is not a priority in the US. Instead, the USSC has focused on ensuring stability for an already-sufficiently-integrated market\textsuperscript{579}. At the same time, the approach of the USSC also enshrines a high degree of deference to the political institutions, both state legislatures and Congress. The principle of non-discrimination calls for a lesser degree of judicial activism than “balancing”. Given their wide resources and expertises, States are better equipped to wage the interests of interstate trade against state regulatory autonomy. In addition, in so far as Congress may intervene to correct state determinations, interstate commerce is always secured. Therefore, the DCC gives room for “States (to act as) laboratories\textsuperscript{580}.

On the other side of the Atlantic, Keck brought the case-law of Article 28 EC closer to the US experience. Yet, since Cassis remains largely good law, Keck had only a limited impact in the law of free movement. With the exception of selling arrangements, this treaty provisions goes beyond discrimination. Can Keck be read as a deferential gesture to the political institutions? Not without reservations. While Keck could be interpreted as admitting that state political actors are better qualified than the ECJ and national courts to examine the impact of non-discriminatory selling arrangements upon intra-Community trade; I do not believe this was the ultimate intention of the ECJ. By drawing a catalogue of measures falling within and outside the scope of Article 28 EC, the ECJ imposed its own cost/benefit analysis of market integration. As opposed to the DCC, it is not “balancing” which is deemed unfitted for judicial review. Keck simply narrowed down the scope of Article 28 EC. Thus, this ruling does not enshrine strong believes in the institutional capacities of national

\textsuperscript{579} Maduro, supra note 520, 96
\textsuperscript{580} New State Ice Co. v. Liebmann, 285 U.S. 262, 310- 311, 386 (1932) (Brandeis dissenting).
political actors when balancing the virtues and vices of market uniformity and diversity.

In view of the achievements made, I do not believe that Keck should be overruled. Its formalistic character has brought clarity into the realm of free movement of goods. Besides, as explained above, alternative tests seem to fall either into the over-breadth of Cassis or the under-inclusiveness of Keck. Thus, how can Keck be improved without destroying it? In my view, the ECJ should stop focussing on “outcomes” and start examining national political processes. The approach advanced by AG Maduro in Alfa-Vita points in this direction. Nevertheless, in expounding his model, the AG still reviews the adequacy of national processes by evaluating outcomes, raising the same old questions but reformulated in new terms. In my view, the Advocate General is right in trying to extrapolate the “inner political check” or “virtual representation” argument into the EU. However, the ECJ should not second-guess the outcome reached by national legislators when regulating selling arrangements in a non-discriminatory fashion. Instead, I would advocate for a “process-oriented” review, whereby courts should evaluate whether the measure adopted is the result of sound legislative deliberations on the costs and benefits to the European internal market. Thus, national courts should check that national legislators took the internal market seriously. Discussed at more length in the general conclusion, the advantage of this “process-oriented” review is twofold. Firstly, it would not undermine the results achieved by Keck, in so far as “process-oriented” review would be limited to non-discriminatory selling arrangements. Secondly, not only would it epitomise that the ECJ is willing to trust the Member States, but, in the long run, the latter would internalise the adoption of a European perspective when passing national law. It would compel national legislatures to think “federal”.
Chapter IV

**Positive Integration: The Commerce Clause and Article 95 EC**

This chapter is divided as follows. In Section I, the USSC’s application of the principle of “enumerated powers” to the Commerce Clause is examined. In the same vein, Section II outlines how the ECJ has applied the principle of attribution to Community measures adopted under Article 95 EC. After drawing some comparisons between the recent case-law of both Courts, Section III argues that the judicial enforcement of the principle of enumerated powers (attribution) has not contained the competence creep of the central government. Accordingly, Section IV looks at three alternatives capable of striking a proper balance between the Union’s interests in an integrated market and respecting States’ autonomy namely, reliance on the political process, the principle of proportionality and the principle of subsidiarity. Finally, it is concluded that courts ought to focus on controlling that, in the vast field of concurrent powers, Congress and the EC legislator pay due homage to “the values of federalism”. Although protecting enclaves of state sovereignty remains important when reminding Congress and the EC legislator of the limited nature of their powers, it appears that an adequate balance would only be reached if courts duly examine “what lies within”. This may be achieved by relying on “process federalism”, that is, judicial review that solves failures in federal or Community legislative deliberations that improperly impinge upon state autonomy.
1. The Principle of Enumerated Powers applied to the Commerce Clause

A. The History of the Commerce Clause until *Lopez*

US scholars tend to divide the “pre-*Lopez*” history of the Commerce Clause into three periods. While the first two are dominated by “Dual Federalism”, that is, the existence of two separate and independent spheres of competences, one belonging to Congress, the other reserved to the States, with the New Deal not only did the USSC accept the possibility of competence overlapping, but it also exercised a rubber-stamped review of congressional legislation.

From 1826 to 1887, the Commerce Clause was interpreted both intensively and extensively. In *Gibbons v Ogden*, Marshall supported a broad reading of “commerce”, understood in general terms as “describing the commercial intercourse […]”582. Likewise, the term “among” suggested that, notwithstanding transactions being completely internal, “commerce “cannot stop at the external boundary line of each State, but may be introduced into the interior”583. In addition, he ruled that, even in the absence of federal legislation, States had no powers to regulate transactions with sister States584. However, Marshall also acknowledged that the Commerce Clause should not deprive States from adopting health and safety legislation as part of their police powers. Thus, federal courts were entrusted with drawing bright lines between activities falling within “commerce” and activities pertaining to the police powers of States. However, once Congress started legislating, the Court realised that Marshall’s approach eroded state regulatory powers excessively, thus it decided to revisit its doctrine.

From 1887 until 1937, the USSC also adopted a substantive test drawing a catalogue of activities falling “in” and “outside” of commerce.

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582 *Ibid*, 190-91
583 *Ibid*, 194
584 *Ibid*, 197
Although this test was originally construed under the Dormant Commerce Clause, it was soon applied to control congressional powers. First, the USSC embraced a test which allowed Congress to regulated activities having “direct” impact upon interstate commerce, while excluding those whose effects were only “indirect”. Subsequently, the USSC decided to construe the notion of “commerce” narrowly, by excluding activities such as “manufacturing”\(^{585}\) or “mining”\(^{586}\) from the realm of federal power. For instance, in *Hammer v Dagenhart*\(^{587}\), the USSC found that Congress lacked the power to exclude the products of child labour from interstate commerce. It based its ruling on the ground that rules relating to manufacturing were for States to adopt. Nevertheless, since the USSC failed to justify why certain economic activities were excluded from the Commerce Clause, whereas others were not, it was progressively accused of introducing arbitrary criteria. In addition, not only did these tests not respond to the needs of an interdependent and interconnected American economy, but it also pushed the USSC into a political cleavage with the Executive. In annulling several pieces of federal legislation adopted under the Commerce Clause\(^{588}\), the USSC became the main obstacle to the implementation of the New Deal program, which sought to recover the American economy from the 1929 Big Depression. Thus, with a view to avoiding the “*Court-packing plan*” promoted by President Roosevelt\(^{589}\), the USSC opted for reformulating its interpretation of the Commerce Clause, granting more leeway to congressional action.

From 1937 until 1995, Congress saw, therefore, its powers increase. It was no longer relevant to determine which activities were “in or out” of “Commerce”. Hence, “Dual Federalism” was abandoned. Apart from

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585 *United States v E.C. Knight Co.*, 156 US 1 (1895)
586 *Oliver Iron Mining Co. v Lord*, 262 US 172 (1923)
587 *Hammer v Dagenhart*, 247 U.S. 251 (1918)
including the channels of interstate commerce and the instrumentalities of interstate commerce or things and persons therein within the scope of the Commerce Clause, the USSC ruled that Congress could also regulate activities having “substantial” effects upon interstate commerce. In United States v Darby, the USSC was called upon to rule on the validity of two provisions of the Federal Labor Standards Act (FLSA), namely whether [1] Congress could prohibit the shipment in interstate commerce of goods manufactured by employees whose wages and working hours did not comply with the FLSA and whether [2] it could also ban the employment of these workers in the production of goods for interstate commerce. First, the USSC held that the powers of Congress to exclude goods from the interstate commerce were plenary. In so doing, the USSC expressly rejected Hammer v Dagenhart, adding that the distinction in which it rested had long been abandoned. As for the second question, the USSC justified the constitutionality of the FLSA under the Necessary and Proper Clause. After recognising the “property” of suppressing nationwide competition from goods produced under substandard labour conditions, the USSC ruled that Congress “may choose the means reasonably adapted to the attainment of the permitted end even though they involve control of intrastate activities”. Thus, Congress was right in excluding employees hired under sub-labour conditions, since the prohibition contributed to the objectives of the statute. As a result, the USSC concluded that intrastate activities, which

591 In Lopez, Rehnquist gave three cases to illustrate this concept. First, in Shreveport Rate Cases, 234 US 342 (1914), the USSC held that Congress had the authority to regulate intrastate travel fares by carriers, which also travel outside the State. As instruments of commerce, the fact that carriers were also used for intrastate travelling did not deprive Congress from having a complete authority over them. Secondly, in Southern Railway Co. v United States, 222 US 20 (1911), the Court upheld the validity of the Safety Appliance Act, which penalised the intrastate use of defective carriers operating in a railroad which also served for interstate traffic. Finally, in Perez v United States, 402 US 146 (1971), the Court held that Congress could protect the instrumentalities of commerce. For instance, Congress could validly impose penalties for the unauthorised destruction of aircrafts.
592 NLRB v Jones & Laughlin Steel, 301 US 1 (1937)
593 Perez v US, Op cit, 150
594 United State v Darby, 312 US 100 (1941)
595 29 U.S.C. 201 (1938)
597 Ibid, 121
were substantially related to interstate commerce, fell within the scope of congressional powers.

Furthermore, in *Wickard v Filburn*\(^{598}\), the USSC held that, in regulating intrastate activities, not only should effects on interstate commerce be considered on an individual basis, but also in the aggregate. In order to obtain price stability in the wheat market, Congress passed the Agricultural Adjustment Act in 1938\(^{599}\) (AAA), introducing a system of annual quotas. Where farmers exceeded their assigned allotments, the AAA provided for the imposition of fines. The appellee, a farmer from Ohio who had been fined for exceeding his quota, challenged the constitutionality of the Act as applied to him. He argued that the regulation of home-consumption of wheat was beyond Congress’ powers under the Commerce Clause. Put differently, wheat not marketed but consumed by farmers themselves could not account as a part of their quota. Writing for the USSC, Justice Jackson began by restating that the USSC had abandoned any formalistic approach\(^ {600}\). He stressed that Congress had the power to regulate intrastate activities, where “[they] exert […] a substantial economic effect on interstate commerce”\(^ {601}\). It is very unlikely, Justice Jackson conceded, that the excess of wheat sown by the appellee would have an effect by itself on the interstate commerce. However, “his contribution, taken together with that of many others similarly situated, is far from trivial”\(^ {602}\). Since, in controlling the supply of wheat, Congress had sought to increase its price, an eventual flow into the market of home-consumed wheat could put at risk this objective. Likewise, owing to the fact that farmers consuming their own wheat would otherwise purchase it on the market, home-grown wheat was in competition with wheat in commerce. It follows that, though home-consumed wheat was outside the regulatory scheme, its disturbing “substantial effects” on interstate commerce allowed congressional

\(^{598}\) *Wickard v Filburn*, 317 US 111 (1942)

\(^{599}\) 7 U.S.C. 1281 (1938) as amended by 7 U.S.C. 1340 (1941)

\(^{600}\) *Wickard*, Op. cit, 120

\(^{601}\) *Ibid*, 125

\(^{602}\) *Ibid*, 127-129
intervention. Thus, Justice Jackson concluded that the AAA was constitutional.

Along with the “substantial effect” doctrine and the “aggregation principle”, the scope of the Commerce Clause was further expanded by significantly deferring to congressional fact-findings. In so far as Congress demonstrated a “rational basis” for its conclusions, the USSC would agree in qualifying the effects of local incidents upon interstate commerce as “substantial”. A good illustration of this argument is provided by Katzenbach v McClung. There, the owner of a restaurant, which refused to serve blacks, sought the annulment of Title II of the Civil Rights Act, according to which no restaurant could discriminate on grounds of sex, colour, national origin or religion, “if […] it serves or offers to serve interstate travelers or a substantial portion of the food which it serves […] has moved in commerce.” Particularly, the defendant contested that Congress could impose a non-discriminatory treatment on the ground that the food it served had moved in the interstate commerce. However, by relying on congressional hearings, the USSC took an opposite view. It recalled congressional findings, holding that black people will not attend racial discriminatory restaurants. These restaurants would have fewer customers and consequently, “(t)he fewer customers a restaurant enjoys, the less food it sells, and consequently the less it buys (from the interstate commerce).” Likewise, the USSC agreed with Congress in that racially discriminatory restaurants would render more difficult the interstate travel of black people, owing to the fact that “one can hardly travel without eating.” Thus, the USSC ruled that “this testimony afforded an ample basis” to conclude that discriminatory treatment undertaken by restaurants impaired interstate commerce. Lastly, in recalling Filburn v Wickard, the USSC ruled that in determining whether the Civil Rights Act was constitutional, one should not assess the impact of the appellee’s activities upon interstate commerce alone. On the contrary, it was necessary to bear in

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603 Katzenbach v McClung, 379 US 294 (1964)
604 42 U.S.C. 1971
605 Katzenbach, 299
606 Ibid, 300
mind that the appellee’s conduct was “representative of many others throughout the country”\textsuperscript{607}.

It follows from the foregoing that the breadth of the Commerce Clause rendered applications seeking to limit the reach of federal commercial legislation almost nugatory. In fact, during more than fifty years, only in \textit{National League of Cities v Usery}\textsuperscript{608} did the USSC annul an act of Congress. There, it held that by extending the minimum hours and wages provisions of the FLSA to state and municipal employees, Congress had gone beyond the powers conferred to it. However, the ruling of the USSC relied on the X\textsuperscript{th} Amendment, leaving untouched the line of cases favouring broad congressional powers to regulate interstate commerce. In any case, the impact of \textit{National League} lasted less than a decade, since it was subsequently overruled by \textit{Garcia v San Antonio Metropolitan Transit Authority}\textsuperscript{609}. These circumstances were welcomed by some scholars, who opined that the USSC was right to follow judicial restraint\textsuperscript{610}. Simultaneously, others urged the USSC to modify its case-law, which had excessively eroded the federal model and, did not comply with the principle of enumerated powers\textsuperscript{611}. In this regard, the then Justice Rehnquist criticised the USSC thoroughly, calling for a more tempered interpretation of congressional authority under the Commerce Clause\textsuperscript{612}.

\begin{thebibliography}{99}
\item \textit{Ibid}, 302.
\item \textit{National League of Cities v Usery}, 426 US 833 (1976)
\item \textit{Garcia v San Antonio Metropolitan Transit Authority}, 469 US 528 (1985)
\item R. A. EPSTEIN, The Proper Scope of the Commerce Clause, (1987) 73 \textit{Va. L. Rev.}, pp 1387-1455. (The author maintains that the pre-New Deal interpretation of the Commerce Clause facilitated integration of national markets by preventing state balkanisation, while avoiding excessive uniformity. He also suggests that the scope of the Commerce Clause should be construed along the lines of its dormant version).
\item \textit{Hodel v Virginia Surface Mining & Reclamation Association}, 452 US 264, 310 (1981) (Rehnquist Concurring)
\end{thebibliography}
B.- The *Lopez-Morrison-Raich* Trilogy: The beginning and the end of “the federalist revolution”

1.- *United States v Lopez*: The beginning.

In *Lopez*\(^{613}\), Rehnquist managed to mobilise the USSC and in a 5-4 decision, the Gun-Free School Zone Act (GFSZA)\(^{614}\) was annulled. Adopted under the Commerce Clause, this act criminalised the possession of firearms in a school zone. The US Government supported the validity of the GFSZA by maintaining that there was a close connection between the possession of firearms in a school zone and violent crime. In turn, violent crime adversely affected the national economy in two ways, namely the “*cost of crime*” and the “*cost of productivity*”. Firstly, through the mechanism of insurance, the financial effects of violent crime are suffered by the entire population. Likewise, violent crime also refrains people from travelling to areas perceived as unsafe. Secondly, violent crime is also an obstacle to the educational process. A poorly educated population is less productive and consequently, the national economy is weakened. Thus, the US Government inferred that the GFSZA regulated an activity having a substantial adverse effect upon commerce and, urged the USSC to uphold the statute.

“We start first with principles”\(^{615}\), Rehnquist wrote for the USSC. He stated that the Congress was bound by the principle of enumerated powers. Although plenary and submitted to no limitations but the ones prescribed by the Constitution, the very wording of the Commerce Clause imposes intrinsic limitations to congressional powers. Likewise, the USSC had never conceived the Commerce Clause as an unbounded source of federal power. He proceeded then to enounce the three categories of activities that Congress may regulate under the Commerce Clause, namely [1] channels of interstate commerce, [2] the instrumentalities of interstate commerce or things and persons therein and, [3] activities having a “substantial effect”

\(^{613}\) *United States v Lopez*, 514 US 549 (1995)  
\(^{614}\) 18 U.S.C. § 922(q) \(^{615}\) *Lopez*, 552
upon interstate commerce. Owing to the fact that the GFSZA did not fall within the two first categories, Rehnquist decided to examine whether the possession of firearms in school zones had a “substantial” impact upon interstate commerce.

In this regard, he drew a distinction between local economic and local non-economic activities. On the one hand, “where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained”\(^{616}\). Indeed, even in \(\text{Filburn v Wickard}^{616}\), “[…] the most far reaching example of Commerce Clause authority over intrastate activity”, the federal statute in question regulated an economic activity. \(A\ sensu\ contrario\), where Congress sought to regulate non-economic areas traditionally reserved to state sovereignty, such as criminal law, federal legislation will be almost certainly struck down. Consequently, Rehnquist declared the unconstitutionality of the GFSZA, affirming that it had “nothing to do with commerce or any sort of economic enterprise”\(^{617}\).

Moreover, he indicated that the GFZSA did not form part of a larger regulation of economic activity, requiring for its effectiveness the inclusion of intrastate non-economic matters. Neither was there a “jurisdictional hook” conditioning the application of the GFZSA to a case-by-case inquiry into the effects of gun possession on interstate commerce\(^ {618}\). Nor were there specific legislative findings indicating the effects of gun possession in school zones on interstate commerce. As for the arguments pushed forward by the US Government, Rehnquist did not spend much time dismissing them. They were no more than “inferences upon inferences”. If the USSC had followed the appellant’s arguments, it would have been very “difficult to perceive any limitation of the federal power, even in areas such as

\(^{616}\) \text{Lopez, 560.}\n\(^{617}\) \text{Ibid, 561}\n\(^{618}\) This was precisely what Congress did after \text{Lopez} was rendered. It limited the scope of the GFSZA to “a firearm that has moved in or that otherwise affects interstate or foreign commerce”. 18 USC § 922 (q) (2) (A) (2000). Besides, the constitutionality of this statute was subsequently affirmed in \text{United States v Dorsey}, 418 F. 3d 10398 (9\text{th Cir.} 2005)
criminal law enforcement and education where States historically have been sovereign". As a result, the GFZSA was declared unconstitutional.

Dissenting Justices accused the USSC of creating three major legal problems. Firstly, the USSC had already upheld federal statutes regulating intrastate activities having lesser connection with interstate commerce than violent crime. Particularly, they found impossible to reconcile Lopez with the racial discrimination cases. Secondly, the distinction between regulating local “non-commercial” and local “commercial” activities was difficult to bring together with previous case-law. Indeed, they criticised Rehnquist for having reintroduced a formalistic approach, long abandoned since the New Deal. Finally, they stated that this new test would introduce legal uncertainty into the realm of the Commerce Clause. Specially, they foresaw the end of congressional power to impose criminal penalties. Conversely, dissenting Justices argued in favour of following judicial restraint. The task of judges should be confined to determining whether there was a “rational basis” for finding a significant link between the regulated activity and interstate commerce. The reason behind judicial deference lies in that determining this rational connection requires an “empirical judgment”, which is better performed by the legislature rather than the judiciary. Accordingly, by extensively invoking “reports, hearings, and other readily available literature”, dissenting Justices agreed with the appellant.

The direct implications flowing from Lopez are fourfold. Firstly, Lopez canvasses the USSC’s intention to enforce the principle of enumerated powers. It is a clear statement directed to Congress, encapsulating that its powers under the Commerce Clause are not unlimited. Secondly, although the USSC conceives Lopez as a clear depart from precedent, it does not state which cases it pretended to overrule. This circumstance may

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619 Lopez, 564
620 Ibid, 617 (Breyer dissenting)
621 Ibid, 619 (Breyer dissenting)
623 The Court seems to reject the opinion of some scholars arguing for a limited role of the judiciary in federalism cases. See Choper, supra note 610.
mislead lower courts, which may struggle to ascertain what precedent is still valid\textsuperscript{624}. Thirdly, the USSC appears to introduce a formal test which focuses on the type of regulated activity rather than in the effects it produces\textsuperscript{625}. Indeed, the USSC seems willing to recognise congressional powers to regulate local economic activities, while local non-commercial activities fall outside the scope of the Commerce Clause. However, the Lopez Court failed to provide a definition to this effect. Consequently, lower courts may opt for interpreting “commercial activity” broadly, refusing to follow the USSC in its federalist revival\textsuperscript{626}. Alternatively, they may interpret this concept restrictively, so that the constitutionality of entire areas of federal law, such as environmental legislation, would be put into question\textsuperscript{627}. Finally, though the USSC appears to reject federal regulation of local non-commercial activities, it leaves many doors open through which Congress may circumvent this limitation\textsuperscript{628}. Perhaps, the most important loophole in Lopez is that Congress may include local non-commercial matters in a larger regulatory scheme of an economic activity. To the extreme, Lopez could become counterproductive for limiting the powers of Congress, given that the exercise of judicial review is hindered when Congress drafts legislation


\textsuperscript{628} LA GRAGLIA, \textit{United States v Lopez: Judicial Review under the Commerce Clause}, (1996) 74 Tex. L. Rev., pp 719-771 (affirming that the GFSZA could have been saved, had Congress alluded to commercial transactions). JA KLEIN, Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism, (2003) 55 Stan. L. Rev., pp 571-606 (holding that, since the Court follows a broad approach when defining the channels and instrumentalities of interstate commerce, the repercussions of Lopez must be nuanced).
in broad terms. Accordingly, it appears that Lopez was only a “minor constitutional revolution”.

2.- United States v Morrison: The Confirmation.

One aspect left unresolved in Lopez was whether by relying on a specific factual inquiry demonstrating that local non-economic activities have an adverse impact on interstate commerce, Congress could invoke the Commerce Clause to pass legislation. Indeed, in Lopez, the USSC did not expressly foreclose this possibility. Besides, the absence of congressional fact-findings had led the Court of Appeals to annul the GFZSA. However, in United States v Morrison, the USSC answered in the negative. There, the appellee challenged the constitutionality of Section 13981 of the Violence against Woman Act (VAWA), providing a federal civil remedy for the victims of gender motivated violence. The appellee argued that, in adopting Section 13981, Congress had gone beyond its powers under the Commerce Clause and Section 5 of the XIVth Amendment. By contrast to Lopez, in Morrison Congress had done an exhaustive background research proving that gendered motivated violence impinged upon interstate commerce. However, the USSC was categorical, “simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so”. The USSC recalled its ruling in Lopez. It insisted that the US Constitution did not confer on Congress the power to regulate intrastate non-economic activities. To this

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629 A KREIT, Why is Congress still Regulating Non-Commercial Activity?, (2005) 28 Harv. J.L. & Pub. Pol’y, pp 169-204 (affirming that most of lower courts have not followed Lopez. Instead, lower courts have upheld the regulation of local non-economic activities. By deferring to congressional purposes, lower courts have concluded that the effectiveness of a larger regulatory scheme of economic activities is conditioned upon the inclusion of local non economic activities therein) Additionally, this possibility was later acknowledged by Justice O’Connor when writing her dissenting opinion in Gonzales v Raich, infra 3.

630 DJ MERRITT, Commerce !, (1996) 94 Mich. L. Rev., pp 674-751 (qualifying Lopez as “limited attempt” to lay down judicial enforceable standards under the Commerce Clause)


632 42 U.S.C §13981

633 Congress found that gender motivated violence deprived potential victims from travelling interstate and from engaging in interstate business. It also discovered that this violence diminished national productivity by increasing medical costs and diminishing the supply and demand for interstate products.

634 Morrison, 614 (quoting Hodel, supra note 612, 311.)
effect, since gendered motivated violence was a local activity which did not have an economic nature, the USSC ruled that the Commerce Clause could not operate as the constitutional basis for Section 13981 of the VAWA. By contrast to *National League of the Cities v Usery*, the ruling of the USSC in *Morrison* confirms that *Lopez* was not an isolated event. On the contrary, it illustrates the USSC’s serious purpose to revitalise the federalist debate. Additionally, in holding that congressional fact findings are not decisive when drawing the limits of the Commerce Clause, the USSC erects itself as the supreme interpreter of the Constitution. However, albeit this assertion, *Morrison* did not help to clarify many of the questions *Lopez* left unanswered. It repeated the USSC’s intention to police the powers of Congress under the Commerce Clause, but did not provide further guidance how to do it. Indeed, there was no definition of “economic activity”. Nor did it explain how local non-commercial activity may be included in a broader economic scheme. Thus, maybe due to the fact that both Opinions were authored by Rehnquist, *Morrison* confirmed *Lopez* in the true sense of the word. Not only did it reproduce its outcome, but also its shortcomings.

3.-*Gonzales v Raich*: The end?

*Lopez* and *Morrison* made clear that the outer limits of the Commerce Clause would depend on how broad the USSC conceives the notion of “economic activity”. From these two cases, it appears that regulating intrastate non-economic activities is beyond congressional power. On the contrary, regarding economic activities taking place within a single State, Congress has a broad leeway to invoke its commercial powers. To this effect, Congress may rely on the aggregation principle enounced in

635 *Ibid*, 627
636 CA MacKINNON, Disputing Male Sovereignty in *United States v Morrison*, (2000) 114 *Harv. L. Rev.*, pp 135-177 (qualifying *Morrison* as the “high-water mark to date” on the Court’s notion of federalism. However, the author criticised the Court for qualifying gendered-motivated violence as non-economic, since it cost billions of dollars to the American economy.)
Wickard to sustain that there is a connection between the local economic activity and interstate commerce.

Accordingly, a broad construction of “economic activity” would render the ruling in Lopez “little more than a drafting guide” for Congress. Ten years after Lopez, this was the approach followed by the USSC. In Gonzales v Raich, with a view to preventing seriously ill patients from suffering excruciating pains, California passed the Compassionated Use Act of 1996 (CUA), which provided an exemption from criminal prosecution for physicians, patients and caregivers who possess or cultivate marijuana for medical purposes. Respondents, two Californian residents, had relied on the CUA to possess and cultivate marijuana; when, in enforcing the Controlled Substance Act (CSA), federal agents of the DEA seized and destroyed their cannabis plants. Respondents filed then an injunction against the US Attorney General, alleging that, in relation the cultivation, distribution and possession of marijuana for medicinal use, the CSA violated the Commerce Clause. On appeal, the CSA was declared unconstitutional, by heavily relying on Lopez and Morrison.

However, in a 6-3 decision, the USSC took a different view. Writing for the USSC, Justice Stevens stated that the similarities between this case and Filburn v Wickard were striking. In both cases, the cultivation of a home grown commodity could put at risk the objectives Congress aimed to achieve. Just as home-grown wheat could threaten the federal interests in stabilising the interstate wheat market, the diversion of home-cultivated marijuana could put in peril the congressional intent of eliminating this substance from the interstate commerce. “Be in wheat or marijuana”,

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638 Gonzales v Raich, 545 U.S. 1, (2005) (O’Connor dissenting)
639 Before Raich was delivered, the Court avoided pronouncing itself on the constitutionality of two federal statutes; instead the Court based its ruling on statutory interpretation. See Jones v United States, 529 US 848 (2000) and Solid Waste Agency of North Cook County v United States Army Corps of Engineers, 531 US 159 (2001)
640 Supra note 638.
642 21 U.S.C § 801 et seq. In accordance with the CSA, the distribution, manufacture or possession of marijuana is a criminal offence.
Justice Stevens wrote, “home consumption has [...] a substantial effect on supply and demand in the national market for that commodity”\textsuperscript{643}. However, respondents argued that Wickard could not be invoked, since by contrast to Mr. Wickard, they did not cultivate marijuana with a view to selling it. Justice Stevens rejected this argument, holding that the fact that Mr. Wickard was a commercial farmer never played a role in the USSC’s ruling.

Furthermore, respondents contented that Congress had not embarked itself on an extensive factual inquiry determining the effects of home-cultivated marijuana upon interstate commerce. In recalling Lopez, Justice Stevens briefly replied that congressional findings had never been a decisive factor when determining the validity of federal legislation\textsuperscript{644}. Justice Stevens proceeded then to stress that, in examining the constitutionality of federal legislation under the Commerce Clause, the role of the judiciary was a “modest one”. Judicial review was limited to ascertaining the existence of a “rational basis” demonstrating that the federally regulated activity produced substantial effects upon interstate commerce, without being necessary to verify if “in fact” that was the case. To this effect, Justice Stevens concluded that, given the “enforcement difficulties between marijuana cultivated locally and marijuana grown elsewhere”\textsuperscript{645}, Congress had acted rationally.

Finally, respondents alleged that the possession and cultivation of home-grown marijuana did not have an economic nature and consequently, in pursuance with Lopez and Morrison, the CSA was in breach of the Constitution. Nevertheless, by alluding to the broad definition of “Economics” contained in Webster’s Dictionary, Justice Stevens replied that “the activities regulated by the CSA [were] quintessentially economic”\textsuperscript{646}. Accordingly, since economic activity alludes to “the production, distribution and consumption of commodities”, banning the possession and manufacture of certain commodities fell within this definition. Therefore, by

\textsuperscript{643} Gonzales v Raich, 16
\textsuperscript{644} Ibid, 18
\textsuperscript{645} Ibid, 19
\textsuperscript{646} Ibid, 23.
eliminating marijuana from the market, the CSA regulated activities having an economic nature. Further, the fact that respondents used marijuana for medical purposes was not a sufficient factor for distinguishing this class of activities from the general scheme of the CSA. On the contrary, Congress had rational basis to believe that their inclusion was necessary to render the federal general regulatory scheme effective.

4.- The Lopez and Morrison Legacy after Raich.

In Raich, the USSC overruled neither Lopez nor Morrison. Both cases remain good law. Unless Congress introduces a jurisdictional hook or demonstrates that its inclusion in a larger regulation of economic activity is necessary, a local activity not having an economic nature lies beyond the scope of the Commerce Clause. In addition, the presence or absence of congressional fact findings does not appear to alter this statement.

Moreover, how extensively the definition of “economic activity” is coined remains decisive in defining the outer limits of congressional powers. However, since the majority in Lopez and Morrison failed to define this concept, Justices favouring Congress’ broad commercial powers subsequently profited from this shortcoming. Arguably, the definition provided in Raich appears to be sufficiently generous, so that it includes mere “possession”.

As for the regulation of local non-economic activities, it is not clear whether the inclusion of a jurisdictional hook is sufficient in itself to guarantee the constitutionality of a federal statute. The rationale behind jurisdictional hooks is to confine the application of federal statutes to cases

647 By contrast dissenting Justices stated that this definition of economic activity “threatens to sweep all of the productive human activity into the federal regulatory reach”. Instead, economic activity should be identified with commercial activity. Thus, since Lopez recognised the non-commercial character of “possession”, they concluded that the CSA does not regulate an economic activity.

648 TR STUCKEY, Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce, (2006) 81 Notre Dame L. Rev., pp 2101-2144 (indicating that, before Raich, many lower courts had held that the inclusion of a jurisdictional hook does not ensure the constitutionality of federal legislation).
where there is an important nexus with interstate commerce. Accordingly, jurisdictional hooks failing to constrain congressional powers may not be sufficient to save a federal statute. For instance, lower courts were divided as to the constitutionality of Child Pornography Statutes\textsuperscript{649} criminalising the intentional possession of child pornography that had travelled “in the interstate or foreign commerce”. In \textit{United States v Maxwell}, the 11\textsuperscript{th} Circuit argued that the inclusion of this “in-commerce” hook did not guarantee that the regulated activities substantially affected interstate commerce\textsuperscript{650}. However, the USSC remanded and vacated \textit{Maxwell}, ordering its re-examination in the light of \textit{Raich}. Subsequently, the 11\textsuperscript{th} Circuit reversed, holding that the regulated activity could be included in a larger regulation of an economic activity. Thus, there was not need to adjudicate on the sufficiency of the jurisdictional hook\textsuperscript{651}.

Indeed, why should Congress rely on jurisdictional hooks to guarantee the validity of federal legislation, when it can do so by catching local non-economic activities in a regulatory net\textsuperscript{652}? In this regard, \textit{Raich} seems to welcome this strategy. The only requirement seems to be the presence of a “rational basis” demonstrating that the regulation of these activities is vital for the larger scheme. It follows that, when examining the connections between local non-economic activities and the larger scheme, the ruling in \textit{Raich} supports a high level of deference to Congress. Further, this holding may encourage Congress to legislate without precision. As dissenting Justice O’Connor affirmed\textsuperscript{653}, “[t]oday’s decision suggests that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than a piecemeal”.

As Tushnet reckons, the federalist vision promoted by Rehnquist limited itself to describing the objective of having a Federal Government

\textsuperscript{649} 18 U.S.C.A. § 2252A(a)(5)(B)
\textsuperscript{650} \textit{United States v Maxwell}, 386 F. 3d 1042 (11\textsuperscript{th} Cir. 2004), vacated 126 S. Ct. 321 (2005)
\textsuperscript{651} \textit{United States v Maxwell}, 446 F. 3d 1218 (11\textsuperscript{th} Cir. 2006)
\textsuperscript{652} Stuckey, \textit{supra} note 648, pp 2126-2127.
\textsuperscript{653} \textit{Raich},
with limited powers, but he missed the opportunity to provide judicial enforceable standards\textsuperscript{654}. This absence prevented the federal judiciary from erecting substantial limitations\textsuperscript{655} on the Commerce Clause, while giving room for manipulative use of precedent. Put differently, the ruling in \textit{Lopez} can be read as a programmatic manifesto, which did not provide enough guidance for judicial obedience.

\textbf{C.- The Necessary and Proper Clause: An alternative approach.}

Even if Congress lacks the power to regulate local non-economic activities under the Commerce Clause, it may still invoke the Necessary and Proper Clause as a valid constitutional authority. As a matter of fact, the USSC had already recognised this alternative in \textit{United States v Darby}.

As Marshall suggested in \textit{McCulloch v Maryland}\textsuperscript{656}, it would suffice for Congress to demonstrate that a federal statute contributes to making effective interstate commerce (“necessary”) and that it is consistent with the Constitution (“proper”). However, this clause cannot be interpreted as sweeping all state regulatory powers. For instance, Marshall himself declared that, under the pretext of executing its powers, Congress could not invoke this clause to “\textit{pass laws for the accomplishment of objects not instructed to (it)}”\textsuperscript{657}. In the same way, he also posited that there must be an “\textit{obvious relation}” between legislative means and constitutional ends\textsuperscript{658}. Thus, the Necessary and Proper Clause covers neither pretextual legislation nor remoteness in the chain of cause\textsuperscript{659}.

\begin{footnotesize}
\begin{itemize}
\item[655] RJ PUSHAW Jr., The Medical Marijuana Case: A Commerce Clause Counter-Revolution?, (2005) 9 \textit{Lewis & Clark L. Rev.}, pp 879-941. (holding that the Lopez/Morrison revolution was quite modest, since the Court failed to identify judicial enforceable standards capable of introducing a coherent doctrine under the Commerce Clause)
\item[656] \textit{McCulloch v. Maryland}, 17 U.S. 316 (1819)
\item[657] \textit{Ibid}, 423
\item[658] \textit{Ibid}, 409
\end{itemize}
\end{footnotesize}
Bearing in mind that neither in *Lopez* nor in *Morrison* the USSC discussed the application of the Necessary and Proper Clause, could the latter have saved the GFSZA and the VAWA? Concurring in *Lopez*, Justice Thomas replied in the negative, arguing that such a broad reading of this Clause would make various enumerated powers redundant\(^{660}\). Commentators also agree\(^{661}\). By rejecting the “costs of productivity and crime” arguments defended by the US Government, the *Lopez* Court rejected the federal regulation of activities bearing only remotely on the interstate commerce. The same applies to *Morrison*, where the USSC qualified the relationship between interstate commerce and combating gender motivated violence as “attenuated”\(^{662}\). Therefore, the GFSZA and the VAWA were just a pretext for Congress to regulate matters falling within the police powers of States.

Moreover, while siding with the States in *Lopez* and *Morrison*, Justice Scalia supported the constitutionality of the CSA in *Raich*. However, by contrast to the majority, Scalia opined that the Commerce Clause is not in itself sufficient to regulate activities which, while having substantial effects upon interstate commerce, are not part of it. Instead, congressional powers derive from the Necessary and Proper Clause. Thereunder, Congress may regulate all intrastate activities, whether economic or not, which are necessary to render the regulation of interstate commerce effective. It follows that, concerning non-economic activities (local possession of home-grown marijuana), the question that arises is whether its regulation (its prohibition) is necessary to achieve the objectives (eradicating marijuana from the interstate commerce) Congress legitimately sought to attain. Scalia replied in the affirmative, noting that it was very difficult for the enforcing authorities to distinguish between home grown marijuana and marijuana purchased in the interstate market.

\(^{660}\) *Lopez*, Op cit, 587-89 (Thomas concurring)
\(^{662}\) *Morrison*, 612
However, the Necessary and Proper Clause has been “internalised” in the Commerce Clause. In *Lopez*, the USSC indicated that, in order to preserve the effectiveness of a federal general regulatory scheme, Congress may also incorporate local non-economic activities. The same was posited in *Raich*. So, what is the added value of Scalia’s concurring vote? It is suggested that it provides an accurate solution to the federalist debate. Instead of navigating through the conundrums of *Lopez*, the Necessary and Proper Clause clearly flags up that Congress is approximating the outer boundaries of its powers. First, it escapes the formal dichotomy “economic / non-economic” activities. Secondly, the “necessity strand” of the doctrine introduces a “means-end” test, which allows a sufficient degree of congressional manoeuvre. Lastly, it would prevent Congress from relying on its enumerated powers as a pretext to enact unconstitutional legislation. To this effect, Gardbaum argues that “property” requires the means deployed to comply with the “Spirit of the Constitution”, part of which are federalism concerns.\(^{663}\)

II.- The Principle of Attribution applied to Article 95 EC

A.- Article 95 EC (ex 100a EEC) and *Titanium Dioxide*

Article 95 EC (ex 100a EEC) was introduced by the Single European Act 1986, with a view to ensuring the establishment and functioning of the internal market as defined in Article 14 EC. By contrast to Article 94 EC, which was the original provision of the Treaty governing harmonization, Article 95 EC does not require unanimity, but qualify majority voting (QVM). Albeit fiscal matters, the free movement of persons and the protection of workers, Article 95 EC meant that positive integration would take place, even if some Member States raised dissenting voices. Fearing a substantial loss of their sovereignty, Member States introduced two safeguards when drafting Article 95 EC. Firstly, this provision may be relied

upon “save where otherwise provided for in [the] Treaty”, that is, it has a residual character. Secondly, it introduces a derogation procedure for those Member States wishing to maintain in force their own national provisions, or adopt new measures in the light of new scientific evidence. However, despite these two safeguards, the Community legislature started a centripetal trend, leading to a proliferation of Community measures.

Additionally, in the light of Titanium Dioxide, the ECJ allied itself with an expansive use of Article 95 EC, by embracing a wide interpretation of the concept of “internal market”. In this case, the Commission challenged Directive 89/428/EEC on the harmonization of programmes for reduction of pollution caused by waste from the titanium dioxide industry, alleging that it had wrongly been adopted under Article 130s EEC (now 175(4) EC). Instead, the applicant contended it should have been adopted under Article 95 EC. Whereas Article 130s required unanimity and thus, protected Member States to the maximum, the Commission sought to push forward the integrationist momentum. The ECJ found that, since the Directive required titanium dioxide industries to adopt programmes concerning the treatment of waste, production costs were rendered largely uniform and thus, conditions of competition too. Hence, the Directive equally aimed to eliminate pollution and to improve the conditions of competition in that industry. Accordingly, the ECJ held that the establishment and functioning of the internal market would not be achieved by solely removing obstacles to trade, but also by eliminating distortions of competition. Thus, reliance on Article 130s as well as on 95 EC was correctly founded. However, taking the view that recourse to dual legal basis was not possible, the ECJ opted for Article 95 EC, holding that this provision already compelled institutions to adopt a high level of environmental protection. Therefore, the Directive was annulled.

664 250 out of 282 Proposals put forward by the Commission were approved by 1992, most of which had as their legal basis Article 100a (now 95 EC). See COM (92) 383
666 OJ L 201, 14.7.1989, p. 56–60
Titanium Dioxide expanded the scope of Article 95 EC in two ways. Substantially, the ECJ held that the elimination of distortions of competition is necessary for the establishment or functioning of the internal market. Even in the absence of obstacles to trade, recourse to harmonization remains possible.\(^{667}\) Systematically, on an equal footing, the ECJ seemed to prefer Article 95 EC to other horizontal treaty provisions, such as Article 130s.

Further, the ECJ expanded again the interpretation of this treaty provision, by holding that recourse to Article 95 was not conditioned upon “approximating national laws”. On the contrary, where necessary, it can “lay down measures relating to a specific product or class of products”\(^{668}\).

As a result, though the ECJ dismissed several applications supporting Article 95 EC as legal basis to the detriment of other treaty provisions\(^{669}\), until 2000, no challenge succeeded in sticking down Community legislation adopted under this treaty provisions\(^{670}\). Arguably, for the sake of achieving the internal market programme launched by the Commission, the ECJ had decided to follow a pro-integrationist judicial restraint. Article 95 EC was conceived as an unstoppable vacuum of national power. Had the ECJ continued this line of reasoning, it would have been very difficult to argue that Community powers were governed by the principle of attribution\(^{671}\). In fact, all seemed to indicate that Article 95 EC had to be read as a general source of power to regulate the market\(^{672}\).

Reacting against this “judicial-accomplice” erosion of national sovereignty, the drafters of the Treaty of the European Union introduced


\(^{668}\) Case C-359/92, Germany v Council, [1994] ECR I-3685.


Article 5 EC, according to which, when exercising its legislative powers, the Community is bound by three constitutional principles, namely the principles of attribution, subsidiarity and proportionality. In the same way, national courts also showed their concern about the competences of the Community being unlimited. Perhaps taking note of these warnings, in *Tobacco Advertising I*, the ECJ changed the dynamics of integration and, for the first time, quashed a Community measure adopted under Article 95 EC. The subsection that follows tries to explain this case and its progeny, to conclude that, though taking the issue of competence seriously, the ECJ commits errors similar to the ones of USSC.

B.- The Tobacco Saga in three acts

1.- Act I. – *Tobacco Advertising I*

With a view to eliminating obstacles to the free movement of advertising media (other than television) and distortions of competition among advertisers, those benefiting from sponsorship of tobacco products and tobacco manufacturers; the Council and Parliament relied on Articles 47(2), 55 and 95 EC, as legal basis, to adopt Directive 98/43/EC. In principle, this Directive prohibited all forms of advertising and sponsorship of tobacco products in the Community. Nevertheless, its Article 3 allowed the advertising of brand names already used in good faith for both tobacco products and other types of goods or services. In the same way, the Directive excluded from its scope communications between professionals in the tobacco trade, advertising in sales outlets or in publications published and printed in third countries but not principally intended for the Community market. Moreover, Article 5 of the Directive did not preclude...

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673 See the ruling of the German Constitutional Court in *Brunner v European Union Treaty*, [1994] 1 CMLR 57. (where it subtly warned the ECJ that if it persisted in failing to police the boundaries of Community competences, national courts will have legitimate grounds to take over)
Member States from issuing stricter measures in relation to the advertising and sponsorship of tobacco products, that is, the Directive only laid down minimal harmonization.

Germany, which had voted against the adoption of the Directive, put forward several pleas contesting its validity. On the one hand, the applicant argued that the Community institutions had circumvented the prohibition laid down in Article 152 EC, according to which the Community lacks legislative powers in the realm of public health. On the other hand, the Directive did not contribute to the establishment or improvement of the internal market. Firstly, advertising of tobacco products had only an insignificant impact on intra-Community trade. Secondly, the applicant argued that, instead of promoting the advertising of tobacco products, the Directive negated the exercise of this economic freedom. Finally, the applicant objected the transposition of the case-law of Article 28, in so far as it prohibited minimal obstacles to trade.

As the USSC did in *Lopez*, the ECJ began by stating that, in pursuance with Article 5 EC, Article 95 EC cannot be read as vesting upon the Community legislature “*a general power to regulate the internal market*”. Neither mere disparities between national rules nor abstract obstacles to the free movement can lead to the adoption of Community legislation under Article 95 EC. Next, the ECJ rejected that Article 152 EC precluded all Community measures from having an impact on the protection of public health. Provided that the contested Directive fulfilled the conditions laid down in Articles 47(2), 55 and 95 EC, the fact that the Community legislature had opted for highly protecting human health was welcomed. Indeed, the ECJ pointed out that it was Article 95 EC itself which compels Community Institutions to take into account human health when enacting harmonizing measures thereunder. Thus, the validity of the Directive could not be questioned under public health considerations alone, but as to whether it was permissible to rely on the aforementioned treaty

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676 *Tobacco Advertising I*, 83-84
provisions as legal basis. In this regard, the ECJ verified whether the contested Directive contributed to eliminating [a] obstacles to free movement or [b] distortions of competition.

As for the elimination of obstacles to the free movement of goods and freedom to provide services, the ECJ drew a distinction between static and dynamic advertising media. While recognising that the choice of Article 95 EC was legitimate with a view to ensuring the free movement of dynamic advertising media (e.g. newspapers or magazines), the ECJ concluded that this was not the case for advertising media located in hotels, restaurants, cafes or cinemas (e.g. posters, parasols, ashtrays). It is true that not all provisions contained in the Directive had to contribute to eliminating obstacles to free movement, as long as they were “necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented”, the ECJ wrote. However, it briefly indicated that this was not the case. Anyhow, as AG Fennelly observed, traders complying with the Directive were not exempted from stricter rules laid down by the Member States under Article 5. Thus, even if obstacles to the free movement of dynamic advertising media were real or at least potential, the absence of a “free movement clause” did not guarantee their removal. As a result, the ECJ concluded that the Directive did not eliminate obstacle to free movement.

Regarding the elimination of distortions of competition, quoting Titanium Dioxide, the ECJ held that distortions had to be “appreciable”. The ECJ conceded that advertising agencies and producers of advertising products would be economically favoured by States imposing fewer restrictions on the advertising of tobacco products. Consequently, these disparities would distort sound competition. However, by contrast to differences in the production cost as it was the case in Titanium Dioxide, these distortions were “remote and indirect”, that is, not appreciable.

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677 Ibid, 88
678 Ibid, 98-99
679 Ibid, 100
Although the relocation of sports events, resulting from national disparities concerning their sponsorship by tobacco products, could give rise to appreciable distortions of competition, this finding did not justify an “outright prohibition of advertising of the kind imposed by the Directive”.

To sum up, the ECJ conceded that the Community had competences to regulate certain forms of advertising and sponsorship of tobacco products. Nonetheless, in the light of the general nature of the prohibition, the ECJ opted for annulling the Directive in its entirety.

From *Tobacco Advertising I*, it seems that the ECJ tries to enforce the principle of attribution (or enumerated powers). As the USSC held for the Commerce Clause, the ECJ ruled that Article 95 EC cannot be read as a “carte blanche”\(^\text{680}\). It is not an unlimited source of Community power, but it is constrained to constitutional internal and external limits.

Internally, in order to recourse to Article 95 EC, the Community measure must contribute to eliminating “real or potential obstacle to free movement” or alternatively, “appreciable distortions of competition”. In accordance with the ECJ, static advertising media cannot be considered as an obstacle to free movement. In this regard, if one considers that advertising is a selling arrangement\(^\text{681}\) and that prohibiting the advertising of tobacco products in public places does not discriminate against imports\(^\text{682}\), it seems that “non-discriminatory selling arrangements” fall outside the scope of Article 95 EC. It seems logical to believe that what is not considered an obstacle to Community trade under Article 28 EC cannot justify the choice of Article 95 EC. Arguably, *Tobacco Advertising I* introduces a parallelism between Article 28 EC and 95 EC\(^\text{683}\). The Community Institutions may not

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\(^{680}\) Opinion AG Fennelly, Para. 89


\(^{682}\) *Hünermund* (holding that German rule prohibiting pharmacies from advertising parapharmaceutical products outside their premises was not discriminatory, consequently falling outside Article 28 EC)

expand the scope of the free movement of goods beyond the limits set-out in Keck. Therefore, harmonization would focus on national measures which, while falling within the scope of Article 28 EC, can be justified under Article 30 EC or under mandatory requirements, but nonetheless, hinder the completion of the internal market. As recognised by the case-law of the ECJ, Community legislation would then focus on construing the degree of discretion enjoyed by the Member States when invoking the protection of general interests. However, following this approach, several pieces of Community legislation in the field of consumer protection or contract law would be “ultra vires”. Still, the ECJ simultaneously introduced an exemption from the overlapping interpretation of Articles 28 and 95 EC. Activities not considered obstacles to the free movement can be harmonized in so far as they are necessary to avoid the circumvention of the aim the Community legislature seeks to achieve. This exemption echoes the USSC in Lopez when holding that local non-economic state activities may be federally regulated in order for the general economic scheme not to be undercut. Unfortunately, the ECJ did not develop this point further, living the door open for different interpretations.

As for “appreciable” distortion of competition, the ECJ seems willing to introduce a de minimis test, along the lines of the one accepted under competition law. This would seem at odds with the case-law pertaining to the free movement, where the ECJ has consistently refused to endorse a de minimis rule. Distortions on the production costs are

128 (suggesting that the proposal of the Commission on the Tobacco Directive was misconceived in the light of Keck)

684 This is precisely how the Commission intended to use Article 28 EC. See The Commission White Paper Completing the Single Market, COM (85) 310.


687 For a critical opinion, see L GORMLEY, Competition and Free Movement: Is the internal market the same as the Common Market?, (2002) 13 EBL Rev., pp 517-522 (arguing that the notion of “internal market” of Article 95 EC only aims at eliminating obstacles to free movement. Conversely, the notion of “common market” laid down in
sufficiently important to trigger harmonization, so are disparities in sponsoring sports events. On the contrary, divergent national regulatory frameworks on the advertising of tobacco products are not. But why is that? The ECJ did not provide an exact answer; it only briefly highlighted the differences with Titanium Dioxide.

Externally, in relation to activities complying with the internal limits of Article 95 EC, the ECJ examined the validity of the contested Directive under the principle of proportionality laid down in Article 5 EC. Firstly, since potential contradictions among national advertising rules of tobacco products constituted obstacles to the free movement of dynamic media, the ECJ went on to assess whether the Directive was suitable for eliminating this obstacle. It replied in the negative. Owing to the lack of a free movement clause, the Directive was manifestly inappropriate to ensure the free movement of dynamic media. Secondly, as for appreciable distortions of competition arising from disparities in sport sponsorship rules, the Community had gone beyond what it was required to counter this obstacle. An outright ban on all types of sponsorship by tobacco products excessively eroded the competence of the Member States. Thus, the ECJ applied the two limbs of the principle of proportionality, stressing its decisive importance in balancing Community and Member State legislative powers.

As a result, Tobacco Advertising I encapsulates the ECJ’s efforts to enforce constitutional limits upon the Community legislature. Thus, as Tridimas suggests, it is an activist judgement because it empowers the ECJ vis-à-vis the Community political institutions, but decelerates the process of integration. However, by leaving important questions unresolved, the ECJ

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Article 94 EC also includes distortions of competition. He also observes that “competition analysis does not assist the removal of national barriers to trade within the Community trough negative integration”. In any case, the author indicates that when seeking to eliminate distortions to competition, in the light of Tobacco Advertising I, the Community legislature will be required to include an assessment demonstrating their appreciable effects).

repeated analytical mistakes similar to the ones of the USSC in *Lopez*. It did not indicate to what extent the scope of Article 28 and 95 EC overlap in relation to “the notion of obstacles to trade” and, failed to provide a precise definition of “*appreciable*” distortions of competition. Nor did it not elucidate whether, once the existence of an obstacle to trade was proved, the insertion of a “*free movement clause*” would render Community legislation compatible with the principle of proportionality.

2.- Act II. – *BAT, Arnold André* and *Swedish Match*.

In *BAT*689, two producers of tobacco products instituted proceedings against the intention of the UK Government to transpose Directive 2001/37/EC690 into national law. Adopted under Articles 95 and 133 EC, the Directive introduced maximum tar, nicotine and carbon dioxide yields of cigarettes. It also imposed labelling requirements regarding warnings for health as well as indications of yields, while banning descriptions suggesting that a particular tobacco product is less harmful to health (e.g. mild, light). Article 3 extended the aforementioned maximum yield to cigarettes produced in the Community, but intended for export. Finally, Article 13 of the Directive precluded Member States from adopting additional requirements against traders complying with its provisions. On the merits, the ECJ first examined whether the Directive was compatible with Articles 95 and 133 EC. In recalling *Tobacco Advertising I*, the ECJ held that reliance on Article 95 EC was conditioned upon finding that the contested measure contributed to eliminating obstacles to trade or distortions of competition. To this effect, in quoting *Keck*, the ECJ held that disparities in the national legislations concerning the composition or labelling of tobacco products “*are in themselves liable [...] to constitute obstacles to the free movement of goods*”691. In addition, taking the view that Member States were increasingly conscious of the danger to health caused by tobacco products

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689 Case C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd* and *Imperial Tobacco Ltd*, [2002] ECR I-11453
690 OJ L 194, 18.7.2001, p. 26–35
691 Ibid, 64
and that the already existing Community legislation harmonizing maximum yield tars and presentation of tobacco products only lay down minimal requirements, in the absence of the contested Directive, nothing prevented state legislatures from adopting stricter measures. Thus, the ECJ concluded that the Directive tackled obstacles to free movement. Besides, by contrast to the directive annulled in Tobacco Advertising I, in inserting a “free movement clause”, Directive 2001/37/EC guaranteed that tobacco products produced in conformity with its provisions would move freely throughout the Community.

Furthermore, claimants put forward two arguments contesting the validity of the Directive in the light of the principle of proportionality. On the one hand, in banning the use of certain descriptors, the Community legislator had excessively interfered with their rights. In their view, requiring the display of tar, nicotine and carbon dioxide levels in the packaging sufficed to ensure that consumers were objectively informed. In the same way, it would have been preferable the adoption of provisions governing the use of descriptors or at least, safeguarding established denominations protected by trade marks. On the other hand, they alleged that prohibiting the manufacture of cigarettes for export not complying with the Directive was inadequate to prevent the illegal re-importation into the Community, owing to the fact that most of the illegal cigarettes are produced in third countries. This risk would be better addressed by reinforcing import controls. However, the ECJ rejected both arguments. Firstly, it stated that the Community enjoys broad discretion when adopting policy measures, which entail complex assessments. Accordingly, the role of the judiciary is limited to examining that the Community has acted within those bounds, that is, that the measures adopted are not “manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue”692. Secondly, the ECJ stated that the Community was right in considering that the descriptors laid down in Article 7 could be misleading and consequently, it decided to forbid them in order to ensure that consumers were well aware of

692 Ibid, 123
the toxicity of tobacco products. Finally, though Article 3 of the Directive
did not in itself ensure that the importation of illegal cigarettes into the
Community would be prevented, the ECJ stated that it contributed to this
objective. Consequently, the ECJ replied to the referring court that there
were no factors for annulling the Directive.

Two years later, in Arnold André\textsuperscript{693}, a German company was banned
from importing tobacco for oral use called “Snus” from Sweden. Likewise,
in Swedish Match\textsuperscript{694}, the Swedish producer of “Snus” challenged the
validity of the decision of British authorities denying the marketing of this
product in the UK. Both decisions were taken on the basis of the national
law implementing Article 8 Directive 2001/37/EC which, prohibited the
market of tobacco for oral use in the Community. Article 8 also indicated
that, in pursuance with Article 151 of its Act of Accession, Sweden was
excluded from this prohibition. The German and the Swedish Company
challenged this decision before the Administrative Court of Minden and the
High Court of England and Wales respectively. The latter decided then to
suspend proceedings, while asking to the ECJ whether Article 8 complied
with Articles 95 EC, 28 EC and the principle of proportionality.

Unsurprisingly, when deciding on the compatibility of Article 8 of
Directive 2001/37/EC with Article 95 EC, the ECJ limited itself to recalling
Tobacco Advertising I and, especially BAT. It simply repeated that, since
some Member States had prohibited the selling of tobacco products for oral
use, “those prohibitions […] contributed to the heterogeneous development
of that market and were therefore such as to constitute obstacles to the free
movement of goods”\textsuperscript{695}. As for the principle of proportionality, the German
company claimed that Article 8 did not take into account recent scientific
information. The ECJ disagreed, holding that no scientific information
proved that tobacco for oral use presented no danger for human health. In
particular, the ECJ considered that there were no alternative measures

\textsuperscript{693} Case C-434/02, Arnold André, [2004] ECR I-11825
\textsuperscript{694} Case C-210/03, Swedish Match, [2004] ECR I-11893
\textsuperscript{695} Arnold André, Op cit., Para. 39; Swedish Match, Op. Cit., Para. 38
capable of being as effective as a complete ban, since they would allow these products to gain a place in the market. Further, the German company argued that Article 8 of the Directive was in breach of Article 28 EC. The ECJ concurred in this point with the applicant. It, nevertheless, held that Article 8 was justified on the ground that it protected the health and life of humans, as provided by Article 30 EC. Finally, after holding that the Community legislature had complied with its obligation to state reasons, the ECJ ruled that Article 8 of the Directive complied with the EC Treaty.

Although the outcome in BAT, Arnold André and Swedish Match favours the Community, one must stress that the ECJ applied the rationale it defended in Tobacco Advertising I. Reliance on Article 95 EC is conditioned upon [1] finding obstacles to free movement or appreciable distortions of competition and at the same time, [2] complying with the principle of proportionality. Furthermore, BAT seems to partially clarify Tobacco Advertising I. It reinforces the argument supporting a parallelism between Article 28 EC and 95 EC. In fact, the ECJ referred to Keck in order to qualify national disparities concerning composition and presentation of tobacco products as obstacles to trade. Therefore, product requirements can be harmonized under Article 95 EC. Likewise, the ruling in Arnold André suggests that positive harmonization must comply with Article 28 EC or be justified under Article 30 EC. A total ban of a product, that is, a quantitative restriction imposed by the Community is an obstacle to trade and consequently, it can only be upheld in so far as it is justified under Article 30 EC. Accordingly, in relation to the notion of “obstacles to trade”, the scope of Article 28 and 95 EC overlap. To this effect, the Dansonville Formula and Keck case-law may apply mutatis mutandis to positive integration. However, one can rebut this reading of BAT, Arnold André and Swedish Match. Simply because the ECJ clearly stated that product requirements fall within the scope of Article 95 EC, it does not follow inter alia that non-discriminatory selling arrangements are out. Put differently, an “inverse a fortiori” argument is not entirely convincing. From BAT, it can only be inferred that Article 28 EC and 95 EC converge at eliminating national measures, which unless justified, are incompatible with the internal
market. Moreover, it appears that introducing “free movement clauses” brings Community legislation in line with the principle of proportionality. This raises questions as to whether Article 95 EC leaves room for minimum harmonization.  

3.- Act III. - Tobacco advertising II 

As a result of the annulment of Directive 98/43/EC, the Community adopted Directive 2003/33/EC, on the basis again of Articles 47(2), 55 and 95 EC. The new Directive also regulated advertising and sponsorship in respect of tobacco products in media other than television. Article 3 of the Directive prohibited the advertising of tobacco products in the press and other printed publications, with the exception of publications exclusively intended for professionals in the tobacco trade, or printed and published in third countries and not principally intended for the Community market. It also extended this prohibition to the information society services (e.g. Internet). Further, Article 4 prohibited the advertising of tobacco products in radio programs, as well as their sponsorship by tobacco manufacturers or distributors. Article 5 banned the sponsorship of events or activities taking place in several Member States or having cross-border implications by tobacco products. The free distribution of tobacco products in these events or activities was also prohibited. Finally, Article 8 of the Directive laid down a “free movement clause”. In trying to repeat the previous success obtained, Germany challenged the validity of Articles 3 and 4 of the Directive. Firstly, the applicant contented that these Articles neither removed obstacles to the free movement nor appreciable distortions of competition. Germany alleged that 99.9% of press and other publications were marketed only regional or locally. Thus, the obstacles to their free

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696 P ROTT, Minimum Harmonization For the Completion of the Internal Market? The Example of Consumer Sales Law, (2003) 40 CML Rev., pp 1107-1135 (affirming that a “too low degree of harmonization” would not contribute to the establishment and functioning of the internal market”. To this effect, in the realm of private law, e.g. consumer protection, he suggests that minimum harmonization can only take place outside the core provisions of Directives adopted under Article 95 EC)  
697 Case C-380/03, Germany v Parliament and Council, [2006] ECR I-11573  
698 OJ L 152, 20.6.2003, p. 16–19
movement that the Community legislature was seeking to eliminate were only marginal. In the same way, “other publication” could allude to a wide range of publications targeted only to local people. (e.g. posters, telephone directories, leaflets…). Additionally, there was no distortion of competition, owing to the fact that there was no competitive relationship between local publications in one Member State and those in other Member States. Germany also put into question that, in extending the advertising ban to information societies, prohibiting the advertising in “paper” media would not be circumvented. In fact, since Internet operates worldwide, websites of third countries could advertise tobacco products. Moreover, as for radio advertising, Germany argued that radio programs take place locally. Finally, as it did previously, Germany insisted that the Directive did not seek to contribute to the functioning or establishment of the internal market, but to protect public health. Consequently, it was contrary to Article 152(4) (2) EC. However, the ECJ immediately disagreed. In recalling its previous case-law, it repeated that, in so far as the Directive eliminated obstacles to trade or removed distortions of competition, the Community legislation was not prevented from protecting public health. On the contrary, Article 152 and 95 required the Community institutions to take into account the protection of public health.

The ECJ went on to acknowledge the existence of disparities between the Member States in relation to the advertising and sponsorship of tobacco products. Indeed, whereas several Member States allowed the advertising of tobacco products under certain conditions, others envisaged even greater restrictions. Besides, these disparities were not only real, but also increasing. In this sense, the ECJ observed that these disparities impeded the free movement of press and other publications, and freedom to provide advertising services thereof in three ways. Firstly, they impeded market access to imports more than they did so to domestic products. Imported publications would have to comply with the rules laid down by the home and the host State, imposing a double burden. Secondly, they also prevented services providers from offering space in their publications to advertisers located in different Member States. Finally, the ECJ rejected the
de minimis rule advanced by Germany. “Even if only by way of exception or in small quantities”, the previous findings remained valid regarding publications primarily distributed locally. Thus, after noting that the same conclusions applied to advertising of tobacco products in radio programs and information societies, it held that disparities in the national laws constituted obstacle to trade, as required by Article 95 EC.

The ECJ proceeded then to examine whether Article 3 and 4 of the contested Directive actually contributed to eliminating these obstacles. As it could be foreseen from its ruling in Tobacco Advertising I, the ECJ held that a ban on advertising of tobacco products facilitated the free movement of printed media and the provision of radio and information society services. Moreover, the inclusion of a free movement clause guaranteed that once publications or radio programs complied with the Directive, they are free to move or broadcast in the Community. Additionally, the ECJ held that reliance on Article 95 EC was not conditioned upon the existence of an interstate element for every situation covered by the Community measure adopted thereunder, in so far as it generally contributed to the functioning and establishment of the internal market.

As for the principle of proportionality, Germany argued that the prohibition broadly drafted in Articles 3 and 4 was contrary to the freedom of press, in so far as it restricted the revenue of press products. Moreover, it alleged that an exemption should have been granted for press media locally distributed. Nevertheless, the ECJ took a different view. It held that, though freedom of press was recognised as a general principle of EC law, this fundamental right could be proportionally and rationally limited by public interests. Since the Directive facilitated the free movement of press media, while ensuring a high protection of human health, the ECJ stated that the solution adopted by the Community legislature was not manifestly inappropriate. Further, in relation to publications targeting a regional or local market, the ECJ ruled that there were not less restrictive options available. Indeed, granting an exemption would have rendered extremely
difficult to distinguish between the exempted publications and the ones violating the Directive. As a result, the ECJ dismissed the application.

_A priori_ and as all sequels, _Tobacco Advertising II_ leaves the reader with a “désjà-vu” impression. In _Tobacco Advertising I_, the ECJ hinted that it would not oppose the harmonization of “dynamic advertising media”, such as new papers, journals and magazines\(^\text{699}\). As the ECJ pointed out in both cases, disparities among national laws could obstruct the free movement of these goods. This was precisely what the Community legislator did, when adopting Directive 2003/33/EC. Indeed, having learned from the mistakes of the past, the Community legislator included a free movement clause, and limited the ban on sponsorship by tobacco products to events having cross-border implications. Moreover, extending the prohibition to radio programs and information societies not only seems reasonable, but it could be considered as completing the legislative framework initiated by Directive 89/552/EEC\(^\text{700}\) prohibiting the advertising of tobacco products in order to promote the free broadcasting of television programs. In the same way, the ECJ seems to embrace a parallelism between Articles 28 and 95 EC regarding the concept of “obstacles to trade”. The Opinion of AG Leger develops this point further. He posited that, even if qualified as selling arrangements; the ban on advertising would discriminate against imports, consequently falling within the scope of Article 28 EC. Thus, AG Leger appears to support that what are considers obstacles to trade under Article 28 EC, are also obstacles under Article 95 EC. Thus, Directive 2003/33/EC can be read as the codification of _Tobacco Advertising I_.

However, in examining the existence of obstacles to the freedom to provide radio and Internet services, the ECJ limited itself to indicating that, in the view of the “increasing public awareness”, it was likely for future barriers to emerge. Consequently, the ECJ set the probability of new obstacles at such a low level that it thwarted the accepted internal limits of

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\(^{699}\) _Tobacco Advertising I_, Para 98

\(^{700}\) OJ L 298, 17.10.1989, p. 23–30
Article 95 EC\textsuperscript{701}. Indeed, it appears that the ECJ incurred into an oxymoron. How can mere disparities among national rules not be enough to invoke Article 95 EC, while “potential” obstacles are? Therefore, as the Raich did when defining “economic activities”, the ECJ also appears to follow a broad definition of activities to be regulated at a central level. Obstacles to trade include not only “actual”, but also “prospective” barriers.

C.- Article 308 EC: a “Scalia-like” alternative?

One may wonder whether the Directive annulled in Tobacco Advertising I could have been adopted under Article 308 EC. This treaty provision enables the Community to adopt measures necessary for attaining objectives of the treaty where no other specific provision can be used. However, as the US experience demonstrates, Article 308 cannot be read as circumventing the principle of attribution. In its Opinion 2/94, the ECJ ruled that Article 308 may not modify the “general framework of the treaty”, that is, it cannot amount to a treaty amendment\textsuperscript{702}. In the same way, it is also suggested that this provision is framed by the principles of subsidiarity and proportionality as provided by Article 5 EC\textsuperscript{703}.

Coming back to the question, I would suggest a negative reply. Firstly, the unanimity rule would render politically impossible the use of this treaty provision where a Member States votes against the Directive. Secondly, one could argue that Article 308 could still be invoked to purse treaty objectives outside the realm of the internal market\textsuperscript{704}. For example, the Directive could contribute “to the attainment of a high level of health protection”\textsuperscript{705}. Nevertheless, this argument is difficult to reconcile with Article 152 EC which expressly excludes “any harmonization of the laws”

\textsuperscript{701} M LUDWIGS, Note on Case C-380/03, (2007) 44 CML Rev., pp1159-1176
\textsuperscript{703} R SCHUTZE, Organized Change towards an “Even Closer Union”: Article 308 EC and the Limits to the Community’s Legislative Competence, (2003) 22 YEL, pp 79-116
\textsuperscript{704} This would nevertheless appear to run counter the wording of Article 308 EC, which limits its application to situations “in the course of the operation of the common market”. However, this contextual limitation played no role in the case-law of the ECJ. See Schutze, op cit, 88-89. Besides, the new Article 352 TFEU finally abandons it.
\textsuperscript{705} Article 3 (1) (p) EC
designed to protect and improve human health. Thirdly, due to its residual character, Article 308 EC can only be relied upon if it harmonizes beyond the bounds of Article 95 EC. Accordingly, this provision could be invoked in order to cover activities being neither obstacle to the free movement nor causing distortions of competition but if left-unregulated, they would render harmonization ineffective. Nevertheless, just like in the US Commerce Clause, Article 95 EC has also “internalised” the regulation of these activities. Finally, admitting that Article 28 EC defines the outer-limits of Article 95 EC; could Article 308 EC be invoked to harmonize non-discriminatory selling arrangements not causing appreciable distortions of competition? This would involve two opposite understandings of the internal market, namely one limited to removing obstacles to trade, the other exercising a general regulatory power over economic matters. Nevertheless, since the Community is not vested with a plenary power to regulate the market, Article 308 cannot be relied upon.

III.- Enumerated Powers Compared

A.- Can the Community criminalise the possession of cannabis under Article 95 EC?

It appears that the width of the Commerce Clause is broader than the one of Article 95 EC. Selling arrangements involve local economic activities and consequently, they can be subjected to the aggregation principle laid down in Wickard. Thus, Congress would have no problems in regulating tobacco advertising even for static media. As a matter of fact, Congress has done so, by approving the Federal Cigarette Labeling and Advertising Act. On the contrary, it is difficulty to see how either prohibiting gun possession near schools or creating civil actions against gendered motivated violence could contribute to eliminating “obstacles to trade” or “appreciable distortions of competition”.

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706 Article 352 (3) TFEU excludes the “flexibility clause” from areas where the Treaty prohibits harmonization.
707 Tobacco Advertising I, para 100; BAT, op cit, para 82
Raich is somehow different. The USSC believed that imposing criminal penalties for possession of home-grown marijuana for therapeutic use would smooth the eradication of this commodity from the interstate market. Could the EC legislator adopt an analogue measure to the CSA? In my view, the EC legislator could prohibit the marketing of marijuana. Indeed, in the light of Swedish Match and Arnold Andre, for the ECJ to reach this outcome it would suffice to swap the ban on “oral tobacco” for a ban on “cannabis”. The ban on marketing cannabis could be regarded as eliminating the opposite national views towards its legalisation, which lead to “heterogeneous development of that market such as to constitute an obstacle to free movement”.

However, prohibiting the possession of home-grown commodities raises some questions. It would be difficult to see how home-grown commodities for self-consumption could be an “obstacle to free movement”, since they never entered the market in the first place. Perhaps, the answer lies in the alternative argument posited by Justice Stevens in Raich, whereby regulating local non-economic activities is justified in order to prevent the general scheme of the CSA from being undercut. This line of reasoning has been recognised by the ECJ in Paragraph 100 of Tobacco Advertising I. The ECJ held that activities not being obstacles to trade can be nevertheless harmonized, provided that they are necessary to “ensure that certain prohibitions in pursuit of that purpose are not circumvented”. Would that imply that the Community legislator is entitled to include activities not being obstacles to trade (home-grown marijuana for self-consumption) with a view to ensuring the effectiveness of a broad regulatory scheme (its eradication)? Although in Tobacco Advertising I the ECJ did not elaborate further on this point, a close reading of BAT would suggest an affirmative reply. There, the extension of labelling and packaging requirements to cigarettes intended solely for exportation to third countries was not

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710 Arnold Andre, op cit, para 39
711 BAT, Op cit, Para. 82.
considered as an obstacle to trade. However, the ECJ recognised that its inclusion was necessary in order for the whole scheme introduced by the Directive not to be undermined. Likewise, in *Tobacco Advertising II*, the ECJ acknowledged that it was very complex for the Community legislator to preserve the effectiveness of the Directive, while distinguishing between intra-Community and local publications\textsuperscript{712}. This clearly echoes *Raich*, where the USSC recognised the difficulty for the DEA in distinguishing between medical and drug-trafficking marijuana. Therefore, it seems possible for the Community legislature to rely on “*Raich’s regulatory net*”.

Another alternative would be for the Community legislature to include “jurisdictional hooks”, with a view to preserving the validity of its legislation. As matter of fact, the Community legislator has adopted this technique. It suffices to look at Article 5 Directive 2003/33/EC. There, the ban on sponsorship by tobacco products was limited to sports events “having cross-border effects”. However, as previously mentioned, this legislative technique cannot validate *ipso facto* Community legislation, when it intends to expand, rather than constrain, Community powers. For instance, the inclusion of a jurisdictional hook would not render the regulation of activities “not-being” obstacles to trade lawful. Therefore, though this legislative technique illustrates the commitment of the Community institutions to be more cautious when relying on Article 95 EC, it does not solve by itself the issue of competences.

Finally, until recently it was not certain whether the Community legislator had the power to enact criminal statutes. If the reply had been in the negative, this would have been a major difference between the scope of federal and Community commercial powers. Nonetheless, two recent cases\textsuperscript{713} suggest that the ECJ will not annul Community legislation just because it imposes criminal penalties. In order to make the prohibition effective, the Community legislator could require Member States to impose

\textsuperscript{712} *Tobacco Advertising II*, *supra* note 697, Para 149.

“effective, dissuasive and proportionate” penalties for the marketing and possession of cannabis. Certainly, due to their informative proximity, it is for the Member States to assess the appropriateness of a punitive response. However, where criminal sanctions are so “essential” for Community legislation to be effective that the appraisal becomes manifest, the Community legislator itself may require their adoption\textsuperscript{714}. Whereas criminal penalties seem adequate to combat drug trafficking, the same cannot be said in relation to the possession of cannabis. In the light of different possible strategies towards drug-users, it is not self-evident whether criminalising possession would actually contribute to the effectiveness of the general ban. Thus, the ECJ would defer to the Member States when designing the policy to combat the possession of cannabis.

As a result, the Community could ban home-grown marijuana intended for self-consumption in so far as it was necessary not to circumvent the prohibition to market it. However, the Community is not entitled to impose criminal penalties for its possession.

B.- Appreciable distortions of competition

The notion of “distortions of competition” does not find an equivalent under the Commerce Clause. It is true that in \textit{United States v Darby}, when enacting the FLSA, the motive and purpose of Congress was to “\textit{make effective (its) conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions}”\textsuperscript{715}. Nevertheless, the USSC stated that congressional intent lay outside its purview. In fact, the rationale of the USSC follows an inverse “\textit{iter}” to the one of the ECJ. Since Congress has the power to control all objects inside the “\textit{river}” of commerce, it may exclude all the ones it considers injurious. Accordingly, Congress is empowered to exclude from the interstate commerce objects which, for

\textsuperscript{714} See Opinion of AG Colomer in C-176/03, paras 48-50

\textsuperscript{715} \textit{United States v Darby}, supra note 715, 115.
example, distort competition. Inversely, the Community legislature may only rule out from intra-Community trade Articles qualified as “obstacles to trade” or which “distort competition”. As Arnold André and Swedish Match reveal, this legislative exclusion must also comply with Article 30 EC. Accordingly, if one extrapolates the facts of United States v Darby to a European scenario, the ECJ would uphold a Directive regulating minimum wages and maximum working hours adopted under Article 95 EC, on the grounds that it removes distortions of competition arising from disparities in national labour laws; that it pursues the general interest of ensuring the wellbeing of workers and; that it is proportionate.716

By contrast, it seems that the rationale of United States v Darby would follow the argumentative line of the ECJ in relation to harmonizing measures having an impact in the public health. Once it is demonstrated that a federal or Community measure complies with a constitutional source of authority, what lies “under the guise of regulating the interstate commerce” escapes judicial control. Let it be improving labour standards, tackling discrimination in public places, prohibiting marijuana for medical purposes or improving the health of citizens by reducing tobacco advertising and sponsorship, both Courts will not oppose to these policies, provided that they are consistent with the constitutional requirements to regulate commerce. Hence, in the US and in Europe, the judiciary accepts the “indirect or incidental” regulation of social matters at federal level through the medium of commercial regulation.

C.- Concluding Remarks

Three conclusions may be drawn when comparing the Lopez-Morrison-Raich Trilogy with the Tobacco Saga. Firstly, both the USSC and the ECJ have stressed that the commercial powers of the central government are not

infinite, but they must comply with the principle of enumerated powers. To this effect, both Courts sought to identify activities falling outside the scope of the Commerce Clause and Article 95 respectively. The *Lopez* Court indicated that local non-economic activities do not have a substantial effect on interstate commerce, while *Tobacco Advertising I* suggests that non-discriminatory selling arrangements are not obstacles to trade. However, both Courts failed to provide clear guidance as to the activities remaining “within”. *Lopez* did not provide a definition of “economic activities”. Likewise, the ECJ did not clarify either to what extent the scope of Articles 28 and 95 overlap or when distortions of competition are appreciable.

Secondly, in subsequent developments, these analytical flaws benefited the federal and Community legislature. In *Raich*, Justice Stevens provided the broadest possible definition of economic activities. In *Tobacco Advertising II*, the ECJ opened the door to “potential” obstacles. Finally, *Tobacco Advertising I* and *Lopez* introduced an important exception to the regulation of activities falling outside the scope of the Commerce Clause and Article 95 EC respectively. Where the inclusion of these activities prevents the general regulatory scheme from being circumvented, Congress and the Community legislature may expand its “regulatory net”. Besides, in determining whether this is the case, both Courts apply a soft standard of review.

Therefore, the foregoing raises questions as to whether the principle of enumerated powers (or attribution) may suffice by itself to counter “centripetal forces”. Perhaps, it would best to look at other additional or alternative solutions, which would better allocate powers between the center and the periphery.

**IV.- Other Solutions to Counterbalance the Centripetal Trend**

**A.- Reliance on the Political Process**

Some American scholars maintained that political safeguards are enough to protect States’ autonomy. For example, Weschler maintained that the Senate -representing the will of States, the important role of state
legislatures in congressional districting and presidential rapports with Congress- ensures that state rights are taken into account in the federal-decision-making process\textsuperscript{717}. Garcia echoed this theory, when the majority ruled that “the structure of the Federal Government itself was relied on to insulate the interests of the States”.\textsuperscript{718} However, not only did Lopez suppose a revival of judicial enforcement of federalism, but this approach also fails to capture the modern political environment. Firstly, state governments’ interests do not necessarily coincide with the protection of States as “political institutions”\textsuperscript{719}. For instance, obtaining federal funding may reduce the incentives of state governments to oppose to an \textit{ultra vires} federalisation of extensive areas of law. Secondly, since Senators are no longer chosen by state legislatures but directly elected\textsuperscript{720}, a Senator will support interests geographically concentrated in his State, but not its regulatory prerogatives. federal and state elected officials are “rivals and not allies”, competing for providing the electorate with beneficial regulation. Thirdly, it is very unlikely for the US President to veto popular bills alluding to federalism. For instance, though President Bush raised federalism concerns, he finally did not veto the GFSZA\textsuperscript{721}. Fourthly, political safeguards do not prevent “horizontal aggrandisements”, that is, a coalition of States imposing their preference on a dissenting minority. Last but not least, since federalism is not a tangible policy objective, Congress may forego it to benefit more pressing substantive policies\textsuperscript{722}.

Most recently, Kramer has tried to rescue this doctrine, claiming that organised national parties protect federalism. They link the fortunes of federal politicians to state and local party organisations, encouraging them

\textsuperscript{717}H WESCHLER, The Political Safeguards of Federalism: The Role of The States in the Composition and Selection of the National Government, (1954) 54 Colum.L.Rev., p 543-560; Choper, supra note 610, pp 1561-67
\textsuperscript{718}Garcia, supra note 609, 551
\textsuperscript{719}L KARMER, Putting the Politics Back into the Safeguards of Federalism, (2000) 100 Colum.L.Rev., p 215-292
\textsuperscript{720}XVII Amendment US Constitution
\textsuperscript{721}Perhaps, he was not willing to suffer the political harm of opposing to the “omnibus” Crime Control Act, a variety of legislative provisions combating crime, which were positively welcomed by the public opinion, and of which the GFSZA was part.
to work together towards common goals. However, Kramer’s theory main flaw is that it entrusts non-constitutional actors with protecting core constitutional values. Thus, political parties are not permanently committed to defending federalism. Indeed, just like state governments’ interests not always coincide with state institutional integrity, the fact that political parties are organised at state level does not imply that they protect the State. Local politicians would be more than happy to transfer expensive and troublesome policies to the federal government.

Drawing on the US experience, Young maintains that, in the EU, the political safeguards have also failed to protect state autonomy. Firstly, though States are best represented at the Council than in Congress, success in obtaining substantive policy commitments may overwhelm concerns over institutional interests. Admittedly, the Council prevents radical intrusions into state autonomy, but it leaves the door open to gradual erosions. Indeed, with a view to obtaining short term objectives, Bermann suggests that European States have obviated long term considerations on regulatory competences. In the same way, incentives to protect federalism become less attractive when state executives rely on the Council to circumvent political obstacles at national level. Thus, “communitarization” was seen by state executives as a way of escaping from parliamentary control. Likewise, the shift from unanimity to QMV has facilitated “horizontal aggrandisements”. Secondly, it is difficult to see how the Commission will protect state autonomy when the Treaty itself prohibits its members from acting in the interests of the Member States. Besides, its formal promises to respect subsidiarity have not been followed in practice. Finally, empirical evidence reveals that the overwhelming voting pattern of the European Parliament (EP) is explained by “left-right” politics, while national interests,

\[723\] Kramer, 273
\[724\] Young, supra note 625, p 75
\[728\] Article 213 EC.
independent of national party positions, have a marginal influence on voting\textsuperscript{729}. Arguably, Kramer’s theory could still be applicable to the EP. Indeed, not only are candidates elected from national parties, but European transnational parties need the support of their national counterparts. At the same time, reducing informative costs and improving voting efficiency force national parties to forge alliances at EU level. Yet, the same criticisms can also be repeated here. Notwithstanding Euro-sceptics, parties are subject to other concerns that not always address federalism.

Therefore, since all EU political institutions have failed to check the vertical powers of the Community, their “\textit{prevailing institutional incestuousness}” has been denounced, urging for a better competence monitoring\textsuperscript{730}. Perhaps, the failure of political safeguards to protect federalism is due to the absence of the national parliaments in the EU legislative process. As the most affected party by a vacuum of competences, the Treaty of Lisbon provides for their active involvement in monitoring compliance with the principle of subsidiarity. It introduces an “early-warning” mechanism. National parliaments may manifest their opposition to the presidents of the EU political institutions, by issuing a reasoned opinion against proposals not complying with the principle of subsidiarity. If at least one third of the votes allocated to the national parliaments favour the withdrawal of the proposal, the Commission must review it. If a simple majority of negative votes is reached, but the Commission decides to maintain the proposal, before concluding the first reading, the EU legislator must express its opinion by voting\textsuperscript{731}. Moreover, national parliaments may also recourse to the same monitoring system when the outer limits of Article 352 TFEU (current 308 EC) are overstepped.

\textsuperscript{731} See Article 7 Protocol (No2) Treaty of Lisbon. It is interesting to note that these new reforms go beyond the measures provided in the failed EU Constitution, which only compelled the Commission to review its proposal, but no vote of the EU legislator was required.
This is a welcome development since it breaks the vicious cycle of the EU institutions\textsuperscript{732}. However, this reform has not been introduced as an alternative to judicial review. On the contrary, in accordance with their own constitutional arrangements, Member States may lodge direct actions on behalf of their national parliaments\textsuperscript{733}. Thus, the ECJ would still exercise a key “ex-post” control.

B.- Controlling the Exercise of Commercial Power

By contrast to the EU, in the US there is no equivalent to the principles of proportionality and subsidiarity. Indeed, as Justice Marshall wrote, once an activity falls within the scope of the Commerce Clause, congressional power becomes “\textit{complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the Constitution}.”\textsuperscript{734} Thus, in the US, there is no second layer of competence control\textsuperscript{735}. The next subsections try to explain why this absence.

1.- The Principle of Proportionality

The Community legislator must remove obstacles or eliminate distortions of competition. If the ECJ considers that the measure adopted is inadequate or excessive, in the light of the principle of proportionality, the measure will be struck down. Conversely, congressional commercial legislation does not have to take into account whether the federal policy is suitable for the objectives it aims to achieve or, whether it does not go beyond what it is necessary. The Commerce Clause does not have the “remedial” justification Article 95 must comply with. Time and again, the USSC has stated that these issues pertain to the wisdom of the statute, and

\begin{itemize}
\item \textsuperscript{732} \textit{Weatherill}, Op cit, pp 39-40 (generally welcoming this reform, but raising two inadequacies namely, the exclusion of Article 114 TFEU (current 95 EC) and the principle of proportionality from “ex-ante” monitoring).
\item \textsuperscript{733} See Article 8 Protocol (No2)
\item \textsuperscript{734} \textit{Gibbons v Odgen}, supra note 581, 196.
\end{itemize}
defer to the political process\textsuperscript{736}. For instance in \textit{Wickard}, Justice Jackson stated that whether the AAA was unfair in forcing farmers to buy what they could provide for themselves was not a matter for the USSC to decide, but to be discussed and resolved through the legislative process. In the same way, in \textit{Raich}, Stevens expressly excluded from his evaluation whether it was wise for the CSA to apply the ban to therapeutic marijuana. On the contrary, if the ECJ decided a case similar to \textit{Raich}, it would certainly examine whether the principle of proportionality advise against banning its therapeutic use. Applicants could argue that it is an oxymoron to harmonize cannabis trying to achieve a high level of health protection, while denying its use to alleviate patients suffering excruciating pain. Although judicial review is limited to verifying that the challenged measure is not “manifestly inappropriate”, the EC legislator would still have to demonstrate that available scientific evidence is not conclusive over the positive use of cannabis; that its healing effects do not outweigh its toxicity and addiction; or that other relieving substances less dangerous for public health were available. Nonetheless, failure to do so would force the ECJ to recall \textit{Tobacco Advertising I} and to side with the applicants.

Functionally, Article 95 EC is closer to the XIV\textsuperscript{th} Amendment than to the Commerce Clause. In this regard, the USSC has stressed that this amendment is not a substantive grant of legislative power, but it must “remedy” unconstitutional behaviour arising from state action or inaction. To this effect, federal legislation adopted under the XIV\textsuperscript{th} Amendment must bear “\textit{a congruence and proportionality between the injury to be prevented and the means adapted to that end}”\textsuperscript{737}. By contrast, this test is absent under the Commerce Clause. This different approach is clearly illustrated in \textit{Morrison}. After rejecting that § 13981 could be adopted under the Commerce Clause, the USSC went on to examine whether reliance on §5 of the XIVth Amendment was constitutionally possible. Congress contended that the civil remedy created under the VAWA responded to the documented pervasive bias of state justice systems against victims of gender

\textsuperscript{736} \textit{Gibbons v Ogden}, Op. Cit., 197

\textsuperscript{737} \textit{City of Boerne v Flores}, 521 US 507, 520 (1997) (see also Chapter V)
motivated violence and thus, tried to counter sexual discrimination, ensuring the “equal protection under laws” as stipulated by § 5. However, the USSC disagreed. It began by stressing that recourse to §5 could correct state action only. Consequently, it held that, since the federal remedy targeted private conducts rather than sexually discriminatory conducts sponsored by certain States, Congress could not rely on this constitutional provision. In any case, even if admitting this were the case, §13981 of the WAVA did not meet the “congruence and proportionality test”. On the one hand, the federal remedy did not aim at “proscribing discrimination by officials”, instead it was directed to perpetrators of gender motivated crimes. On the other hand, it went beyond what was necessary, owing to the fact that it failed to limit its scope to the infringing States. Further, this test has proved to be stricter than the principle of proportionality as applied to Community measures. While the ECJ limits itself to verifying that there is no manifest error between the means deployed and the aims to be achieved, the USSC scrutinizes in depth federal legislation. For instance, it would be very unlikely for the ECJ to reject that a civil remedy for victims of gender motivated violence could contribute to tackling a long history of sexual discrimination in state justice systems.

Thus, in the light of Morrison, one can affirm that by contrast to Article 95 EC or the XIVth Amendment, the Commerce Clause is not subjected to a proportionality test. Why is that? In my view, under the Commerce Clause, Congress is not confined to harmonizing or remedying unconstitutional behaviour of States. Its authority is broader. It is entrusted with defining policies regulating the interstate commerce. The policy can be directed towards establishing common standards, but also favouring diversification and even discrimination. The Constitution does not prescribe an objective to be attained by Congress. Accordingly, it would be very difficult for the USSC to start second guessing congressional policy choices. Provided that there is no breach of other constitutional provisions, Congress is free to regulate interstate commerce as it pleases.\textsuperscript{739} Besides, if the USSC

\textsuperscript{738} Morrison, supra note 631, 626
\textsuperscript{739} Halberstam, Op cit, p 793
were to evaluate whether federal economic regulation is excessive, it would wake up the ghosts of *Lochner*. As explained in the previous chapter, the *Lochner* Court, which sought to guarantee private autonomy at the outmost, was accused of imposing its own ideology on a neutral Constitution. Accordingly, applying the proportionality principle would be seen as an illegitimate intrusion into the political process. Indeed, the open-texture of the Commerce Clause renders very difficult for the judiciary to look for benchmarks facilitating scrutiny of manifest errors.

However, a different answer could be given, had the USSC examined the congressional regulation of local activities under the Necessary and Proper Clause. The two limbs of this constitutional provision would provide the constitutional authority to apply a soft version of the proportionality principle. As discussed above, the “necessity prong” would evaluate that there are no manifest errors in the chain of causation, where “property” would determine whether the incursion into States’ autonomy is excessive. Nevertheless, it is difficult to see how Scalia himself would promote applying a “standard-oriented” review, given that he opposes to do so in other areas of constitutional law.  

2.- The principle of Subsidiarity

If proportionality controls the intensity and suitability of Community legislation, subsidiarity operates at an earlier stage. Whit the exception of exclusive competences, it limits the exercise of Community competences to objectives which cannot be sufficiently achieved at state level.

However, while the ECJ applies a mild version of proportionality under Article 95 EC, subsidiarity appears to be non-justifiable at all. Indeed, the ECJ has never annulled a Community measure on this ground. *BAT* may provide some insights as to why. There, the ECJ briefly stated that, since the Directive eliminated obstacles to trade arising from the multifarious developments of national laws, this objective could not be sufficiently achieved at state level.

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attained by the Member States\textsuperscript{741}. Put simply, once an objective falls within the scope of Article 95 EC, subsidiarity “\textit{vas de soi}”. Nevertheless, this reasoning is misleading, in so far as it does not explain why obstacles to trade may not be tackled at national level.\textsuperscript{742}

Perhaps, the non-justiciability of subsidiarity lies in that is very difficult for the ECJ to ascertain at which level of governance a policy is more efficiently adopted. In this regard, “\textit{as being par excellence a political principle seeking to influence the legislative process ex ante}”, Tridimas suggests that this principle is hardly susceptible of judicial determination\textsuperscript{743}. Likewise, Bermann posit that \textit{“the uncertainty about how much localism really matters on a given issue, the heavy reliance on prediction and the probability of competing scenarios, the possibility of discretion and tradeoffs between and the sheer exercise of political judgment”} render virtually impossible crafting judicially enforceable standards\textsuperscript{744}. Indeed, liaising with the Chapter II, subsidiarity would raise political questions reserved to the legislator.

While judicially abdicating subsidiarity on “substantive grounds” may be tolerated, the same does not follow when invoked as a “procedural principle”, pursuant to which the EC legislator would be obliged to seriously deliberate and explicitly provide sufficient reasons satisfying a test of comparative efficiency. By “enhancing process federalism”, the ECJ would not replace legislative choices for its own preferences. On the contrary, it would limit itself to verifying that, in its decision-making process, the EC legislator has reflected upon the interests of the States in preserving their autonomy. Therefore, the judiciary would undertake a soft review, requiring nonetheless more than an abstract reference to objectives calling for harmonisation. The Community judicature would press the

\textsuperscript{741} Case C-377/98 Netherlands v Parliament and Council [2001] ECR I-7079, para 33; \textit{BAT}, op. cit, paras 177-185; see also Joined Cases C-154/04 and C-155/04 \textit{Alliance for Natural Health and Others} [2005] ECR I-6451, paras 106-107


\textsuperscript{743} Ibid, Op cit, p 183

\textsuperscript{744} Ibid, Op cit, p 183; Bermann, Op cit, p 391; Sander, Op cit, p569
legislator for supporting quantitative and qualitative information showing that joined or individual action at national level is inadequate. Unfortunately, as BAT reveals, the ECJ has not adopted an approach that would examine subsidiarity as an independent procedural principle. Instead, it has been subsumed into the more general enquiry on competence and proportionality.

In the US, the validity of congressional commercial powers is not conditioned upon compliance with the principle of subsidiarity. The reason is that, when delimitating federal powers, the USSC is still influenced by the notion of “dual-federalism”. Although the existence of federal and state concurrent powers has long been accepted, no circumstances and conditions constrain Congress when deciding to invoke the Commerce Clause. Lopez provides a clear example: local “economic” activities are in, while “non-economic” are out. Thus, the USSC has focussed on preserving “state sovereign enclaves”, rather than on evaluating whether efficiency advise in favour of leaving the regulation of local economic activities to the States. This has not discouraged US scholars from thinking beyond “borderline federalism”. For instance, when regulating local activities, Gardbaum argues that the vertical balance of powers is altered and consequently, Congress is required to “seriously deliberate on the needs and merits of (its actions)”.

Even admitting the existence of reserves of state sovereignty, he concludes that this test would still operate as a supplementary guarantee on federalism. Moreover, Young reckons that, though drawing substantive borderlines is necessary in order to preserve a significant regulatory area where States compete for the People’s loyalty, it is not sufficient to alt the centripetal trend. He advocates for soft substantives limits to federal power, while

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745 Needless to say, a statement of reasons consistent with subsidiarity would not excuse the ECJ from verifying compliance with the limits of Article 95 EC and the principle of proportionality. As the Morrison Court indicated, legislative-fact findings may not circumvent the principle of enumerated powers. Still, failure to indicate the reasons why the Community was better positioned to act than the Member States would annul the measure, regardless of whether it falls within the bounds of Article 95 EC and it is proportionate.

746 Tridimas, Op cit, 188; Weatherill, Op cit, 27-28

747 Sander, p 258; Young, Op cit, p 1666; Gardbaum, supra note 663, pp 795-838

748 Young, supra note 625, pp 105-106

749 Gardbaum, Op cit, pp 814; 830-831
imposing non-derogable “clear statement” rules when Congress displaces state regulations. In his view, this process-oriented review corrects failures in the political process that threaten federalism, while avoiding direct confrontations with Congress. Not only do “clear statement” rules facilitate the task of States in monitoring congressional activity impinging on their autonomy, but they also slow down the federal legislative process by imposing additional drafting costs.

V.- Conclusion

The purpose of this chapter was to demonstrate the difficulties that the USSC and the ECJ have encountered when applying the principle of enumerated powers to Community and federal commercial measures. To some extent, the adoption of formal tests does not appear to absolutely counter the competence creep. *Lopez* was weakened by the broad notion of “economic activity” defined in *Raich*, whereas opening the door to “potential obstacles” may reduce the impact of *Tobacco Advertising I*. Likewise, both Courts introduced an important caveat, namely Congress and the EU legislator may regulate activities that, while falling outside of the Commerce Clause and Article 95 EC respectively, are necessary for the effectiveness of a larger regulatory scheme. This does not mean that formal boundaries are not necessary. On the contrary, despite their shortcomings, *Lopez* and *Tobacco Advertising I* canvass the judiciary’s willingness to police the outer limits of federal commercial powers. Congress and the Community legislator now bear in mind that their powers are not unlimited.

However, in order to counterbalance the vertical vacuum of power, it seems that other solutions are also necessary. Although it has been defended that federalism may not rest on political safeguards alone, courts may nonetheless restore failures in the federal legislative process where they excessively impinged upon state autonomy. Courts should not limit themselves to protecting enclaves of state sovereignty. Instead, in the vast

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750 Young, Op cit, pp 122-134
area of concurrent competences, they should also control that the federal legislator provides enough justifications as to why state regulation is displaced. “Process Federalism” would contribute to this end. In the EU, the ECJ should check that the EC legislator provides enough informative input justifying compliance with the principle of subsidiarity. Indeed, the Protocol on Subsidiarity of the Treaty of Lisbon points in this direction. Not only does it enhance political debate by incorporating national parliaments, but the latter would have access to the ECJ. Accordingly, it is not expected from the ECJ to give the final word on whether a policy may be sufficiently achieved at national level, but just to verify that the dissenting voices of national legislators have been taken into account and that an adequate rebuttal was provided. In the US, clear statement rules when Congress regulates local activities would also protect the values of federalism. Finally, at first stage, “process federalism” would entail a higher judicial involvement in scrutinizing legislative deliberations. However, step by step, when judicial rulings become internalised in the political culture, the role of courts would diminish. Along with reminding from time to time that federal powers are limited, this is how courts should also protect federalism: As neutral enhancers of legitimately-adopted policy decisions.
Chapter V

The Principles of Sovereign Immunity of States and Non-Contractual State Liability Compared

As a constitutional principle, supremacy instructs the judicial department to uphold federal law and ignore conflicting state law. This principle is embodied in Article VI of the US Constitution. In particular, the “Judges Clause” commands every judge throughout the nation to disregard state law violating federal law. Likewise, though primacy of Community Law is not expressly recognised in the EC Treaty, this circumstance did not prevent the European Court of Justice (ECJ) from introducing this principle into the newly created Community legal order. Not only has primacy been interpreted, along with direct effect, as the foundational constitutional principle, but also as a legal basis bestowing national courts with all necessary powers to set aside conflicting national laws. It follows from the foregoing that both the EC and the US legal orders mandate the judicial department to ensure that infringing States do not contest that federal law is “the supreme law of the land”. Accordingly, there is an essential linkage between this principle and the constitutional law of remedies. The perspective adopted to characterise this linkage will determine how much remedial power must be granted to the judiciary for it to accomplish its constitutionally assigned mission. On the one hand, one may argue that supremacy is only ensured where for every violation of a federal right, there is a judicial remedy. Thus, compliance with the maxim “ubi jus, ibi remedium” conditions the supremacy of federal law. Said differently, failure to provide an adequate remedy erodes the supremacy of federal law. On the other hand, one may consider that, even if there is not always an available remedy for every violation of a federal right, the

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751 See Annex
752 Case 6/64 Costa v ENEL [1964] ECR 585. Although, Article 1-6 CT embedded this principle, the Treaty of Lisbon is again silent.
753 K ALTER, Establishing the Supremacy of European Law, (Oxford: OUP, 2001)
supremacy of federal law is ensured in so far as States remain bound by the rule of federal law. Allowing a certain degree of infringement does not deprive federal law from its supremacy. On the contrary, it just gives equal importance to other constitutionally protected interests, such as the role played by States in the federal design, which may advise against granting judicial relief. Put simply, supremacy of federal law cannot be construed as an absolute remedial grant, but its supreme character is apprehended by weighing it against other constitutional principles.

By determining the availability of monetary relief against States for violation of federal or Community law, this chapter aims at determining which of the two aforementioned perspectives has been followed by the US Supreme Court (USSC) and the ECJ. By contrast to declaratory or injunction relief, monetary relief is more intrusive into state sovereignty. While a declaratory judgment or enjoining state action may seem sufficient measures in themselves to restore the legality of a federal system, awarding damages goes to the heart of States’ financial dignity. Hence, monetary relief is the optimal example to compare the reach of the principle of supremacy in the United States and of primacy in the European Community. This chapter unfolds as follows. Section I is devoted to studying the principle of state sovereign immunity under the US Constitution, in particular, its increasing constitutional importance. Once limited by the wording of the Eleventh Amendment, the USSC now derives this principle from “fundamental postulates implicit in the constitutional design”\textsuperscript{757}. As a result, state sovereign immunity has become an important limitation on Congress which may only rely on its limited XIV\textsuperscript{th} Amendment Powers and the Bankruptcy Clause to award damages. As a result, monetary relief has been almost precluded. However, the USSC considers that alternative remedies are sufficient to secure the supremacy of federal law, namely, suits brought by the Federal Government, the \textit{Ex-Parte Young} Doctrine and monetary relief against state officials. In Section II, the principle of state liability for damages under EC law is explored. In describing its harmonious

\textsuperscript{757} \textit{Alden v Maine}, 527 US 709, 729 (1999)
evolution from Francovich to Köbler, it will be asserted that state liability for damages has developed into a General Principle by which the ECJ merged the concepts of primacy and judicial protection. Section III argues that structural differences and a different attitude towards state financial implications explain why both Courts give a different answer to the same question. While in the US, the federal legislature may not commander either the state executive or legislature, liability for damages was born in the EU as a reply to the non-implementation of Directives. Additionally, in extending the principle of state liability, the ECJ pays little attention to the possible financial implications upon the Member States. On the contrary, the USSC only accepts monetary implications on the state treasuries when prospective relief is seen as necessary to ensure the supremacy of federal law. Finally, it is concluded that whereas primacy of community law is seen through the lens of judicial protection, the USSC considers that for the federal law to be supreme, it is not always necessary to have an effective remedy.

I.- The Principle of Sovereign Immunity of States under US Law

A.- Concept

In the American federal system, each State is a sovereign entity. Since it is inherent in the nature of sovereignty not to be amenable to suit without consent\(^\text{758}\), the principle of sovereign immunity of States implies that both federal and state courts lack jurisdiction in cases where an individual files a suit against a non-consenting State\(^\text{759}\). Thus, this principle operates as a limit to the judicial enforcement of individual rights.

\(^{758}\) *Hans v Louisiana*, 134 US 1, 13 (1890)

\(^{759}\) This principle originates from old English that “the King can do no wrong”. See *Hans v Louisiana*, 12-13 quoting Alexander Hamilton in THE FEDERALIST No 18.: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent”.
States’ consent is a relevant factor in determining the scope of the sovereign immunity of States. The more States’ consent is deemed given, the less immune from suits States will be. Besides, since this principle is “a personal privilege (of States) which may be waived at pleasure”\textsuperscript{760}, the number of cases in which it is applicable varies from one State to the other. However, the USSC has introduced some uniformity in its application. Firstly, regarding suits brought by the United States or by a sister State, the USSC has understood that such consent was given when States joined the Union. Hence, federal courts have jurisdiction to rule in these cases\textsuperscript{761}. Secondly, the USSC has rejected the doctrine of “constructive waiver” whereby a State engaged in a federally regulated commercial activity authorising private suits, has implicitly waived its immunity\textsuperscript{762}. Instead, an unequivocal statement is now required\textsuperscript{763}. As a result, notwithstanding the cases in which the United States or other States are the plaintiff, States’ waiver cannot be presumed. Even if a State interacts in the market with private undertakings, state immunity is preserved. Therefore the USSC has interpreted the principle of sovereign immunity in very broad terms\textsuperscript{764}: Not only are States immune while carrying out acts of government (“\textit{jus imperii}”), but also where they operate in the market (“\textit{jus gestionis}”)\textsuperscript{765}.

\textsuperscript{760} Clark v Barnard, 108 U.S. 436, 447-448 (1883).
\textsuperscript{761} US v Texas, 143 US 621 (1982)
\textsuperscript{762} Parden v Terminal R. CO., 377 U.S. 184 (1964)
\textsuperscript{763} College Savings Banks v Florida Prepaid Postsecondary Education, 527 US 666 (1999)
\textsuperscript{764} Against, K. KINPORTS, Implied Waiver After Seminole Tribe, (1998) 82 Minn. L. Rev, pp 793-832 (The author holds that the USSC has hopelessly confused the doctrine of implied waiver and the doctrine of abrogation. Accordingly, by rescuing this distinction, she supports the constitutionality of federal statutes passed under the Spending Clause that condition obtaining federal funds to States’ waiver of their immunity, as well as federal regulated activities passed under Article I in which States voluntarily engage.)
\textsuperscript{765} The scope of States’ immunity under American Constitutional law is even wider than the one normally accepted under Public International Law pursuant to which, whilst a Foreign State is pursuing a commercial activity, the latter cannot invoke its immunity. See e.g. Resolution of the UN General Assembly 59/38, “United Nations Convention on Jurisdictional Immunities of States and Their Property”. 16 December 2004. See Also L GARDNER, State employers are not Sovereign: Transfer the Market Participant Exception to the Dormant Commerce Clause to States as Employers, (2004) 79 Chi.-Kent L. Rev, pp 725-54 (arguing that the market-participant exception to Dormant Commerce Clause challenges should be extrapolated to cases under the Eleventh Amendment where States act as employers)
B.- Legal Basis of State Sovereign Immunity

The principle of sovereign immunity of States and the enactment of Eleventh Amendment have been closely related. The Eleventh amendment is the result of a political dissent against the USSC ruling in *Chisholm v Georgia*\(^{766}\). There, a South Carolina citizen sought to recover from Georgia the payments overdue for the goods supplied during the American Revolution. Nevertheless, Georgia argued that it was sovereign and thus, not liable to such action. The USSC rejected Georgia’s arguments and held that Article III US Constitution\(^{767}\) empowered the federal judiciary to rule on proceedings brought by individuals against States.

Owing to the fact that in the aftermath of the Revolution, States were heavily indebted, *Chisholm* ruling filled States with consternation\(^{768}\). The fear of insolvency prompted the States to seek for constitutional reform which led to the adoption of the Eleventh Amendment, according to which:

> “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state”.

If one relies on the literal reading of the Eleventh Amendment, it could be argued that the latter only bars diversity jurisdiction, that is, suits brought against out-of-state citizens. Accordingly, citizens could still be entitled to suit their own State\(^{769}\). Nevertheless, following *Hans v Louisiana*\(^{770}\), the current opinion of the USSC is precisely the opposite. Proceedings brought by a citizen against its own State are also barred by the

\(^{766}\) *Chisholm v State of Georgia*, 2 US. 419 (1793)  
\(^{767}\) See Annex  
\(^{768}\) *Alden*, Op cit, 720  
\(^{769}\) See AR AMAR, Of Sovereignty and Federalism, (1987) 96 Yale L. J., pp 1429-37. The author argues that the principle of sovereign immunity should be limited to diversity cases. Thus, when exercising federal question jurisdiction, States may not rely on their immunity. However the problem with this theory is that the Eleventh Amendment refers to “any suit”. See to this effect, L MARSHALL, Fighting the Words of the Eleventh Amendment, (1989) 102 Harv. L. Rev., pp 1342 -1371 .  
Eleventh Amendment. The reason is that the Eleventh Amendment does not modify the original understanding of the US Constitution, but it simply overrules the USSC’s ruling in Chisholm. In this sense, in *Alden v Maine*, Justice Kennedy, writing for the USSC, held that the doctrine that a sovereign State could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. He also added that this principle has been embraced by the US Constitution since its creation. Lastly, he stressed that had the US Constitution provided that States could be suit in their own courts and by their own citizens, it would not have been ratified. Thus, the Eleventh Amendment does not define on itself the principle of sovereign immunity of States. On the contrary, it simply emphasises the importance of such principle in the American constitutional design. In other words, as the USSC held in *Seminole Tribe v Florida*, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms". Therefore, the principle of sovereign immunity of States, as a constitutional principle, is not framed by the wording of the Eleventh Amendment. As a result, one may infer four direct implications.

Firstly, the principle can be extended beyond the wording of the Eleventh Amendment. As a matter of fact, the USSC has done so. In particular, in *Hans v Louisiana*, in *Smith v Reeves*, *Principality of Monaco* and *Blatchford v Native Village of Noatak* the USSC respectively held that States’ immunity was applicable to proceedings brought by citizens against their own States, federal corporations, foreign nations and Indian tribes. However, the principle of Sovereign immunity is not applicable to political subdivisions of the State (e.g. cities, counties, towns …), which can be sued at federal courts. The reason is that for

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771 *Alden*, Op cit, 715-716
772 Ibid, 720
773 Ibid, 727
775 *Smith v Reeves*, 178 U.S. 436 (1900)
776 *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934)
778 *Cowles v. Mercer County*, 7 Wall. 118 (1869), more recently *Mt Healthy City Board of ED v Doyle*, 429 US 274 (1977)
diversity purposes\textsuperscript{779}, unless they are the “arm or alter ego of the State”, local corporations are considered “citizens” of the State where they are formed\textsuperscript{780}.

The second implication is that the principle of sovereign immunity stands on an equal footing with other constitutional principles, such as supremacy of federal law. In order to determine the current position occupied by the principle of immunity in the American constitutional landscape, two cases must be examined namely, \textit{Pennsylvania v Union Gas}\textsuperscript{781} and its subsequent overruling in \textit{Seminole v Florida}\textsuperscript{782}. In \textit{Union Gas}, the Federal Government, which had partially covered the expenses for the cleaning-up at Brodhead Creek, sued Union Gas claiming that it was responsible for the environmental disaster. The latter filed a third party claim against Pennsylvania arguing that in accordance with federal law, Pennsylvania should share responsibility. By relying on the Eleventh Amendment, Pennsylvania replied that Congress did not have power under Article I to abrogate States’ immunity. However, the USSC disagreed. While acting within the scope of its plenary powers under Article I (in the case at issue, it was the Commerce Clause), Congress could fashion statutes enabling individuals to claim damages against States for breach of federal law. In accordance with the USSC’s opinion, “the States surrendered a portion of their sovereignty when they granted the Congress the power to regulate commerce, and that by empowering Congress to regulate commerce, the States surrendered any portion of their sovereignty that would stand in the way of such regulation”\textsuperscript{783}. Consequently, “the power to regulate interstate commerce would be incomplete without the authority to render States liable in damages”\textsuperscript{784}.

However, in \textit{Seminole Tribe v Florida}, the USSC felt “bound to conclude that Union Gas was wrongly decided, and that it should be, and now is,

\textsuperscript{779} 28 U.S.C. §1332
\textsuperscript{780} See Cowles, supra note 778, 120.
\textsuperscript{781} \textit{Pennsylvania v. Union Gas Co.}, 491 U.S. 1 (1989)
\textsuperscript{782} \textit{Seminole Tribe v Florida}, 517 US 44 (1996)
\textsuperscript{783} \textit{Union Gas Co.}, Op cit, 14 (1989).
\textsuperscript{784} \textit{Ibid}, 19-20.
In *Seminole Tribe v Florida*, Congress had passed the Indian Gaming Regulatory Act (IGRA) by which States were required to negotiate with Indian tribes the formation of a compact. The IGRA also granted Indian tribes the right to start proceedings against States which failed to perform this duty. The same conflicting arguments as the ones exposed in *Union Gas* were repeated by the parties. The Seminole Tribe recalled *Union Gas*, arguing that under Article I (the Indian Commerce Clause) Congress is empowered to abrogate state immunity from suits by individuals, whereas Florida argued that Congress lacked such power. However, this time the USSC sided with Florida, holding that “*Article I cannot be used to circumvent constitutional limitations placed upon federal jurisdiction*”\(^786\). In accordance with the USSC, where in a subject matter, States have surrendered their competences to the federal legislature, this does not imply *per se* that the federal judiciary has jurisdiction over claims brought by individuals against States. Thus, the USSC draws a distinction between transfers of competence to the federal legislature and transfers of jurisdiction to federal judiciary. The former does not imply *inter alia* the latter. In fact, it is only the US Constitution, and not Congress by enacting federal statutes, which is capable of empowering the federal judiciary with jurisdiction over claims brought by individuals against the State. It clearly appears from the rationale of the case that the principle of States’ immunity has a constitutional character. Likewise, in *Alden v Maine*, state employees sought compensation from Maine before its own state court, alleging that it had breached the Fair Labor Standard Act (adopted under the Commerce Clause). While petitioners argued that the principle of supremacy of federal law, embodied in Article VI of the Constitution, by necessity overrides the sovereign immunity of the States, Maine relied on its immunity. The USSC agreed with Maine and held that “*when a States asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in a manner consistent with the sovereign immunity of the States*”\(^787\). It seems therefore that in accordance with the USSC’s opinion, state liability

\(^785\) *Seminole Tribe*, Op cit., 66  
\(^786\) Ibid, 72-73  
\(^787\) *Alden*, 732
is outside the scope of supremacy of federal law. In other words, in order to preserve federal law as the “supreme law of the land”, it is not necessary to render infringing States liable for damages caused to individuals.

The third implication is that since the principle of sovereign immunity of States has a constitutional ranking, exemptions from the said principle are only possible if the US Constitution allows it. So far, the USSC understands that Section §5 of the Fourteenth Amendment\textsuperscript{788} and the Bankruptcy Clause\textsuperscript{789} under Article I are the only constitutional provisions empowering Congress to fashion statutes capable of removing immunity from States.

In \textit{City of Boerne v Flores}\textsuperscript{790}, the USSC ruled that §5 cannot be defined as general powers to legislate, but as corrective legislation. Firstly, it may be invoked to provide remedies against state laws or actions which (or are likely to) infringe the Due Process and Equal Protection Clause. Secondly, in order to discern between substantive measures and enforcing measures, only the latter being allowed under §5, the USSC will apply a proportionality and congruence test by which a connection “between the injury to be prevented or remedied and the means adopted to that end” is necessary\textsuperscript{791}. In this sense, the USSC pointed out that sunset clauses, geographic restrictions or egregious predicates are not required, but these or similar limitations would tend to ensure that Congress legislation is proportionate.\textsuperscript{792} Lastly, in accordance with the USSC’s opinion, the proportionality and congruence tests are not applicable in abstracto, on the contrary, “the appropriateness of remedial measures must be considered in light of the evil presented […] Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.[…]”\textsuperscript{793}. For instance, in \textit{Florida Prepaid}\textsuperscript{794}, a private company, College Savings Bank,

\textsuperscript{788} Fitzpatrick v Bitzer, 427 U.S. 445 (1976).
\textsuperscript{789} Central Virginia Community College v Katz, 548 US 356 (2006)
\textsuperscript{790} City of Boerne v. Flores, 521 U.S. 507, 519 (1997)
\textsuperscript{791} Ibid, 519-520
\textsuperscript{792} Ibid, 533
\textsuperscript{793} Ibid, 530
\textsuperscript{794} Florida Prepaid Postsecondary, 527 U.S. 627 (1999)
brought a patent infringement claim against Florida Prepaid, a company belonging to Florida. The plaintiff based its claim on the Patent Remedy Act (PRA), which had been passed by Congress to put an end to constant infringements committed by state related companies. Florida argued that the PRA was unconstitutional because it infringed States’ immunity, whereas College Savings Bank contended that under §5 of the Fourteenth Amendment, the PRA complied with the Constitution and thus, could abrogate States’ immunity. The USSC upheld Florida’s arguments. It stated that the Due Process Clause does not protect the deprivation of property alone, but the deprivation of property without due process of law. Since Congress had failed both to prove that state remedies for patent infringement were questionable and to limit federal claims to such cases, its reliance on §5 did not comply with the Constitution. From these and similar cases, it seems that the proportionality test under §5 is a very strict one. Indeed, reliance on §5 is conditioned, on the one hand, to remedy or prevent unconstitutional behaviour and, on the other, to the absence of state remedies. Hence, the USSC has added a subsidiarity test to the proportionality and congruence ones.

In Central Virginia Community College v Katz, the USSC held that under the Bankruptcy Clause, States could not rely on their immunity to avoid complying with transfer recovery proceedings. The USSC based the “Bankruptcy Clause” exception on two grounds. Firstly, historical evidence shows that the Framers wanted to put an end to the problems caused by disparities of state legislation, which prevented debtors from being finally discharged. Thus, the USSC considered that during the constitutional

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795 Ibid, 643
796 Ibid, 639-648
798 Compare with the powers of Congress under the Commerce Clause. See Chapter IV
800 Justice Stevens who delivered the Opinion of the USSC referred to two pre-constitutional cases, namely, James v Allen, 1 Dall 188 (CP Phila. City 1786) and Millar v Hall, 1 Dall 229 (Pa.1788); showing that even if a debtor was discharged in one State and
ratification process, States were aware of the importance of harmonizing bankruptcy law, even if it entailed subordinating their immunity to this “pressing goal”. Secondly, since bankruptcy jurisdiction is “in rem”\(^801\), the impact on States’ immunity is only ancillary. The USSC took the view that under the Bankruptcy Clause, Congress was granted with the power to regulate the entire “subject to Bankruptcies”. Bankruptcy courts are therefore entitled to issue ancillary order necessary to enforce their in rem adjudication, that is, they have the power to avoid preferential transfers and to recover the transferred property, regardless of the third-party withholding it. Thus, if the “res” is being held by a State, the latter must return it to the bankruptcy trustee.

The question that then arises is what differentiates the Bankruptcy Clause from other Article I legislative powers? Unfortunately, the USSC did not provide a clear answer. Some scholars argue that no persuasive argument can support such distinction\(^802\). Conversely, it is also maintained that congressional powers under the Bankruptcy Clause are greater than under other clauses of Article I. The term “uniform” is only present in this provision, indicating a greater grant of power. Indeed, it is suggested that Congress enjoys exclusive competence in the field of bankruptcies and consequently, sovereign immunity has been surrendered\(^803\). Likewise, by contrast to Seminole, Alden, and Florida Prepaid, in Katz Congress did not rely on its legislative powers to create an action in personae against the States, but in rem. Arguably, the unique nature of the bankruptcy power may be sufficient to award a different treatment. In any case, the USSC did

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\(^{801}\) Jurisdiction “in rem” means that bankruptcy trustees are empowered to recover the property of the insolvent debtor resulting from preferential transfers.


not overrule *Seminole Tribe*. It just seems willing to accept an incidental limitation on States’ immunity.

Lastly, the USSC has applied the principle of sovereign immunity not only in proceedings before federal courts, but also before state courts. In *Alden v Maine*, after recalling its previous decision in *Seminole Tribe*, the USSC justified its expansion to state fora by stressing that “a congressional power to authorize private suits against non consenting States in their own court would be even more offensive to state sovereignty than a power to the suits in a federal forum”\(^{804}\). The principle of sovereign immunity of States is therefore applicable irrespectively of the forum where the suit is filed.

In short, the principle of sovereign immunity of States is a constitutional principle which denies state liability to private claims. States are only liable for infringing federal law when they have unequivocally consented to be sued or where federal legislation is passed under §5 of the Fourteenth Amendment or the Bankruptcy Clause.

C.- Why has the USSC endorsed States’ immunity?

The reasons leading the USSC to consider state immunity as one of the key principles in the American constitutional design are of a double nature. On the one hand, according to the USSC, the quest for the interpretation of the founding Fathers leads to the endorsement of sovereign immunity of States\(^ {805}\). On the other hand, in *Alden v Maine*, the USSC added four substantive arguments demonstrating that its interpretation is consistent with the essential principles of federalism laid down by the US

\(^{804}\) *Ibid*, 749

Constitution. Since historical evidence does not appear to be entirely conclusive\textsuperscript{806}, it is best to focus on these substantive arguments.

The first substantive reason announced by the USSC in \textit{Alden} is that, since the United States enjoys immunity from suit\textsuperscript{807}, either in federal or state courts, States should be entitled to the same privilege. In other words, when it comes to sovereign immunity, there is a constitutional parity between the two levels of governance. In this regard, it appears that this legal parallelism is justified, provided that two conditions are met, namely that federal and state immunity have the same constitutional sources and that they produce the same constitutional effects. Nevertheless, none of the two conditions is fulfilled.

First of all, the USSC itself has recognised that the sources of federal and state immunity differ. In this sense, in \textit{Lapides v Board of Regents}\textsuperscript{808}, Georgia, which had waived its immunity before its own courts, decided to remove the case to the US District Court in order to rely on its sovereign immunity. Georgia relied on an analogical application of the USSC’s case-law on cross-claims against the United States whereby, even if the United States files a suit against a private party, it does not follow that it is subjected to the full jurisdiction of the federal judiciary. Consequently, a private party can only counter-claim in so far as Congress has agreed\textsuperscript{809}. However, by recalling its previous case-law\textsuperscript{810} the USSC held that a voluntary appearance in federal court amounts to a waiver of state immunity\textsuperscript{811}. To this effect, the USSC drew a distinction between state and federal immunity, holding that cases where the United States is a plaintiff,
“[...] do not involve the Eleventh Amendment – a specific text with a history that focuses upon the State’s sovereignty vis-à-vis the Federal Government”. In the light of Lapides v Board of Regents, federal immunity and state immunity are not “two sides of the same coin”. State immunity arises as a limit to the federal power, whereas federal immunity is not explained as a limit to States’ powers, but within a wider constitutional context. Furthermore, although it is not expressly mentioned in the wording of the Constitution, Articles I §8, §9 and III§1 not only create a solid basis in favour of federal immunity, but they also enshrine two special characteristics which evince the differences between federal and state immunity. Firstly, Articles I§8 and §9 US Constitution state that control of appropriation and the power to pay debts of the United States is allocated to Congress. Therefore, Congress must enact a statute authorising awards of monetary relief against the federal treasury before judicial relief can be granted. Secondly, according to Articles I and III US Constitution, Congress has substantial discretion over the jurisdiction of federal courts and thus, it could simply shape the federal jurisdiction so as to refuse suits against the Federal Government. Hence, it seems that, whereas the United States can bring proceedings against States in federal courts (because their consent is deemed given in the Constitution), States cannot suit the United States unless Congress has previously agreed to grant jurisdiction to the federal judiciary and to authorise money relief against the federal treasury. Finally, vis-à-vis private individuals, state and federal immunity have taken different paths. On the one hand, in the absence of a waiver, the USSC has relied on suits against States’ officials as a way to compensate for state immunity. On the other hand, by enacting the Federal Torts Claims Act (FTCA),

812 See Annex
813 See Annex
816 Kansas v United States, 204 US 331, 342 (1907)
818 See also Jackson, supra note 814, 563-567. See also H. M GOLDBERG, “Tort Liability for Federal Government Actions in the United States: An Overview”, in D FAIRGRIEVE,
Congress has decided that suits against the United States as such are the normal way to claim liability against the Federal Government and thus, claims against federal officials are almost barred.\textsuperscript{819}

Furthermore, the USSC held that state liability could threaten the financial integrity of the State and adversely affect its process of government, that is, States’ decision-making power would be weaken by the possibility of being sued. Nevertheless, one could counter argue that States could enact statutes which would lay down a limited liability. In other words, a limited liability would provide a balance between federal rights of private individuals and state legislative independence. In the same way, although the threat to state financial integrity might be partially satisfactory in cases where States act relying on their “imperium” to attain general interests, it is not acceptable when they carry out commercial activities in competitive markets. Indeed, in cases such as \textit{Florida Prepaid}\textsuperscript{820}, where States are competing on an equal footing with private undertakings, it is difficult to see how their financial integrity is affected while pursuing an economic activity intended to increase the state treasuries.

Lastly, the USSC held that state liability not only would blur federal-state accountability, but it would also be contrary to the principle of separation of powers. The USSC believes that if as a result of breaching federal law, Congress could create remedies which seek monetary relief from the state treasuries, then States would be forced to align their policies with federal mandates and consequently, they would not be able to comply with their electorate’s wishes. It follows that not only would States’ political independence be undermined, but it would also be impossible to identify which government is the actual responsible for the positive or negative

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\textsuperscript{820} Jackson, supra note 814, p. 565-567. Although it is true that under \textit{Bivens v Six Unknown Named Agents of the Federal Narcotic Agency}, 403 US 388 (1971) suits against federal officials for constitutional violations are permitted, the USSC currently interprets \textit{Bivens} in its terms. It is reluctant to expand suits against federal officials to other scenarios. In this sense, see \textit{Scweiker v Chilicky}, 487 US 412(1994) or \textit{FDCI v Meyer}, 510 US 471 (1994).

\textsuperscript{820} Florida Prepaid, 627
impact of such policies. Accordingly, political accountability would be blurred. In the same way, the USSC considers that it is for the state legislature and not for the (federal or state) judiciary to determine how state resources should be spent. In fact, empowering courts with the possibility of awarding damages would transform the judiciary into a decision-making institution on budgetary matters and thus, this would violate the principle of separation of powers.

As a result, the USSC believes that actions for damages against States have both vertical and horizontal repercussions which are incompatible with the US Constitution. However, even if these substantive reasons are well founded, it seems that they do not safeguard the supremacy of federal law. The USSC’s reply to this objection is that the Constitution provides alternative remedies which render suits for damages against the States unnecessary.

D.- Alternative Remedies

In addition to the aforementioned substantive reasons, the USSC has held that state liability is not a necessary instrument to secure the supremacy of federal law. In the USSC’s opinion, the Constitution has provided alternative remedies which sufficiently secure States’ compliance with federal law, while respecting state immunity. Therefore, it appears that the USSC is proud of having found a balance between States’ sovereignty and supremacy of federal law. These alternative remedies are, on the one hand, suits brought by the Federal Government and, on the other, suits for prospective and retrospective relief against state officials.

1.- United States as a Plaintiff

States may not rely on their immunity against actions for prospective relief, to recover a fine or to claim damages brought by the Federal Government. The latter does not have to prove any interest in the case. The
basis of its claim may be the enforcement of a federal statute\textsuperscript{821}. The USSC only requires that the Federal Government retains full discretion to start, suspend or put an end to proceedings against infringing States and consequently, private individuals whose rights have been infringed cannot compel the Federal Government to act in their defence. Nor can the Federal Government delegate to private individuals its privilege applicant status. The reason is that the USSC draws a distinction between private suits and suits brought by the United States, which is “entrusted with the constitutional duty to take care that the laws be faithfully executed”. Indeed, in its opinion, unlike suits brought by private individuals, “suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State”\textsuperscript{822}.

However, two objections can be raised against the suitability of this remedy. Firstly, whereas the Federal Government would most certainly start proceedings against States whose breach of federal law adversely affects the population at large, it is doubtful that it would do the same in cases where violations only affect a few private individuals\textsuperscript{823}. Secondly, “political responsibility” is a concept not necessarily related to States’ compliance with federal law. Indeed, the Federal Government might not be interested in filing a suit against an infringing State because it might have adverse repercussions in the political arena. Thus, the aim of this remedy is not as much to protect the rights of individuals as to protect the interests of the Federal Government. As long as there is an overlap between the two of them, judicial protection of private rights is ensured. Nonetheless, if there is a conflict of interests, “political responsibility” might prevail over effectiveness of federal rights.

\textsuperscript{821} See Chapter I in relation to standing. This is not the case for States. In the light of \textit{New Hampshire v Louisiana}, 108 US 76, 91 (1883), a State cannot enforce a private right against another State.

\textsuperscript{822} See \textit{Alden}, 756

\textsuperscript{823} \textit{Vazquez}, supra note 817, p. 871
From private individuals’ standpoint, suits for prospective or retrospective relief against state officials appear to be the only available way to enforce their federal rights.

2.- Suits for Prospective relief: *Ex parte Young*

Federal courts have jurisdiction to adjudicate in cases where private individuals or entities seek injunctions against state officials who breach federal law. In *Ex parte Young*\(^{824}\), the attorney general of Minnesota sought to rely on the Eleventh Amendment to avoid complying with a Circuit Court order, pursuant to which Minnesota’s railroad rates scheme was unconstitutional and thus, had to be eliminated. However, the USSC upheld the Circuit Court *mandamus*. It ruled that unconstitutional acts cannot be attributed to the States of the Union and consequently, whenever a state official violates federal law, he is “*stripped of his official or representative character and is subjected to the consequences of his individuals conduct*”\(^{825}\). Thus, although sovereign immunity prevents individuals from suing States, the so-called “*Ex parte Young*” doctrine allows them to seek an injunction against their state officials.

However, since States can only act through their officials, a suit for prospective relief against the latter is indeed a suit for prospective relief against the former. As a result, since the distinction between the addressees of the injunction is purely formalistic, the USSC has finally accepted that *Ex parte Young* doctrine is in fact a derogation from the Eleventh Amendment\(^{826}\).

In order to rely on this remedy, the application must fulfil two conditions. Firstly, there must be an alleged violation of federal law. Secondly, the application must address an ongoing violation, that is, applicants cannot seek compensation or retrospective relief for past violations.

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\(^{824}\) *Ex parte Young*, 209 US 123 (1908)

\(^{825}\) *Ibid*, 160

Nevertheless, following the same trend as it did in relation to congressional powers under Article I and under the Fourteenth Amendment, the USSC has also narrowed down the *Ex parte Young* Doctrine in favour of States’ sovereign interests. In this sense, in *Seminole Tribe* the applicant based its application on two pleas, namely, they suited Florida claiming that it had breached the IRGA and sought prospective relief against the Governor (who, in spite of being obliged by this federal statute to enter into the formation of a compact, did not do so). As mentioned above, the USSC declared the IRGA unconstitutional on the ground that Congress lacked power under Article I US Constitution to abrogate States’ immunity. As for the second plea, the USSC refused to apply the *Ex parte Young* doctrine, holding that, since the IRGA laid down suits against the States, it also implicitly pre-empted suits against state officials. As a result, the application was dismissed in its integrity.

In the same way, in *Coeur d’Alene*, the USSC dealt with an entitlement dispute between Idaho officials and the Coeur d’Alene Tribe over the submerged lands and bed of Lake Coeur d’Alene. The Tribe filed an *Ex parte Young* injunction aiming at prohibiting state officials from taking any further regulatory action in violation of its federal rights in lands. However, the USSC refused to grant an injunction. In the USSC’s opinion, where special sovereignty interests of States are at stake or where a prospective relief becomes as intrusive as an award of damages against the State, *Ex-parte Young* is not applicable. Otherwise, the principle of state sovereign immunity would be reduced to “an empty formalism”.

Whereas the limitation of the *Ex parte Young* doctrine in *Seminole Tribe* only shifted the burden of proof to Congress, which is now required to expressly mention that federal action against States does not prevent private individuals from relying on prospective relief against state officials; *Coeur d’Alene* is an important curtail to this remedy. Indeed, the exercise of

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827 *Seminole Tribe*, 44
829 *Ibid*, 270
federal jurisdiction is not conditioned upon protecting the US Constitution and federal law alone, but it must also take into account state sovereign interests. In other words, this remedy which, in the USSC’s opinion, would secure the supremacy of federal law is also submitted to the Eleventh Amendment. In so far as suits for prospective relief do not adversely affect the States’ most valuable interests, this remedy would be available to private individuals and entities. Nevertheless, even if federal law has been manifestly breached by a state official, the latter would be protected by the Eleventh Amendment if *Ex parte Young* would turn out to be “too intrusive”.

However, as dissenting Justices pointed out in *Coeur d’Alene*[^830^], it is difficult to distinguish this case from others where federal rights have been granted to private individuals. It seems that an injunction against an economic regulatory activity (as it was in *Ex parte Young*) is as intrusive as one against the regulation of the use of land. Besides, *Ex parte Young* is per se “intrusive” since “state officials [...] are almost always doing what their States’ legislative and administrative authorities intend them to do”. Thus, this evisceration of *Ex parte Young* is depriving individuals from an effective prospective relief, not only because the USSC did not specify what “*special sovereign interests*” means, but also because the USSC seems to justify state officials’ impunity for unlawful breaches of valid federal law, leading to a clear infringement of the principle of supremacy of federal law, and most importantly, of the rule of law. However, in defence of the USSC’s reasoning, one could object that, since Idaho had waived its sovereign immunity in its own courts, federal rights could still be protected. The Coeur d’Alene Tribe could consequently rely on state courts to apply federal law[^831^]. Therefore, the USSC is eager to reinforce the principle of subsidiary: As it did in *Florida Prepaid*, before granting federal courts with jurisdiction which would undermine States’ immunity, due account has to be taken of the remedies available at state courts.

[^830^]: Ibid, 311
[^831^]: Ibid, 274-276
3.- Suits for retrospective relief: state official’s liability

Furthermore, prospective relief in itself is not sufficient to ensure that state officials will comply with federal law. As a matter of fact, this remedy is only suitable to put an end to current or prospective violations of federal law. It is not however an appropriate mean to render States liable for infringements already committed. In other words, had the Constitution only allowed individuals to seek prospective relief, there would be many, albeit temporary, violations of federal law. Thus, in order to secure the supremacy of federal law, violations of federal law not only have to be stopped, but also deterred. In the USSC’s opinion, suits claiming damages against state officials acting in their individual capacity are the deterrent element by which violations of federal law would be prevented.

State official’s liability for breach of Constitutional and federal rights is laid down in § 1983 and it is also completed by the USSC case-law. Private individuals can indistinctly start proceedings either before federal or state courts. In the latter case, since the claim for damages is based on federal law, state statutes limiting the liability of state officials are inapplicable.

Moreover, pursuant to the USSC, this remedy is subjected to two limitations. Firstly, state officials enjoy “qualified immunity” which “reflects an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizen […] but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority”. Thus, the USSC has set up a threshold of liability which deters state officials from breaching federal law, while ensuring that they

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832 For 42 USC § 1983, see Annex.
835 Butz v Economou, Op cit, 504-506
will carry out their tasks with normality, that is, over-deterrence must also be avoided. Ensuring the supremacy of federal law must not simultaneously entail that valid state law is not applied by fearful state officials.

In this sense, the USSC has held that state officials are liable for breach of federal law in so far as the law violated was “clearly established”\(^ {836}\). In other words, the USSC applies a test “which focuses on the objective legal reasonableness of an official’s acts”\(^ {837}\) and thus, his subjective good faith is irrelevant\(^ {838}\). Where the state official is “expected to know” that his conduct was in breach of statutory or constitutional rights, then injured parties can bring an action for damages against the state official.

As a result, a mere breach of federal law is not sufficient to render the state official liable, it is necessary that “a reasonable official would understand that what he is doing violates that right”\(^ {839}\).

Secondly, they can only be sued in their individual capacity, that is, applications must seek compensation from state official’s personnel resources, but not from the state treasury. This distinction was drawn by the USSC in *Edelman v Jordan*\(^ {840}\). There, the applicant brought a class action against a state official seeking to recover the money which Illinois had withheld in breach of a federal statute. The USSC dismissed the application, holding that “a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment”. However, the USSC did not indicate the reasons for dismissing the application. What was the distinguishing element in *Edelman* that precluded officials’ liability? Mr. Eldeman did not seek damages for Illinois’ wrongfully withholding of aid. Instead, his application was limited to recovering the money. Said differently, Edelman’s claim was not an action in tort but in restitution. Likewise, as the principle of agency


\(^{837}\) Ibid, 818

\(^{838}\) J. JEFFRIES Jr. “In praise of the Eleventh Amendment and Section 1983”, (1998) 84 *Va. L. Rev.* 47-82. In accordance with Jeffries, some constitutional violations require more than “negligence”, they require a particular intention or purpose, e.g. racial discrimination.

\(^{839}\) *Anderson v Creighton*, 483 US 635 (1987)

\(^{840}\) *Eldelman v Jordan*, 415 US 651 (1974)
states, “a servant is liable for torts committed in the master’s business, but
the servant is not responsible for master’s contract”\textsuperscript{841}. Hence, it seems that
the USSC distinguishes between actions in torts and actions in contract, the
former are admissible under § 1983, whereas the latter are barred by the
Eleventh amendment\textsuperscript{842}.

However, the difference between obtaining compensation from the state
official’s own resources and from the state treasury is blurred by a
widespread system of indemnification, pursuant to which damage judgments
rendered against state officials are usually, directly or indirectly, paid by the
State. As Vázquez points out\textsuperscript{843}, prospective state officials will consider the
risk of being sued for violation of federal law before accepting to work for
the State. Thus, the State will have either to pay the judgment directly,
indemnify the official or get a less competent employee\textsuperscript{844}. Accordingly, the
economic risk for an eventual breach of federal law is not supported, at least
in its integrity, by the state official, but they are a burden on the state
treasury. It follows that, since state officials do not suffer the economic
consequences of their wrongdoing, through the system of indemnification
States are “dampening the incentive to comply with federal law”\textsuperscript{845}.

Nevertheless, one could raise four arguments in favour of the
deterring suitability of this remedy\textsuperscript{846}. Firstly, States are not legally obliged
to indemnify their officials. Secondly, States could set a maximum for
indemnification. Thirdly, States could refuse to indemnify in cases where
the official incurred in gross negligence or wilful misconduct. Lastly, the
official will be called to court and would suffer the embarrassment of
having been found responsible for violating federal law. However, these
arguments do not appear to be entirely convincing.

\textsuperscript{841} Jeffries Jr, supra note 838, p. 66
\textsuperscript{842} Ibid, p. 67-68
\textsuperscript{843} Vázquez, supra note 817, p. 880-888
\textsuperscript{844} Ibid, 880
\textsuperscript{845} Ibid, 883
\textsuperscript{846} JH CHOPER and JC YOO, “Who’s afraid of the Eleventh Amendment? The limited
Although States are not legally compelled to indemnify state officials, they are economically. As previously mentioned, actions for damages against state officials transfer the economic risk for violations of federal law to States and consequently, they will direct or indirectly have to suffer that burden.

Moreover, denying indemnification in cases of gross negligence or wilful misconduct would push the threshold of deterrence to a higher level than the one applied by the USSC in the “clearly established” test. In the same way, the level of deterrence will not be established in accordance with the case-law of the USSC, but by States’ discretion. As for capping indemnification, its deterrence force would depend on the amount that the State has agreed to cover. The lower it is, the more deterring it will be. However, by fixing a maximum indemnification, not only do States take into account the level of deterrence to ensure an appropriate compliance with federal law, but also other policy considerations, such as the necessary amount to attract competent employees or how much resources they want to spend to cover officials’ liability in detriment to other expenses. In other words, by fixing a maximum indemnification, the degree of compliance with federal law would depend on a series of economic factors, all of which would depend on each State’s budgetary policy. Finally, although it is true that a state official who is found responsible of having violated federal or constitutional rights will have to suffer the embarrassment of his misbehaviour, it does not appear sufficient to leave the deterring strength of this remedy and consequently, the supremacy of federal law in the hands of the moral values of the state officials.

Consequently, as it currently stands, since States assume the economic risks for violations of federal law committed by state officials, suits for damages against the latter do not provide a sufficient degree of deterrence to ensure the supremacy of federal law.
II.- The Principle of State Liability under EC Law

A.- Concept

The principle of state liability implies that where a Member State has seriously breached Community rights, individuals are entitled to reparation for the damages suffered. It is thus a retrospective remedy, which has a financial nature. Besides, state liability can also be seen as an economic sanction against infringing Member States, it is for the latter to assume the economic repercussions of their wrongdoing, and not for the injured parties. It follows that as most judicial remedies in a federal system, state liability has a double dimension: it renders effective individual federal rights, whilst it keeps national governments under the rule of federal law.847

The ECJ has consistently ruled that in spite of being enforced by national courts, the principle of state liability must be determined by referring to the conditions laid down by the ECJ in Francovich848 and Brasserie849. It is therefore an independent concept, which does not have to take into account additional requirements of national tort law.

Moreover, the ECJ does not distinguish among the branches of the State liable for having violated Community law. On the contrary, it considers that it is the Member State as a whole which has committed the infringement850. Accordingly, the same conditions of liability apply irrespectively of whether the violation has been committed by the (regional or central) Government851, the legislature852, the judiciary853 or public authorities854.

847 Fallon & Meltzer, supra note 756
848 Joined Cases C-6/90 and C-9/90, Francovich & Others, [1991] ECR I-5357
850 Brasserie, supra note 849, P 34
852 Brasserie, Para 35
853 C-224/01, Köbler v Austria, [2003] I-10239.
Furthermore, the principle of state liability has been influenced by and has subsequently influenced the principle of non-contractual liability of the Community institutions. At first, the ECJ inferred from Article 288 EC, which embodies the principle of non-contractual liability of the Community, that there is a general principle of liability of public authorities, familiar to the legal systems of the Member States and recognised by the Community legal order\(^\text{855}\). Thus, not only Community institutions, but also Member States are liable when they breached Community law. Later, in *Bergadem\(^\text{856}\)*, in order to determine whether the European Commission was liable for breach of Community law, the ECJ applied the conditions laid down by its case-law on state liability. Thus, there has been a mutual influence or crossed-fertilization\(^\text{857}\) between the two principles, which submits Member States and the Community to the same standard of liability.

In addition, the principle of state liability has also influenced national administrative law. Indeed, nowadays the conditions of liability of public authorities for breach of national law are often analogue to the ones laid down by the ECJ for breach of Community law. Hence, there has been a spill-over effect which is leading, in the words of Van Gerven\(^\text{858}\), to the creation of a “*jus commune europeus*” in liability of public authorities.

As a result, the characteristics of the principle state liability under EC law are threefold, namely, independence in its definition, uniformity and universality in its application, and a harmonizing aptitude.

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\(^{855}\) *Brasserie*, Para 29


B. The Break-through: Francovich

Until 1991 when Francovich was decided, the ECJ had held that it was for the national law to decide whether individuals could claim damages arising from violations of EC law. In Russo v AIMA, the Court’s reply to this question was that the State was “liable to the injured party of the consequences in the context of the provisions of national law on the liability of the State” 859. The ECJ’s self-restraint can be explained by its ruling in Rewe v Hauptzollamt Kiel, where it held that “the treaty was not intended to create new remedies” 860. In other words, the ECJ believed that the principle of procedural autonomy counterbalanced by the principles of equivalence and effectiveness provided an adequate level of judicial protection to Community rights and consequently, additional remedies were not required 861.

By embracing the principle of state liability for breach of Community Law, the ECJ brought the missing piece in its vision of Community remedies. Thus, along with Simmenthal 862, Johnston 863 and Factortame I 864, Francovich can be considered as one of the landmark cases of the ECJ in providing national courts with judicial instruments aiming at enforcing the effectiveness of EC Law 865. Due to its unquestionable importance, this case is discussed in detail.

The facts of the case can be summarised as follows. Italy had failed to implement Directive 80/987/EEC 866, which compelled Member States to provide specific guarantees of payment of unpaid wage claims. Mr. Francovich and Ms. Bonifaci 867 brought proceedings against their former

859 Case 60/75, Russo v AIMA, [1976] ECR 45
862 Case 106/77, Simmenthal, [1970] ECR 629
864 Case C-213/89, Factortame I, [1990] ECR I-2433
865 Tridimas, supra note 857, Chapter 11.
866 OJ 1980 L 283/23-27
867 The proceedings were brought by Ms Bonifaci and 33 other employees.
employers seeking the payment of their wages. However, as a result of their employer’s insolvency and since under Italian law there were no guarantees to cover their unpaid wages, the applicants brought proceedings against Italy seeking compensation.

In a preliminary reference procedure, two Italian courts asked the ECJ firstly whether the plaintiffs could rely on the Directive to oblige Italy to pay the guarantee laid down therein. Secondly, if the previous question were answered in the negative, they asked whether the plaintiff could claim damages against the infringing Member State.

Firstly, the ECJ found that the provisions of the Directive concerning the identity of the beneficiaries and the scope of the rights were unconditional and sufficiently precise to give rise to direct effect. However, this was not the case regarding the person liable. Indeed, in pursuance with the Directive, the Member States had two possibilities when choosing the methods of financing the guarantee institution, namely either it was financed by the employers or by public authorities. Hence, since the Member States enjoyed some discretion in the implementing process, the provisions of the Directive were not sufficiently unconditional and precise to give rise to directly enforceable rights.

Secondly, as for claiming damages, the ECJ answered in the affirmative. The ECJ held that the EC Treaty has created its own legal system, whose subjects are not only the Member States, but also their nationals. It added that Community law can impose obligations and grant rights to individuals, which are to be found not only in the wording of the EC Treaty, but also by virtue of the obligations clearly imposed on the Member States, Community Institutions or other individuals. In this sense, it is for the national courts to give full effect to Community law and to protect these rights. Then, the Court went on to rule that:

“The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals

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868 Francovich, 7
869 Ibid, 25-26
were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. 870

Additionally, the ECJ stressed that Article 10 EC can be considered as a further basis for state liability. It argued that the principle of loyal cooperation enshrined in Article 10 EC, according to which Member States must take “all appropriate measures [...] to ensure fulfilment of their obligations under Community law”, obliges the latter to “nullify the unlawful consequences of a breach of Community law” 871.

Moreover, the ECJ enounced the three conditions which must be fulfilled in order to render a Member State liable for violating EC law. Firstly, the implementation of the Directive should result in granting rights to individuals. Secondly, the Directive itself should suffice to identify the content of those rights. Finally, there must be a casual link between the breach of the infringing Member State and loss or damage suffered by the individual 872.

Moreover, even though in a preliminary reference procedure, the ECJ is not deemed to rule on the case at issue, but it is for the national court to decide in the light of its ruling, the ECJ went all the way, providing the Italian courts with an outcome. It held that, since the aforementioned

870 Ibid, 33
871 Ibid, 36
872 Ibid, 38-43
conditions were fulfilled, the referring courts should uphold the rights of Mr Francovich and Ms Bonifaci in obtaining compensation from Italy for the loss or damage suffered as a result of the non-implementation of Directive 80/987.

C. Legal Basis

In Francovich, the ECJ’s rationale was based on two principles, namely, the principle of effectiveness and the principle of cooperation.

1. Principle of Effectiveness

The principle of effectiveness can be defined as the teleological interpretation of the constitutional principles of primacy and direct effect, that is to say, the transformation of “programmatic principles” into “judicial instruments”. Since the enforcement of Community law is decentralised, national courts play a fundamental role in ensuring that Community rights are respected. Indeed, it is difficult to imagine how Community law would prevail over national law and be directly enforceable at national courts, did the latter have no power to render these postulates real. Consequently, the more empowered national courts are, the more respected primacy and direct effect will be.

Furthermore, in relation to national procedural rules, the principle of effectiveness can be assessed from a double perspective. On the one hand, it can be seen as a “negative judicial power”, that is, by virtue of the principles of primacy and direct effect, national courts have the authority to set aside any national procedural rule which undermines the effectiveness of Community law. On the other hand, it can also be considered as a “positive judicial power”, which enables national courts to create new remedies,

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873 Tridimas, supra note 857, Chapter 9.
where the existing national ones are not adequate to guarantee a sufficient level of protection of Community rights. In addition, whereas the first aspect only implies purifying national rules of procedure in the light of Community law, the second involves the creation of new remedies via judicial interpretation. Hence, it is clear that effectiveness seen as a way to cover remedial gaps is more intrusive, than setting aside national rules of procedure.

In fact, this distinction can be found in the evolving case-law of the ECJ. At first, the ECJ held in Simmenthal\textsuperscript{875} that national courts had the power to set aside any provision, including of constitutional ranking, which “might impair the effectiveness of Community law”. However, at the same time, the ECJ refused to grant national courts with a “positive judicial power”, that is, creating new remedies was out of the question\textsuperscript{876}. At second stage, the ECJ realised that setting aside national provisions inconsistent with Community law was not sufficient to ensure a suitable level of judicial protection, in particular, where there were remedial lacunae in national law. To this end, in Johnston\textsuperscript{877}, the ECJ held that a certificate issued by the Secretary of State precluding any judicial review as to its compatibility with Directive 76/207\textsuperscript{878} was in breach of Community law. The ECJ stated that “the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment” was a General Principle of Community Law and thus, it was for the Member States to take all appropriate measures capable of securing an effective judicial control. In other words, the ECJ urged the Member States to create new remedies where necessary. In the same way, in Factortame I\textsuperscript{879}, the House of Lords asked the ECJ whether, owing to the fact that under English law the judiciary was unable to grant interim relief against an act of Parliament, such power could be derived from Community law. The ECJ answered in the affirmative and consequently, British courts

\begin{footnotes}
\item Simmenthal, supra note 862, Para 22.
\item Rewe, supra 860.
\item Johnston, supra 863, Para 19.
\item OJ 1976 L 39/ 40–42.
\item Factortame I, supra note 863, P
\end{footnotes}
were bestowed with a new prospective remedy, which ran counter to the ancient principle of parliamentary supremacy. Thus, the ECJ took a step further: not only are Member States obliged to create effective remedies, but also Community law in itself can grant national courts with the necessary instrumental power to ensure an effective judicial protection.

Lastly, as Tridimas points out, *Francovich* can be seen as the ultimate step toward the full enforcement of the principles of primacy and direct effect\(^880\). The facts of the case demonstrate that the applicant did not have other remedies, but to claim damages against Italy. Indeed, since the provisions of the non-implemented Directive lacked direct effect, the latter could not be enforced before the national courts. As a result, not only would the plaintiffs be deprived from any remedy, but also this remedial gap would put into question the binding capacities of non-implemented Directives. Hence, in the light of its previous case-law, *Francovich* seems to be a consistent development. Firstly, by closing a remedial gap, it enhanced the protection of Community rights. Secondly, the ECJ completed the range of remedies arising from Community law. Not only can national courts grant prospective, but also retrospective relief. Finally, by shifting the economic burden of non-implemented Directives, it reinforced their binding character and thus, their effectiveness.

2.- Principle of Loyal Cooperation: Article 10 EC

The principle of loyal cooperation imposes two types of obligations on the Member States. On the one hand, they must adopt all the necessary measures to fulfil their obligations under the Treaty, as well as to facilitate the task of the Community Institutions. On the other, they must refrain from adopting any measure capable of putting at risk the objectives of the Treaty\(^881\).

\(^{880}\) Tridimas, supra 857,  
\(^{881}\) Accetto & Zleptnig, supra note 874, P 386-388
Therefore, Article 10 EC has been relied upon by the ECJ in order to impose additional obligations on the Member States. This treaty provision is a legal basis which favours the teleological interpretation of Community provisions, that is, their “effet utile”. Although Article 10 does not have direct effect, in conjunction with other provisions of the Treaty, it is a powerful instrument. In other words, Article 10 operates as a “catalyst of European integration”. It does not produce any effects in itself, but in reaction with other principles, it causes great change. Indeed, Article 10 EC is not a substantive provision. It requires cooperation from the Member States, but it does not specify either in which subject-matters or to what extent Member States must cooperate. Consequently, the ECJ has relied on this provision in a large variety of cases, but always with the same goal in mind: fostering the enforcement of European law. It follows that it is not surprising that the ECJ also relied on Article 10 EC to enhance the consistency of its ruling in Francovich.

D.- From filling in a lacuna to a General Principle: Joined Cases Brasserie du Pêcheur and Factortame III

In these cases, Brasserie du Pêcheur, a French brewery, sought compensation from Germany for the loss of earning resulting from German legislation on Beer purity which, pursuant to a previous judgment of the ECJ, was in breach of Article 28 EC (free movement of goods). Likewise, Factortame, a British company but whose vessels and shareholder were Spanish, claimed damages against the UK arising from the Merchant Shipping Act, whose incompatibility with Article 43 EC (freedom of establishment) was upheld by the ECJ in Factortame II.

883 For a general overview of the cases in which this principle has been applied, see JT LANG, Developments, issues and new remedies- The duties of national authorities and courts under Article 10 of the EC Treaty. (2004) 27 Fordham Int'l L.J. 1904-1939.
884 See P. OLIVER, Case Note (1997) 34 CML Rev., pp 635-680
The differences between *Brasserie* and *Francovich* are twofold. On the one hand, whereas in *Francovich* the Community measure infringed was not directly enforceable, both Articles 28 and 43 EC have direct effect. On the other hand, whereas the damage in *Francovich* was the result of the Italy’s inaction (failure to implement a Directive), in *Brasserie* the damage was the direct result of legislative activity.

Therefore, as Germany, Ireland and the Netherlands argued<sup>887</sup>, *Francovich* could have been interpreted restrictively. The principle of state liability should be limited to cases where individuals do not have alternative remedies. Hence, since Articles 28 and 43 EC are directly effective, state liability should be precluded. Furthermore, applying this principle to cases where the legislature is involved not only would be contrary to the principle of separation of powers (it is for the legislature to create remedies and not for the judiciary), but it would also threaten its independence<sup>888</sup>.

However, the ECJ rejected both arguments and decided to expand *Francovich*. It held that direct effect was a “minimum guarantee”, adding that it was not an adequate remedy in cases where the damage was already produced. As for the principle of separation of powers, the ECJ pointed out that deciding whether violations of Community law committed by national legislatures give rise to damages was a “question of Treaty interpretation which falls within the competences of the Court”<sup>889</sup>. In relation to the independence of the legislature, owing to the fact that all domestic authorities are bound by Community law, the ECJ deduced that the violation of community law should be attributed to the Member State as a whole. The fact that the infringing authority was the legislature is thus irrelevant. As a result, the ECJ ruled that in so far as the conditions of liability are fulfilled, legislative activity in breach of Community law may give rise to financial reparation.

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<sup>887</sup> *Brasserie*, 18  
<sup>888</sup> Ibid, 24  
<sup>889</sup> Ibid, 27
As for the conditions of liability, the ECJ introduced the new concept of “serious breach”. The ECJ recognised that in implementing Community policies, Member States may enjoy some discretion. Therefore, not every violation of Community law gives rise to a right to reparation. In addition, the infringing Member State must have “manifestly and gravely disregarded the limits on its discretion”.

Two conclusions can be drawn from Brasserie. Firstly, the ECJ opted for a cumulative use of remedies and upgraded state liability from a specific solution to a remedial gap to a General Principle of EC law\textsuperscript{890}. Therefore, this case demonstrates that not only is the ECJ determined to create new remedies, but it is also willing to defend their universal application. Secondly, the concept of serious breach appears to be consistent with the principle of effectiveness of Community law, whilst avoiding over deterrence on Member States by the prospect of actions for damages.

\section*{E.- Conditions of State Liability}

Although based on the general tort principle of “neminen laedere”, state liability of public authorities has special features, such as the attainment of tasks of general interests, which may limit its scope in various ways. In fact, in order to preserve a fair balance between public interests and private rights, any breach of EC law does not lead \textit{inter alia} to a right to reparation. Therefore, Member States’ unlawfulness is not always automatically translated into state liability.

It is thus indispensable that additional requirements are met, namely [1] the law infringed was intended to confer rights to individuals, [2] the existence of a serious breach and [3] a direct causal link between the violation of EC law and the damage. Whereas the existence of the two first conditions can be determined by the ECJ through a preliminary reference procedure, determining whether there is a direct causal link falls within the competences of the national courts. Moreover, the ECJ has pointed out that

\textsuperscript{890} See Opinion of AG Tesauro in Brasserie, 23-34
the Member States are not precluded from lowering down the threshold of liability under national law. It follows that by enunciating these three conditions, the ECJ compelled the Member States to attain a minimum degree of diligence while acting in the sphere of Community law. It is to the study of these three cumulative conditions that I now turn.

1.- The law infringed was intended to confer rights on individuals.

As Francovich shows, this first condition cannot be confused with direct effect. Indeed, a Community provision can be “intended to confer rights on individuals” and nevertheless, not be unconditional or lack sufficient precision to be directly effective. Put differently, a non-directly effective provision can give rise to state liability. Indeed, by contrast to direct effect, in order to determine whether a Community provision is intended to confer rights to individuals, it is sufficient that the beneficiary of that right and its content are ascertainable. In other words, it is not necessary for the Community provision to determine against whom this right may be enforced. It follows that for the purpose of state liability, conferring Community rights is a less stringent requirement than the “sufficient precision and unconditionality” of direct effect.

Furthermore, Community provisions intending to confer rights on individuals must aim at protecting specific or individual interests, and not only merely public or general interests. The question than then arises is whether the protection of individual interests must be the main objective of the Community provision, or whether it suffices with the inclusion of individual interests in its general scope of protection. Until Peter Paul, it would seem that the ECJ’s answer was rather that the protection of individual interests as the specific goal of the Community measure was not

892 Ibid, 310-315
893 Case C-222/02, Peter Paul [2004] ECR I-9425.
required. However, in *Peter Paul*, the ECJ took a different approach. The ECJ held that from the fact that Banking Directives impose obligations on regulatory authorities vis-à-vis credit institutions, or that the protection of depositors is also included among their objectives; it does not follow that these Directives intended to confer rights on individuals as a result of defective supervision. By ensuring the mutual recognition of authorizations and of prudential supervision systems, the ECJ stressed that Banking Directives focussed on harmonizing the banking sector and consequently, liability for defective supervision fell outside their scope. As a result, *Peter Paul* evinces that the protection of individual interests cannot be an incidental objective of the Community provision, the latter will be deemed to confer rights on individuals where it directly seeks to protect them.

2.- Serious breach

In *Brasserie*, the ECJ held that a breach of Community law is sufficiently serious where the Member State concerned “has manifestly and gravely disregarded the limits of its discretion.” In paragraph 56, the ECJ gave some guidelines to be taken into account by national courts when considering the seriousness of the breach, namely “the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. [...] On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established or a preliminary ruling or settled

895 *Peter Paul*, supra note 893, 40-43
896 *Brasserie*, supra note 849, 55
case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.”

Thus, it seems that the seriousness of the breach is intrinsically linked to the notion of discretion. The more discretion is enjoyed by the Member State, the less likely it is for the breach to be serious. Conversely, where Member States have no discretion, a mere breach of EC law would suffice to consider it as serious. In this sense, in *Dillenkofer* the ECJ held that, since Germany did not enjoy any discretion to defer the implementation of Directive 90/314/EEC, its late transposition was *per se* a serious breach. Likewise in *Hedley Lomas*, the UK had refused to issue export licences of live sheep to Spain on the sole ground that Spanish slaughter houses did not comply with Directive 74/577/EEC. The English Court referred two questions to the ECJ. Firstly, it asked whether the UK could rely on Article 30 EC to refuse to issue exports licences. Secondly, if the first question was answered in the negative, whether traders, who had suffered loss caused by the UK’s failure to grant export licences, had a right to reparation. The ECJ answered that the Directive precluded Member States from relying on Article 30 EC and thus, the UK could not justify its violation of the freedom to export goods. As for the possibility of claiming

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897 *Ibid*, 56 In this sense, in relation to the German law on Beer Purity, the ECJ held that German provisions which prohibited the marketing under the designation of “bier” of products manufactured in accordance with rules other than the “Biersteuergesetz”, were clearly a serious breach. The reason being is that under its previous ruling “Cassis de Dijon”, German law would be clearly incompatible and thus, it could not be seen as an excusable error. Conversely, since its case-law on the use of additives was not clearly defined, the ECJ stated that German provisions banning the use of additives could not be considered as a serious breach. (*Ibid*. 59) In the same way, concerning the Merchant Shipping Act, the ECJ stated that by enacting provisions which required British nationality as a condition for registration of vessels, UK legislation was directly discriminatory and hence, it had committed a serious breach. However, in relation to the requirements of residence and domicile, the ECJ held that, though these conditions breached *prima facie* Article 43 EC, the UK had sought to justify them under common fisheries policy (*Ibid*, 61-63)

898 *Dillenkofer*, supra note 894, P 26-27 By contrast, a plaintiff seeking compensation from a Member State which has defectively implemented a Directive before the deadline, would need to prove the seriousness of the infringement. See Case C-392/93, *The Queen v H. M. Treasury, ex parte British Telecommunications plc*, [1996] ECR I-1631, also Case C-63/01, *Evans* [2003] ECR I-14447.

899 OJ 1990 L 158/59


damages, the ECJ pointed out that, since the UK did not enjoy any
discretion, its refusal to issue export licenses was considered to be a serious
breach.

Furthermore, in *Haim II*[^903], the ECJ held that in order to determine the
seriousness of the breach, the degree of discretion enjoyed by domestic
authorities under national law is irrelevant. It is only by reference to
Community law that discretion must be measured.

Lastly, in *Brasserie*, the ECJ indicated that the concept of serious breach
cannot be regarded as the possibility of making reparation conditional upon
the existence of *intentional fault or negligence*. It clarified that additional
requirements based on this notion, which go beyond the concept of serious
breach, are forbidden.[^904]

Therefore, despite the fact that the concept of serious breach gives some
flexibility to the national judiciary, the ECJ has introduced some uniformity.
Indeed, national courts must not pay attention to the intentions of the
infringing State, but to the general circumstances in which the breach
occurred. As a result, it seems that “serious breach” is based on objective
criteria.

3.- Direct casual link

As mentioned above, it is for the national court to decide whether there
is a direct casual link between the breach of Community law and the
damage suffered. However, this does not mean that causation must be seen
as a wholly national concept[^905]. It is true that causation must be inferred
from the facts of the case and thus, national courts are in a better position to
determine its existence. Nonetheless, the ECJ’s guidance remains necessary

[^903]: *Haim II, supra* note 854, P40
in order to clarify how the causality factor may affect the vertical and horizontal allocation of damages.\textsuperscript{906}

In this regard, there are four factors which may break the chain of causation, namely interventions by the Community Institutions, by a different public authority, by a third party and by the injured party itself. Firstly, when national authorities are required to implement a Community measure leaving no room for discretion which is subsequently stroked down by the ECJ, the damages resulting from its unlawfulness cannot be attributed to the Member States.\textsuperscript{907} Indeed, there is no casual link between national implementing measures and the damage occurred, instead the plaintiff should claim damages against the Community institution which adopted the unlawful act. Secondly, in \textit{Brinkmann}\textsuperscript{908}, the ECJ offered the possibility for Danish administrative authorities to correct the failure of the legislature to implement Directive 79/32/EEC on time. Although this legislative failure is a serious breach, the ECJ pointed out that the immediate effect given by the administrative authorities to the Directive interrupted the chain of causation.\textsuperscript{910} Thus, in accordance with \textit{Brinkmann}, even if the ECJ considers that a violation of Community Law is attributable to the State as a whole, this does not prevent different national authorities from cooperating among each other to ensure that Community law is observed. Thirdly, third parties who infringe Community law may also interrupt the chain of causation. A good illustration is provided by cases where third parties deliberately violate Community Law and a Member State fails to adopt any measure putting an end to such violations.\textsuperscript{911} It is true that the ECJ has held that the passive behaviour of Member States will involve a failure to fulfil its obligations under the Treaty, however this does not entail that state liability would arise. In fact, one could argue that the behaviour from which the damage arose was not caused by the State, but by a third party and

\textsuperscript{907} See Case 106/87, \textit{Asteris} [1988] ECR 5515
\textsuperscript{908} Case C-319/96 \textit{Brinkmann} [1998] ECR I-5255
\textsuperscript{909} OJ 1979 L .10/ 8–10
\textsuperscript{910} \textit{Brinkmann, supra} note 908, 28-29.
\textsuperscript{911} Case C-265/95, \textit{Commission v France}, [1997] ECR I-6959
consequently, a casual link is missing. In addition, if the Community provision breached has horizontal direct effect, pursuant to *Courage*[^912], the injured party could directly seek compensation from the infringing party. As a result, in order for national courts to determine the existence of a casual link, third parties behaviour must be taken into consideration. Finally, in *Brasserie*, the ECJ stated that there is a duty of mitigation on the injured party, whereby the latter must, as far as possible, do everything to avoid any loss or damage, or limit its extend. In particular, the injured party must “*avail himself in time of all the legal remedies available to him*”[^913]. Thus, if the latter does not fulfil his duty of mitigation, a causal link could be missing. However, it does not follow from the foregoing that all remedies must be used before claiming damages, regardless of their probability of success. Indeed, in *Metallgesellschaft*[^914], the ECJ held that the duty of mitigation is only applicable in relation to remedies which have prospects of being upheld.

Consequently, the third condition cannot be taken as a given and it may be relied upon by the national courts as an escaping mechanism to avoid rendering the infringing Member State liable for damages. In this sense, after *Brasserie* was delivered and sent back to Germany, owing to the fact that the damages were caused by multiple breaches and since the plaintiff did not prove the correlation between the ones deemed serious and the damage suffered, the German court held that element of causation was missing[^915].

F.- Liability of the national judiciary

In *Brasserie*, by indicating that the principle of state liability is applicable to the Member States as a whole, regardless of whether the breach of EC Law has been committed by the legislature, the executive or the judiciary, the

[^913]: *Brasserie*, supra note 849, 84
ECJ supported its universal application\textsuperscript{916}. This view was ratified in Köbler \textit{v} Austria\textsuperscript{917}, where the ECJ was called upon to decide for the first time on the liability of national courts of last instance\textsuperscript{918}.

The fact of the case can be summarised as follows. Mr. Köbler applied for a special length-of-service increment granted to university professors who had completed a 15-year service in Austrian universities. However, his application was dismissed on the grounds that his years of service in other European universities could not be taken into account. Köbler challenged this decision, arguing that Austrian law was in breach of the free movement of workers\textsuperscript{919}. The case reached the Verwaltungsgerichtshof (Austrian Supreme Administrative Court) which requested a preliminary reference to the ECJ. Before the question was answered, the ECJ delivered \textit{Schöning-Kougebetopolou}\textsuperscript{920}. There, it ruled that a collective agreement which denies promotion on grounds of seniority to public employees, who have completed comparable employment in the public service of another Member State, was in breach of the free movement of workers. Thus, the registrar of the ECJ asked the Verwaltungsgerichtshof whether in the light of this case, it considered necessary to maintain its request for a preliminary reference. It follows that the Verwaltungsgerichtshof had two options, either to uphold Mr Köbler’s claim or to maintain its request. Nevertheless, the Verwaltungsgerichtshof took a different approach. It withdrew the preliminary reference, but dismissed Mr. Köbler’s claim, holding that the length-of-service could be qualified as a loyalty bonus and thus, it was a justified derogation from the free movement of workers. As a result, Mr. Köbler filed an action in damages against the Austrian State before the Regional Civil Court of Vienna. He alleged that by infringing its obligations under Article 234 EC and by misinterpreting the case-law of the ECJ, the Verwaltungsgerichtshof had infringed Community law and consequently, he was entitled to reparation. The Regional Civil Court of Vienna made a

\textsuperscript{916} Brasserie, Para. 32
\textsuperscript{917} Case C-224/01, Köbler \textit{v} Austria, [2003] ECR 1-10239
\textsuperscript{918} See also C-173/03 Traghetti del Mediterraneo [2006] ECR 1-5177
\textsuperscript{919} Article 39 EC and 7 Council Regulation (EEC) no 1612/68.
\textsuperscript{920} Case C-15/96, Schoning-Kougebetopolou, [1998] ECR 1-47
reference to the ECJ. It asked whether the principle of state liability was applicable to national courts of last instance, if so, what the conditions of liability of the judiciary were. It also asked whether compensation could be awarded to Mr. Köbler⁹²¹.

Firstly, the ECJ held that the principle of state liability was applicable to violations of EC law committed by the judicial branch of the Member State. Owing to the fact that under international law, infringing States are seen as a single entity, a fortiori States must also be viewed as a whole under Community law. The ECJ added that pursuant to the principle of effectiveness, Community rights would be weaken if individuals were precluded from obtaining reparation where national courts of last instance violate Community law. Consequently, the ECJ acknowledged that, since a decision of a court of last instance in breach of Community law cannot be repealed, individuals must be provided with an alternative way to protect their rights. Thus, rendering national courts of last instance liable prevents violations of Community rights from being unsolved⁹²². In the same sense, the ECJ acknowledged that liability of the judiciary had also been recognised by the ECtHR.

In addition, the ECJ dismissed the arguments of the UK, according to which state liability for judicial acts not only would undermine the independence of the judiciary, but it would also be contrary to the principle of res judicata⁹²³. The ECJ replied that, since it is the State which is liable and not the judge in his personal capacity, there is no threat to the independence of the judiciary. Additionally, the ECJ rejected that the principle of state liability would undermine the authority of the national courts of last instance. On the contrary, the ECJ opined that it would “enhance the quality of the judiciary” and “in the long run [its] authority”. Likewise, there is no violation of the principle of res judicata, since an

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⁹²¹ Köbler, Para. 14
⁹²² Ibid, 31-35.
action in damages has neither the same purpose nor necessarily the same parties.\textsuperscript{924}

As for the conditions of liability, the ECJ held that they remain the same. However, the ECJ pointed out that, in light of the special role of the judiciary and legal certainty, national courts of last instance should only incur in liability in exceptional circumstances, that is, where there is “\textit{a manifest infringement of the law applicable}”\textsuperscript{925}. Indeed, by contrast to the executive and the legislature, the degree of discretion is not an appropriate parameter to measure the seriousness of the breach committed by national courts of last instance\textsuperscript{926}. Instead, liability will be determined by assessing, for instance, the degree of clarity and precision of the rule infringed, whether the breach was intentional, whether it was erroneous, or whether the national court of last instance violated its obligation to refer under Article 234(3) EC.

Lastly, the ECJ held that its findings in \textit{Schoning-Kougetopoulou} were applicable to the case at issue\textsuperscript{927}. Consequently, the Austrian length-of-service scheme was contrary to Community law. However, the ECJ considered that the Verwaltungsgerichtshof had not committed a serious breach. Firstly, there was no previous case-law of the ECJ on whether loyalty bonus could be a justified derogation from free movement. Secondly, although by withdrawing its request for a preliminary reference, the Verwaltungsgerichtshof committed a procedural violation of Article 234 EC, the ECJ considered that its seriousness was extenuated by the fact that the withdrawal was prompted by a misinterpretation of \textit{Schöning-Kougetopolou}. Hence, the ECJ concluded that the

\textsuperscript{924} \textit{Ibid}, 39-43. However, this argument does not appear to be entirely convincing. See CD CLASSEN, Case Note, (2004) 41 \textit{CML Rev.} pp 813-834. (Holding that it is very difficult to see how the national court in charge of solving the claim for damages will not go into reviewing the lawfulness of the ruling of the national court of last instance. Moreover, it could be possible for the infringing court to adjudicate over a claim for damages based on its own infringement. The way to escape from this dilemma would be to make a new referral to the ECJ.)

\textsuperscript{925} \textit{Ibid}, 52-56

\textsuperscript{926} Tridimas, pp 524.

\textsuperscript{927} \textit{Ibid}, 81-86
Verwaltungsgerichtshof had not manifestly and seriously breached Community law. Mr. Köbler was not entitled to reparation.

It is noteworthy pointing out that, whereas courts of last instance have an obligation to refer, inferior courts enjoy full discretion. In the same way, the ECJ indicated in Brasserie that the person who has suffered damage for breach of EC law has a duty of mitigation, which may include “all legal remedies available to him”, such as appealing judicial decisions inconsistent with EC Law. It follows that under Community law, only national courts of last instance may generate state liability.

Furthermore, not only is Köbler the logical continuation of the case-law of the ECJ on state liability, but it also introduces significant constitutional changes. On the one hand, Köbler evinces that none of the branches of government can escape from faithfully fulfilling its duties under Community Law. In the same way, by ratifying the three-pronged test enounced in Brasserie, the ECJ resisted the assault of several Member States urging for the introduction of more stringent conditions of liability. On the other hand, its innovative feature lies in that it modifies, to a certain extent, the relationships between the ECJ and national courts of last instance. In pursuance with Article 234 (3) EC, where in order to solve the case, national courts of last instance are called upon to interpret Community law, the Treaty requires the latter to seek for guidance to the ECJ by requesting a preliminary reference. The rationale behind this obligation is to create a common understanding of the EC Treaty by “(nothing) other than the expression of a mechanism of judicial cooperation and mutual trusts between courts”. In CILFIT, the ECJ tolerated that the obligation to refer imposed on national courts of last instance did not apply in cases where “the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question

\footnote{Ibid, 117-124} \footnote{However, AG Leger was more demanding with the Austrian Court, and understood that Mr Köbler was entitled to reparation. Opinion of AG Leger in Köbler, supra note 917. Paragraph 170} \footnote{Brasserie, Para. 84-85} \footnote{Opinion of AG Leger in Köbler, Para. 111}
raised is to be resolved [...]” and “the matter is equally obvious the courts of the other Member States and to the Court of Justice”. Thus, by giving up its place as final interpreter of the Community law to the courts of last instance in cases where the interpretation of Community law is obvious, the ECJ acknowledged their contribution to the interpretation and application of Community law. However, the Treaty does not provide any means to prevent or to sanction a misuse of the CILFIT doctrine. Since there is no appeal to the ECJ, before Köbler, there was no remedy against a national court of last instance infringing its obligations under Article 234 EC. Thus, Köbler can be read as a curtailment to this doctrine, which also provides a remedial answer to a structural need. Indeed, as Tridimas points out, national courts of last instance will think twice before applying CILFIT and would rather “play safe”\textsuperscript{932}. In this regard, by upholding the liability of the national judiciary, the ECJ has introduced a federal element capable of establishing its leadership in the relationship with national courts. As discussed below, liability of judicial acts can be seen as a functional substitute to the absence of an appellate jurisdiction over national courts’ decisions. Consequently, state liability for judicial acts demonstrates that the ECJ sees itself as “the Supreme Court of the European Union”. If “cooperation and mutual trust” define the “ECJ-national courts” relations, liability of the national judiciary allocates the role played by each party in the Community legal order.

\textbf{III.- Structural Differences and State Financial Implications}

The historical context in which the principles of state sovereign immunity and of state liability for damages arose may provide the explanation of a ruling. However, it is not sufficient in itself to explain subsequent developments in the case-law. Indeed, history may not in itself justify the constitutional value attributed to these two principles. While the enactment of the Eleventh Amendment provides the constitutional basis for state sovereign immunity, it is not a solid reason in itself to justify its

\textsuperscript{932} For critic view of Köbler, see PJ WATTEL, Köbler, CILFIT and Welthgrove: We can’t go on like this, (2004) 41 CML Rev., pp 177-190.
extensive application. In the same way, the fact that state liability firstly appeared as an adequate solution to the non-transposition of Directives does not explain its subsequent application to directly effective provisions.

Accordingly, this section tries to explain why the USSC and the ECJ have taken different stands towards state liability for damages. It is firstly argued that structural differences between the federal architectural design of the USA and of the EU provide valuable insights as to why the USSC persistently refuses to render States liable for breach of federal law, whereas the ECJ considers state liability as remedy vital to the full effectiveness of Community law. In addition, whereas the ECJ does not pay much attention to the adverse economic impacts of its rulings on Member States, the USSC considers the financial integrity of the state treasuries as a key element of its vision of federalism. Thus, the interplay between retrospective and prospective remedies and the state treasuries may shed some light on this issue.

A.- Structural differences: EC Directives and the Principle of “Anti-Commandeering”

1.- Some theoretical views on Commandeering

There are two ways in which “central” and state authorities may interact, namely either the central government is empowered to employ States as regulatory agencies or not.

Where the central government is empowered to rely on component States, it may do so in two ways. On the one hand, the central government may lay down a general framework within which States must adopt policy measures.

933 In order to avoid confusions, the term “central” instead of federal” is preferred in this section.
934 D HALBERSTAM, Comparative Federalism and the issue of Commandeering, pp 213-251 in NICOLAIDIS and HOWSE (eds), The Federal Vision : Legitimacy and Levels of Governance in the US and the EU (OUP, 2002)
Thus, the central government adopts “policy-making” commands which, as a general rule, are addressed to state legislatures. On the other hand, the central government may adopt policy measures in their entirety, leaving their execution to state authorities. Consequently, the central government may issue “executive-enforcing” commands, often addressed to the state administrative authorities.935

Furthermore, where the central government commands component States, the effectiveness of federal law is intrinsically linked to the effectiveness of central commands. The better component States perform their implementing duties, the more effective “central law” will be. Conversely, where the central government is not empowered to command States, “central law” can only grant rights to or impose obligations on individuals. It follows that, since the central government is not empowered to rely on state legislative and administrative apparatus, a strong federal bureaucracy appears to be of paramount importance in order to secure the proper enforcement of federal law.

As a result, where commandeering is possible, the effectiveness of central law depends on the strength of central commands. On the contrary, if the constitutional text precludes the central government from relying on States, then the effectiveness of central law would depend on the enforcement capacities of the central government alone.

935 Moreover, from the standpoint of individual rights, this distinction also seems relevant. In relation to “policy making” commands, owing to the fact that States may enjoy some, albeit limited, discretion, state legislative intervention is required in order to fully concretise individual rights. However, where “executive-enforcement” commands are issued, individual rights have already been defined by the central government. State intervention is not necessary to define their scope. It is, only required to enforce them. Besides, whereas in the first case, it is almost impossible to compel the legislature to adopt a measure, that if, reliance on the judiciary is usually precluded, individuals can bring an action forcing the administration to conduce its activity in compliance with the central commands. Therefore, state disobedience of “policy-making” commands constitutes a bigger threat to individual rights, than an infringement of an “executive-enforcement” command.
2.- The EU and the US

In Europe, the Community institutions have both the power to legislate directly upon individuals and to compel Member States to implement Community policies.

By adopting EC Regulations, the Community institutions may grant rights to and impose obligations on individuals. EC Regulations can also issue “executive-commands” addressed to the Member States. However, since there is no need for further implementing measures, EC Regulations do not lay down “policy-making” commands. Moreover, Regulations are directly effective and thus, individuals can rely on them before national courts to enforce Community rights. Thus, state intervention is not necessary in order to give full effect to individual Community rights.

By contrast, EC Directives are not addressed to individuals but to the Member States. When the Community institutions adopt a Directive, Member States are obliged to attain a certain result, but they enjoy some discretion as to the means to be deployed. Therefore, Member States are required to enact or adapt national legislation pursuant to the “policy-making” commands laid down in the Directive. Moreover, in order for Community rights embodied in a Directive to be fully directly effective, Member States must enact legislation. In other words, state intervention is required. Thus, when implementing a Directive, Member States act as Community Agents.

On the contrary, in America, in accordance with the judicial principle of “anti-commandeering”, Congress lacks powers to use States as implements of regulation. In the USSC’s opinion, the Framers of the US Constitution thought that the confederate method, according to which

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936 See e.g. Regulation 1210/2003 imposing economic sanctions on Iraq. Regulation 1/2003 obliging National Competition Authorities to cooperate with the Commission.

congressional powers targeted the States and not the individuals, was inappropriate in order to create a strong central government\textsuperscript{938}. As a result, they decided that Congress should only be vested with the power to legislate on individuals (e.g. power to tax, to regulate interstate commerce)\textsuperscript{939}, who - in Hamilton’s words- are “the only proper object of government”\textsuperscript{940}. In addition, the USSC has held that where the subject matter is not pre-empted by the Federal Government and the latter commands States to implement its policies, States officials cannot act in accordance with the views of their electorate. Consequently, accountability between federal and state governments is blurred\textsuperscript{941}. In other words, commandeering disturbs the allocation of political responsibilities between these two levels of governance, making impossible for the electorate to determine the institutional origin of any decision.

Moreover, not only is the principle of anti-commandeering applicable to the state legislative branch, but also to the executive one. Therefore, the USSC understands that the US Constitution prohibits both “policy-making” and “executive-enforcement” commands\textsuperscript{942}.

However regarding states courts, the USSC has held that commandeering is possible. In its view, the reason for this distinction lies in Articles III and VI US Constitution. Article III only provides for “a Supreme Court”, leaving the creation of lower federal courts to congressional discretion. This option is known as the “Madisonian Compromise”\textsuperscript{943}. Accordingly, Congress could have relied exclusively on state courts to enforce federal law. In the same way, in Article VI there is no constitutional provision directed to state legislatures that is similar to the Judge Clause\textsuperscript{944}. Accordingly, whereas the US constitutional design precludes commandeering state executive and legislative branches, the

\textsuperscript{938} New York v United States, 505 US 144 (1992)
\textsuperscript{939} See FERC, Op cit, 762-766
\textsuperscript{940} The Federalist No 15, at 109.
\textsuperscript{941} New York v US, Op. cit, 166-169
\textsuperscript{943} See Printz v US, Op. Cit, 907.
supremacy Clause and the *Madisonian Compromise* authorise Congress to command state courts to enforce federal law.

Furthermore, although Congress cannot oblige States to implement its policies, it is, nonetheless, entitled to provide some incentives. It follows that this principle does not prevent Congress from encouraging States to regulate in compliance with its policies. In *New York v United States*[^945], the USSC indicated that the difference between encouraging and compelling lies in that, whereas the former allows state officials to remain accountable to local preferences[^946], the latter does not. It is true that in order for States to benefit from federal incentives, they are required to follow Congress’ instructions. However, if a State decides to line up its legislation to congressional wishes and then, fails to do so, there will be no constitutional violation. It will simply lose its right to federal incentives. Accordingly, even if States consent to follow Congress’ instructions, they cannot be considered as federal agents.

As a result, whereas European Member States may be required by the Community institutions to act as their agents, this possibility is precluded in America.

3.- State Liability and Commandeering

In relation to state liability, States may commit two types of infringements, namely [a] by omitting to give full effect to federal/Community rights, or [b] by actively breaching federal/Community legislation granting rights to individuals. This section will focus on the first type of breach.

In Europe, the first type of violation corresponds to Member States’ failure to implement a Directive. In this sense, if a Member State fails to transpose a Directive, it is settled case-law that individuals would not be able to enforce Community rights therein against other individuals (non-horizontal

direct effect of Directives). Consequently, Member States’ inaction hinders the effectiveness of Community law.

Thus, in order to ensure “l’effet utile” of Directives, the ECJ was obliged to find ways which would deter Member States from disobeying Community commands. At first, by holding that after the implementation deadline, individuals could rely on non-implemented Directives against infringing States (vertical direct effect), the ECJ prevented Member States from benefiting from their own infringements. In the same way, in *Foster v British Gas*, by widening-up the concept of State, the ECJ simultaneously extended the scope of vertical direct effect of Directives. Secondly, the ECJ held in *Marleasing* that national courts are required to interpret national law “in the light of the wording and purpose” of the Directive. Accordingly, where national law can be interpreted in different ways, national courts must choose the one which is consistent with the non-implemented Directive. Therefore, both vertical direct effect and consistent interpretation can be seen as deterring mechanisms against Member States’ disobedience of Community commands. However, these mechanisms are limited. In fact, they do not provide an effective remedy in cases where national law does not leave any room for judicial interpretation and where an individual seeks to rely on Community rights contained in a non-implemented Directive against another individual. In such cases, the effectiveness of the non-implemented Directive is seriously put into question.

Finally, the principle of state liability can be seen as the ultimate endorsement to EC Directives’ commands. Indeed, the principle of state liability for breach of Community law can be examined under two perspectives, which are nevertheless convergent. In the light of the protection of individual’s rights, the principle of state liability can be seen as an effective remedy. Thus, although individuals cannot rely on community

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949 See Case C-188/89, *Foster v British Gas* [1990] ECR I 3313
rights laid down on a Directive against another individual, state liability gives rise to compensation against the infringing Member State.

From the point of view of the effectiveness of EC Directives, the principle of state liability can be seen as an economic sanction, in favour of private individuals. Therefore, by shifting the economic cost of the non-transposition of a Directive from the private parties to the infringing Member State, the latter would be eager to comply with Community commands. As a matter of fact, in the light of the ECJ’s case-law, failure to implement a Directive is not only the scenario which opened the door to claims in damages for breach of Community law\textsuperscript{951}, but it is also the paradigmatic example of a “serious breach”\textsuperscript{952}.

Thus, the rationale of the ECJ is simple: the combined effect of vertical direct effect, the \textit{Marleasing} doctrine and the principle of state liability would deter Member States from non- implementing EC Directives. The principle of state liability renders more effective Community commands and thus, Community law.

In the United States, since Congress legislates directly upon individuals, that is, federal rights are directly effective without the need for state intervention, “\textit{the failure to implement a Directive}” scenario simply does not exist under US Constitutional law. State inaction has no adverse repercussion on federal rights. The States would only act pursuant to federal policies in so far as they freely consent to do so. However, as previously mentioned, if they agree to follow the commands of the Federal Government and subsequently, fail to do so, no constitutional obligation will be breached, only the right to federal incentives will be lost. Therefore, since States do not have a constitutional obligation to act in compliance with the congressional mandates, they cannot omit what they are not required to do. With due regard to the exception of state courts, the effectiveness of federal law depends on federal authorities alone.

\textsuperscript{951} \textit{Francovich}, Op cit
\textsuperscript{952} \textit{Dillenkofer}, Op cit..
A structural difference may also explain why the ECJ has decided not to exclude the judiciary from incurring liability for breach of Community Law, whereas in the United States, not only do judges enjoy absolute immunity from suit, but the USSC has also a restrict view on collateral challenges to state court decisions. The EC Treaty does not provide any appeal over national courts’ decisions. The ECJ does not have an appellate jurisdiction to review the compatibility of national courts rulings with Community law. Instead, the Treaty provides for a preliminary reference procedure through which the ECJ and national courts cooperate in interpreting Community law. The difference between a preliminary reference procedure and an appellate jurisdiction is twofold. Firstly, parties do not have a right to appeal. The decision to refer falls within the exclusive competence of the national court. Secondly, even though the ECJ has occasionally provided a detailed guidance indicating how a case should be solved, it is still for the national court to follow and apply the preliminary ruling. The cooperative nature of the preliminary reference procedure is further demonstrated by the fact that, though Article 234 (3) EC imposes on national courts of last instance an obligation to refer where the interpretation of Community law is decisive for the case at issue, the EC Treaty does not provide any sanction or remedy against its violation.

Thus, the absence of a remedy against a breach of Article 234(3) EC is an important weakness of the preliminary reference procedure, not only because parties injured by judicial action are not protected, but also because infringing national courts of last instance could threaten the uniform application and primacy of EC law.

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954 It is true that Article 226 EC enforcement actions could be seen as a way of enforcing the obligation to refer. See Case C- 129/00, Commission v Italy, [2003] ECR I-14637. Nonetheless, injured parties will not benefit from this type of remedy, which has rather a prospective character.
It follows that Köbler can be read as introducing a functional substitute to the lack of an appellate jurisdiction. In accordance with Köbler, where a court of last instance infringes Article 234 (3) EC and in so far as the three conditions enounced in Brasserie are fulfilled, the injured party is entitled to reparation. However, it is very unlikely that the court dealing with the claim for damages will adjudicate in favour of the plaintiff without making a reference to the ECJ. Firstly, the claim for damages will often be heard by a court inferior to the one which committed the breach. Consequently, it would not feel at ease ruling against its hierarchical authority. Secondly, a lack of referral may lead the infringing court to determine its own infringement and thus, to put into question the impartiality of the judicial system. Hence, it appears that courts in charge of solving the claims for damages will often make a reference to the ECJ. Consequently, the ECJ will often decide whether the national court of last instance incurred in liability. Thus, Köbler fulfils an analogous function as a direct appeal to the ECJ. It provides a remedial solution to a structural gap. Although, the cooperative and trustful nature of a preliminary reference procedure remains, Köbler can be understood as opening the way for a “de facto” appellate jurisdiction of the ECJ.

On the contrary, the USSC has appellate jurisdiction to review the consistency of state courts decisions with the US Constitution and federal law. Article III US Constitution states that the USSC has appellate jurisdiction over all the cases to which the federal judicial power extends. Although it is not expressly stated in the US Constitution, in Martin v Hunter’s Lessee, the USSC strongly asserted its appellate jurisdiction over state court decisions. Firstly, pursuant to Article III US Constitution, the appellate jurisdiction of the USSC is determined by the notion of “case”, regardless of the court it comes from. Secondly, as mentioned above, in the light of the Madisonian Compromise, had Congress decided not to establish

956 Ibid, pp.13-16.
957 Martin v Hunter’s Lessee, 14 US (Wheat) 304 (1816)
federal courts, “the appellate jurisdiction of the Supreme Court would have nothing to act upon unless it could act upon cases pending in the States courts”\(^{958}\). Thirdly, it ensures that the US Constitution and federal law are uniformly applied. Furthermore, the appellate jurisdiction of the USSC has always been expressly endorsed by Congress in its various judiciary acts\(^{959}\). It is also noteworthy mentioning that the appellate jurisdiction of the USSC operates as an “ultima ratio” remedy, that is, in order to file a direct appeal to the USSC, it is previously required that the plaintiff concludes his pilgrimage at state courts\(^{960}\).

Furthermore, Köbler can also be understood as a collateral attack to a decision of a national court of last instance. Although, the ECJ stated that an action for damages would involve neither the same purpose nor the same parties, the truth is that an inferior court will often be called upon to review the consistency of a higher court’s findings with EC law. Conversely, the USSC has been reluctant to allow inferior federal courts to review the validity of a state court decision with the US Constitution and federal law\(^{961}\). In *Rooker v Fidelity Trust Co*\(^{962}\), after their appeal was dismissed by the Supreme Court of Indiana, plaintiffs brought a new action before a US District Court alleging that the state court judgment was in breach of the US Constitution. Nevertheless, the USSC ruled that the US District Court lacked original jurisdiction and instead, plaintiffs should have sought for direct appeal to it. Likewise in *District of Columbia Court of Appeals v Feldman*\(^{963}\), two applicants challenged an admission rule to the bar of the District of Columbia which denied access to students not graduated from accredited law schools. Their actions before the courts of the District of Columbia were unsuccessful and as a result, they filed a new action before the US District Court. Again, the USSC held that it was the only court which could review decisions of the highest court of a state. Thus, lower federal courts lack jurisdiction to review state court decisions. Hence, in the

\(^{958}\) *Ibid*, 340
\(^{959}\) 28 USC §1257 (2000)
\(^{960}\) See *supra* note 959. State courts certiorari
\(^{961}\) *Pfander, supra* note 953, pp.284-285
\(^{962}\) *Rooker v Fidelity Trust Co*, 263 US 413 (1923)
\(^{963}\) *District of Columbia Court of Appeal v Feldman*, 460 US 462 (1983)
light of the Rooker-Feldman doctrine, a direct appeal to the USSC is deemed sufficient to secure constitutional and federal rights of private parties, while preserving their uniform application. A collateral challenge will thus become too intrusive into state judicial autonomy.\textsuperscript{964}

As a result, Köbler can be considered as an answer to the fact that the ECJ does not have an appellate jurisdiction over national court decisions. Thus, state liability for judicial acts operates as a remedial response to a structural need. By contrast, since the USSC is vested with appellate jurisdiction over state court decisions, as the Rooker-Feldman doctrine shows, it does not need additional means to enhance its authority.

B.- Remedies and the State Treasuries

The principle of commandeering or its prohibition provides an answer to the constitutional consequences resulting from state inaction. Nevertheless, this principle is not sufficient to explain the opposite approach of both Courts regarding violations of federal/Community law due to state action. I believe that the answer to this question lies in the interplay between remedies and the state treasuries.

1.- America’s antagonism between past remedies and future rights

One must recall that the USSC has held that one of the “raisons d’être” of the Eleventh Amendment is to safeguard States’ “financial integrity.”\textsuperscript{965} The availability of alternative remedies ensuring the supremacy of federal law seems to be conditioned upon economic considerations. Coeur d’Alene demonstrates that prospective relief is only available in so far as it is not as intrusive as a “retroactive claim for damages.”\textsuperscript{966} Likewise, actions for

\textsuperscript{964} The incompatibility between direct appeal to the USSC and collateral challenges is also demonstrated by exceptional cases where due to the fact that direct appeal to the USSC was precluded, a collateral challenge was allowed. See Fidelity Natural Bank & Trust Co v Swope, 274 US 123 (1927)

\textsuperscript{965} Alden, 709

\textsuperscript{966} Coeur d’Alene, 287
damages against state officials allow States to decide whether they indemnify and if so, to calculate, limit and foresee the economic risks generated by federal violations committed by their own officials. Accordingly, liability for breach of federal law is conditioned upon state budgetary policy.

_A priori_, the USSC’ ultimate aim is to protect the state treasuries, even if this implies that private individuals or entities will be deprived from any remedy; that state officials are not deterred from breaching federal law; or that the supremacy of federal law is not secured. Notwithstanding cases where Congress has the power to abrogate state immunity, it appears that private individuals will have access to justice, provided that the state treasuries are not threatened. It can be _prima facie_ suggested that economic repercussions on state budgets are the decisive factor in determining whether private individuals have an effective remedy to enforce their federal rights against infringing States. However, in the light of _Milliken II_967, this argument needs to be nuanced.

In _Milliken II_, the USSC had to decide whether the federal courts had the power to order compensatory and remedial educational programs for school children who had suffered from _de jure_ segregation. These programs would require States to spend millions of dollars. Accordingly, the USSC was asked to determine whether an _Ex-Parte Young_ injunction could have adverse economic repercussions on the state treasuries. The USSC replied in the affirmative. It held that although desegregation programs were compensatory in nature, it “_does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment_”968.

Thus, prospective remedies can have “ancillary”969 effects on the state treasuries. Hence, the USSC draws a distinction between the economic impact of prospective remedies and the one of retrospective remedies, that

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967 _Milliken v Bradley_, 433 US 267, 279 (1977) See also _Hutton v Finney_, 437 US 678, 691 (1978)
968 Ibid, 290.
969 _Hutton v Finney_, supra note 967, 690
is, between “New and Old Property”970. Whereas retrospective relief cannot adversely affect the state treasury, the effectiveness of prospective relief could be seen as a limitation to its absolute protection.

As Jeffries points out971, there is an antagonism between past remedies and future rights, which can be explained as follows. If constitutional innovation is seen as a positive value, then retroactivity must be limited. Indeed, in order for the judges to ease depart from precedent, the impact of their “new law”972 rulings should be only prospective, that is, break-through judgments are easier to render if judges escape from economic considerations of the past973. It follows that awarding damages for past claims may be a hindrance to constitutional innovation and consequently, it should be kept, as far as possible, limited. On the contrary, prospective remedies operate as a device which favours constitutional renewal. As a matter of fact, not only can injunctive remedies be relied upon in cases of ongoing violations of rights, but they also prevent potential breaches. Hence, they are able to go beyond the underlying rights, ultimately leading to a remedy-right transformation. Moreover, since state resources are limited and both prospective and retrospective remedies are capable of affecting the state treasuries, the judiciary is required to decide whether redressing past damages or favouring constitutional innovation974. In this sense, the American Constitutional structure of remedies is clearly biased in favour of the future. By limiting retrospective relief in favour of injunctive and declaratory remedies, societal resources are shifted from old claimants to new ones, that is, from old to new property975.

In short, the protection of state treasuries is not absolute. The USSC has agreed that it can be adversely affected in cases where new property requires protection. Nevertheless, the state treasuries are a limit which

972 Fallon and Meltzer, supra note 756
973 Ibid. 98-99
974 Ibid. 105-112
975 Ibid. 113-114
forces retrospective and prospective remedies into a dichotomy, which in order to promote constitutional innovation, is settled is favour of the latter.

2.- The ECJ’s convergent view on remedies

The ECJ has held that there are no antagonistic forces between retrospective and prospective remedies. In *Brasserie du Pêcheur*, the ECJ rejected the argument brought by the German, Irish and Dutch Governments pursuant to which the principle of state liability for breach of EC law should be limited to non-directly effective provisions, that is, to cases where prospective relief was not possible. It held that direct effect was only a "minimum guarantee" and that "the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained." Thus, the ECJ has a convergent view on prospective and retrospective remedies, the combine effect of both leads to a complete protection of Community rights.

Moreover, the ECJ’s convergent view on remedies may be explained by the fact that in its rationale, the protection of state treasuries has not taken issue. In this regard, *Haim II* clearly demonstrates that budgetary policy considerations do not prevent individuals from receiving full compensation from the Member States.

Mr. Haim was an Italian national who had studied dentistry in a non-Member (Turkey), but whose title had been recognised by Belgium. In order to join the social security scheme as a dental practitioner, he sought to enrol with the German Association of Dentists (GAD). Nevertheless, the GAD rejected his application on the ground that he was not covered by the Council Directive 78/686/EEC on mutual recognition of diplomas. In *Haim*

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976 *Brasserie du Pêcheur*, 18.
977 *Ibid*, 20
978 *Ibid*, 22
979 *Haim II*, supra note 854
980 More recently, see Case C-470/03 *A.G.M.-COS.MET Srl* [2007] ECR I-2749 (rejecting that national law could deny the award of loss of profit as a head of damage)
I\textsuperscript{981}, the ECJ ruled that Mr. Haim was entitled to enrol and consequently, the GAD had breached his freedom of establishment. However, instead of adhering to the social security scheme, Mr. Haim brought an action before a German court asking for compensation for the loss of earnings against the GAD. The German court sought a preliminary reference from the ECJ, asking whether the principle of state liability was extendable to public-law bodies such as the GAD. The ECJ answered in the affirmative, stressing that “Member States cannot, therefore, escape that liability [...] by claiming that the public authority responsible for the breach of Community law did not have the necessary powers, knowledge, means or resources”\textsuperscript{982}. Therefore, even in cases where the infringing public authorities cannot financially cover the claims for damages, Member States would still remain liable.

In the same way, though it is true that the ECJ can limit the temporal effects of its rulings\textsuperscript{983}, it has held that the financial repercussions for the state treasuries are not on themselves sufficient to justify such limitation.\textsuperscript{984} In its opinion, since serious infringements of Community law usually produce the most significant financial implications for Member States, limiting the effects of its rulings solely on financial grounds would lead to a paradoxical outcome, namely a lenient treatment of the most serious violations\textsuperscript{985}. In effect, the message of the ECJ is quite clear: “to limit the effects of a judgment solely on the basis of such considerations would considerably diminish the judicial protection of the rights which taxpayers have under Community fiscal legislation”\textsuperscript{986}. As a matter of fact, the ECJ prefers to rely on the principle of legal certainty to limit the retroactive effects of its rulings. Particularly, it requires parties concerned to have acted

\textsuperscript{981} Case C-319/92, \textit{Haim I}, [1994] ECR I-425
\textsuperscript{982} \textit{Haim II}, 28.
\textsuperscript{983} Case C-43/75, \textit{Defrenne v Sabena}, [1976] ECR 455, para 69-75
\textsuperscript{984} Case C-209/03, \textit{Bidar} [2005] ECR I-2119
\textsuperscript{986} Roders, 48.,
in good faith and the presence of serious difficulties\textsuperscript{987}. Although it is true
that in specific circumstances, repercussions for the state treasuries have
been considered as “serious difficulties”, the requirement of good faith has
been equally taken into account by the ECJ\textsuperscript{988}.

Therefore, the financial repercussions for the state treasuries are not
a sufficient reason to justify limiting either retrospective relief or the non-
retroactivity of the ECJ’s rulings. As a result, the ECJ does not need to
decide to which remedy state resources are allocated. Neither does the ECJ
need to endorse the effectiveness of one remedy to the detriment of the
other. Judicial protection is seen as a whole, to whose completion both
remedies contribute on an equal footing.

IV.- Conclusions

Even though both Courts have given opposite answers to question of
state liability arising from breach of federal/Community law, one can draw
some parallels between the two. Firstly, both principles have been
interpreted extensively. Cases such as College Savings Bank (rejection of
implied waiver) Florida Prepaid (strict interpretation of §5 of the
Fourteenth Amendment), Seminole Tribe (Congressional Plenary Powers
under Article I cannot override this principle), and Alden (extension to this
principle to state courts) demonstrate that the principle of state sovereign
immunity has gained importance in the American constitutional landscape
to the detriment of other constitutional principles, in particular, the
supremacy of federal law. In the same way, Brasserie du Pecheur
(universality of the principle), Hedley Lomas (discretion is determined by
reference to Community law), Haim II (irrelevance of economic
considerations) evince that the ruling of the ECJ in Francovich was not a
shy statement, but the enoncement of a General Principle of Community
law.

\textsuperscript{987} Case C-437/97, EKW [2000] ECR I-1157.
\textsuperscript{988} Bidar, 67-69
Secondly, either where an individual brings an action for damages against a Member State under EC law or where an individual decides to sue a state official under Section §1983, the mere breach of Community/federal law does not *per se* give rise to reparation. In fact, both Courts have laid down a similar threshold of liability which requires the element of “*fault*”, understood not as intentions, but as an expected objective behaviour.

Lastly, both federal systems have a centralised model of enforcing federal/Community law. As previously mentioned, the United States can bring proceedings against infringing States on the sole ground of enforcing a private right. Likewise, under Article 226 EC, the Commission can decide to start proceedings against an infringing Member State for failure to fulfil its obligations under the EC Treaty.

However, despite these few points in common, the truth is that major differences persist. Indeed, although the threshold of liability under EC law and under Section §1983 may meet, the principles governing the *quantum* could not be more poles apart. Whereas in the light of the ECJ’s case-law, Member States would be precluded from arbitrarily capping compensation, not only do American States enjoy discretion as to the amount that they decide to cover, but they may also refuse to insure their officials. Therefore, whilst Section §1983 allows States to accommodate officials liability to their budgetary policy and not to an optimal degree of deterrence, the principle of state liability excludes any possibility of limiting compensation. According to the ECJ, compensation must be *full* and *effective* and thus, Member States have little to say as to the amount that they want to pay.\footnote{989 See *A.G.M.*, *supra* note 980, paragraphs 87-98. Also, an analogical application of the Case C-271/91, *Marshall v Southampton & SW Hampshire Area Health Authority*, [1993] ECR I-4367.}

Furthermore, the Courts’ opposite approach is due, on the one hand, to structural differences between the European and American federal design and on the other hand, to the interaction between remedies and the state treasuries. The principle of commandeering entails that the effectiveness of Community law depends, to a great extent, on the observance of
Community commands (Directives). Hence, in order to reinforce these commands, the ECJ considered that state liability was a necessary excipient. In other words, state liability could be seen as the appropriate answer to a structural need. Conversely, since the US Constitution precludes the United States from relying on the States as agents, it is for the Federal Government alone to implement federal law. State intervention is not needed to secure the effectiveness of federal law. Likewise, Köbler is a possible answer to the fact that the EC Treaty does not grant the ECJ with an appellate jurisdiction over national courts’ decisions. Nor does it provide private parties with remedies for violations of Article 234(3) committed by national courts of last instance. Thus, state liability for judicial acts appears to be a remedial solution to a structural gap. It creates a “de facto” appeal which is capable of submitting the highest national courts to the mandates of an incipient Supreme Court of the European Union. On the contrary, since the USSC has appellate jurisdiction to review the consistency of state court decisions with the US Constitution and federal law, additional means are not necessary to secure its authority.

Moreover, since the USSC is keen on protecting the state treasuries, the judiciary is forced to choose between past remedies and future rights. This antagonism is solved in favour of prospective remedies which are deemed to favour constitutional innovation. On the contrary, since the state treasuries are not taken into consideration by the ECJ’s rationale, retrospective and prospective relief are seen as complementary and supplementary remedies.

As a result, state liability in damages is a monetary remedy which illustrates the way in which the principle of primacy/supremacy of Community/federal law operates in a constitutional legal order. In this sense, as the American and European examples demonstrate, primacy or supremacy can be understood in two different ways.

In Europe, the principle of primacy of Community law is intrinsically linked to dictum “ubi jus, ibi remedium”. Thus, primacy is respected in so far as for every violation of Community law, there is a correlative remedy. The strength of primacy amounts to the indissolubility of the binomial “right-remedy”. In addition, the fact that there are already in place other remedies
is not an obstacle to create new ones, whose adequacy is greater. The more suitable remedies are, the best protected rights are and consequently, the more enhanced primacy of Community law is. In this regard, the principle of state liability clearly demonstrates the foregoing. At first stage, it was relied upon by the ECJ in order to cover a remedial gap. Later, taking the view that liability for damages was the most adequate instrument to solve past violations of EC law, the ECJ upheld its universal application.

On the contrary, in America, the supremacy of federal law is interpreted as the capacity of submitting component states to the rule of law. Hence, the supremacy of federal law is respected where remedies are able to secure state compliance with federal law, regardless of whether past violations of federal rights remain unsolved. It follows that where alternative remedies (such as suits brought by the Federal Government, suits against state officials or the *Ex-Parte Young* Doctrine) seem sufficient to ensure observance of federal law, rendering State liable for damages is not necessary. As *Alden* demonstrates, remedial gaps or remedial inadequacy do not *inter alia* put into question that federal law is the “*supreme law of the land*”.

Thus, whereas in Europe, primacy of Community law and judicial protection walk hand-to-hand, in America, it is not always the case.
CONCLUSIONS

The preceding chapters have sought to show how the United States Supreme Court (USSC) and the European Court of Justice (ECJ) contribute to the vertical and horizontal allocation of powers. The following normative and descriptive conclusions may be drawn from the results of this comparative analysis.

In the US, standing is conceived as a structural safeguard that prevents federal courts from “governing through injunction”. By conferring standing only to litigants having suffered (or likely to suffer) a relevant injury, the USSC believes that judicial review does not fall into abstraction. Abstract adjudication is seen as a threat to the principle of separation of powers, since it would enable federal courts to engage in policy-making and policy-enforcing, functions constitutionally reserved to Congress and the US Executive respectively. Thus, standing confines federal courts to their traditional judicial functions when dealing with public law cases namely, redressing individual harms caused by public intervention.

To this effect, while Members of Congress, the US Executive and States may recourse to federal courts with a view to redressing their own “private” injuries, separation of powers and federalism concerns render the USSC suspicious when they litigate representing the interests of third parties. In spite of the Take Care Clause of Article II US Constitution, without statutory provisions authorising the US Executive to enforce a particular scheme, it is dubious that the latter enjoys standing. The reason given is that these suits may impinge upon congressional considerations, such as preference for private enforcement. In the same way, Congressmen alleging “dilution of their political power” lack standing. These lawsuits are deemed unfit for judicial resolution, and are redirected to the political process, where applicants enjoy sufficient mechanisms to recover the power lost. Standing is also denied to States challenging, as “parens patriae”, the constitutionality of a federal statute. This type of challenge is believed to generate an undue interference between the US government and its citizens.
However, from these concerns it does not follow that all conflicts involving federalism or separation of powers questions are always excluded from the purview of the federal judiciary. Provided that there is a relevant injury inflicted upon private individuals, federal courts are legitimised to decide on the merits. Suffice it to compare *Raines v Byrd* with *Clinton v City of New York*\(^{990}\). While in the first case standing was denied to Congressmen challenging a federal law enhancing the presidential veto, in the second case private applicants adversely affected by the use of the US President’s new veto powers had standing.

The problem with the “*Marbury*-paradigm” of standing lies in that some injuries resulting from a violation of federal law may not be concrete enough to be litigated by private individuals, but they may, nevertheless, cause real harm to the general population as whole. Environmental injuries are a paradigmatic example. As Scalia opines, it may be argued that these “generalized grievances” are better addressed by the political process, where the majoritarian interests are better represented. Besides, at federal level, in so far as Congress has authorised the US Executive to enforce a federal statute, these injuries may be addressed under Article II US Constitution. However, what would happen where the Executive itself or a federal agency violates federal law? In *Massachusetts v EPA*\(^{991}\), the USSC provided the answer by broadly interpreting “*parens patriae*” standing. It is for States to step-up as congressional allies in checking that agencies do not abuse the powers delegated to them.

In the EU, “*locus standi*” under article 230 EC is not read by the ECJ as drawing the line between politics and judicial review. Instead, it allocates jurisdiction between Community and national courts. Whereas, with the exception of decisions directly addressed to the applicants, the traditional judicial business of redressing private injuries is shifted to the national courts, article 230 EC welcomes disputes brought directly by the political actors even if they have no interests in the case.


Following the Kelsenian model that inspired several European national constitutions, “free-standing” is granted to the Community Institutions and the Member States. Under this model, it is believed that the law, as an expression of the “volonté générale”, should be shielded from the capricious attacks of a few, which would disturb the proper functioning of the political institutions. Conversely, free standing should be given to the Member States and the Community Institutions, not only because of their role as “Guardians of the Treaty”, but also due to their active participation in law making.

In the eyes of the USSC, the Community Courts would thus incur an excessive abstraction incompatible with sound adjudication. However, if one looks at the rulings of the USSC in cases like Lopez, New York v US and Alden, the truth is that the factual context did not play a major role in deciding the merits. In structural cases, the USSC often embraces a formalistic approach insulated from the nuances of factual considerations. However, though the “utilitarian” reading of Article III may be put into question, its dogmatic foundation still makes sense. As Marbury suggests, expounding the meaning of the US Constitution is not an end in itself, but a “by-product” to redress harms. Thus, in order to call in the Constitution, federal courts need a factual substratum where an injury occurred. Conversely, in Europe, interpreting the EC treaty is seen as independent and autonomous function of the judiciary. Moreover, when the Community Institutions or the Member States act as plaintiffs, there are no separation of powers and federalism concerns. On the contrary, as Les Verts and Chernobyl demonstrate, not only does judicial access enables the political actors to safeguard their prerogatives, but it also ensures their accountability.

993 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
As for the traditional role of solving injuries, the case-law under Plaumann shows that, without prejudice of Community measures directly addressed to private applicants, Luxembourg is rather an exceptional venue. As a matter of fact, by comparing cases like Greepeace and Laidlaw\(^{995}\), one concludes that standing under article 230 (4) EC is notoriously stricter than under Article III US Constitution. Therefore, as stressed by the ECJ in UPA and Jégo-Quéré\(^{996}\), it is for the national law to assume the burden of complying with the principle of judicial protection, by affording applicants indirect challenges to Community Law.

A related question in this regard is when national law must confer standing to an applicant wishing to rely on its EC rights. Cases like Verholen and Safalero\(^{997}\) indicate that Community law does not require national courts to allow “action popularis”. However, it was argued that imposing the conditions embedded in article 230 EC would be contrary to the principle of judicial protection. To this effect, if a Member State were to adopt standing rules similar to the ones laid down in Article III, it would comply with the principle of judicial protection.

The problem with interpreting article 230 EC as enshrining a “jurisdictional shifting strategy” lies in the excessive reliance on the remedial capacities of the preliminary reference procedure. AG Jacobs is right in sustaining that article 234 EC is merely a tool of judicial cooperation. Hence, it would be best for the ECJ to emulate the rulings of USSC in ASARCO, Akins and Massachusetts v EPA\(^{998}\). Standing under article 230 EC should be self-sufficient when evaluating its compatibility with the principle of judicial protection. The ECJ should admit reforms that adapt its standing doctrine to new remedial needs without destroying its


\(^{996}\) Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677; Case C-263/02 P Commission v Jégo-Quéré [2004] ECR I-3425

\(^{997}\) Joined Cases C-87/90 to C-89/90 Verholen and Others [1991] ECR I-3757; Case C-13/01 Safalero [2003] ECR I-8679

paradigmatic features. Besides, given that article 263 TFEU points in this direction, the ECJ should not be so reluctant to modify its case-law accordingly.

Since in the EU, standing does not operate as an implement of the separation of powers preventing the judiciary from participating in abstract discussions, the next logical step was to look for substantive questions deemed too political for judicial resolution. After explaining the case-law of the USSC under the political question doctrine, it was maintained that, either because the TEU excludes political questions or because their regulation is entrusted to national law, the ECJ lacks jurisdiction to decide similar questions as the ones raised in *Luther, Powell or Coleman*\(^{999}\). However, in accordance with *Eman & Sevinger*\(^{1000}\), the ECJ understands that its lack of jurisdiction does not mean *inter alia* that these questions are beyond judicial cognizance. It is for the national judiciaries in interpreting national law, and where appropriate for the ECtHR in interpreting the Convention, to determine if that is the case.

Where the Community Courts enjoy jurisdiction, their approach is similar to the one adopted by the USSC in *Baker*\(^{1001}\). As famously articulated by Justice Holmes in footnote four of *Carolene Products*\(^{1002}\), it appears that the ECJ will not abdicate its reviewing powers where incumbent majorities become obstacles to the democratic process or where the protection of “discrete and insular” minorities is at risk. *Les Verts* and *Martinez v Parliament*\(^{1003}\) can be interpreted in this vein. The fact that both cases were at the epicentre of the political process did not prevent the Community Courts from applying a “representation-reinforcing” review, according to which judicial intervention sought to resolve flaws in the political process.


\(^{1000}\) Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055

\(^{1001}\) *Baker v. Carr*, 369 U.S. 186 (1962),

\(^{1002}\) *United States v. Carolene Products Company*, 304 U.S. 144 (1938)

As for foreign policy, the USSC is reluctant to mediate in disputes involving the division of competences between Congress and the US President. Similar reasons as the ones adduced when denying standing to Members of Congress are put forward by the USSC. The Constitution has provided these two branches with sufficient checks and balances to be protected from each other. Additionally, the lack of judicially manageable standards and the need for the US to speak with “one single voice” also advise against federal courts becoming involved. Nevertheless, as Justice Brennan articulated in Baker, “it is an error to suppose that every case touching foreign relations is beyond judicial cognizance”\(^\text{1004}\). Cases like Hamdi and Hamdan\(^\text{1005}\) indicate that the USSC is not willing to forgo its role as guarantor of fundamental rights, even if its rulings lead to adverse repercussion in the international sphere or serious cleavages with the political branches.

In the EU, the “external-relations factor” does not play a role when distributing political competences. Vertically, in addition to checking whether the Community acts within its attributed competences, Community Courts evaluate the degree of discretion enjoyed by the Member States when invoking foreign policy considerations. Horizontally, the ECJ allocates power not only among the institutions, but also among the pillars.

However, apart from policing the boundaries, the ECJ lacks jurisdiction under the CFSP. This jurisdictional stripping is particularly alarming where CFSP measures not requiring further implementation restrict human rights. Indeed, inconsistencies with the principle of judicial protection may appear. By contrast to the flexibility enshrined in the political question doctrine, the ECJ is confined by jurisdictional walls impossible to climb. Accordingly, it would be preferable to grant full jurisdiction to the Community Courts over the CFSP, in so far as the Community Courts would embrace a political question doctrine. Against

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\(^{1004}\) *Baker*, Op cit, 211

this grant of jurisdiction, one may argue that the Community judiciary would fail both ways, either by overly deferring to the Council or by initiating a reckless activism. However, in the light of cases like *OMPI* and *Kadi*\(^{1006}\), these fears do not seem to hold true. When enjoying jurisdiction, the Community Courts have proved capable of striking a right balance between “freedom and security”. While policy determinations are deemed political questions (whether there is a risk to the international community or whether imposing economic sanctions is an adequate strategy to combat terrorism), judicial oversight focuses on checking that the decision-making process of the political institutions complies with human rights standards (e.g. right of defence). Again, one cannot avoid drawing parallelism with the *Carolene Products* rationale. Not only do the Community Courts protect a minority (persons blacklisted) from immediate majoritarian concerns, but they also contribute to enhancing the legitimacy of the decisions adopted by the Community institutions.

From the above, it appears that in cases located at the heart of the political process or touching sensitive areas of foreign relations, it is best for the courts to focus on improving the decision-making process of the political institutions. Using the words of Scott and Sturm, courts rather than imposing their own belief should also operate as “a catalyst”. Courts should not always impose what they think is the best solution. Instead, they should devote more attention to verifying that the political actors are adopting the right procedures to find it\(^{1007}\).

When exploring how the USSC and the ECJ allocate regulatory powers between the Union and its Member States, this thesis looked at negative and positive integration. Regarding the former, it was concluded that the USSC reads the Dormant Commerce Clause (DCC) as prohibiting discrimination alone. It follows that, when “balancing” state autonomy

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against market integration, the USSC has opted for deferring to state legislatures. In the EU, article 28 EC goes beyond banning unequal treatment between import and domestic products. Balancing forms an essential part of the judicial arsenal to build-up market integration.

These opposite answers reveal two important findings. Firstly, as AG Maduro puts it, given that the US internal market has reached “a point of no return”\textsuperscript{1008}, the USSC no longer focuses on guaranteeing access to market, but on adopting rules that bring clarity and certainty to economic operators. On the contrary, Cassis was an eagerly awaited answer to break the path dependence of European traders and to overcome the malfunction of the political institutions. These circumstances forced the ECJ to coin rules ensuring the establishment of an incipient European market. Therefore, the different degrees of market integration help us to understand why Cassis\textsuperscript{1009} entails a greater erosion of state regulatory sovereignty than Pike\textsuperscript{1010} does (or ever did).

Since Keck\textsuperscript{1011} did not overrule Cassis but just limited its scope, the former amounts to a reformatory step away from “market-building” and towards a “market-maintenance”. It evinces that, though the current stage of the EU market has not reached the degree of integration of its US counterpart, its situation is not comparable to the date when Dassonville\textsuperscript{1012} or Cassis were delivered. Nowadays, bringing some clarity into the scope of article 28 EC is also important for the ECJ.

Secondly, the “discrimination-only” approach indicates that the USSC believes in the higher institutional capacities of state legislature when balancing state autonomy against the interests of an integrated market. On the contrary, the same cannot be said for the ECJ. Indeed, though Keck brought the ECJ closer to its American counterpart, Cassis remains largely

\textsuperscript{1008} MADURO, We, the Court: The European Court of Juystice and the European Economic Constitution (Oxford: Hart Publishing,1998)

\textsuperscript{1009} Case 120/78 Rewe-Zentral(‘Cassis de Dijon’) [1979] ECR 649

\textsuperscript{1010} Pike v. Bruce Church, Inc., 397 U.S. 137

\textsuperscript{1011} Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097

\textsuperscript{1012} Case 8/74 Dassonville [1974] ECR 837
good law. Accordingly, “balancing” is not seen as unfit for judicial
determinations, it has just been excluded from “non-discriminatory selling
arrangements”. Besides, contrary to the “virtual per se invalidity” rule
applied by the USSC to discriminatory measures, in the EU, discrimination
does not exclude “balancing”. Of course, the principle of proportionality
applied to article 28 EC is a very strict one. National courts have a limited
discretion, since only national measures being the least restrictive
alternative will be upheld. Yet, judicial intervention is greater in the EU
than in the US. National courts still have a say in determining what option
can be qualified as a permissible restriction on free movement.

Moreover, even if Keck has raised many criticisms, one cannot deny
that its formalistic character has brought clarity into article 28 EC. How can
Keck be improved without being overruled? This would mean that a new
reform would have to be limited to cases falling outside the scope of article
28 EC, that is, to “non-discriminatory selling arrangements”. Perhaps, the
ECJ should follow the USSC in deferring to the higher institutional
capacities of the national legislatures when “balancing”. However, national
courts should still exercise some sort of control. What type? By contrast to
Cassis, judicial review should not second-guess the outcome attained by the
legislator. Instead, it was supported that national courts should apply a
“process-oriented review”. Following this approach, national courts would
limit themselves to verifying that legislative deliberations have taken into
account the interests of the internal market. If the answer is in the negative,
non-discriminatory selling arrangements would fall again into the scope of
article 28 and be submitted to a fully fledged “balancing”. Thus, this
approach would solve the under-inclusiveness of Keck, without returning to
the unclarity and overbreadth of Dansonville. It would not replace a
category of measures by others. Neither would it involve additional obscure
legal concepts or categories. On the contrary, it would press national
legislature “to think federal” when enacting legislation having an impact
upon the internal market. Besides, while one may concede that this type of
review would generate excessive judicial oversight of legislative
deliberations, it would only be in the short term. In the long run, national
legislatures would become acquainted with the degree of information they need to provide. Of course, one may counter argue that this type of review would allow “re-entering by the window what Keck sought to exclude by the door”. In other words, national courts would start again to balance. However, imposing higher levels of deliberation does not amount to measuring whether national law is justified. The former focuses on the decision-making process, the latter in the outcome. As explained below, our “process-oriented review” would demand from the national legislatures what the principle of subsidiarity requires from the Community Institutions.

When examining positive integration, it was concluded that both the USSC and the ECJ have struggled in countering the competence creep of the central government. By juxtaposing Lopez against Raich\textsuperscript{1013}, one has the impression that the principle of enumerated power does not suffice to limit the commercial powers of Congress. Perhaps, the Rehnquist Court missed twice a golden opportunity, when he failed to define “economic activities”. In any event, with a view to preserving the effectiveness of a general regulatory scheme, allowing the inclusion of “local non-economic” activities also appears to water-down the rigid limits Lopez sought to establish. Alternatively, as Scalia noted in Raich, Congress could also rely on the Necessary and Proper Clause to regulate activities having an impact upon interstate commerce, provided that [1] there is no breach of fundamental constitutional tenets; [2] that federal law is not a pretext for Congress to increase its powers; [3] or that the chain of causation is not too attenuated. Nevertheless, this alternative approach has been abandoned by the USSC, since the regulation of “local non-economic activities” is still possible under the Commerce Clause.

Similar findings were made when examining the case-law of ECJ under article 95 EC. Although the case-law of the ECJ proves to be more stable, the ECJ has failed to clarify to what extent the limits of article 28 and 95 EC overlap. Neither has it provided sufficient guidance as to when

\textsuperscript{1013} Gonzales v. Raich, 545 U.S. 1 (2005)
distortions of competition become “appreciable”. Moreover, in Tobacco II\textsuperscript{1014}, by lowering the threshold of activities considered “future obstacles” to trade, the ECJ appears to commit an oxymoron. How can mere disparities among national rules not be sufficient to invoke article 95 EC, while “potential obstacles” are? Further, just as reliance on the Necessary and Proper Clause has been neglected, so too have activities that could be regulated under article 308 EC been absorbed by article 95 EC. However, due to fact that article 308 EC requires unanimity whereas article 95 EC just QMV, the inclusion of activities being neither obstacles to free movement nor causing distortions of competition but if left unregulated would render harmonization ineffective under the scope of article 95 EC appears to be necessary.

Since the principle of enumerated powers (attribution) does not seem to suffice by itself to contain the rampant powers of the Union, other ways which could better allocate powers between the centre and the periphery were explored. Contrary to what Weschler maintained\textsuperscript{1015}, neither in the US nor in the EU, are political safeguards adequate to protect federalism. In the US, state governments’ interests do not necessarily coincide with the protection of States as “political institutions”. Secondly, since Senators are directly elected, they will support interests geographically concentrated in their State, but not their regulatory prerogatives. Thirdly, it is very unlikely for the US President to veto popular bills alluding to federalism concerns. Fourthly, political safeguards do not prevent “horizontal aggrandisements”. Lastly, since federalism is an intangible policy objective, Congress may forego it to benefit more pressing substantive issues. In EU, as Young posits\textsuperscript{1016}, political safeguards have also failed. First, though state interests are better represented in the Council than in the Senate, the former may prevent radical intrusions into state autonomy. However, in order to obtain short term objectives, the European States may obviate long term

\textsuperscript{1014} Case C-380/03, Germany v Parliament and Council, [2006] ECR I-11573
\textsuperscript{1015} H WESCHLER, The Political Safeguards of Federalism: The Role of The States in the Composition and Selection of the National Government, (1954) 54 Colum.L.Rev., p 543
considerations on regulatory competences. Most importantly, the protection of federalism becomes less important when national executives rely on the Council to circumvent political obstacles at national level. Further, the shift from unanimity to QMV allows “horizontal aggrandisement”. Finally, neither the Commission nor the Parliament seems particularly devoted to protecting state autonomy.

Another way of protecting federalism lies in controlling the exercise of commercial power by the Union. Therefore, it is not sufficient for the Union to act within its enumerated powers. In addition, its action must comply with the principles of proportionality and subsidiarity. As *Gibbons v Odgen* indicates, this second layer of competence control is absent in the US.

By contrast to the EC Treaty, there is no principle of proportionality under the Commerce Clause. The USSC does not measure whether federal legislation is inadequate or excessive. The reason lies in that congressional authority under the Commerce Clause is broader. It is not confined to harmonizing or remedying unconstitutional behaviour of the States. It is true that federal statutes may be directed toward establishing common standards, but Congress may also decide to favour diversification and even discrimination. Besides, since the Constitution does not prescribe any objective to be attained under the Commerce Clause, it would be almost impossible for the USSC to start reviewing congressional policy choices. Finally, reviewing the adequacy of economic regulation would revive the ghosts of *Lochner*¹⁰¹⁷, where the USSC was accused of acting arbitrarily.

The principle of subsidiary, understood as limiting the exercise of Union competences to objectives which cannot be sufficiently achieved at state level, may be a good solution for both the US and the EU. However, this principle may be read as a “political question”, given that it is very difficult for the judicial department to design “judicial manageable”

¹⁰¹⁷ *Lochner v. New York*, 198 U.S. 45 (1905),
standards capable of determining at which level of governance a policy is better achieved. In the same way, courts also lack the institutional expertise and resources to take this decision, without appearing arbitrary. Nevertheless, even if one assumes the non-justiciability of this principle on “substantive grounds”, nothing would prevent either the ECJ or the USSC from applying it as a “procedural principle”. Thus, courts would not second-guess the conclusions made by Congress and the EU legislator. Instead, they would press for qualitative and quantitative evidence demonstrating why a policy cannot be sufficiently achieved at national level. It is a pity that, in *Morrison*\textsuperscript{1018} and subsequently in *Raich*, the USSC turned its back to this possibility. Of course, the USSC was right in holding that it has the last word when enforcing the principle of enumerated powers. Still, congressional findings could have been relied upon to determine whether state autonomy was paid due homage. In the same way, it is also unconvincing for the ECJ to rule that the existence of an obstacle to free movement justifies by itself compliance with the principle of subsidiarity. Therefore, “process-federalism” would render subsidiarity judicially enforceable, without imposing policy choices. Indeed, the Protocol on Subsidiarity of the Treaty of Lisbon points in this direction. Not only does it enhance political debate by incorporating national parliaments, but the latter would also have access to the ECJ. Accordingly, it is not expected from the ECJ to give the final word on whether a policy may be sufficiently achieved at national level, but just to verify that the dissenting voices of national legislators have been taken into account and that an adequate rebuttal was provided.

The last chapter sought to explain why the principle of state sovereignty precludes private applicants from seeking damages from American States, whereas state liability in damages is a General Principle of EU law. Two reasons were found. Firstly, the principle of anti-commandeering prevents the US Government from issuing “Directives”. The US Government may not compel States to implement its policies.

\textsuperscript{1018} *United States v. Morrison*, 529 U.S. 598 (2000)
Therefore, the “Francovich”\textsuperscript{1019} scenario does arise under US law. In the same way, by contrast to the USSC which may quash the decisions of inferior state and federal courts based on the US Constitution or federal law, Köbler\textsuperscript{1020} may be read as a functional substitute for the lack of appellate jurisdiction against decisions of national courts of last instance. Secondly, whereas the financial repercussions that actions in damages may have on the state treasuries are taken into account by the USSC when awarding remedies, it is not the case for the ECJ. Preserving the financial integrity of States forces the USSC to choose between prospective and retrospective relief and, in order to promote constitutional innovation, the USSC chooses the former. However, the Community judiciary opines that primacy of Community law is intrinsically linked to the dictum “\textit{ubi jus, ibis remedium}”. Therefore, Community law would cease to be “the supreme law of the land”, where a violation of a private right is not accompanied by the possibility of full remedial relief. On the contrary, the USSC has opted for dissociating the Supremacy of federal law from the law of remedies. In the light of \textit{Alden}\textsuperscript{1021}, federal law remains supreme were States abide, regardless of whether past violations have been solved in full.

As Young indicates, it seems that the principle of state sovereignty is not a positive way of protecting “States’ integrity”\textsuperscript{1022}. By rendering States unaccountable for past violations of federal law, the USSC is not reserving an area where States may adopt policy decisions. It is simply shielding States from private suits in damages. Indeed, it would be best for States to be sued in damages, if the USSC adopted an adequate strategy halting the competence creep of the Federal Government. Besides, the ECJ is right in holding that the principle of state liability reduces the independence of neither national legislatures nor national judiciaries. The requirements laid down by the ECJ strike a proper balance between ensuring the proper functioning of all branches of government and an effective remedy for violations of Community rights. Accordingly, state autonomy would not

\textsuperscript{1019} Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357
\textsuperscript{1020} C-224/01 Köbler [2003] ECR I-10239
\textsuperscript{1021} Alden, Op cit
\textsuperscript{1022} E YOUNG, The Rehnquist Court’s Two Federalisms, (2004) 83 Tex. L Rev, pp 1-166
become excessively eroded, did the USSC abandon the principle of state sovereignty. It would suffice for the USSC to impose a similar requirement as the “clear established” test laid down in §1983, in order to award damages against the State.

From the foregoing, it follows that, when allocating powers, courts should not always look for “substantive” constitutional benchmarks, since sometimes they may turn to be either questions deemed too political for judicial resolution or insufficient to control congressional or Community legislative powers. Instead, the judicial department should also pay due regard to a “process” review. This type of review would work at two levels. At first stage, courts should solve flaws in the procedure by which the political institutions adopt their decisions. For instance, this would be the case where procedures neglect “discrete and insular” minorities, or where they entrench incumbent political majorities. Thus, judicial review would be principled upon understanding “democracy” as an intangible value that cannot succumb to majoritarian pressures. At a second stage, courts should also examine whether, in their deliberations, political actors pay due account to all interests at stake, particularly, to those not represented in the political process. While acknowledging that “process-review” would not become the panacea to the “double security” sought by Madison, it may nonetheless contribute to providing more complete and harmonic solutions in this regard.
ANNEX

ANNEX CHAPTER I

US Constitution

Article I, § 6, Clause 2
“No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time: and no person holding any office under the United States, shall be a member of either House during his continuance in office”

Article II § 3
“(H)e shall take care that the laws be faithfully executed”.

Article III § 1
“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”

Article III § 2
“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”

Fourteenth Amendment § 1
“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
ANNEX CHAPTER II

US Constitution

Article I §2
“No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.”

1949 Third Geneva Convention relative to the Treatment of Prisoners of War

Article 3
“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

[…]”

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

ANNEX CHAPTER V

US Constitution

Article I §8
“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”

Article I § 9
“No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time”

Article III § 1
“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”

Article III § 2
“The judicial power shall extend to [...] controversies [...] between a state and citizens of another state [...].”

Article VI
“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding”

42 U.S.C. § 1983

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”
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