EU Free Movement Law and the Powers Retained by Member States

Lena Boucon

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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This thesis has been submitted for language correction to the EUI Language Center.

Abstract

The intention of my thesis is to shed light on a technique of integration implemented by the European Court of Justice described as 'power-based approach.' Frequently neglected and overlooked, it is distinct from the ECJ traditional rights-based approach. It materializes in a specific range of free movement cases where Member States are suspected of having impinging on the free movement principle – understood as encompassing the four economic freedoms and EU citizenship – when they exercise what the Court deems as being their retained powers. A variety of fields are concerned, such as nationality, direct taxation, social security, or education. My overall claim is that the power-based approach contributes to defining and shaping the contours of the relationship between the European Union and its Member States, of EU interstate relations and, ultimately, of Union membership.

I start with an attempt at deconstruction to identify the defining features of the cases concerned by this approach: (i) they revolve around the structural notion of power; (ii) the applicability of the free movement principle stems from the disjunction of the scope of application of EU law from the scope of EU powers; (iii) the settlement of the conflicts at hand amounts to a 'mutual adjustment resolution,' which consists in putting limitations on the exercise of the powers retained by Member States, while the Court itself tends to soften its own approach to protect national autonomy. I then proceed with an effort at reconstruction. First, I identify the jurisdictional implications of the power-based approach. Next, I look into its implications for membership of the Union. Lastly, I provide an overall critical and structural reassessment. I show that the silence of the Court regarding the rationale behind its approach has the effect of weakening its legitimacy and its authority. I finally identify its resulting structural model.

Finisce sempre così, con la morte.
Prima, però, c'è stata la vita.
La vita, nascosta sotto il bla, bla, bla, bla, bla.
Tutto s'è sedimentato sotto il chiacchiericcio e il rumore.
Il silenzio e il sentimento, l'emozione e la paura.
Gli sparuti, incostanti sprazzi di bellezza.
E poi lo squallore disgraziato e l'uomo miserabile.
Tutto è sepolto dalla coperta dell'imbarazzo dello stare al mondo.
Bla, bla, bla, bla.
Altrove, c'è l'altrove.
Io non mi occupo dell'altrove.
Dunque, che questo romanzo abbia inizio.
In fondo, è solo un trucco.
Sì, è solo un trucco.

La Grande Bellezza
(P. Sorrentino, 2013)

DEDICATION

Cette thèse est dédiée à tous ceux qui m'ont témoigné leur soutien pendant ces cinq années et sans qui elle n'aurait tout simplement pas pu voir le jour. J'ai une pensée toute particulière pour ceux qui, malgré le temps et la distance, m'ont tant épaulée et ne m'ont jamais oubliée.

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Et, bien sûr, pour ma mère qui, je l'espère, aurait été fière.

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This thesis is about law, of course, but it is also about people and places.

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Firenze, Villa Schifanoia, August 2014.

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INTRODUCTION

It is sometimes actually more difficult to make people see that there is *a problem than to make them, once they have seen it, comprehend its solution.*[1]

1. Justice S. O'CONNOR pointed out, in *New York v. United States*, that the issue relating to the "proper division of authority between the Federal Government and the States" is the "oldest question of [US] constitutional law."[2] She was referring to the fact that, from the earliest days of the formation of the Union, the United States has faced the question as to how to draw the lines between the two levels of authority, given that the national government is subject to the principle of enumerated powers. This challenge continues nowadays and concerns all manner of actors: the state and national political arenas, the state and national legislative and executive branches, the judiciary, and, last but not least, the everyday citizens. Every federal system is, as a matter of fact, confronted with this fundamental issue, which often turns out to be very difficult to settle, and which requires answers and solutions to be refined on a continual basis. In particular, the very nature of the relationship between the two levels of government, and therefore of the Union itself, stems from the lines that will be drawn between their respective spheres of authority. The European Union is no exception. In this respect, J. H. H. WEILER noted, already long ago, that "the most significant change in Europe, justifying appellations such as 'transformation' and 'metamorphosis,' concerns the evolving relationship between the Community and its Member States."[3] Such a change has been induced, to a certain extent, by the case law of the Court of Justice of the European Union (hereafter "the Court of Justice," "the Court," or "the ECJ"). In the same manner as the US Supreme Court, the Court of Justice has indeed been assigned the difficult task of settling jurisdictional conflicts between

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[1] Preface by E. S. CORWIN, in E. S. CORWIN, *Liberty against government*, (Baton Rouge: Louisiana State University Press, 1948), xii.

[2] *New York v. United States* 488 U.S. 1041, 1049 (1992).

[3] J. H. H. WEILER, "The Transformation of Europe," in *The Constitution of Europe: Do the new Clothes have an Emperor? And other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999), 12.

the European Union and the Member States. The various cases decided by the Court, affecting and shaping the links between the two levels of authority of the European Union legal order, have resulted in the constant development of the relationship between the European Union and the Member States.

2. Against this backdrop, my thesis intends to shed light on the entrenchment of a fairly recent form of integration that I describe as a 'power-based approach,' and that materializes in a specific range of free movement cases. Frequently neglected and overlooked, it is a technique used by the Court of Justice to settle jurisdictional disputes in which Member States are suspected of impinging on the free movement principle – understood as encompassing the four traditional economic freedoms[4] and European Union citizenship[5] – when they exercise what

[4] The four traditional economic freedoms encompass:
The free movement of goods
Article 34 TFEU: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."
Article 35 TFEU: "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."
Article 36 TFEU: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."
The free movement of persons
Article 45 TFEU [workers]: "1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

1. (a) to accept offers of employment actually made;
2. (b) to move freely within the territory of Member States for this purpose;
3. (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
4. (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service."
Article 49 TFEU [establishment]: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

the Court deems as being their retained powers. Ultimately, the power-based approach of the Court of Justice has significant implications for the constitutional ordering of the European Union. It indeed contributes to defining and shaping the contours of the relationship between the European Union and its Member States, and the fundamental features of the status of the Member States within the European Union.

3. By way of introduction, I start by drawing the contextual background of my thesis, in order to better grasp the various issues that arise in relation to the question of the division of authority in the European Union. I then proceed with an empirical identification of the cases that reflect the Court of Justice's power-based approach. I then set out the original analytical framework employed throughout the thesis. Last but not least, I shed light on the two fundamental purposes pursued by my thesis, which are, respectively, (i) the identification of an original form of legal integration; and (ii) placing emphasis on the significance of the power-based approach for the constitutional dynamics of the European Union.

1. The oldest of the newest questions of European Union law

4. The initial limited focus on issues relating to the relations between the spheres of authority of the European Union and the Member States. Until relatively recently, issues relating to the "proper division of authority" between the European Union and its Member States were, with a few exceptions,[6] seldom explored in the literature.[7] This may be explained by several factors. First of all, focus was initially primary put on the issues relating to the nature of European Union law,

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Article 52§1 TFEU [establishment]: "The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."
The free movement of services
Article 56 TFEU: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."
The free movement of capital
Article 63§1 TFEU: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

[5] Article 21§1 TFEU: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

[6] See, for instance, K. LENAERTS, Le juge et la Constitution aux États-Unis d'Amérique et dans l'ordre juridique européen, (Brussels: Bruylant, 1988).

[7] A. VON BOGDANDY & J. BAST, "The federal order of competences," in *Principles of European Constitutional Law*, (Eds.) A. VON BOGDANDY & J. BAST, (Oxford: Hart Publishing, 2010), 275, 276. These authors point out that "[l]egal literature had almost exclusively focused on Article 235 EEC." [Now Article 352 TFEU, the so-called "flexibility clause]

its constitutionalizing process,[8] and legitimacy.[9] These issues became even more prominent when the Court of Justice consecrated the principles of direct effect[10] and primacy.[11] Second of all, the limited attention paid to jurisdictional issues also stemmed from the initial wording of the Treaties. The Treaties were, as a matter of fact, silent as to how the two levels of authority were to interact.[12] By way of illustration, they did not explicitly mention the principle of conferral until the introduction of the Maastricht Treaty. Moreover they neither specified which powers were conferred on the Communities, nor did they define how these powers were to be exercised. Instead, they were based on a functionalist method, which replaced the federalist[13] and idealist[14] aspirations of the aftermath of World War II. Under the functionalist approach, the spheres of jurisdiction of the European Union, as well as the way they have to be exercised, were identified with reference to the list of tasks and objectives provided by Article 2 EC[15] and Article 3 EC[16] respectively, combined with sector-specific provisions.[17] As a result,

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[8] E. STEIN, "Lawyers, judges, and the making of a transnational constitution," 75 *American Journal of American Law* 1 (1981).

[9] S. BOERGER & M. RASMUSSEN, "Transforming European Union law: The establishment of the constitutional discourse from 1950 to 1993," 10 *EuConst* 199-225 (2014).

[10] Case 26/62, *Van Gend en Loos*, [1963] *ECR* 3.

[11] Case 6/64, *Costa v. ENEL*, [1964] *ECR* 585.

[12] R. SCHÜTZE, "The European Community's federal order of competences – A retrospective analysis," in *50 Years of the European Treaties: Looking back and thinking forward*, (Eds.) M. DOUGAN & S. CURRIE, (Oregon: Hart Publishing, 2009), 63, 70.

[13] G. DE BÚRCA, "The language of rights and European integration," available from http://aei.pitt.edu/6920/1/de_búrca_gráinne.pdf.

[14] E. MAULIN, "Le pouvoir constituant dans l'Union européenne," 45 *Droits* 73, 77 (2007).

[15] Article 2 EC: "The Community shall shave as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States."

[16] Article 3 EC: "For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (a) the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; (d) measures concerning the entry and movement of persons in the internal market as provided for in Article 100c; (e) a common policy in the sphere of agriculture and fisheries; (f) a common policy in the sphere of transport; (g) a system ensuring that competition in the internal market is not distorted; (h) the approximation of the laws of Member States to the extent required for the functioning of the common market; (i) a policy in the social sphere comprising a European Social Fund; (j) the strengthening of economic and social cohesion; (k) a policy in the sphere of the environment; (l) the strengthening of the competitiveness of Community industry; (m) the promotion of research and technological development; (n) encouragement for the establishment and development of trans-European networks; (o) a contribution to the attainment of a high level of health protection; (p) a contribution to education and training of quality and to the flowering of the cultures of the Member States; (q) a policy in the sphere of development cooperation; (r) the association of the overseas countries and territories in

powers and objectives became deeply intertwined,[18] the former being intrinsically linked to the systemic dynamic of the Treaties.[19] Last but not least, the initial lack of interest in the relations between the European Union and the Member States from a power-based perspective was probably caused by the Court of Justice's own approach. As some authors have rightly pointed it out, it has "never attempted to delineate a complete doctrine of the division of powers between the [European Union] and the Member States."[20] With the notable exception of the field of external relations,[21] the Court's reasoning does not rely, generally, on a power-based legal framework when faced with issues relating to the division of authority between the two levels of government, but almost exclusively on arguments of a functionalist nature.

5. The growing interest in issues relating to the division of powers in the European Union. My thesis, which focuses on the constitutional adjudication by the European Court of Justice of disputes of a jurisdictional nature, is part of a growing literature. Issues relating to the division of powers between the European Union and its Member States, and to the protection of Member States' jurisdiction in particular, have gradually become considered crucial. This shift flows from three main factors. First, the functionalist approach has resulted in a significant expansion of the jurisdiction held by the European Union. Second, this has led to an increasing fear of the so-called 'competence creep' phenomenon. Lastly, this has ultimately given rise – ironically – to the inclusion of tools of a federal nature into the new treaties, in

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order to increase trade and promote jointly economic and social development; (s) a contribution to the strengthening of consumer protection; (t) measures in the spheres of energy, civil protection and tourism."

[17] A. G. SOARES, "The principle of conferred powers and the division of powers between the European Community and the Member States," 23: 1 *Liverpool Law Review* 57, 58-59 (2001); L. BURGORGUE-LARSEN, "A propos de la notion de compétence partagée," available from http://www.univ-paris1.fr/fileadmin/IREDIES/Contributions_en_ligne/L._BURGORGUE-LARSEN/LBL-RGDIP_1_-2.pdf, 6-7.

[18] L. POTVIN-SOLIS, "Competences partagées et objectifs matériels," in *Objectifs et compétences dans l'Union européenne*, (Ed.) E. NEFRAMI, (Brussels, Bruylant, Coll. Droit de l'Union européenne, 2013), 29-30; E. NEFRAMI, "Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'Union européenne," in *Objectifs et compétences dans l'Union européenne*, (Ed.) E. NEFRAMI, (Brussels, Bruylant, Coll. Droit de l'Union européenne, 2013), 5.

[19] P. PESCATORE, La répartition des compétences et des pouvoirs entre les Etats membres et les Communautés européennes: Etude des rapports entre les Communautés et les Etats membres, (1967) 5; L. AZOULAI, "Introduction," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press, 2014), 2.

[20] G. DE BÚRCA & B. DE WITTE, "The delimitation of powers between the EU and its Member States," in *Accountability and Legitimacy in the European Union*, (Eds.) A. ARNULL & D. WINCOTT, (Oxford, Oxford University Press, 2002, Oxford Studies in European Law), 201. See, in the same vein, C. TIMMERMANS, "ECJ doctrines on competences," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press, 2014), 155.

[21] See Case 22/70, *Commission v Council*, [1971] *ECR* 263 (ERTA).

order to better define, and even circumscribe, the scope of the powers held by the European Union. This was indeed aimed at safeguarding Member States' jurisdiction.

6. The expansion of the jurisdiction held by the European Union. The jurisdiction held by the European Union – understood as encompassing the former European Community as well as the European Union – has significantly expanded over the years. As P. CRAIG accurately points it out, three ranges of actors are responsible for this expansion: the Member States themselves, the institutions of the European Union, and the European Court of Justice.[22] The action of Member States has taken two forms: the amendment process of the Treaties, and the assent to the adoption of acts of secondary legislation by the institutions of the European Union.[23] With respect to the former, the successive reforms of the Treaties, since the adoption of the Single European Act, have expanded the scope of the objectives assigned to the Community and the European Union by gradually adding up new legal bases for sector-specific policies. Mention should also be made of the fact that the Single European Act abandoned the unanimity rule. Since then, the Council has adopted most acts of secondary legislation by a simple or qualified majority. This logically implies that acts may be introduced into the European Union legal order against the will of a minority of the Member States. Member States have moreover generally assented to the work of the European Union institutions when the latter have interpreted the reach of the legislative jurisdiction of the European Union broadly. S. WEATHERILL refers, in this regard, to their "long-standing readiness"[24] to adopt acts relating to policies non-explicitly mentioned in the treaties on the basis of Article 352 TFEU,[25] or of Article 114 TFEU while protecting non-purely economic values.[26] Accordingly, Member States and the institutions of the European Union have acted in concert to expand the scope of the jurisdiction held by the European Union. Last but not least, the European Court of Justice has also played a significant role. It has indeed consistently legitimized, from a legal point of view, the action of the two other sets of actors. Through a teleological and finalist interpretation of

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[22] P. CRAIG, "Competence and Member State autonomy: Causality, consequence and legitimacy," *Oxford Legal Studies Research Paper No 57/2009*, 2.
[23] Ibid., 16.
[24] S. WEATHERILL, "Competence creep and competence control," *Yearbook of European Law* (2004) 23(1): 1, 6. See also, in the same vein, P. CRAIG, "Competence and Member State autonomy: Causality, consequence and legitimacy," above, n. 22, 16.
[25] V. MICHEL, "2004: le défi de la répartition des compétences," *Cahiers de Droit Européen* 17, 36 (2003).
[26] G. DE BÚRCA & B. DE WITTE, "The delimitation of powers between the EU and its Member States," above, 20, 215.

the Treaty, it has developed various doctrines linking the objectives fulfilled by the Treaty to the exercise of the jurisdiction of the European Union, thereby broadening the scope of European Union general or sector-based powers.[27]

7. *The fear of competence creep.* The joined action of the Member States, the institutions of the European Union, and the European Court of Justice gave rise, starting in the late 1990s/early 2000s, to the fear of 'competence creep,' which can be defined as "a deficit in confidence about the Union's readiness to operate within its constitutional limits."[28] An increasing number of voices, such as the German *Länder*'s voice in particular,[29] began to contest the expansion of the jurisdiction of the European Union, arguing that it overstepped on Member States' own spheres of authority, thereby undermining the integrity of their powers. The flexibility clause of Article 352 TFEU[30] and the internal market harmonization clause of Article 114 TFEU[31] were two of the main bones of contention. They were notably accused of amounting to granting 'general authorizations' to the European Union. More generally speaking, European Union action was increasingly seen as infringing the principle of conferral. Against this background, the Declaration 23 of the Treaty of Nice on the future of the Union called for "a deeper and wider debate about the future of the European Union." It launched a fourfold process of reflection addressing, in particular, the question as to "how to establish and monitor a more precise delimitation of powers between the European Union and the Member

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[27] A. G. SOARES, "The principle of conferred powers and the division of powers between the European Community and the Member States," above, 17, 63, 65; J. DUTHEIL DE LA ROCHÈRE, "La jurisprudence de la Court de Justice des Communautés européennes et la Souveraineté des Etats," in *La Constitution et l'Europe*, (Paris, Montchrestien, 1992), 234, 240; L. AZOULAI, "La fabrication de la jurisprudence communautaire," in *Dans la fabrique du droit européen : scènes, acteurs et publics de la Cour de la justice des Communautés européennes*, (Eds.) P. MBONGO & A. VAUCHEZ, (Brussels: Bruylant, 2009), 153, 156; A. TIZZANO, "Quelques observations sur le développement des compétences communautaires," 48 *Pouvoirs*, 81, 85 (1989).

[28] S. WEATHERILL, "Competence creep and competence control," above, n. 24, 6; S. WEATHERILL, "Better competence monitoring," 30 *European Law Journal* 23, 24 (2005).

[29] F. C. MAYER, "The debate on European powers and competencies. Seeing the trees but not the forest," available from http://www.whi-berlin.eu/documents/whi-paper1803.pdf, 15.

[30] Article 352 TFEU: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament."

[31] Article 114 TFEU: "Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

States, reflecting the principle of subsidiarity." Following this, the European Council issued the Laeken Declaration in December 2001,[32] which set out the "challenges and reforms in a renewed Union." It mentioned in the first place the "better division and definition of competence in the European Union." Accordingly, the problem of the division of authority, which had been latent since the formation of the Communities, became one of the core concerns of the institutions of the European Union. The Laeken Declaration addressed, in this respect, three issues: the distinction between different types of powers, the need for a reorganization of the system of powers, and the balance between the need to preserve Member States' jurisdiction and the preservation of the powers held by the European Union itself.

8. *The protection of Member State jurisdiction.* As is well known, the Laeken Declaration paved the way for the Convention on the future of Europe, which led, in turn, to the stillborn Treaty establishing a Constitution for Europe. The latter comprised several provisions defining and rendering explicit the system of powers of the European Union, which were taken up by the Lisbon Treaty. To begin with, the Treaties resulting from the adoption of the Lisbon Treaty reaffirm the cornerstone principle of conferral, defined as follows:

> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.[33]

They comprise multiple and redundant reassertions that the system of powers in the European Union is based on this principle, and that, as a result, all powers not conferred upon the European Union remain within the jurisdiction of the Member States.[34] This reveals the concern of the drafters of the Lisbon Treaty to curtail the expansion of the jurisdiction of the European Union, and to protect the integrity of national powers.

9. *Other legal orders.* This willingness to preserve certain subject matters from the incursions of the law of the central authority has not only occurred in the European Union legal order. In the aftermath of the ratification of the Constitution of the United States, for instance, the states added the Tenth Amendment to the Bill of Rights:

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[32] Available from http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/68827.pdf.
[33] Article 5§2 TEU.
[34] See, e.g., Articles 4§1 TEU; Article 7 TFEU; and the Declaration 18 in relation to the delimitation of competences. See S. WEATHERILL, "The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court's case law has become a 'drafting guide'," 12 *German Law Journal* 827, 850-851 (2011); L. AZOULAI, "Introduction," above, n. 19, 10-12.

> The 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.

Likewise, the members of the League of Nations had the same reaction with respect to the international legal order in the first half of the twentieth century. Article 15§8 of the Covenant of the League of Nations provided that:

> If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

Through this provision, States aimed to exclude certain subject matters from the international settlement of conflicts. They expressed similar concerns when they adopted Article 2§7 of the Charter of the United Nations after World War II:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

10. *Article 4 TEU.* On top of the provisions safeguarding Member State jurisdiction, the Treaty on European Union attempts for the first time to comprehensively delineate the relationship between the European Union and the Member States, as well as interstate relations in its Article 4, which deserves to be quoted at length:

> 1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
>
> 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.
>
> 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

As M. BLANQUET indicates, this provision represents "a significant component of a legal definition of what is a Union of States."[35] Its first two paragraphs pertain to the obligations imposed on the European Union. The latter is not only subject to the conferral principle; it must also comply with a range of requirements aimed at ensuring that Member States retain their State identity. All in all, this provision can be described as being fundamentally structural, in the sense that it aims to define the overall structure of the European Union.

11. The current system of powers of the European Union. Last but not least, the Treaty on the Functioning of the European Union, from its Article 2 TFEU to its Article 6 TFEU, provides a typology[36] of the various types of powers that form the basis of the system of powers of the European Union. The European Union legal order comprises exclusive powers, powers shared between the European Union and its Member States, and powers relating to European Union action to support, coordinate or supplement action of the Member States. This typology is aimed at clarifying and better delimiting the scope of the overall jurisdiction held by the European Union. Many authors have however expressed doubts as to its chances of achieving such a goal. It is noteworthy, in this regard, that the Lisbon Treaty has kept the European Union internal market harmonizing power (Article 114 TFEU)[37] intact, and that it has even broadened the scope of the flexibility clause (Article 352 TFEU),[38] which was already subject to broad judicial constructions. Altogether, the following observation made by L. D. KRAMER in the context of the US constitutional order may be easily transposed to the context of the European Union – and, for that matter, to any federal system that has a constitution enumerating the powers of the federation:

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[35] M. BLANQUET, "Article I-5," in *Traité établissant une constitution pour l'Europe*, (Eds.) L. BURGORGUE-LARSEN, A. LEVADE, F. PICOD, Tome 1, (Brussels, Bruylant, 2005), 100.

[36] For typologies established in the literature before the Treaty establishing a Constitution for Europe see, for instance, A. G. SOARES, "The principle of conferred powers and the division of powers between the European Community and the Member States," above, n. 17, 60s; V. MICHEL, "2004: le défi de la répartition des compétences," above, n. 25, 54s; A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 7, 289s; R. SCHÜTZE, "The European Community's federal order of competences – A retrospective analysis," above, n. 12, 72s.

[37] B. DE WITTE, "A competence to protect. The pursuit of non-market aims through internal market legislation," in *The Judiciary, the Legislature and the EU Internal Market*, (Ed.) P. SYRPIS, (Cambridge/New York, Cambridge University Press), 2012, 25, 45.

[38] A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 7, 300.

> All we have [in the Constitution] are a set of broadly-defined powers and a set of very general principles that, in any given context at any given time, can lead reasonable people to reach very different conclusions about the proper limits of federal authority.[39]

As a result, the question of the proper articulation between the two levels of authority remains, in the European Union, more relevant than ever.

2. Empirical identification of the cases analyzed in the present thesis

12. Empirical criterion: the formulae. It is in this context that my thesis intends to focus on a specific range of free movement cases. As I have already mentioned, the European Court of Justice implements, in these cases, an original approach centring on the notion of power and having significant implications for the relationship between the European Union and its Member States. Since I look into this issue more thoroughly later on,[40] it is sufficient at this stage to stress that these cases ought to be singled out from what I have described as 'traditional free movement cases,' understood the remainder of cases involving one of the four economic freedoms and/or European Union citizenship. One of their defining features resides in the fact that the Court of Justice systematically states formulae, most of the time at the applicability stage. The wording of these formulae varies, depending on the field involved, but it is built on the same pattern. The various formulae all amount to asserting, in substance, that:

> *Even though this [field involved] falls within Member States' powers, Member States must nonetheless comply with European Union law while exercising this power.*

That being said, I have used these formulae as empirical criteria to identify the various cases where the Court of Justice implements its power-based approach, and thus to circumscribe the scope of my thesis. From now on, when I refer to terms such as 'cases involving powers retained by Member States,' or 'cases concerned by the Court of Justice power-based approach,' I am referring to the judgments that have been decided, up to now, by the European Court of Justice and that comprise one (or more) of the aforementioned formulae.

13. The main fields concerned by the power-based approach. Everything considered, the formulae have allowed me to identify eight main ranges of cases, which relate to the following fields of (i) nationality, (ii) direct taxation, (iii) the rules governing surnames, (iv) the enforcement for the

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[39] L. D. KRAMER, "Putting the politics back into the political safeguards of federalism," 100 *Columbia L. Rev.* 215, 292 (2000).
[40] See *Infra*, Chapters 1, 2, & 3.

recovery of debts, (v) cross-border health care, (vi) higher education, (vii) the compensation of civil war victim, and (viii) the right to take collective action. I will show in Chapter 2 that the Court of Justice has, to a certain extent, departed from its rights-based approach, and has gradually subjected an increasing number of fields to its power-based approach.[41] Therefore, this list should not be seen as exhaustive, but rather as an indicative list illustrating which fields, as of today, are concerned by the power-based approach.

14. Overview of the cases concerned by the power-based approach. All in all, I have gathered several dozens of cases. The following table provides a general overview of the various issues raised in these decisions. For the sake of clarity, I have divided the cases into two broad categories, depending on whether they involve entry restrictions where host states are suspected of infringing the free movement principle or exit restrictions where the focus is on home states. I have moreover indicated the leading and most emblematic cases.

[41] See, *Infra*, §120.

	Entry restrictions	Exit restrictions
(i) Nationality	• Individual having dual citizenship prevented from exercising their free movement rights because national authorities refuse to recognize their nationality. [Case C-369/90, *Micheletti*, [1992] *ECR* I-4239] • Individuals prevented from exercising their free movement rights on the grounds that they do not/no longer hold the nationality of at least one Member State. [Case C-192/99, *Kaur*, [2001] *ECR* I-1237; Case C-135/08, *Rottmannn*, [2010] *ECR* I-1449]	
(ii) Direct Taxation	• Taxation of nonresident individuals: nonresidents not granted the same tax advantages or not subject to the same tax rules as residents on the grounds that they are not in objectively comparable situations. [E.g. workers: Case C-279/93, *Schumacker*, [1995] *ECR* I-225] • Taxation of nonresident corporations: nonresident corporations not granted the same tax advantages or not subject to the same tax rules as residents on the grounds that they are not in objectively comparable situations. [E.g. corporate tax rates: Case C-311/97, *Royal Bank of Scotland*, [1999] *ECR* I-2651] • Taxation of inbound dividends: foreign inbound dividends taxed more heavily than national inbound dividends. [E.g. Case C-315/02, *Lenz*, [2004] *ECR* I-7063]	• Taxation of resident individuals: residents involved in cross-border situations not granted the same tax advantages or subject to the same tax rules as those involved in purely internal matters. [E.g. Case C-35/98, *Verkooijen*, [2000] *ECR* I-4071] • Taxation of resident corporations: resident corporations involved in cross-border situations not granted the same tax advantages or subject to the same tax rules as those involved in purely internal matters. [E.g. cross-border tax relief: Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837] • Taxation of outbound dividends: outbound dividends taxed more heavily if they are granted to nonresidents shareholders than residents. [E.g. Case C-513/04, *Kerckhaert-Morres*, [2006] *ECR* I-10967] • Exit taxes: additional tax burdens imposed on individuals/companies moving to other Member States. [E.g. Case C-371/10, *National Grid Indus*, [2011] *ECR* I-12273]
(iii) Rules governing surnames	• EU citizens face, in their host states, administrative refusals to change their surnames or to have them recognized according to the rules in force in their country of origin/in the country where they hold their other nationality. [E.g. Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613; Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693]	
(iv) Enforcement for the recovery of debts		• Conditions of the enforcement for the recovery of debts vary depending on whether individuals reside in their home state or have moved to another Member State. [Case C-224/02, *Pusa*, [2004] *ECR* I-5763]
(v) Cross-border health care		• EU patients having received treatments abroad without the prior authorization of their state of affiliation are denied benefits (reimbursements in particular) from the social security scheme of their state of affiliation. [E.g. Case C-120/95, *Decker*, [1998] *ECR* I-1831; Case C-158/96, *Kohll*, [1998] *ECR* I-1931; Case C-372/04, *Watts*, [2006] *ECR* I-4325]
(vi) Higher education	• Access to higher education systems: nonresident individuals subject to heavier burdens with respect to the conditions of access to national higher education systems. [Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969; Case C-73/08, *Bressol*, [2010] *ECR* I-2735] • Nonresident students are denied or not granted financial support under the same conditions as resident students. [Case C-209/03, *Bidar*, [2005] *ECR* I-2119]	• Financial support of outgoing students: outgoing students subject to more burdensome conditions to study abroad than students remaining in their home country. [E.g. Joined Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161]
(vii) Compensation of civil war victims		• The legal framework applicable to the compensation of civil war victims excludes from its scope nationals not residing in the home state. [E.g. Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451]
(viii) Right to take collective action	• A provider of services established in another Member State and willing to post workers faces collective actions undertaken by trade unions in the host Member State in order to force it to enter into negotiations and to sign a collective agreement according to which working conditions of the home state apply. [Case C-341/05, *Laval*, [2007] *ECR* I-11767]	• A company faces collective action in order to induce it to enter into a collective agreement under which employees working in a subsidiary established in another Member State should be subject to the same working conditions as those of the home state. [Case C-438/05, *Viking*, [2007] *ECR* I-0779]

Without going into detail, as I deal with this issue in depth later,[42] two points deserve to be made. First of all, it is striking that the Court of Justice power-based approach is implemented in fields that pertain to the core of Member State political autonomy – nationality, direct taxation, personal status, recovery of debts – and social autonomy – direct taxation, social security, education, right to take collective action. It does not particularly concern their regulatory powers, but rather fundamental public policies which, taken together, form the basis of what is commonly considered, in Western Europe, as their state identity. It is moreover remarkable that these fields are generally seen as falling outside the traditional scope of action of the European Union, and, accordingly, as remaining the primary responsibility of the Member States. Second of all, the *retained* powers should not be confused with Member States' *reserved* powers, which are traditionally defined, with reference to the principle of conferral, as the "competences not conferred upon the Union in the Treaties."[43] Neither should they be confused with Member States' *residual* powers. The latter are used in the context of the powers shared between the European Union and the Member States, and they correspond, as such, to the powers remaining within the hands of the Member States. Thus, for instance, to quote but one example, in case of minimum harmonization, all the fields not concerned by European Union action are said to fall within the residual powers of the Member States.

3. An original analytical framework

15. I have chosen to use a specific and original analytical framework to explore the cases involving powers retained by Member States. First, my inquiry consists in analyzing the technique that is implemented by the Court of Justice in these cases. Second, the legal framework of my thesis mirrors the Court of Justice power-based approach, since it also centers on the notion of power. It moreover relies on a structural perspective. Last but not least, it draws on various comparisons, which allows the many singularities of the power-based approach to be better identified.

a. The analysis of a technique implemented by the European Court of Justice

16. *Analysis of a technique v. analysis of a field.* The fundamental purpose of my thesis is to shed light on the technique employed by the European Court of Justice in the cases involving

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[42] See, *Infra*, §§42-52.
[43] Article 5§2 TEU.

powers retained by Member States, and on its ramifications. As I have already mentioned, the Court develops, in these cases, a singular judicial technique, through an original interpretation of the free movement principle – hereafter, the 'power-based approach.' Broadly speaking, this technique contains singular features. In contrast to the Court's traditional rights-based approach, it is largely centered on the notion of 'power' – or 'competence' to use the words of the Court of Justice. Furthermore, the Court of Justice almost systematically states formulae, most of the time at the applicability stage of the cases concerned by the power-based approach. Besides the applicability stage, the justification phase of the cases where the Court implements its original technique is also peculiar. Indeed, the Court of Justice develops what I have described as a 'mutual adjustment resolution.' This original way of adjudicating jurisdictional conflicts between the European Union and the Member States consists in imposing original adjustment requirements on the exercise of Member States' powers, while the Court adapts its own approach in such a way as to preserve Member State autonomy. In short, my inquiry does not consist in focusing on specific fields, but in identifying how the Court of Justice shapes and fashions an original interpretation of the free movement principle. In other words, my thesis does not aim to define abstractly what the powers retained by Member States are or, to put it differently, it does not focus on fields *per se*. Instead, it intends to shed light on *how* the Court limits the exercise of certain national powers that it considers retained by the Member States.

17. *Basic assumption.* That being said, the fundamental assumption underlying my thesis is that the implementation of the power-based approach by the European Court of Justice has significant implications for the relationships between the European Union and its Member States and for the interrelations among the Member States. Therefore, I will assume, throughout my inquiry, that analyzing how the Court develops its original technique, and identifying the implications of such a technique, allow for a better and deeper understanding of the constitutional order of the European Union and its developments. In other words, I start from the assumption that the analysis of the Court of Justice's technique will be revealing of fundamental features of the legal order of the European Union.[44]

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[44] On the significance of legal "technicalities," and the fact that scholars often overlook them, see A. RILES, "A new agenda for the cultural study of law: Taking on the technicalities," 53 *Buffalo Law Review* 973-1033 (2005-2006), who takes the example of the conflicts of laws in the US to sustain her claim that the study of technicalities allows for a better understanding of a legal system and should not be seen as only containing a technical dimension.

b. Free movement cases analyzed through a structural perspective

18. The third defining component of the analytical framework used throughout my thesis refers to the fact that I analyze free movement cases from a structural perspective.

19. *The traditional analytical frameworks used to examine free movement cases.* Free movement cases may be analyzed through different prisms. First, decisions relating to the four economic freedoms can be read from an economic perspective, raising anti-protectionism issues.[45] Second, all free movement cases, regardless of whether they are based on one of the economic freedoms or on European Union citizenship, may be examined through the lenses of individual rights.[46] Both approaches take as their starting points the individual, and focus primarily on the bonds between the European Union and individuals. In the first case, the emphasis is put on the freedom of economic operators. Some of the key issues relate to, for instance, how to achieve a genuine internal market without obstacles to trade, or how to strike a balance between the deregulating effects of the Court of Justice case law and the need for appropriate standards of protection. The second perspective primarily focuses on the legal means put in the hands of natural or legal persons to exercise their free movement rights, i.e. to challenge national laws. As a result, it is principally interested in the role played by those granted rights under European Union law in the process of European integration. My analysis of the free movement cases involving powers retained by Member States departs from these two approaches.

20. *The approach of my thesis.* In a similar way to various authors, the analytical framework used in my thesis is based on a structural reading of free movement cases.[47] I focus, for the most part, on the implications induced by free movement cases for the division of authority between the European Union and the Member States, and interstate relations. Admittedly, there are variations among free movement cases, which are even sometimes significant. Thus, for instance, each freedom is subject to its own conditions of applicability. The Court of Justice has developed, in this regard, specific definitions of the notions of goods, services, remuneration,

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[45] J. SNELL, "Who's got the power? Free movement and allocation of competences in EC law," 22: 1 *YEL* 323 (2003).
[46] Ibid.
[47] Ibid.; N. BERNARD, "La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence," 34 *Cahiers de Droit Européen* 11, 32 (1998); M. P. MADURO, *We the court : the European Court of Justice and the European Economic Constitution : a critical reading of Article 30 of the EC Treaty*, (Oxford : Hart, Evanston, Ill., USA : Distributed in the United States by Northwestern University Press, 1998); S. WEATHERILL, "Pre-emption, harmonization and the distribution of competence to regulate the Internal Market," in *The Law of the Single European Market. Unpacking the premises*, (Eds.) C. BARNARD & J. SCOTT (Hart Publishing, 2002).

workers, self-employed, and so forth. Likewise, the assessment of the restriction stage varies, depending on the freedom involved. As for the justification stage, it is less subject to variations. The assessment of justifications depends more on the subject matter at hand. Each field has, as a matter of fact, its own set of justifications. However, notwithstanding these variations, my analysis starts from the assumption that the overall reasoning developed by the European Court of Justice is, from a structural point of view, similar in all free movement cases.[48] First of all, its reasoning is always divided into the same steps, regardless of the freedom involved: (i) applicability stage: do the facts of the case fall within the scope of application of one of the freedoms?; (ii) restriction stage: does the national law that allegedly infringes the free movement principle have a restrictive object and/or restrictive effects? (iii) justification stage: are the justifications put forward by the Member State in question admissible? If so, is the national measure proportionate? Second of all, these various steps of reasoning have similar structural implications: (i) from a structural point of view, the applicability stage amounts to assessing whether European Union law may intrude into the national sphere of authority at hand i.e. whether European Union law may potentially impose requirements upon Member States within this sphere; (ii) in case the Court of Justice concludes that the national measure at hand does not have a restrictive object or effect, the national sphere of authority results in not being affected by European Union law. Member States remain free from constraints. However, if the Court finds that the national measure is in fact restrictive, it will most probably impact the national power at hand; (iii) finally, the national power is most impacted in cases where the Court concludes that the national measure in question has a disproportionate effect. Broadly speaking,[49] this has the effect of compelling Member States to modify the way they exercise their powers, or of even preventing their exercise – this situation is dealt with, under the traditional 'internal market law approach,' through the lenses of the regulation/deregulation debate. In addition, free movement cases may even alter national spheres of authority when the national measure is found to be proportionate. The Court may indeed consider the proportionality of the measure conditional on the fulfillment of additional requirements affecting national

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[48] Some authors are of the view that the convergence does not only concern the constitutional implications of free movement cases. See, for instance: A. TRYFONIDOU, "Further steps on the road to convergence among the market freedoms," 35: 1 *Eur. Law Rev.* 36-56 (2010); P. OLIVER & W.-H. ROTH, "The internal market and the four freedoms," in *A Review of forty Years of Community Law: Legal Developments in the European Communities and the European Union*, (Ed.) A. MCDONNELL, (The Hague: Kluwer Law International, 2005), 129, esp. 440-441.

[49] I will deal with this issue at length in Chapter 4 of the thesis. See, *Infra*, §§ 238s.

powers. That being said, my thesis mirrors the approach of the Court of Justice, which increasingly tends to take the free movement cases as a whole. To this end, it provides a crosscutting analysis of the free movement cases involving powers retained by Member States – while taking their variations into account when necessary. This ultimately allows me to draw a comprehensive picture of their various structural implications.

21. An analysis centering on the Member States. Most of the analyses relating to the case law of the European Court of Justice dealing with the issue of the division of authority in the European Union legal order tend to focus primarily on the impact of this case law on the powers of the European Union.[50] Alternatively, as I have already mentioned, free movement cases are read through the prism of the individual. By contrast, the approach I have adopted throughout my thesis places an emphasis on the Member States, in a way similar to the analyses focusing on the principles of institutional and procedural autonomy of Member States.[51] I start from a premise similar to that of A. VON BOGDANDY & J. BAST, according to whom a "proper understanding of the Union's competences requires one to consider its impact on the Member States' competences."[52] I also draw on O. BEAUD, who has pointed out that:

> In the phenomenological analysis of the 'federal operation,' the emphasis is often put on the most striking aspect of the federal covenant: the creation of the Federation as a new political entity. But if one becomes aware of the fact that this Federation is the sum of two entities that ought to be analytically distinguished – the federation and the member States – one must reintegrate in her analysis what happens to these States, which become member States.[53]

In other words, my analysis takes as a starting point the implications induced by the application of the law of free movement for the Member States. In so doing, I look at the latter under two

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[50] This holds true with respect to legal analyzes, but also with respect to analyzes conducted in the field of political science. See, for instance, D. S. MARTINSEN, "Welfare policies under pressure? The domestic impact of cross border social security in the European Union," *EUI Working Paper SPS* 2004/11, 22.

[51] See, among many: NEFRAMI E. "Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'Union européenne," in *Objectifs et Compétences dans l'Union européenne*, (Ed.) E. NEFRAMI, (Bruylant, Brussels, 2013), 5-26; M. LE BARBIER-LE-BRIS, "Les principes d'autonomie institutionnelle et procédurale et de coopération loyale," in *Liber amicorum en l'honneur de Jean Raux. Le droit de l'Union européenne en principes*, (Editions Apogée, Publications du Centre d'Excellence Jean Monnet de Rennes, 2006), 423s; K. LENAERTS, "L'encadrement par le droit de l'Union européenne des compétences des Etats membres," in *Mélanges Jacquet*, (Paris: Dalloz, 2010).

[52] A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 7, 285.

[53] O. BEAUD, *Théorie de la Fédération*, (Paris: Presses universitaires de France, 2007), 201: "Dans l'analyse phénoménologique de l' « opération fédérale », on met souvent l'accent sur l'aspect le plus frappant du pacte fédératif: la création de la Fédération comme nouvelle entité politique. Mais si l'on prend conscience du fait que cette Fédération est la somme de deux entités qu'il faut analytiquement distinguer – la fédération et les Etats membres – on doit réintégrer dans son analyse ce qui arrive à ces Etats qui deviennent des Etats membres."

discrete angles. On the one hand, I treat them classically, in their *vertical* relationship to the European Union. I intend to establish how compliance with the European Union interest affects relations between the European Union and its Member States. On the other hand, I also examine the Member States *horizontally*, within the framework of their interrelationships. I look at their interactions, and seek to assess how they mutually influence each other. This allows me to gain an in-depth understanding of the fundamental interactions between the two sets of actors which, taken together, form the European Union. And, ultimately, this enables me to infer from these findings fundamental conclusions as to the identity of the European Union itself.

c. 'Reasoning by comparing'

22. *Two points of comparison.* Last but not least, the ultimate component of the analytical framework I have developed can be described as 'reasoning by comparing.' In the manner of L. HARTZ, my approach is based on the following line of questioning:

> How can we know the uniqueness of anything except by contrasting it [...]?[54]

One of the crucial points of my thesis being that the European Court of Justice develops an original and unique form of integration in cases involving powers retained by Member States, I have decided to compare its various features to other legal structures and processes. I do not mean to assimilate them, but rather to contrast them, in order to bring to light the singularities of the Court of Justice power-based approach. I have selected two main yardsticks against which to compare the range of cases at hand. On the one hand, I contrast them with other cases decided by the European Court of Justice. As might be expected, I draw comparisons between cases involving powers retained by Member States and traditional free movement cases, in order to assess the extent to which, and in which respects, the former differ from, or resemble, the latter. In addition, I also make frequent references to the cases decided in the field of external relations. The latter are, as will be seen later on,[55] the first range of decisions in which the Court of Justice has developed a structural reasoning. Instead of being based on a rights-based perspective, it has traditionally primarily focused on the issue of the division of authority between the European Union and the Member States, and on how their two respective spheres

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[54] L. HARTZ, *The liberal tradition in America*, (Hartcourt Brace, 1955), 4.
[55] See, *Infra*, § 89.

of authority interact. On the other hand, I have opted for comparing the Court's power-based approach to other legal orders. Among several foreign references, such as, for instance, public international law or the case law of the German Constitutional Court, I put great emphasis, for the following reasons, on the US constitutional order.

23. *The US constitutional order.* First of all, I have found the US constitutional debate over the nature of the Union appealing. In a similar way to the European Union, the United States corresponds to an integrative model of federalism, characterized by the integration of previously independent states.[56] As noted by C. WARREN, at the end of the eighteenth century:

> [T]he differences between the States – economic, social, religious, commercial – were in some instances as great as the differences between many of the nations of Europe today; and out of these differences arose materially hostile and discriminating state legislation.[57]

In addition, if they knew that they wanted to form a union more integrated than the entity established by the Articles of Confederation, the drafters of the US Constitution did not, however, unequivocally identify, from a legal point of view, the polity they were creating. A long and fundamental debate over the nature of the Union followed from this ambivalence: was it a genuine federation? Or was it rather closer to what we would call today a confederation, or even an international organization?[58] Was sovereignty vested in the national government on the contrary was it held by the states?[59] As is well known, this debate was settled by the Civil War. However aside from the historical interest, the issue relating to the division of authority between the national government and the states remains fundamental today. The question as to how to preserve the integrity of both the national government and the states while ensuring unity is still subject to lively debates that the US Supreme Court is called upon to settle. I therefore make frequent references to US constitutional law throughout my thesis, especially in the final chapters.

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[56] LENAERTS K. "Constitutionalism and the many faces of federalism," 38 *The American Journal of Comparative Law* 205, 206 (1990).

[57] C. WARREN, *The Supreme Court and Sovereign States*, (Princeton University Press, 1924), 9. See, in a similar vein, L. B. KADEN, "Politics, Money, and State sovereignty: The judicial role," 79 *Colum L. Rev.* 847, 852-853 (1979).

[58] See, for instance, M. DIAMOND, "What the framers meant by federalism," in *A Nation of States*, (Ed.) R. GOLDWIN, (Chicago: Rand McNally, 1974), 27, who defends the view that "[f]ederalism meant then exactly what we mean now by confederalism."

[59] L. CATÁ BACKER, "The extra-national state: American confederate federalism and the European Union," 7 *Colum. J. Eur. Law* 173, esp. 176-177 (2001).

24. Mention must be made, in this respect, of the various US Constitutional clauses that the US Supreme Court uses to settle jurisdictional disputes between the states and the national government, and therefore to define the contours of their relationship. (i) First, Article 1, Section 8 of the US Constitution puts forward the enumerated powers principle by setting out an explicit list of powers that are conferred upon Congress; (ii) the Tenth Amendment asserts, as I have already pointed out,[60] that all the powers not delegated to Congress belong to the States or to the people; (iii) the US Constitution also contains clauses that pertain specifically to the question of free movement, coupled with that of the promotion of national unity:[61] the Commerce Clause, the Privileges and Immunities Clause of Article IV, and the right to travel, though the constitutional sources of the latter remain unclear. Article 1, Section 8, Clause 3 of the Constitution states that:

> Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The US Supreme Court interprets it under two discrete perspectives. It is first an instrument to settle what I would describe as 'positive' jurisdictional conflicts, when Congress is suspected of having gone beyond the power delegated to it while adopting an act, or, alternatively, when the states are suspected of having violated the Commerce Clause through the adoption of a statute conflicting with an Act of Congress. In this context, the Commerce Clause resembles Article 114 TFEU, the provision granting the legislator of the European Union power to adopt harmonizing acts in relation to the internal market. One of the latest typical illustrations involving the Commerce Clause is, for instance, *National Federation of Independent Business v. Sebelius*, in which the Supreme Court ruled on the constitutionality of the Obamacare Act.[62] Second, the Court also interprets the Commerce Clause from a negative perspective. The latter is then generally referred to as the 'dormant Commerce Clause.' The issue is no longer whether Congress has infringed the enumerated power principle, but instead whether the states have encroached upon Congress's power to regulate interstate commerce, even if Congress has not

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[60] See, *Supra*, § 9.
[61] D. LAYCOCK, "Equality and the citizens of sister states," 15 *Fla. St. U. L. Rev.* 431, 439 (1987).
[62] National Federation of Independent Business v. Sebelius, 567 U.S. __ (2012).

(yet) regulated the field at hand.[63] Viewed from this angle, the dormant Commerce Clause is reminiscent of the four economic freedoms of the European Union legal order.

25. Turning now to the Privileges and Immunities Clause of Article IV, its Section 2 provides that:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Also known as the Comity Clause, the Privileges and Immunities Clause governs interstate relations. The US Supreme Court has interpreted it in such a way as to bar the states from discriminating against out-of-staters, i.e. nonresidents – this type of discrimination corresponds to nationality-based discriminations in the European Union legal order. Last but not least, the right to travel has been defined as follows:

> [...] the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[64]

Its constitutional sources remain unclear. For some, they are to be found in the Privileges and Immunities Clause of Article IV, while for others they reside in the Privileges or Immunities or the Equal Protection Clauses of the Fourteenth Amendment.[65] Notwithstanding this question, its third component is of particular interest, since it aims to protect those newly arrived in a state, or, in other words, to bar a state from discriminating between long-established and new residents. Therefore, taken together, the Privileges and Immunities Clause of Article IV and the right to travel are, to some extent, equivalent to what we would describe in the European Union legal order as the free movement principle. They are indeed reminiscent of European Union citizenship and of some aspects of the economic freedoms. As I show later on,[66] the US

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[63] The question as to whether the Commerce Clause comprises this 'dormant' dimension has raised much debate among US constitutional scholars. For an overview of this debate and its pros and cons, see, for instance, V. BLASI, "Constitutional limitations on the powers of states to regulate the movement of goods in interstate commerce," in *Courts and Free markets*, (Eds). E. STEIN & T. SANDALOW, (Oxford: Clarendon Press, 1982), 174-175.

[64] *Saenz v. Roe*, 526 U.S. 489, 500 (1999). (Justice STEVENS writing for the majority)

[65] The Fourteenth Amendment reads as follows:
"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."

[66] See, *Infra*, §§ 408-412.

Supreme Court has notably used these various clauses to impose limits upon state reserved powers. As a result, they are fundamental to understand how the states and the central government interact within the US constitutional order. In sum, they constitute an interesting point of reference for the analysis of the European Court of Justice power-based approach.

4. Two fundamental ranges of purposes

26. The contours of my analytical framework having been established, I can now turn to the identification of the various purposes of my thesis. To put it briefly, it aims to (i) demonstrate that the approach developed by the Court of Justice in cases involving powers retained by Member States amounts to an original form of legal integration, and to (ii) bring to light its significance for the European Union constitutional dynamics.

a. An exercise in deconstruction

27. To be 'original,' a technique of integration must refer to a legal approach developed by the Court that is both specific and applied in a distinct range of cases. In other words, it must distinguish itself from other forms of integration in such a way as to be singled out and described as unique. For the present purposes, I broadly define the concept of legal integration as the penetration of European Union law into national legal systems.[67] In this respect, an important distinction must be kept in mind between law understood as an object, and law understood as an agent of European integration.[68] Given the above, this thesis primarily refers to law as an agent, i.e. to the legal means and techniques used to achieve and further European integration.

28. *The unicity of the power-based approach.* In order to shed light on the original character of the Court of Justice power-based approach, I endeavor to establish an in-depth deconstruction of the various cases concerned by it. I moreover aim to build up a comprehensive analysis, and draw comparisons of their defining features. This requires, in particular, the refutation of the

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[67] A.-M. BURLEY & W. MATTLI, "Europe before the Court: A political theory of legal integration," 47: 1 *International Organization* 43 (1993), 43; L. AZOULAI, "La révolution introduite par Pierre Pescatore dans l'étude du droit communautaire européen," 55: 4 *Revue de la Faculté de Droit de l'Université de Liège* 469, 474 (2010); P. PESCATORE, preface to *Le droit de l'intégration: émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, (Bruxelles : Bruylant, 2005), 5: "Si le droit international est un droit relationnel, au mieux coopératif, le droit de l'intégration est un droit fusionnel et unitaire."

[68] R. DEHOUSSE & J. H. H. WEILER, "The legal dimension," in *The Dynamics of European Integration*, (Ed.) W. WALLACE, (London: Pinter, 1990), 242, 243.

two following powerful arguments that could be advanced to deny the existence and/or the significance of the power-based approach. According to the first, cases involving powers retained by Member States would not fundamentally differ from traditional free movement cases, given that the two sets of cases are both based on the same general legal framework. They are based on the same Treaty provisions – the economic freedoms and European Union citizenship – and the Court divides its rulings into the same steps of reasoning: applicability, restriction, and justification. The second relates to the material scope of the national powers concerned by the power-based approach. Since they cover, at first glance, very heterogeneous areas, there seems to be no obvious reason why the Court would develop an approach that is common to these fields.

29. The forms of integration developed by the Court of Justice. As D. SIDJANSKI puts it, the "various types of integration develop at various levels, interfere, influence each other within a general interdependence framework."[69] J. H. H. WEILER drew, in this respect, a compelling typology[70] of the various forms of integration developed by the Court, the function and the effects of which are to shape and govern the relationship between the European Union and its Member States. He identified four categories of mutation that have affected their interplay, and that reflect the fact that the jurisdiction of the European Union has substantially grown over the years. J. H. H. WEILER first distinguished the category of *extension*, "in the area of autonomous Community jurisdiction,"[71] which concerns the mutation of human rights in the European Union legal order as well as the standing of the European Parliament. This form of integration "did not have a direct impact on the jurisdiction of the Member States"[72] since it primarily concerned European Union's own powers. The second category, *absorption*, encompasses instances in which the Court of Justice rules that European Union measures trump conflicting national measures even if they affect "areas over which the Community has no competence."[73] The third category concerns the issue of *incorporation*. J. H. H. WEILER borrows this concept from US constitutional law. This is a doctrine developed by the Supreme

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[69] D. SIDJANSKI, *Dimensions européennes de la Science Politique: questions méthodologiques et programme de recherches*, (Paris: Pichon & Durand-Auzias, 1963), 19: "[D]ivers types d'intégrations se développent à divers niveaux, interfèrent, s'influencent mutuellement dans le cadre d'une interdépendance générale."
[70] J. H. H. WEILER, "The Transformation of Europe," above, n. 3, 45s.
[71] Ibid., 45.
[72] Ibid., 46.
[73] Ibid., 49.

Court of the United States, whereby the federal Bill of Rights not only applies to the measures of the federal government but also to state action.[74] Last but not least, the category of *expansion* is depicted as "the most radical form of jurisdictional mutation" because it corresponds to cases where "the original legislation of the Community 'breaks' jurisdictional limits."[75] This typology shows that these legal forms of integration, as they are developed by the European Court of Justice, may: (i) not have direct implications for Member States (extension); (ii) have implications for the existence of European Union and/or national powers (expansion + incorporation); (iii) have implications for the exercise of national powers (absorption + incorporation). The categories of expansion and absorption are of significant interest for the present purposes.

30. *Expansion.* The expansion form of integration corresponds to legal techniques used to resolve disputes involving the division of powers between the European Union and its Member States. The Court of Justice is called upon, in these cases, to draw boundaries between the respective spheres of jurisdiction of the European Union and the Member States. As J. H. H. WEILER and many other authors point out, it has always interpreted European Union powers in an expansive way with, as a result, a reduction[76] and/or an erosion[77] of national powers. The most obvious of these legal techniques can be found in the Court's interpretation of current Article 352 TFEU, also called the flexibility clause. The Court has endorsed a very expansive use of this provision, which has served as the legal basis for developing policies that are not mentioned in the Treaties, such as the environmental policy or the protection of consumers.[78] The doctrine of exclusivity, as developed in the context of EU external relations, is another telling example. While a certain range of subject matters is exclusive, such as fisheries conservation or commercial policy,[79] under other circumstances the exercise of its – express or

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[74] Ibid., 50.
[75] Ibid., 51.
[76] A. TIZZANO, "Les compétences de la Communauté," in *Trente ans de droit communautaire*, (Luxembourg, Office des publications officielles des Communautés européennes), 1982, 67.
[77] V. MICHEL, "2004: le défi de la répartition des compétences," above, n. 25, 37.
[78] See, for instance, A. TIZZANO, "Quelques observations sur le développement des compétences communautaires," above, n. 27, 91s who described current Article 352 TFEU as a limited form of Treaty revision (at 93); A. DASHWOOD, "The limits of European Community powers," *Eur. Law Rev.* 123 (1996); A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 7, 300s; P. CRAIG, *EU Administrative Law*, (Oxford; New York: Oxford University Press, 2006), 386s; V. MICHEL, "2004: le défi de la répartition des compétences," above, n. 25, 36s; G. DE BURCA & B. DE WITTE, "The delimitation of powers between the EU and its Member States," above, n. 20, 216.
[79] Article 3 TFEU.

implied – powers by the European Union entails the exclusion of Member States' powers.[80] The interpretation of Article 114 TFEU also reflects the Court's expansionist stance on the powers held by the European Union. The Court has confirmed, for instance, that subject matters not strictly economic may be nonetheless harmonized.[81] The Court's developments in free movement cases, decided in the absence of legislation at the level of the European Union, can also be analyzed in light of J. H. H. WEILER's expansion concept. M. P. MADURO claims, by way of illustration, that cases involving the free movement of goods imply choices regarding the division of powers between the European Union and the Member States. In his view, they boil down to deciding on the issue of who, between the Union and Member States, should have jurisdiction over a certain subject matter.[82] This observation also holds true for the other fundamental freedoms as well as for European Union citizenship.

31. Absorption. Besides these forms of legal integration pertaining to the division of powers and therefore to the existence of both European and national powers, the Court has developed absorption techniques that have significant implications for the exercise of Member States' powers. In some instances, the Court requires Member States to comply with European Union

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[80] See, among many, M. CREMONA, "External relations and external competence of the European Union: The emergence of an integrated policy," in *The Evolution of EU Law*, (Eds.) P. CRAIG & G. DE BURCA, (Oxford, Oxford University Press, 2011); G. DE BAERE, *Constitutional principles of EU external relations*, (Oxford; New York: Oxford University Press, 2008); P. EECKHOUT, *EU External relations law*, (Oxford; New York: Oxford University Press, 2011); A. DASHWOOD, "The attribution of external relations competence," in *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000), 115-138; K. LENAERTS, "Les répercussions des compétences de la Communauté européenne sur les compétences externes des États membres et la question de 'préemption'," in *Relations extérieures de la Communauté européenne et marché intérieur: Aspects juridiques et fonctionnels*, (Ed.) P. DEMARET, (Bruges: Collège d'Europe, 1986), 39-62; P. MENGOZZI, "The EC External competencies: From the *ERTA* case to the Opinion in the Lugano Convention," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Eds.) M. P. MADURO & L. AZOULAI, (Oxford : Hart Publishing, 2010), 213-217.

[81] See, among many, A. MCGEE & S. WEATHERILL, "The evolution of the single market – Harmonization or liberalization?," 53: 5 *The Modern Law Review* 578-596 (1990), ; A. VON BOGDANDY & J. BAST, above, n. 7, 291s; A. DASHWOOD, "The limits of European Community powers," above, n. 78, 120s; P. CRAIG, *EU Administrative Law*, above, n. 78, at 389s; A. DASHWOOD, "States in the European Union," *Eur. Law Rev.* 209s (1998); J. H. H. WEILER, "The constitution of the common market place: Text and context in the evolution of the free movement of goods," in *The Evolution of EU Law*, (Eds.) P. CRAIG & G. DE BURCA, (Oxford: Oxford University Press, 1999), 262s; V. MICHEL, "2004: le défi de la répartition des compétences," above, n. 25; G. DE BURCA & B. DE WITTE, "The delimitation of powers between the EU and its Member States," above, n. 20; M. CAPPELLETTI, M. SECCOMBE & J. H. H. WEILER, "Integration through law: Europe and the American federal experience," *in Integration Through Law. Vol. 1. Methods, Tools and Institutions. Book 2. Political Organs, integration techniques and judicial process*, (Eds.) M. CAPPELLETTI, M. SECCOMBE & J. H. H. WEILER, (Berlin, New York: Walter de Gruyter, 1985-1986), 35; B. DE WITTE, "Non-market values in internal market legislation," in *Regulating the Internal Market*, (Ed.) N. NIC SHUIGHNE, (Cheltenham, Edward Elgar, 2006), 61-86.

[82] M. P. MADURO, *We the court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty*, above, n. 47, 1.

law each time the exercise of their powers undermines the exercise of European Union powers, even when they pertain to areas over which the European Union has no jurisdiction. To this end, it imposes specific legal restraints on the conditions of exercise of national powers. The Court developed this approach for the first time in *Casagrande*. This decision involved the field of education, traditionally seen as reserved to the Member States. The legality of Regulation 1612/68 was challenged on the grounds that the Community infringed Member States' educational powers. The Court of Justice held that:

> [A]lthough educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training.[83]

The Court also places restraints on the exercise of national external powers. As a result of the broader recognition of shared powers – and the relative decline of the doctrine of exclusivity – it increasingly reviews the conditions attached to the exercise of national external powers.[84] Interestingly, the aforementioned expansion techniques also have an absorbing effect on the exercise of Member States' powers. The broader the material scope of European Union powers, the more likely the exercise of national powers to impinge upon the latter. With respect to the nature of the restraints upon the exercise of national powers, R. BIEBER rightly pointed out that "[t]he closer the connection between the exercise of national powers and the Community legislation, the stronger the effects of the obligations which can be derived from Community law."[85]

32. The power-based approach contextualized. That being said, the purpose of my exercise in deconstruction is twofold. First of all, I intend to identify whether the power-based approach falls within one (or more) of J. H. H. WEILER's categories; or, alternatively, to what extent it borrows from them. Second of all, I start from the premise that the Court of Justice has not built the power-based approach from scratch. Instead, it has drawn some of its defining features

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[83] Case 9/74, *Casagrande*, [1974] *ECR* 773, 12.

[84] See, for instance, M. CREMONA, "External relations and external competence of the European Union: The emergence of an integrated policy," above n. 80, 247; D. O'KEEFFE, "Exclusive, concurrent and shared competence," in *EC External Relations Law in the Maastricht Era*, (Eds.) A. DASHWOOD & C. HILLION, (Sweet & Maxwell, 2000), 198-199.

[85] R. BIEBER, "On the mutual completion of overlapping legal systems: the case of the European Communities and the national legal orders," *Eur. Law Rev.* 157 (1988).

on some of its pre-existing integration techniques. What makes this form of integration 'original' is that the Court operates it in a specific and distinctive manner while at the same time creating specific and novel features. Accordingly, my thesis emphasizes both *continuity* and *change*, and aims to show how the Court, on the basis of its existing judicial constructions, has been gradually implementing a distinct and original form of integration in a specific range of free movement cases. To put it differently, it seeks to put the power-based approach in perspective, by assessing to what extent it borrows from other doctrines developed by the Court of Justice, or, on the contrary, the extent to which it distinguishes itself from them.

b. An exercise in reconstruction

33. My thesis combines the exercise in deconstruction with an attempt at reconstruction. This exercise has a threefold purpose, which I intend to deal with by taking the theory of federalism as the starting point of my analysis.

34. *A threefold purpose.* Reconstructing the Court of Justice reasoning implies placing my various findings in a broader perspective, in order to shed light on the significance of the power-based approach for the European Union constitutional dynamics. In other words, this endeavor aims to assess what the power-based approach adds to the constitutional law of the European Union and, therefore, to a better understanding of the European Union building process. This requires addressing three different sets of issues, which relate, respectively, to: (i) the necessity to limit national powers in order to preserve the European Union interests;[86] (ii) the interplay between Member States and the European Union, and Member States' interrelations;[87] and (iii) the shaping of the contours of a "Member State status." With respect to the first issue, cases involving powers retained by Member States are all about the limitations put on the conditions of exercise of national powers. In this respect, an accurate understanding of these decisions requires the paradox as to how a given power can both fall within national spheres of jurisdiction, and be subject to European Union law requirements to be overcome. Turning now to the second issue, cases pertaining to the powers retained by Member States, as I have already mentioned earlier, primarily concern the division of authority between the two

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[86] These issues are similar to those identified by M. LE BARBIER-LE-BRIS in the context of the procedural and institutional autonomy of Member States. M. LE BARBIER-LE-BRIS, "Les principes d'autonomie institutionnelle et procédurale et de coopération loyale," above, n. 51, 429.
[87] Ibid., 420.

levels of government of the European Union. They indeed invite the Court to decide on how the European Union and its Member States are to interact with respect to fields over which the former has no, or very limited, jurisdiction, but which nonetheless affect its interests. In this respect, the following chapters show that the preservation of national autonomy is a constant concern for the Court of Justice. In so doing, the Court takes into account, throughout its rulings, the effects of its decisions on the special bonds that link States with their respective nationals and residents. Similarly, the Court seeks to coordinate national and European Union spheres of powers in such a way as to simultaneously preserve European Union powers and Member States' specific and legitimate interests. The cases concerned by the power-based approach also pertain to Member States' interrelationships, and the way Member States interact, or do not interact, in fields that form the core of their identity. Accordingly, the impact of the application of European Union law on these relations needs to be identified. As a result, my thesis intends to identify the implications of the Court of Justice power-based approach for the European Union vertical and horizontal institutional relationships. Last but not least, it finally aims to draw a comprehensive picture of the resulting conditions of Union's membership. To put it differently, its purpose is to shed light on the defining features of the status of the Members of the European Union. How does the Court of Justice define and fashion them? What are the implications for the Member States? And, ultimately, for the identity of the European Union? In order to address these various issues, I am taking the theory of federalism as the starting point of the exercise in reconstruction.

35. Federalism does not exclusively relate to the nation-state. The second fundamental element of the analytical framework I use to examine free movement cases involving powers retained by Member States relates to my understanding of the European Union as a federation or, to put it differently, as a polity governed by a federal principle. Broadly speaking, federalism is a system of government, which relies on a federal arrangement. D. J. ELAZAR has defined the latter as:

> [O]ne of *partnership*, established and regulated by a *covenant*, whose internal relationships reflect the special kind of *sharing* that must prevail among the partners, based on a mutual recognition of the *integrity* of each partner and the attempt to foster a special *unity* among them.[88]

[88] D. J. ELAZAR, *Exploring Federalism*, (Tuscaloosa, AL: University of Alabama Press, 1987), 5. (Emphases added)

Federal arrangements are characterized, in essence, by the existence of two levels of government, which means, from a constitutional point of view, that powers are divided between the two.[89] As a result, in federal systems, two levels of government, i.e. the federal government on the one hand, and the constituent government on the other hand, exercise their powers with respect to the same territory and the same population simultaneously.[90] In Europe, when scholars examine federal arrangements, they generally take the concept of sovereignty, understood as indivisible, as the starting point of their inquiries. This prompts them to divide the federal principle into two "mutually exclusive species,"[91] the confederation and the federal state. While the former characterizes international arrangements, the latter, so the argument goes, exclusively refers to nation states. As a result, the "F" word is most of the time associated with the idea of nation-state. In addition, issues relating to federalism are very often reduced to a strict typology of confederations and federal states.[92] Against this background, O. BEAUD has described this twofold distinction as an "intellectual obstacle" to the analysis of federalism,[93] and has shown that federalism is instead first and foremost a unitary phenomenon. In the same manner as H. KELSEN,[94] he contends that federal states and confederations of states do not differ in nature, but rather in degree. As P. RILEY puts it, these two forms of political organization are meant to address the same concerns:

> Federalism, both as a scheme for the internal structuring of a single state and as a plan of international organization, can most plausibly be understood as having arisen as an alternative to, and (more precisely) in opposition to, the existence and the monolithic power of the sovereign states of post-sixteenth century modernity.[95]

The fundamental idea, consisting in dividing responsibilities between two levels of government, remains, regardless of the precise 'federal form of government' adopted by the polity:

> [U]sing the federal principle does not necessarily mean establishing a federal system in the conventional sense of a modern federal state. The essence of federalism is not to be found

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[89] Ibid.; M. DIAMOND, "The *Federalist* on federalism: 'Neither a national nor a federal constitution, but a composition of both'," 86 *Yale Law Journal* 1273, 1277 (1977); H. KELSEN, "La garantie constitutionnelle de la Constitution (la justice constitutionnelle)," *RDP* 197, 254 (1928).
[90] O. BEAUD, *Théorie de la fédération*, above, n. 53, 39.
[91] R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, (Oxford University Press, 2009), 69.
[92] O. BEAUD, *Théorie de la fédération*, above, n. 53, 90.
[93] O. BEAUD, "L'Europe vue sous l'angle de la fédération. Le regard paradoxal de Paul Reuter," 45 *Droits* 47 (2007).
[94] O. BEAUD, "Hans Kelsen, Théoricien constitutionnel de la fédération," in *Actualité de Kelsen en France*, (Ed.) C. M. HERRERA, (Bruylant, LGJD, Coll. La pensée juridique, 2001), 47, 56-57.
[95] P. RILEY, "The origins of federal theory in international relations ideas," 6 *Polity* 87, 88 (1973).

> in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life.[96]

Everything considered, the concept of federalism may thus equally be used "within or without the framework of a nation-state."[97]

36. The division of authority between the European Union and its Member States: A federal issue. Against this backdrop, I have decided to look into the issues relating to the division of authority raised by the free movement cases involving powers retained by Member States through the lenses of federalism. To this end, I understand the European Union as a federation, defined as a "union of states"[98] based on a federal principle, without presupposing that it amounts to a state. Admittedly, I do not contend that all of its features are federal. But I nonetheless share the view of several authors,[99] and R. SCHÜTZE's stance in particular,[100] that issues relating to the division of powers between the European Union and its Member States are similar to those of a federal system. J. H. H. WEILER has noted, in this respect, that, in the European Union, the allocation of powers, which governs the relationship between the Union and its Member States, is "very much like similar sets of norms in most federal states."[101] The European Court of Justice moreover plays a fundamental role in relation to the settlement of disputes relating to the federal division of authority between the European Union and the Member States. It is enough to think, for instance, of the *Tobacco Advertising* controversy, in which the Court held for the first time that the European Union had gone beyond its attributed powers when it adopted a directive regulating the advertisement of tobacco.[102] As a result, it has increasingly

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[96] D. J. ELAZAR, *Exploring Federalism*, above, n. 88, 11-12.
[97] K. LENAERTS, "Federalism: Essential concepts in evolution – The case of the European Union," 21 *Fordham International Law Journal* 746, 747 (1997). See also C. M. CHAUMONT, "La signification du principe de spécialité des organisations internationales," in *Mélanges Henri Rolin*, (Paris, Pedone, 1964), 55, 57.
[98] O. BEAUD, "L'Europe vue sous l'angle de la fédération. Le regard paradoxal de Paul Reuter," above, n. 93, 47.
[99] A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 7, 275; W. SWENDEN, "Is the European Union in need of a competence catalogue? Insights from comparative federalism," 42 *Journal of Common Market Studies* 371, 372 (2004); E. A. YOUNG, "Protecting Member State autonomy in the European Union: Some cautionary tales from American federalism," 77 *New York University Law Review* 1612, 1614 (2002). For an opposite view though: G. TUSSEAU, "Theoretical deflation, the EU order of competences and power-conferring norms theory," above, n. 18, 40-41.
[100] R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, above, n. 91, 73.
[101] J. H. H. WEILER, "Federalism and constitutionalism, Europe's *Sonderweg*," in *The Federal Vision: Legitimacy and levels of governance in the United States and the European Union*, (Eds.) K. NICOLAÏDIS & R. HOWSE (Oxford, Oxford University Press, 2001), 54, 56. See also O. BEAUD, "Hans Kelsen, Théoricien constitutionnel de la fédération," above, n. 94, 47; and, as early as 1967, P. PESCATORE, *La répartition des compétences et des pouvoirs entre les Etats membres et les Communautés européennes: Etude des rapports entre les Communautés et les Etats membres*, (1967), 96.
[102] Case C-376/98, Germany v. Council, [2000] ECR I-8419 (Tobacco Advertising).

become similar to federal constitutional courts.[103] Taken together, these two factors explain that, from a structural point of view, the European Union can be described as a federation.

37. *The theory of federalism as the starting point of the exercise in reconstruction.* As M. DIAMONDS has accurately pointed out:

> Federalism is always an arrangement pointed in two contrary directions or aimed at securing two contrary ends. One end is always found in the reason why the member units do not simply consolidate themselves into one large unitary country; the other end is always found in the reason why the member units do not choose to remain simply small wholly autonomous countries.[104]

To put it differently, federalism is characterized by two opposite principles: a centripetal principle, which tends to give precedence to the central government interests and jurisdiction, and a centrifugal principle, according to which the autonomy of the members of the federation must be safeguarded,[105] and their global political status maintained.[106] In sum:

> In any federal system, it is likely that there will be continued tension between the federal government and the constituent polities over the years and that different 'balances' between them will develop at different times. The existence of this tension is an integral part of the federal relationship, and its character does much to determine the future of federalism in each system.[107]

This tension precisely underlies the whole of the cases involving power retained by Member States, and its identification is at the core of my thesis. Accordingly, through the use of the theory of federalism, I can address the question as to how the Court of Justice proceeds to strike a balance between the need to preserve the unity of the European Union legal order, while preserving diversity within the European Union.[108] Focusing on the federal operation that takes place in cases involving powers retained by Member States moreover allows me to identify the transformation that affects Member States. I can identify to what extent Union membership requires Member States to alter the political and social powers that form the core of their

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[103] W. J. FELD, "The European Community Court: Its role in the federalizing process," 50 *Minnesota Law Review* 423, 425-426 (1965-1966); C. N. KAKOURIS, "La relation de l'ordre juridique communautaire avec les ordres juridiques des Etats membres (Quelques réflexions parfois peu conformistes)," in *Liber amoricum P. Pescatore* (Baden-Baden, Nomos Verlag, 1987), 319, 343-344.

[104] M. DIAMOND, "The ends of federalism," 3 *Publius* 129, 130 (1973).

[105] E. ZOLLER, "Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération entre Etats," 294 *Recueil des Cours* 41, 125 (2002); O. BEAUD, *Théorie de la fédération*, above, n. 53, 110.

[106] C. SCHMITT, *Théorie de la Constitution*, (Trad. From German to French by L. Deroche), (Paris: Presses Universitaires de France, 1993), 512.

[107] D. J. ELAZAR, *Exploring Federalism*, above, n. 88, 185.

[108] See, generally, D. L. SHAPIRO, *Federalism: A dialogue*, (Evanston, Ill : Northwestern University Press, 1995), 6s.

identity. Furthermore, this allows me to assess to what extent Union membership affects Member State autonomy and, ultimately, their identity as nation-states.

5. Outline of the thesis

38. Given the above, I have divided my thesis into six chapters. The first three shed light on the three fundamental features of the Court of Justice power-based approach. Taken together, they single it out from the approach traditionally implemented in free movement cases. In Chapter 1, I show that, in contrast to traditional free movement cases, the Court of Justice reasoning amounts to a 'power-based approach.' In Chapter 2, I focus on the applicability stage of the cases concerned by the power-based approach, and demonstrate that the Court proceeds to a disjunction of the scope of application of European Union law from the scope of the powers conferred on the European Union. As for Chapter 3, it concerns more specifically the restriction and the justification stages of the cases involving powers retained by Member States. It claims that the settlement of the jurisdictional conflicts at hand amounts to a 'mutual adjustment resolution.' On the one hand, the Court of Justice places limitations on the exercise of the national powers where the European Union nonetheless holds no, or very limited, jurisdiction. But, on the other hand, the Court adapts its own approach to the sensitive character of the fields analyzed herein. In the remaining three chapters, I intend to reconstruct the Court of Justice power-based approach in three ways. First of all, I identify its effects in Chapter 4, and address the issue as to whether the cases involving powers retained by Member States result in a disempowerment of the Member States and/or an empowerment of the European Union. Second of all, in Chapter 5, I shed light on the existence and the nature of the various implications induced by the power-based approach for European Union membership. Lastly, Chapter 6 gathers the various findings of the five preceding chapters in such a way as to provide an overall structural reassessment. This allows me to shed light, first, on the persistent silence of the Court regarding the question of why certain fields are concerned by the power-based approach, and regarding the foundations of this original form of integration. Second, I identify which structural model the Court of Justice is led to (un)consciously implement through the entrenchment of its power-based approach.

CHAPTER 1. THE ECJ POWER-BASED APPROACH

INTRODUCTION OF CHAPTER 1.

39. Purpose of Chapter 1. This first chapter provides a comprehensive overview of the European Court of Justice power-based approach. Its purpose is twofold. On the one hand, it focuses on the fields concerned by this original approach, and seeks to understand why, despite the disparate character of the subject matters covered, the Court of Justice nevertheless subjects them to a common legal framework. On the other hand, this chapter sheds light on the first defining feature of the power-based approach. In cases involving powers retained by Member States, the notion of power plays a crucial role throughout the Court's reasoning. By contrast, in traditional free movement cases, the Court primarily focuses on the articulation of the norms in conflict through the principle of primacy. It is only indirectly interested in dealing with the implications of its case law for the interplay between national and European Union spheres of powers. This is evidenced by the fact that, in these cases, the Court barely reasons in terms of powers – indeed it seldom refers to this concept at all. This is not the case in the rulings involving retained powers. Instead, the Court gives more weight to issues relating to the division of authority between the European Union and the Member States, and among Member States.

40. Outline of Chapter 1. In order to shed light on the first feature of the Court of Justice power-based approach, Chapter 1 is divided into two sections. In Section 1, I elaborate on the fields briefly listed in the general introduction.[1] In this respect, I present a thorough description of these fields and demonstrate that, notwithstanding their apparent heterogeneity, they nonetheless share common defining features. In Section 2, I focus on the overall reasoning developed by the Court of Justice in cases involving powers retained by Member States, and show that it revolves around the structural notion of power.

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[1] See, *Supra*, §§ 12-14.

SECTION 1. THE IDENTIFICATION OF THE FIELDS CONCERNED BY THE POWER-BASED APPROACH

41. The statement of the formulae at the applicability stage of the cases involving powers retained by Member States reveals that the Court of Justice singles out a certain range of powers with the view to subjecting them to a particular legal framework. The criteria used by the Court in its selection remain obscure and ill-defined. As a matter of fact, nowhere in the cases does the Court indicate why, and/or on what basis, it subjects a given field to the power-based approach.[2] Against this backdrop, the purpose of this first section is to identify those powers in relation to which the Court develops its power-based approach. At first glance, the fields analyzed herein seem, to say the least, heterogeneous, since they cover very diverse subject matters. However, a closer look at the Court of Justice case law indicates that they nonetheless share three fundamental features. First, they all are, in one way or another, defining components of what is traditionally considered in Western Europe as Member State autonomy. Second, they fall, for the most part, outside the jurisdiction of the European Union. With respect to these fields, European Union powers are either very limited or simply nonexistent. Third, and maybe more importantly, the exercise of powers in these fields is essentially based on the principle of closure, while their internal coherence is conditional upon the erection of boundaries.

1. Constitutive components of Member State autonomy as reflected in the ECJ case law

42. In the following, I draw a distinction between the fields pertaining to national political autonomy – nationality, direct taxation, the rules governing surnames and the enforcement for the recovery of debts – and those that fall within Member State social autonomy – social protection, education and the right to take collective action.[3] This logically entails that, as far as these fields are concerned, Member States make different policy choices or, in other words, that they exercise their powers according in different, sometimes conflicting, manners.

a. Key-components of political autonomy

43. To begin with, *nationality* may be broadly defined as a legal bond between the state and the individual. As noted by S. O'LEARY:

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[2] See, *Infra*, §§ 354-359.

[3] Direct taxation can also be considered as a component of Member State social autonomy since it is a significant instrument of social policies.

> The determination of nationality is regarded as an exercise of national sovereignty since it is one of the primary means by which a state defines itself and, in particular, its personal spectrum.[4]

Through the adoption of nationality laws, states as sovereign decide which individuals are subject to the set of rights and duties in force on their territories. In other words, nationality policies determine who is to enjoy the status of membership of a community.[5] Accordingly, nationality can be described as a core component of national autonomy, for the survival of a state depends on its ability to include (exclude) individuals into (from) its population:

> In order to exist, every nation-state needs a population and a territory. Since individual human beings have a limited lifespan, states – to ensure their own continuity over time – have had to find legal tools that not only attribute nationality but also transmit it from generation to generation.[6]

As a result, nationality policy is closely linked to fundamental political choices[7] – it has decisive implications, for instance, for national immigration and integration policies. In this regard, countries of immigration and countries of emigration generally do not pursue the same objectives, and this is reflected in the way they grant nationality. Similarly, states have different views over integration, and can see nationality as a sign of integration and/or as a factor of integration.[8] They therefore do not impose the same range of conditions with respect to the acquisition of nationality. Altogether, Member States use four tools as bases of their respective nationality policies:[9]

> *Jus soli*: a person acquires the nationality of his/her place of birth;
>
> *Jus sanguini*: a person acquires the nationality of one of his/her parent or ancestor;

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[4] S. O'LEARY, *The evolving concept of Community Citizenship: from the free movement of persons to Union Citizenship*, (EUI Ph.D. Thesis, 1993), 30. See also K. HAILBRONNER, "Nationality in public international law and European law," in *Acquisition and Loss of Nationality. Policies and trends in 15 European Countries. Vol. 1. Comparative Analyses*, (Ed.) R. BAUBÖCK, & E. ERSBØLL, (Amsterdam : Amsterdam University Press, 2006), 36.

[5] K. HAILBRONNER, "Nationality in public international law and European law," above n. 4, 35; A. TRYFONIDOU, "The impact of EU law on nationality laws and migration control in the EU's Member States," 25: 4 *Journal of Immigration, Asylum and Nationality Law* 358 (2011).

[6] P. WEIL, *How to be French: Nationality in the making since 1789*, (Durham: Duke University Press, 2008), 2. See also K. HAILBRONNER, "Nationality in public international law and European law," above, n. 4, 35: "Sovereign powers, a defined territory and the existence of a nation are generally considered necessary conditions for the existence of a state in the sense of public international law, entrusted with the competence and sovereign powers attributed to states."

[7] O. LECUCQ, "Propos Introductifs. Nationalité et citoyenneté," in *Nationalité et Citoyenneté. Perspectives de droit comparé, droit européen et droit international*, (Ed.) M.-P. LANFRANCHI, O. LECUCQ, D. NAZET-ALLOUCHE, (Brussels, Bruylant, 2012), 15.

[8] A. DIONISI-PEYRUSSE, *Essai sur une nouvelle conception de la nationalité*, (Paris: Defrénois, 2010), 64-65.

[9] P. WEIL, *How to be French: Nationality in the making since 1789*, above n. 6, 2.

> Residency: a person acquires the nationality of his/her country of residence after a certain length of residence;
>
> Matrimonial status: a person acquires the nationality of the country of his/her spouse.

Some concrete examples show that nationality policies substantially differ from one Member State to another. Suffice to think, for instance, of Italy, where the *jus sanguini* principle plays a cornerstone role given that "acquisition of the Italian nationality has been mostly rooted in family relationship."[10] Conversely, nationality laws in the United Kingdom reflect a policy preference for the *jus soli* principle.[11] As for France, it combines both principles.[12]

44. Direct taxation. The same holds true for the field of direct taxation: "it is difficult to conceive of a modern nation-state that could sustain itself and protect its people from physical or economic harm without raising revenue through taxation of some kind."[13] Taxation is essential to preserve the territorial integrity of a state. It is also vital to conduct social and economic policies. This is especially true with respect to the Member States of the European Union, which have long substantially intervened into domestic matters relating to economy and social matters[14] – and, in this respect, direct taxation is as much an expression of political autonomy as social autonomy. Member States have set up very different tax systems. "As a result, there are significant differences in national tax structures in the EU as regards the financing of the national budget and the welfare system."[15] As evidenced by the European Commission, Member States have implemented disparate tax arrangements, not to mention the divergences in tax rates and the tax base.[16] As way of example, a comparison between the

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[10] M. ARENA, B. NASCIMBENE & G. ZINCONE, "Italy," in *Acquisition and Loss of Nationality, Vol. 2: Country Analyses*, (Eds.) R. BAUBÖCK & E. ERSBØLL, (Amsterdam: Amsterdam University Press, 2006), 329.

[11] A. DUMMETT, "United Kingdom," in *Acquisition and Loss of Nationality Vol. 2: Country Analyses*, (Eds.) R. BAUBÖCK & E. ERSBØLL, (Amsterdam: Amsterdam University Press, 2006), 551-585.

[12] P. WEIL & A. SPIRE, "France," in *Acquisition and Loss of Nationality Vol. 2: Country Analyses*, (Eds.) R. BAUBÖCK & E. ERSBØLL, (Amsterdam: Amsterdam University Press, 2006), 187-211.

[13] See A. CHRISTIANS, "Sovereignty, taxation and social contract," 18 *Minn. J. Int'l L.* 99, 104 (2009): "Since taxation is typically the main means by which governments support themselves and provide public goods, the ability and need of the state to tax is easily conflated with the concept of sovereignty." See also D. BRÄUTIGAM, "Building Leviathan: Revenue, State Capacity and Governance," 33: 3 *IDS Bulletin* 10 (2002), who quotes T. Hobbes, *The Leviathan*, 1651: "These are the rights which make the essence of sovereignty: ...The power to protect his subjects... [the power] of execution of the laws... the power of raising money."

[14] See D. RING, "What's at stake in the sovereignty debate?: International tax and the nation-state," *Boston College Law School Legal Studies Research Paper* No. 153, 10-11 (2008).

[15] C. KELLERMANN & A. KAMMER, "Deadlocked European tax policy. Which way out of the competition for the lowest taxes?," *European Tax Policy* 2/2009, 132.

[16] EUROSTAT, *Taxation trends in the European Union*, Statistical book, 2012 Edition. Available from http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_structures/2012/report.pdf.

various national tax systems has allowed C. KELLERMANN and A. KAMMER to divide the Member States into four groups.[17] The first is composed of the newer Member States, and is characterized by low top income tax rates and low tax revenues generated by personal income tax. The second comprises countries such as France and Germany, and corresponds to high burden on earned income and nominally high income and corporate tax rates. In the third group, also called the 'Anglo-Saxon' model, social security contributions play a subordinate role while the level of differentiation and formalization of tax practices is high. As for the fourth group, it is made up of Scandinavian countries as well as countries such as Belgium, Austria and Italy. Its main features are high revenues from personal income tax, and very high overall tax-to-GDP ratio.

45. Enforcement for the recovery of debts. The conditions relating to the enforcement for the recovery of debts are another component of national political autonomy. The theory of sovereign statehood intrinsically links sovereignty to coercive power, which remains exclusively in the hands of the sovereign state. HOBBES, for instance, saw in the power of execution of the laws one of the rights which make up the very essence of sovereignty.[18] Similarly to what prevails in the previous fields, Member States have set up various substantial conditions of enforcement.

46. Surnames, viewed as legal institution, are multifaceted.[19] Being a means of identifying individuals by reference to their families or lineages,[20] they can be described as part of an inalienable birthright. They are also components of individual personality, and they relate, as such, to individual rights. However, the attribution and change of surnames are not usually left to the choice of individuals. Being of public interest, they are essential to the identification of individuals, be it, for instance, for military, criminal, or fiscal purposes.[21] States have therefore a vested interest in controlling the means of identification of their nationals/residents by adopting laws governing surnames. In this respect, structural differences exist among national

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[17] KELLERMANN C. & KAMMER A. "Deadlocked European tax policy. Which way out of the competition for the lowest taxes?," above, n. 15, 132s.
[18] See above, n. 13.
[19] G. CORNU, *Droit civil. Introduction – Les personnes – Les biens*, Montchrestien, Coll. Domat Droit Privé, 7th Ed., 216.
[20] J. VERLINDEN, Columbia Journal of European Law 706 (2005).
[21] W. SCHÄTZEL, "Le nom des personnes en droit international," 95 *Recueil des Cours* 177, 197 (1968): "Ce sont essentiellement des considérations d'ordre militaire (conscription), d'ordre pénal (casier judiciaire) et d'ordre fiscal qui ont conduit l'État à [réglementer le nom]."

laws governing surnames. If the latter pursue the same ultimate policy goal, i.e. the identification of individuals, they also reflect key-policy choices, and express specific national interests. Thus, Member States differ in the weight they attach to individual freedom and public order. Some of them have a liberal approach towards the rules governing the change of surnames. In the United Kingdom, for instance, the only limit to the change of surnames is fraud.[22] Others however have much stricter laws, making the change nearly impossible. Similarly, Member States put different emphasis on gender issues. In some of them, the passing on of surnames is meant to be gender-neutral but, in others, it is still mostly patriarchal. The last model corresponds, for instance, to the situation prevailing in Belgium. The situation is different in Spain, where children bear double surnames, composed of the first element of the father's surname and of the first element of the mother's surname – parents can choose the order of their children's surnames, provided that the latter all bear the same surname.

b. Key-components of social autonomy

47. *The notion of welfare state.* Turning now to the remaining fields, a distinction is to be drawn between those that are components of the welfare state and those that are part, more generally, of national social policies. *Social security* and *education* pertain to functions undertaken by the welfare state. Defining the latter notion is not an easy task and is much debated in the literature,[23] as evidenced by F.-X. KAUFMAN who has summarized the various understandings. This concept may indeed refer to:

> (a) a state that provides economic security and social services for certain categories (or all) of its citizens;
>
> (b) a state that takes care of a substantial redistribution of resources from the wealthier to the poor;
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> (c) a state that has instituted social rights, as part of citizenship;
>
> (d) a state that aims at security for and equality among its citizens;

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[22] J.-J. LEMOULAND, "Le choix du prénom et du nom en droit français," in *L'identité de la personne humaine. Étude de droit français et de droit comparé*, (Ed.) J. POUSSON-PETIT (Bruxelles: Bruylant, 2003), 633.

[23] D. WINCOTT, "Reassessing the social foundation of welfare (state) regimes," 6: 3 *New Political Economy* 409 (2001). N. BARR, *The Economics of the Welfare State*, (Oxford: Oxford University Press, 5th Éd. 2012), 7; J. ALBER, "Continuities and changes in the idea of the welfare state," 16 *Politics & Society* 451-468 (1988).

> (e) a state that is assumed to be explicitly responsible for the basic well-being of all of its members.[24]

In the same vein, F.-X. MERRIEN has identified three main functions of the welfare state.[25] First, welfare states establish social security systems through regulatory intervention in order to provide their citizens with economic security. Second, they are characterized by the setting up of vertical and horizontal redistribution mechanisms and, thirdly, by their will to provide their population with a range of services and collective facilities at lower market costs.[26] More technically speaking, two main types of benefits are provided by the welfare state. The first category consists of cash benefits, which can themselves be divided into two sub-categories: social insurance, "awarded without an income of wealth test, generally on the basis of (a) previous contributions and (b) the occurrence of a specified event, such as becoming unemployed or reaching a specific age,"[27] and non-contributory benefits, which are made up of universal benefits, "awarded on the basis of a specified contingency, without a contribution or an income test," and "designed to help individuals and families who are in poverty."[28] As for the second category, it consists of benefits-in-kind. The fields of education and cross-border health care fall within the latter category, while the compensation of civil war victims constitutes a universal benefit.

48. Welfare state models. There exist several models of welfare state within the European Union, which differ in substantial aspects. Even if, today, G. ESPING-ANDERSEN's original categorization is currently undergoing reappraisal, his work nonetheless deserves specific consideration. He indeed brought fundamental changes to existing theories[29] when he published *The Three Worlds of Welfare Capitalism* in 1990.[30] He identified three distinct categories:

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[24] F.-X. KAUFMAN, "Major problems and dimensions of the welfare state," in *The welfare state and its aftermath*, (Eds.) S. N. EISENSTADT, O. AHLMEIR, (London: Croom Helm, 1985), 45.
[25] For a more economic perspective, see N. BARR, *The Economics of the Welfare State*, above, n. 23 who defines the objectives of the welfare state as follows: efficiency, supporting living standards, inequality reduction, social integration and administrative feasibility.
[26] F.-X. MERRIEN, *L'État providence*, (1st ed., Paris: Presses Universitaires de France, 1997), 7.
[27] N. BARR, *The Economics of the Welfare State*, above, n. 23.
[28] Ibid.
[29] See e.g. F.-X. MERRIEN, *L'État providence*, above, n. 26; J. ALBER, "Continuities and changes in the idea of the welfare state," above, n. 23.
[30] G. ESPING-ANDERSEN, *The Three Worlds of Welfare Capitalism*, (Cambridge, UK: Polity Press, 1990), 248p.

> The 'liberal' welfare state "in which means-tested assistance, model universal transfers, or modest social-insurance plans predominate"[31] (United States, Canada and Australia);
>
> The conservative and strongly 'corporatist' welfare state where "corporatism was subsumed under a state edifice perfectly ready to displace the market as a provider of welfare; hence, private insurance and occupational fringe benefits play a truly marginal role [...] the state's emphasis on upholding status differences means that its redistributive impact is negligible"[32] (Austria, France, Germany, Italy);
>
> The 'social-democratic' welfare state in which "the principles of universalism and de-commodification of social rights were extended also to the new middle classes"[33] (Scandinavian countries).

49. Various *health care systems* coexist among the members of the European Union. They are a way for Member States to pursue three main policy objectives: ensuring quality of medical benefits, geographical access to doctors and hospitals, and financial access.[34] A distinction must be drawn between social insurance systems and national health services.[35] The former comprises reimbursement schemes (France, Belgium, Luxembourg), under which patients are reimbursed for the cost of medical care, and benefits-in-kind schemes (Austria, Germany, The Netherlands), under which the competent health institution directly pays health practitioners. These systems are financed through social security contributions. As for national health services (United Kingdom, Ireland, and most Southern Member States), they are funded by public taxation and operate in accordance with the principle of benefits-in-kind. In addition, all Member States have set up mechanisms relating to capacity planning in order to "tune health care supply to the national populations' need."[36] Such mechanisms vary greatly and reflect the "institutional and regulatory framework"[37] of health care systems. Thus, for instance, patients may have the freedom to choose their medical practitioners, or, conversely, their choice may be limited to health providers who have concluded agreements with the sickness fund. Similarly, practitioners may or may not be subject to quota regulations.[38] Finally, some Member States

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[31] Ibid., 26.
[32] Ibid., 27.
[33] Ibid., 27-28.
[34] A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, (Oxford; Portland, Or.: Hart 2003), 223.
[35] These categories are only 'ideal types': T. K. HERVEY, "The current legal framework on the right to seek health care abroad in the European Union," 9 *The Cambridge Yearbook of European Legal Studies*, 261, 267 (2006/2007).
[36] R. BAETEN & W. PALM, "The compatibility of health care capacity planning policies with EU internal market rules," in *Health care and EU Law*, (Ed.) J. W. VAN DE GRONDEN, (The Hague: T.M.C. Asser Press; Dordrecht: Springer, 2011), 391.
[37] Ibid., 392.
[38] A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, above, n. 34, 225.

have conferred a role of 'gatekeeper' to general practitioners who steer patients to the appropriate specialists. It is well-known fact that national health care policies involve substantial public investments. Therefore, Member States constantly seek to strike a balance between their population's needs, and the necessity to control costs. This is one of the main reasons why their health care systems are all based on the territoriality principle.[39] On the one hand, only residents – regardless of nationality – have access to their health care system and, on the other hand, medical care is exclusively provided by medical practitioners who are established on the national territory.

50. The *compensation of civil war victims* is another type of benefit provided by some of the European welfare states. It generally consists of universal non-contributory benefits, i.e. benefits that are "awarded on the basis of a specified contingency, without either a contribution or an income test."[40] The award of such benefits is closely linked to the historical past and culture of each Member State which has set up mechanisms aiming at conferring a financial compensation on civil war victims.

51. As for *education*,[41] it accounts for a significant portion of Member States' budgets. Overall, Member States spend around 5% of their GDP on education.[42] In Europe, education systems are also based on the principle of territoriality: they are open to residents while stricter requirements may be imposed on nonresidents, including European Union nonresidents. Here again, Member States implement diverse policies, depending on their social, religious, and cultural traditions.[43] As a result, various education systems coexist within the European Union.[44] They differ in three main respects: structure and content of courses, organization, and funding. Looking more particularly at organizational aspects, European educational systems share important common features: not only are they all based on the territoriality principle, but they also are largely public in nature. Moreover, they pursue efficiency and social justice

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[39] Y. JORENS, "The right to health care across borders," in *The impact of EU law on health care systems*, (Eds.) M. MCKEE *et al.* (Brussels: P.I.E.-Peter Lang, 2002), 86.
[40] N. BARR, *The Economics of the Welfare State*, above, n. 23, 8.
[41] For our purposes, I focus on higher education only in the subsequent chapters.
[42] EURYDICE, EUROSTAT, *Key Data on Education in Europe 2012*, available from http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/134EN.pdf, 87.
[43] A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, above, n. 34, 337.
[44] For a historical perspective, see E. HACKL, "Towards a European area of higher education. Change and convergence in European higher education," *EUI Working Papers* RCS 2001/09, 3-6.

objectives.[45] Despite these common characteristics, Member States have nonetheless set up different mechanisms in relation to the conditions of access to their educational systems. In this regard, a distinction must be drawn between unrestricted/open access and restricted access. A system is said to be of open access when the admission requirement is solely based on the completion of secondary-school certificate. It concerns only a few Member States: Belgium, France, Italy, Malta, and Austria.[46] All the others have opted for restricted access systems. The latter correspond to situations where places available are limited through the imposition of a *numerus clausus*. The decision to limit places may come from central or regional authorities or from higher education institutions themselves.[47] In restricted access systems, the selection of candidates can be either based on entrance examinations, the submission of personal records or the attendance of interviews.[48] With respect to European educational systems funding, private funding remains marginal in all Member States. It represents on average 13,8% of educational expenditure.[49] However, higher education is almost never free of charge.[50] Member States generally impose varying levels of administrative fees and/or tuition fees. In this regard, they have all set up financial support mechanisms, which also differ substantially. First, the levels of financial support are disparate.[51] Second, financial support may cover fees and/or living costs. Third, it may take various forms: tax relief, family allowances, grants or loans. All in all, there exist three categories of financial support within the European Union: 1) financial support to students to cover the cost of living, in the form of loans and/or grants; 2) financial support for the payment of administrative fees and contributions to tuition costs, in the form of loans and/or grants, exemptions and/or reductions; 3) financial assistance to the parents of students in tertiary education, in the form of family allowances and/or tax relief.[52] All Member States provide financial support to students to cover living costs, but only seven provide all three types of support.[53] Finally, mention must be made of the fact that some Member States provide students with specific financial support to encourage mobility across the European Union. The

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[45] A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, above, n. 34, 337.
[46] EURYDICE, EUROSTAT, *Key Data on Education in Europe 2012*, above, n. 42, 63.
[47] Ibid., 61-62.
[48] Ibid., 64.
[49] Ibid., 93. There are, on this point, significant disparities among EU Member States: it goes from 2,7% in Sweden up to 30,5% in the UK.
[50] Ibid., 106: it is free of charge in Denmark, Malta, Finland and Sweden.
[51] Ibid., 101.
[52] Ibid., 106.
[53] Ibid., 106: Germany, France, Italy, Latvia, Lithuania, Austria and Slovakia.

foregoing thus shows that Member States have made different key-policy choices in the field of higher education. Their educational policies pursue common objectives, social justice in particular, but they do not attach the same weight to the same social principles, such as the equality of educational opportunity for all, the widening of access to tertiary education, or student financial independence.

52. As for the *right to take collective action*, it is an important aspect of national social policies, and it is regulated by national labor laws. T. NOVITZ has demonstrated that the right to strike in particular encompasses several dimensions. It is first a socio-economic right, in the sense that it is a means for workers to promote their economic welfare and security.[54] Second, it can be described as a civil liberty because it is highly related to the freedom of association, the freedom from forced labor, and the freedom of speech.[55] Thirdly, it also comprises a political dimension to the extent that it may have the effect of influencing both employer and governmental policies.[56] Thus, the right to strike reveals the balance of power that exists between the state, employers, and employees. As it is generally intrinsically linked to the history of social movements in the Member States, its regulation varies greatly in Europe. Indeed, Member States tend to define the notion of striking according to their own traditions, and differ with respect of the legal status recognized to the right to strike.[57] F. FABBRINI has identified, in this respect, four discrete models that prevail among the Member States of the European Union.[58] First, a model of "enhanced protection" of the right to strike, which characterizes, for instance, France and Italy. It bestows much discretion on employees and trade unions, and is built upon "solid constitutional foundations." Second, in the Nordic countries, the right to strike is also protected at the constitutional level. Social partners play a defining role, in particular through collective agreements. Third, under the model embodied by Germany, the right to strike is not formally protected by the constitution. It is subject to numerous limitations, including the

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[54] T. NOVITZ, *International and European protection of the right to strike: A comparative study of standards set by the International Labor Organization, the Council of Europe and the European Union*, (Oxford; New York: Oxford University Press, 2003), 39, 49s.
[55] Ibid., 65s.
[56] Ibid., 57: "[T]he adjective 'political' can be used to describe actions taken by reason of ideological convictions relating to the achievement of social justice."
[57] i.e. Austria, Belgium, Germany, Denmark, Ireland, Luxembourg, The Netherlands, Czech Republic and Malta (EUROPEAN TRADE UNION INSTITUTE, *Fundamental Social Rights in the European Union. Comparative tables and documents*, Brussels, 2003 at 29 & 33).
[58] F. FABBRINI, "Europe in need of a New Deal. On federalism, free market and the right to strike," available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029145, (2012), 9s.

proportionality requirement enforced by national courts, and is generally seen as a right of the trade unions rather than as an individual right. Finally, the United Kingdom represents the most restrictive model. Striking is not considered as a right, but instead as a statutory freedom.

2. The nonexistent or limited character of EU jurisdiction

53. In addition to being constitutive components of national autonomy, the various fields analyzed herein are areas where the European Union has no, or very limited, jurisdiction. The (quasi)-absence of European Union powers stems from both explicit and implicit exclusions. The former consist of Treaty provisions, which explicitly preclude the European legislator from harmonizing national regulations and/or policies. With respect to the latter, they derive from fundamental principles of European Union constitutional law. The purpose of the following paragraphs is twofold. They identify the nature of European Union action in each of the fields analyzed herein by distinguishing when they are subject to express Treaty exclusions, when the Treaty is silent or, alternatively, when there are no formal constitutional exclusions. In addition, they aim to review the current state of development of European Union acts of secondary legislation in each field. All in all, four cross-categories may be drawn: (a) express exclusions and absence of acts of secondary legislation; (b) silence of the Treaty and absence of acts of secondary legislation; (c) express exclusions but the existence of acts of secondary legislation; (d) no formal exclusion but the quasi-inexistence of acts of secondary legislation.

54. *Express exclusions and absence of acts of secondary legislation.* The first category corresponds to fields where European Union action is explicitly excluded and for which no act of secondary legislation has been adopted. It comprises two of the fields analyzed herein, namely nationality and social rights.

55. Matters relating to *nationality* are, in the European Union legal order, intrinsically linked to European Union citizenship, as evidenced by Article 20§1 TFUE:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

This provision was originally introduced by the Maastricht Treaty, together with a Declaration, according to which:

> [...] whenever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the

> Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration when necessary.[59]

It results from both Article 20§1 TFEU and the Declaration that European Union citizenship is conditional upon national citizenship, and thus on the holding of the nationality of at least one Member State. This means that Member States have exclusive jurisdiction to set out the rules on nationality. As C. CLOSA points it out, European Union citizenship "has not superseded the preponderance of the concept of nationality of each Member State."[60] In this respect, the Declaration reaffirmed that nationality falls within the powers of Member States "by confirming that questions of nationality should be settled solely with reference to the national law of the Member State concerned."[61] This express exclusion of European Union action in matters relating to nationality is coupled with the absence of any act of secondary legislation in the field.

56. The same holds true for the *right to strike*. It is expressly excluded from the sphere of European Union social policy powers. Article 153§5 TFEU, after enumerating the fields in which the European Union may exercise its complementary powers, stresses that:

> The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

The fact that the Charter of Fundamental Rights recognizes the rights of collective bargaining and action in its Article 28[62] does not have the effect of granting new powers to the European Union.[63] It should be noted, however, that the European Commission has recently issued a

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[59] Declaration 2 Annexed to the Treaty of Maastricht.

[60] C. CLOSA, "The concept of Citizenship in the Treaty on European Union," 29 *CMLR* 1137 (1992).

[61] S. O'LEARY, *The evolving concept of Community Citizenship: From the free movement of persons to Union Citizenship*, above, n. 4, 64. See also C. CLOSA, "The concept of Citizenship in the Treaty on European Union," above, n. 60, 1160: "citizenship will be an indirect relationship between the individual and the Union since the link which entitles individuals to the enjoyment of rights is the link with a Member State (i.e. nationality)." And at 1161: "[l]acking a strict definition on what a citizen of the Union is, nationality of any Member States becomes the requisite *sine qua* for the enjoyment of citizenship. [...] Member States will decide also who are to be considered their nationals for Community purposes and may amend this whenever they consider it necessary." See also, *inter alia*, C. CLOSA, "Citizenship of the Union and Nationality of Member States," in *Legal Issues of the Maastricht Treaty*, (Eds.) D. O'KEEFE and P. M. TWOMEY, (London: Chancery Law Publishing, 1994), 109-119; K. HAILBRONNER, "Nationality in public international law and European law," above, n. 4, 89s.

[62] Article 28 of the Charter of Fundamental Rights: "Workers and employers, or their respective organizations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

[63] Article 51§2 of the Charter of Fundamental Rights: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers

Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.[64] Since the *Viking* and *Laval* rulings[65] have raised very controversial debates, this Proposal aims to clarify the interactions between fundamental social rights and the exercise of the freedom of establishment and to provide services. The proposed Regulation would be based on Article 352 TFEU, the so-called flexibility clause. Nonetheless, its eventual adoption appears very uncertain: for the first time, twelve national Parliaments and Chambers have triggered the 'yellow card mechanism' after finding that such an adoption would breach the subsidiarity principle. The right to strike therefore remains within the hands of the Member States.[66]

57. *Silence of the Treaty and absence of acts of secondary legislation.* The second category comprises the *rules governing surnames*, the rules governing the *enforcement for the recovery of debts* and the rules governing the *compensation of civil war victims*. In contrast to the previous category, the Treaty does not provide express exclusions; it is simply silent on these issues. In accordance with the conferral principle,[67] it follows that the European Union does not hold regulatory and policy powers in these fields. In addition, it is also to be noted that no act of secondary legislation has been – up to now – adopted. Regulation 883/2004 on the coordination of social security systems even expressly excludes matters relating to the compensation of civil war victims from its material scope of application.[68]

58. *Express exclusion but existence of acts of secondary legislation.* The first two categories follow the basic principles of European Union constitutional law: no express Treaty empowerment, no act of secondary legislation – even though this affirmation must be somehow mitigated as far as the right to strike is concerned. Things are somewhat more problematic when it comes to the

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and tasks as defined in the Treaties." See U. WENDELING-SCHRÖDER, "Fundamental freedoms of the EC Treaty versus the fundamental social right to take collective action," in *Fundamental Social Rights in Europe: Challenges and Opportunities*, (Eds.) E. ALES *et al.* (Intersentia, Antwerp, Portland, 2009), 32-33; R. BLANPAIN, "The European Union and its social policy in a global setting: looking for the 'European social model'," in *The Changing Face of European Labor Law and Social Policy*, (Ed.) A. C. NEAL, (The Hague: Kluwer Law International, 2004), 9-10; P. RODIÈRE, "Les droits sociaux fondamentaux face à la Constitution européenne," in *Les Droits Sociaux Fondamentaux. Entre Droits nationaux et Droit européen*, (Eds.) L. GAY *et al.*, (Bruxelles: Bruylant, 2006), 241.

[64] EUROPEAN COMMISSION, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final, 21 March 2012.

[65] Case C-438/05, *Viking*, [2007] *ECR* I-0779; Case C-341/05, *Laval*, [2007] *ECR* I-11767.

[66] But see, *Infra*, §§ 288s.

[67] Article 5§2 TFEU.

[68] Article 3§5 of Regulation 883/2004: "This Regulation shall not apply to social and medical assistance or to benefit schemes for victims of war or its consequences."

third category, which consists of education and social security. Here, European Union action is not, strictly speaking, completely excluded. However, the powers of the European Union in these two fields are merely complementary.[69] The Treaty expressly excludes harmonization, and it moreover contains provisions precluding the European Union from taking actions that could affect the core of national educational and health care policies. However, the European legislator has adopted acts of secondary legislation, which have direct or indirect effects on these fields.

59. Until the Treaty of Maastricht, the treaties did not mention the term *education*. Together with the conferral principle, this should have meant that this field was reserved for the Member States to the exclusion of the Community.[70] Nevertheless, the latter adopted several acts of secondary legislation having indirect effects on national educational policies and/or tending towards the building of a common educational policy.[71] The Community used three main provisions as legal bases. First, Regulation 1612/68 on freedom of movement for workers within the Community was based on what is now Article 46 TFEU. It consisted of two provisions, which specifically concern education. Under Article 7(3), any Community worker is entitled "by virtue of the same right and under the same conditions as national worker [to have] access to training in vocational schools and retaining centers." Article 12 grants Community workers' children the right "to be admitted to [the State of residence] general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State." This provision of the Regulation was challenged on the grounds that the Community had infringed on Member States' powers in the field of education. In *Casagrande*,[72] the Court considered that the Community was entitled to take all measures necessary to give full meaning to the free movement principle. It justified the effects induced by the Regulation on national educational policies by the fact that, to be effective, the free movement of workers

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[69] On the notion of complementary powers, see, generally, R. SCHÜTZE, "Cooperative federalism constitutionalized: the emergence of complementary competences in the EC legal order," 31: 2 *Eur. Law Rev.* 167-184 (2006).

[70] K. LENAERTS, "Education in European Community law after 'Maastricht'," 31: 1 *CMLR* 7, 9 (1994); D. DAMJANOVIC, "'Reserved areas' of the Member States and the ECJ: The case of higher education," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W. MICKLITZ & B. de WITTE, (Cambridge; Antwerp: Intersentia; Oxford, 2011), 149; A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, above, n. 34, 341.

[71] K. LENAERTS, "Education in European Community law after 'Maastricht'," above, n. 70, 10; A. P. VAN DER MEI, *Free movement of persons within the Community: cross-border access to public benefits*, above, n. 34, 340s.

[72] Case 9/74, *Casagrande*, [1974] *ECR* 773.

required granting workers and their family members equal access to education. Allowing Member States to set out discriminatory criteria with respect to access to their education systems would otherwise deter workers from leaving their State of origin. Secondly, on the basis of Article 57(1) EEC – now Article 53 TFEU – the Community issued numerous directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. Several authors have shown that this led to "incursions in the Member States educational policies."[73] Finally, the Community also made use of Article 128 EEC to adopt acts that paved the way for the establishment of a common educational policy. This provision specifically concerned vocational training:

> The Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market.

In *Gravier*, the Court referred to this provision to give a broad interpretation of the notion of vocational training, and to conclude that the conditions of access to vocational training fell within the scope of the Treaty.[74] In the *Erasmus* case, the Court inferred from its previous case law that Article 128 EEC entitled the Council "to adopt legal measures providing for Community action in the sphere of vocational training and imposing corresponding obligations of cooperation on the Member States."[75] It thus recognized that this provision granted a regulatory power to the Community in the field of education.

60. As noted by A. P. VAN DER MEI, "[w]ithin a relatively short time a European vocational training policy was established."[76] These various developments gave rise to substantial criticisms. Some Member States in particular feared that Community action would ultimately undermine their regulatory and policy autonomy in the field of education.[77] This explains why the Maastricht Treaty brought important changes, which aimed to delineate more precisely between Community and national powers. First, it added to the Community's objectives the

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[73] D. DAMJANOVIC, "'Reserved areas' of the Member States and the ECJ: The case of higher education," above, n. 70, 154. See also K. LENAERTS, "Education in European Community law after 'Maastricht'," above, n. 70, 16s; S. GARBEN, *EU higher education law: Process and harmonization by stealth*, (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011), 61.

[74] Case 293/83, *Gravier*, [1985] *ECR* 593. See also Case 28/83, *Forcheri*, [1984] *ECR* 1425; and Case 24/86, *Blaizot*, [1988] *ECR* 379, 20 where the Court included university studies into vocational training.

[75] Case 242/87, *Commission v. Council*, [1989] *ECR* 1425, 11.

[76] A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, above, n. 34, 344.

[77] S. GARBEN, *EU higher education law: Process and harmonization by stealth*, above, n. 73, 62.

"contribution to education and training of quality"[78] – this objective is however no longer among the EU objectives since the adoption of the Lisbon Treaty. Second, and maybe more importantly, the Maastricht Treaty replaced Article 128 EEC by Articles 126 and 127 EC – now Articles 165 and 166 TFEU – and inserted them into a Title called 'Education, vocational training and youth' – now Title XII 'Education, vocational training, youth and sport'. Article 165 TFEU concerns general education while Article 166 TFEU deals more specifically with vocational training. They both explicitly confer powers on the European Union in the field of education.[79] However, these powers are limited in nature: they are complementary and supplementary, which means that the Union can only support and supplement Member State action,[80] and that harmonization in the field of general education and vocational training is excluded.[81] The Treaty moreover stresses that the European Union must fully respect "the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity/for the content and organization of vocational training."[82] As noted by M. DOUGAN, "the Maastricht reforms have been widely interpreted as a deliberate attempt by the Member States to curtail the Community's ambitions in the field of education."[83] However, these reforms did not adversely affect the *acquis communautaire* that was built up before Maastricht. They quite had a reverse effect:

> The new Articles 126 and 127 EC consolidate the *acquis communautaire* with regard to educational and vocational-training policy by introducing a legally certain, constitutional basis for that policy and democratizing the relevant decision-making procedures.[84]

In addition, the European Union can still base acts of secondary legislation on Articles 46 and 53 TFEU to adopt educational measures necessary for the free movement of workers and the mutual recognition of diplomas. Similarly, the adoption of harmonizing measures under Articles 115, 116, or 352 TFEU may also have indirect effects on national educational

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[78] Article 3(p).
[79] See, respectively, Articles 165§2 TFUE (general education) and 166§2 TFEU (vocational training).
[80] See, respectively, Articles 165§1 TFEU (general education) and Article 166§1 TFEU (vocational training). K. LENAERTS, "Education in European Community law after 'Maastricht'," above, n. 70, 37s; I. BERGGREN-MERKEL, "Towards a European educational area," 3 *European Journal for Education Law and Policy* 1-7 (1999).
[81] See, respectively, Articles 165§4 TFEU (general education) and Article 166§4 TFEU (vocational training).
[82] See, respectively, Articles 165§1 TFEU (general education) and Article 166§1 TFEU (vocational training).
[83] M. DOUGAN, "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?," 42 *CMLR* 943, 949 (2005). See also, in the same vein, A. P. VAN DER MEI, *Free movement of persons within the Community: Cross-border access to public benefits*, above, n. 34, 345; and D. DAMJANOVIC, "'Reserved areas' of the Member States and the ECJ: The case of higher education," above, n. 70, 150.
[84] K. LENAERTS, "Education in European Community law after 'Maastricht'," above, n. 70, 40.

policies.[85] Therefore, the express exclusions provided by the Treaty are not tantamount to absolute exclusions, since the European Union may adopt acts of secondary legislation that have indirect effects on national educational policies.[86]

61. The sphere of *health care*, which forms part of national social security policies, has known developments that are similar, in several respects, to those of education. Until Maastricht, the Treaty of Rome did not confer specific powers on the Community in the field of public health.[87] However, here again, "it was recognized from an early stage that Community law and policy could impact upon health(-related) issues in a variety of ways."[88] This led the Community to adopt a variety of acts in the realm of health. For instance, directives for the mutual recognition of diplomas were adopted to harmonize diplomas held by "health professionals, such as general practitioners, pharmacists and nurses."[89] The pursuance of Community policies such as consumer policy, environmental policy, and social policy also resulted in having indirect effects on national public health policies.[90] Another example lies in the joint interpretation of Article 2 EEC, which included in the Community's objectives the aim of "raising the standard of living," and Article 235 EEC. It indeed gave rise to the adoption of the Europe against Cancer program in 1989 or the Europe against AIDS program in 1991.[91] In addition, some of the acts that were enacted during the pre-Maastricht period directly concerned the fields of social security and cross-border health care.

62. The Community adopted Regulations 1408/71 and 574/72 on the coordination of social security systems. It chose as a legal basis what is now Article 48 TFEU, which entitles the European legislator to "adopt such measures in the field of social security as are necessary to provide freedom of movement for workers." Regulation 1408/71 sets out the main rules of coordination while Regulation 574/72 comprises provisions on the practical implementation of Regulation 1408/71. As R. CORNELISSEN pointed out:

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[85] S. GARBEN, *EU higher education law: Process and harmonization by stealth*, above, n. 73, 62-63.
[86] Ibid., 63-64.
[87] T. K. HERVEY, *Health Law and the European Union*, (Cambridge: Cambridge University Press, 2004), 24; A. P. VAN DER MEI & L. WADDINGTON, "Public health and the Treaty of Amsterdam," 5: 2 *European Journal of Health Law* 129, 131 (1998).
[88] Ibid.
[89] Ibid., 132.
[90] Ibid.
[91] See T. K. HERVEY, *Health Law and the European Union*, above, n. 87, 33s for a detailed analysis.

> They do not seek to harmonize but only to *coordinate* the national social security systems. [...] they in no way affect the freedom of Member States to determine the rules of their own social security systems. The Member States are, in principle, completely free to decide who is to be insured, what benefits should be granted and under what conditions, how many contributions should be paid, how benefits should be calculated and for how long they should be granted. The Regulations, therefore, do not affect the distinctive features of the various national schemes.[92]

Since then, Regulations 883/2004 and 987/2009 have replaced Regulations 1408/71 and 574/72 respectively, but the original underlying logic of the system of coordination has remained the same. They all aim to coordinate the granting of various benefits to workers and self-employed persons, such as the award, calculation and payment of pensions, unemployment benefits, family benefits and cross-border health care.[93] Regarding the latter, Regulation 883/2004 provides two distinct coordination mechanisms. First, Article 19[94] gives persons who fall within the scope of the Regulation "from one Member State access to *emergency* medical treatment during a stay – for whatever purpose – in the territory of another Member State."[95] In this case, the institution of stay applies its own legislation, while the institution of affiliation bears the costs.[96] Second, Article 20[97] sets up a planned care mechanism in order to coordinate national rules in situations where patients go to other Member States for the specific purpose to receiving treatment at the expense of their home institutions. According to this provision, patients must first be granted a prior authorization and this authorization "shall be accorded where the treatment in question is among the benefits provided for by the legislation in the Member State where the person concerned resides and where he cannot be given such treatment within a time-limit which is medically justifiable, taking into account his current state of health and the probable course of his illness."[98] As a result, this provision gives a broad discretionary power to the institutions of affiliation since, in all other cases, they may refuse to grant authorizations.[99]

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[92] R. CORNELISSEN, "The principle of territoriality and the Community Regulations on social security (Regulations 1408/71 and 574/72)," 33 *CMLR* 439, 443-444 (1996).
[93] See, more generally, F. PENNINGS, *European social security law*, (5th Ed., Antwerp: Intersentia, 2010), 382p.
[94] Ex-Article 22(1)(a) of Regulation 1408/71.
[95] T. K. HERVEY, "The current legal framework on the right to seek health care abroad in the European Union," above, n. 35, 263.
[96] See F. PENNINGS, *European social security law*, above, n. 93, 164-165.
[97] Ex-Articles 22(1)(b),(c) and Article 22(2) of Regulation 1408/71.
[98] Article 20(2) of Regulation 883/2004.
[99] R. CORNELISSEN, "The principle of territoriality and the Community Regulations on social security (Regulations 1408/71 and 574/72)," above, n. 92, 264s. See also A. P. VAN DER MEI, "Cross-border access to medical care

63. Despite the adoption of these various acts of secondary legislation, the fact remains that the European Union "does not have competence to develop a harmonized European-level public health policy."[100] This idea is reflected in the subsequent amendments of the Treaty. The Treaty of Maastricht introduced Article 129 EC, the first "explicit legal basis provision for health,"[101] according to which the Community "shall contribute towards a high level of human health protection by encouraging cooperation between Member States, and, if necessary, lending support to their action" and "health protection requirements shall form a constituent part of the Community's other policies." In a similar way to what took place in the education field, Article 129 EC excluded harmonization of the laws and regulations of the Member States.[102] Therefore, the Community public health power that was established was limited in character since it was, once again, complementary.[103] This was confirmed by the Amsterdam Treaty, which amended Article 129 and renumbered it Article 152. The latter contains detailed provisions on the role of the European Union with respect to public health.[104] The Lisbon Treaty in turn renumbered it to Article 168 TFEU. It brought some slight changes to Article 152, but conserved its structure and most important features by reaffirming the complementary character of European Union powers. Harmonization is still excluded and the European legislator may only take incentive measures. In addition, it states that:

> Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.[105]

As noted by A. VAN DER MEI & L. WADDINGTON, this provision "reflects the reluctance of the Member States to allow the Community and its institutions to intervene in the organization

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within the European Union – Some reflections on the judgments in *Decker* and *Kohll*," 5 *Maastricht J. Eur. & Comp. L.* 277, 278 (1998).

[100] T. K. HERVEY, *Health Law and the European Union*, above, n. 87, 24.

[101] Ibid., 25.

[102] Article 129§4 EC.

[103] T. K. HERVEY, *Health Law and the European Union*, above, n. 87, 26; A. P. VAN DER MEI & L. WADDINGTON, "Public health and the Treaty of Amsterdam," above, n. 87, 134.

[104] T. K. HERVEY, *Health Law and the European Union*, above, n. 87, 28s, 76s; A. P. VAN DER MEI & L. WADDINGTON, "Public health and the Treaty of Amsterdam," above, n. 87, 134s.

[105] Article 168§7 TFEU. Compare with Article 152§5 EC: "Community action in the field of public health shall fully respect the responsibilities of the Member States for the organization and delivery of health services and medical care."

and financing of health care systems which they have always regarded as being within their exclusive domain."[106]

64. The picture would not be complete without mention of the Directive on the application of patients' rights, which concerns, to a large extent, cross-border health care.[107] This act of secondary legislation is inspired, for the most part, by the European Court of Justice case law on cross-border health care. It sets out rules on planned care that differ from those of Regulation 883/2004. Broadly speaking, it entitles patients to seek health care abroad without authorization, provided that care is received outside a hospital environment. As far as treatment in a hospital environment is concerned, it imposes limitations upon the discretionary power of Member States with respect to the granting of prior authorizations. The adoption of this Directive sparked much debate. Member States feared it would result in the undermining of their powers and jeopardize their regulatory and policy autonomy in the field of social security – not to mention the substantial financial implications that it might imply. Furthermore, some European Parliament Members were of the view that Article 114 TFEU (ex-Article 95 EC), the legal basis for adopting measures having as their object the establishment and functioning of the internal marker, was not appropriate.[108] In light of these various concerns, it was decided to base the Directive on both Article 114 TFEU and Article 168 TFEU "which was said to strike a balance between the application of internal market law to health care services and the competences of the Member States for the organization and provision of health care services."[109] In view of the foregoing, it can be said that the Treaty grants only very limited powers to the European Union in the field of social security, since it expressly excludes harmonization in matters concerning public health and contains a specific clause preserving Member States' powers. However, this has not precluded the European legislator from adopting several acts of secondary legislation, which primarily concern cross-border health care.

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[106] A. P. VAN DER MEI & L. WADDINGTON, "Public health and the Treaty of Amsterdam," above, n. 87, 137. See also T. K. HERVEY, *Health Law and the European Union*, above, n. 87, 80: "This is an explicit statement on the application of the principle of subsidiarity in the health field. Presumably, the main concern of the Member States is the preservation of national competence over the financing of national health systems."

[107] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care.

[108] See T. K. HERVEY, "Cooperation between health care authorities in the proposed Directive on Patients' rights in cross-border health care," in *Health care and EU Law*, (Eds.) J. W. VAN DE GRONDEN *et al.*, (The Hague: T.M.C. Asser Press; Dordrecht: Springer, 2011), 166.

[109] Ibid.

65. *No formal exclusion but the quasi-inexistence of acts of secondary legislation. Direct taxation* falls within the fourth category. This case is peculiar because the Treaty theoretically confers powers on the European Union in this field, but, in practice, Member States retain quasi-exclusive jurisdiction.[110] There is no specific provision dealing with direct taxation; "positive harmonization therefore depends on the general harmonization provisions of Articles 114 and 115 [TFEU]."[111] Article 114§2 TFEU, which provides for qualified majority decisions, however expressly excludes direct taxation from its scope of application. As a result, any harmonization measure in this field must be based on Article 115 TFEU, which reads as follows:

> Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.

Accordingly, European Union action in the field of direct taxation is subject to the unanimity rule. It may moreover only take the form of directives, to the exclusion of regulations, and harmonize national measures that directly affect the establishment or functioning of the internal market.[112] The unanimity rule can be described as a 'constitutional constraint.' It has indeed had a paralyzing effect on the European Union decision-making process since any Member State can back out from the negotiation table at any time, thereby compelling the others to abandon the harmonizing project. This explains why, despite the many proposals issued by the European Commission, only four direct-tax directives have to date been adopted on the basis of Article 115 TFEU: Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the Parent-Subsidiary Directive),[113] Council Directive 90/434/EEC on the common system of taxation application to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (the Tax Merger

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[110] M. ISENBAERT, *EC Law and the sovereignty of the Member States in direct taxation*, (Amsterdam: IBFD, 2010), 191-192: "the policy area of direct taxation has fully remained a part of the function-sovereignty of Member States, even though from a strictly formal perspective the EU/EC level is able to legislate in that policy area to the furtherance of the internal market objective."

[111] B.J.M. TERRA & P.J. WATTEL, *European Tax Law*, (6th Éd., Student abridged edition, Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), 16. See also M. ISENBAERT, *EC Law and the sovereignty of the Member States in direct taxation*, above, n. 110, 189s.

[112] Opinion in Case C-279/93, *Schumacker*, [1995] *ECR* I-225, 17-19.

[113] *O.J.* No. L 225 of 20 August 1990, p. 6.

Directive),[114] Council Directive 2003/49/EC on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (the Interest and Royalty Directive),[115] and Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (the Saving Interests Directive).[116]

66. All in all, the foregoing shows that European Union action in the various fields analyzed herein is weak, because these fields are areas where the European Union holds limited, if not nonexistent, jurisdiction. However, this does not mean that European Union law intrusions into national spheres of powers are completely excluded. An important range of European Union acts of secondary legislation that have been, or may be, adopted, affects significant fields. However, notwithstanding the existence of these undeniable effects, Member States remain principally responsible for governing and managing these fields from legal, political and budgetary perspectives. To conclude, as A. DASHWOOD has pointed it out, "it is made crystal clear that the power conferred [on the European Union] are ancillary to national powers."[117]

3. Boundary-based powers

67. *The closure principle.* A final feature ties up the fields analyzed herein. Taken together, these areas turn out to relate to powers that do not only fall within the ambit of the Member States, but that also encompass national policies built upon the same basic principle: the principle of closure. From a legal perspective, this means that the territorial and personal scopes of these policies are strictly circumscribed. Put differently, the exercise of what the Court of Justice deems as the powers retained by Member States is based on legal criteria of inclusion and exclusion that are usually laid down by the Member States in a discretionary manner. Admittedly, Member States enjoy little freedom with respect to criteria of a territorial nature, since they cannot exercise their powers beyond their geographical borders without infringing upon the sovereignty of other states. Similarly, Member States are also constrained with respect to the setting of personal criteria since they cannot, theoretically, attach extraterritorial effects to the exercise of their powers. But they nonetheless enjoy wide discretion, to the extent that they may decide who, within their territorial borders, is subject to their policies – and they may

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[114] O.J. No. L 225 of 20 August 1990, p. 1.
[115] O.J. No. L 157 of 26 June 2003, p. 49.
[116] O.J. No. L 157 of 26 June 2003, p. 38.
[117] A. DASHWOOD, "States in the European Union," *Eur. Law. Rev.* 201, 209 (1998).

in particular draw important distinctions such as those between nationals and non-nationals, or residents and nonresidents. As a result, in these fields, the scope of Member States' powers is confined to a geographical space, and applies to limited categories of persons. The geographical space generally corresponds to the territory of each state. The personal scope is less easily identifiable because states may base conditions of access on multiple conditions, ranging from nationality, residence, age, to conditions of resources, and so on.

68. Boundaries. If the fields analyzed herein were only characterized by the principle of closure, the corresponding powers would ultimately not fundamentally differ from other national powers. The exercise of any national power is, after all, constrained, to the extent that it may not impinge upon the sovereignty of another state. But what essentially distinguishes powers concerned by the Court of Justice power-based approach from the powers involved in traditional free movement cases is that the preservation of their internal coherence, and, therefore, of their existence is consubstantial with Member States' capacity to impose inclusion and exclusion rules or, in other words, to erect territorial and membership *boundaries*.[118] Territorial boundaries refer to the territorial scope, while membership boundaries pertain to the personal scope. The notion of boundaries can be understood as follows:

> Boundaries are sets of norms and rules that define the type and level of closure of a given collectivity vis-à-vis the exterior, gating access to the resources and opportunities of both the in-space and the out-space, and facilitating bonding dynamics among insiders.[119]

In this respect, a distinction must be drawn between the territorial and membership boundaries that are essential to the survival of the state as political entity, and those that are crucial for the development and maintaining of the activities of the welfare state.

69. The state as political entity – Nationality. The very essence of nationality policy is to distinguish between nationals and non-nationals, and therefore to identify who is to be included into or excluded from a closed community. The main purpose of nationality policy is accordingly to set up boundaries. In this respect, nationality laws consist almost exclusively of inclusion and exclusion rules. Consequently, suppressing boundaries in this field would simply render the concept of nationality meaningless. Without going that far, a redrawing of

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[118] F. DE WITTE, "The role of transnational solidarity in mediating conflicts of justice in Europe," 18 *European Law Journal*, 694, 697 (2012).
[119] M. FERRERA, The boundaries of welfare: European integration and the new spatial politics of social protection, (Oxford: Oxford University Press, 2005), 3.

boundaries has in any case the effect of substantially altering the understanding that was originally given to this concept. The important reform introduced by Germany in 2000 is a good illustration. Previously, German nationality policy was primarily based on the *jus sanguini* principle. This meant, among other things, that children of immigrants had the nationality of their parents, even though all resided on the German territory. The 2000 reform brought substantial changes into German law. Paragraph 4 of the law introduced for the first time the *jus soli* principle: "Children of a foreign parent acquire German citizenship under the condition that one parent has had a lawful residence in Germany for eight years and that he or she is in possession of a secure residence permit."[120] This reform sparked arduous debates in Germany because it basically introduced a new mode of acquisition of nationality, no longer exclusively reserved to German descendants.[121] As a result, it had the effect of substantially broadening the scope of German inclusion rules with respect to nationality.

70. *The state as political entity – Direct taxation, enforcement for the recovery of debts, and rules governing surnames.* The powers relating to the fields of direct taxation, enforcement for the recovery of debts, and rules governing surnames do not exclusively consist in setting out inclusion and exclusion rules, but this specific category of rules nonetheless carry out a fundamental function of closure. Rules concerning the enforcement for the recovery of debt are indeed primarily based on the principle whereby state's power of execution of the laws is absolute inside and nil outside its borders. Direct taxation policies are another good example of closed systems. Direct taxation rules set out a great variety of mechanisms relating to the taxation of individuals, corporations, capital, and property. Such mechanisms however only apply to certain categories of taxpayers and revenue. In this respect, states may adopt unilateral laws to define these categories. They can follow two main principles. First, the principle of territoriality, under which states only impose income earned within their territory. Second, the principle according to which tax is imposed on taxpayers' worldwide income. The concurrent adoption of unilateral rules yet often leads to phenomena of double taxation: the parallel exercise of two fiscal sovereignties may result in a taxpayer or revenue to be imposed twice. Together with the necessity to prevent tax evasion, this explains why states often conclude

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[120] K. HAILBRONNER, "Germany," in *Acquisition and Loss of Nationality. Policies and trends in 15 European Countries, Vol. 2*, above, n. 4, 213. A new reform was introduced in 2004 and changed some conditions but the *jus soli* principle remains.
[121] Ibid., 227s.

bilateral tax agreements, which aim to coordinate and allocate national tax jurisdictions. Inclusion and exclusion rules again play a crucial role with respect to the fundamental purposes of taxation policies – i.e. raising government revenue and conducting redistributive policies based on social justice principles. Therefore, their redrawing may have two intertwined implications. It may undermine, or at least reshape, their internal coherence, which may ultimately lead to substantial reductions of income. As for the rules governing surnames, they are also based on inclusion and exclusion rules. They aim to identify persons who live on the same territory according to the same standards. In case of conflict of laws, most Member States apply individuals' personal laws provided that the latter are not at odds with their public order. They may therefore exclude the application of any rule that does not meet minimum standards, which themselves reflect national policy choices.

71. *The state as welfare state.* Welfare policies are also primarily built upon inclusion and exclusion rules. As noted by M. FERRERA,

> The welfare state is definitely a geographical space, with a recognizable territorial scope demarcated by administrative borders. But at the same time it is a membership space or, more precisely, a bundle of membership spaces.[122]

Educational and health care systems, for instance, operate on a territorial basis, and only residents can have access to educational and health care facilities under equal conditions. As a result, in most Member States, nonresident students do not have the same rights as resident students with respect to tuition fees and/or financial support. Similarly, national social security schemes exclude from their scope any patient who is not affiliated, generally nonresident patients. In addition, they impose very strict conditions on affiliated patients who seek health care abroad. Inclusion and exclusion rules are crucial for the preservation of the internal coherence of these two closed systems. Two main reasons may be put forward. First, the

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[122] M. FERRERA, *The boundaries of welfare: European integration and the new spatial politics of social protection*, above, n. 119, 6. See also F. W. SCHARPF, "Negative and positive integration in the political economy of European welfare states," in *Governance in the European Union*, (Eds.) G. Marks *et al*, (London: Sage, 1996) 16, who insists on the importance of boundaries: "In the history of capitalism, the decades following the Second World War were unusual in the degree to which the boundaries of the territorial state had become coextensive with the boundaries of markets for capital, services, goods and labor. (...) since all effective competitors could be, and were, required to produce under the same regimes, the costs of regulation could be passed on to consumers. Hence the rate of return on investment was not necessarily affected by high levels of regulation and union power; capitalist accumulation was as feasible in the union-dominated Swedish welfare state as it was in the American free enterprise system. During this period, therefore, the industrial nations of Western Europe had the chance to develop specifically national versions of the capitalist welfare state. (...) It was not fully realized at the time, however, how much the success of market-correcting policies did in fact depend on the capacity of the territorial state to control its economic boundaries."

existence of boundaries is essential for the financial sustainability of educational and health care policies. As seen earlier, the latter involve tremendous financial investments for each Member State. Their functioning moreover requires capacity planning. Consequently, it is technically impossible to offer a wider or unlimited access without imposing extra-financial burdens on the Member States and/or on students/students' families and patients. Second, the fields of education and health care, like the other components of the welfare state, are institutionalized forms of solidarity, "serving both efficiency and social justice objectives."[123] These two policies are indeed primarily based on redistribution mechanisms and provide students and patients with services well below their actual costs. In Europe, solidarity operates within closed communities and, as M. FERRERA points out, "[t]he establishment of redistributive arrangements played a crucial role in stabilizing the new form of political organization (the nation state) that gradually emerged in modern Europe."[124] Consequently, the redrawing of welfare boundaries may have the effect of altering the bonds that exist between a state and its community made of nationals and residents. It may also allow the entry of free riders who are not linked in any way with the state providing welfare benefits into redistributive schemes, and who moreover do not financially contribute to these schemes. Therefore, inclusion and exclusion rules are legal expressions of the principle of solidarity that binds a state to its population. The same logic of closure underlies the rules relating to the compensation of civil war victims, which relate to redistributive arrangements based on solidarity. Their scope is restricted to the nationals of a state who have suffered from a conflict internal to that state, and their conditions of application greatly depend on the state's own historical past. The same holds true, finally, as far as national labor laws regulating the right to strike are concerned. Their spatial scope of application is indeed limited to the territory of a state, and their personal scope applies only to resident workers and employers. All in all, it appears that the various powers relating to the fields analyzed herein all share the following feature: their internal coherence and ultimately their very existence stem from, and are determined by, the principle of closure, together with the erection of boundaries.

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[123] M. FERRERA, *The boundaries of welfare: European integration and the new spatial politics of social protection*, above, n. 119, 45.

[124] Ibid. See also J. HALFMANN "Welfare State and Territory," in *Immigration and Welfare: Challenging the Borders of the Welfare State,* (Eds.) M. BOMMES & A. GEDDES, (London: Routledge, 2000).

72. *The notion of powers retained by Member States.* Several points may be drawn from the above. It appears, first of all, that the various fields analyzed herein are heterogeneous with respect to their substantive scopes. They cover very different subject matters, and they reflect the various key-policy choices made and implemented by Member States, depending on their own national traditions and interests.

73. But, second of all, they also share a fundamental feature, pertaining to the fact that they all relate, in one way or another, to what are commonly considered as the 'essential functions of the state,'[125] or, in other words, to what allows Member States to be described as states. They pertain to either political functions that are crucial attributes of the nation-state, or social functions that are core parts of the activities of the welfare state. With respect to the latter, the various scholars who study the logic of the welfare state agree upon the fact that, today, the providing of welfare has become an essential feature of European states. In this regard, G. ESPING-ANDERSEN has noted that the welfare state "is a unique historical construction, an explicit redefinition of what the state is all about,"[126] after stating that "[i]ts promise was not merely social policy to alleviate social ills and redistribute basic risks, but an effort to rewrite the social contract between government and the citizenry."[127] In other words:

> The European nation state has typically become a *welfare state*; the social components of citizenship are no less important than its civil and political components; the right to decide about the forms and substance of social citizenship in its turn has come to be considered a crucial aspect of national sovereignty.[128]

Ultimately, it may be said that the various fields analyzed herein are part of what the Member States consider their constitutional identities.[129] As a result, the application of European Union law in these fields raises significant issues, which relate to the risk of undermining core

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[125] Article 4§2 EU.
[126] G. ESPING-ANDERSEN, *Social foundations of postindustrial economies*, (New York: Oxford University Press, 1999), 34.
[127] Ibid., 33.
[128] M. FERRERA, *The boundaries of welfare: European integration and the new spatial politics of social protection*, above, n. 119, 11. Similarly, J. HALFMANN "Welfare State and Territory," above, n. 124, 40 has shown that there exists a close link between nation states, citizenship and welfare state: "[s]tates had to make legal, financial and political 'investments' in their populations to transform them into citizens. It is in this climate that the welfare state and the nation state provided solutions to the problem of identifying and binding individuals to the territorial state." See also M. DOUGAN, "The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon," in (Eds.) R. NIELSEN *et al.*, *Integrating Welfare Functions into EU Law: From Rome to Lisbon*, (Copenhagen: DJØF Publishing, 2009), 148, 154.
[129] A. ILIOPOULOU, "Entrave et citoyenneté de l'Union," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Bruxelles: Bruylant, 2011), 201, who refers to the Decision of 30 June 2009 of the German Constitutional Court on the Lisbon Treaty.

components of Member States' political and social autonomy. In other words, when the Court of Justice is called upon to rule on cases involving the powers that it deems 'retained' through the statement of its formulae, it faces peculiar and sensitive issues, absent from most of traditional free movement cases. This may at least partly explain why the Court singles out these powers, and gathers them under the denomination of 'retained powers.' This indeed seems to be the step preceding their subjection to the specific legal framework that I identify in Section 2 as well as in Chapters 2 and 3.

74. Last but not least, it should be noted that the category of the powers retained by Member States, as identified above, far from being immutable, constitutes an open box. It evolves in line with the case law of the Court of Justice. The Court has indeed gradually extended it over time,[130] which means that it may be inclined to subject new fields to its power-based approach in the future. In other words, the notion of powers retained by Member States is not best, and even cannot be, captured by a rigidly abstract and theoretical definition. Instead, it should rather be viewed as encompassing what the Court of Justice itself refers to as being powers retained by Member States.

75. But, notwithstanding the empirical dimension of the concept of retained powers, it is nonetheless possible to draw a pattern, which identifies which powers are likely to fall within this category. The Court indeed seems to subject to its power-based approach national powers that fulfill the following criteria: being a constitutive component of Member State autonomy over which the European Union has no, or very limited, jurisdiction, and the sustainability and viability of which depends on the existence of boundaries.

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[130] See, *Infra*, § 120.

SECTION 2. THE CENTRALITY OF THE NOTION OF POWER IN THE ECJ REASONING

76. This second section reviews the overall reasoning developed by the Court of Justice in free movement cases involving powers retained by Member States. Its purpose is to show that, in contrast to traditional free movement cases, its reasoning largely centers on the structural notion of power. This is evidenced by the fact that the Court distinguishes between national and European spheres of powers, which ultimately prompts it to play a coordinating role as far as these spheres are concerned.

77. To this end, I start by identifying the components of the Court of Justice reasoning that are in line with its traditional approach. I then single out the varying factors, and I finally shed light on the resulting implications.

1. The elements of continuity

78. *The same general legal framework.* To begin with, the Court of Justice, while resorting to the power-based approach, does not operate a sharp break from its traditional rulings. Cases involving powers retained by Member States, just like any other free movement ruling, are divided into three main steps of reasoning: applicability, restriction and justification.[1] Therefore, whether the Court is dealing with the fields analyzed herein or not, it structures its reasoning according to the same overarching structure. The variations that characterize the free movement cases involving retained powers are thus to be found inside each traditional step of the Court of Justice reasoning. In addition, the Court takes as a starting point of the rulings involving powers retained by Member States the *acquis* already well established in its traditional free movement cases. It refers to the traditional definitions and scopes of both the four fundamental freedoms and European Union citizenship,[2] which it has gradually built up in its

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[1] See *Supra*, § 20.

[2] See, *inter alia*, on the free movement of goods: Case C-120/95, *Decker*, [1998] *ECR* I-1831, 31 and its reference to Case 8/74, *Dassonville*, [1974] *ECR* 837; on the free movement of services: Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 53s; Case C-9/11, *Waypoint Aviation*, [2011] *ECR* I-9697, 21; Case C-281/06, *Jundt*, [2007] *ECR* I-12231, 28s; Case C-341/05, *Laval*, [2007] *ECR* I-11767, 56; on the freedom of establishment: Joint Cases 171 & 172/07, *Apothekerkammer des Saarlandes and Others*, [2009] *ECR* I-4171, 22; Case C-418/07, *Papillon*, [2008] *ECR* I-8947, 15; on European Union citizenship: Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693, 53; Case C-135/08, *Rottmann*, [2010] ECR I-1449, 43-44; Case C-224/02, *Pusa*, [2004] ECR I-5763, 16s, and Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 30s.

previous case law by interpreting the Treaty provisions from a teleological perspective.[3] As is well known, this approach consists in interpreting the Treaty provisions in light of the objectives assigned to the European Union by the Treaties. In other words, "the Court of Justice considers the position of the rule and tries to determine its objective in the general scheme and system of the Treaty and of the chapter to which it belongs."[4]

79. *Effects at least partially identical.* It stems from the above that the Court's power-based approach borrows some of its fundamental features from the Court's traditional free movement rulings. It should thus be expected, as a result, that the effects of the rulings involving powers retained by Member States are at least partially identical to those of the Court's traditional free movement cases. In particular, cases involving retained powers also revolve, to a substantial extent, around the recognition of individual rights: the Court has gradually granted taxpayers, patients, students, and European citizens specific rights pertaining respectively to taxation, social security, higher education, and matters relating to the free movement of the citizens of the European Union. This shows that the Court of Justice is just as keen as in its traditional cases to construct direct bonds between individuals and the European Union legal order, which has the ultimate effect of creating a legitimizing factor for European Union law and for the Court itself.

2. The varying factors

80. *A reasoning centering on the notion of power.* The Court, when faced with powers considered as retained by Member States, does not fundamentally depart from its traditional reasoning. On the contrary, it sticks to its overarching structure while at the same time altering some of its defining features. These variations all relate to the importance that the Court gives to the notion of power throughout its reasoning, coupled with the distinction drawn between the existence and the exercise of national powers, which pertains to the two fundamental dimensions of the notion of power. Before going into further details, it is necessary to define

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[3] On the Court's teleological approach, see, for instance, R. MONACO, "Les principes d'interprétation suivis par la Court de justice des Communautés européennes," in *Mélanges offerts à Henri Rolin - Problèmes de droit des gens*, (Paris: Pedone, 1964), 217, and P. PESCATORE, "Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice. Contribution à la doctrine de l'interprétation téléologique des traités internationaux," in *Études de droit communautaire européen 1962-2007*, (Coll. Droit de l'UE, Bruxelles: Bruylant, 2008), 385-386.

[4] P. LELEUX, "The role of the European Court of Justice in protecting individual rights in the context of the free movement of persons and services," in *Courts and Free markets*, vol. 2, (Eds.) E. STEIN & T. SANDALOW, (Oxford: Clarendon Press, 1982), 387.

more precisely the basic notion of powers, as well as the concepts pertaining to it, and then to shed light on the fundamental distinctions and processes relating to this notion.

81. The notion of power and other concepts pertaining to it. The New Oxford American Dictionary defines the notion of power as the "authority that is given or delegated to a person or body." As for powers of a *legal* nature, they may be described more specifically as the "ability to lay down a rule or decision that is binding on the addressee,"[5] or as a "power to create norms."[6] They moreover refer to the ideas of "means and instruments for action,"[7] while the concept of jurisdiction pertains to the "territory or sphere of activity [i.e. scope of action] over which the legal authority of a Court or other institution [such as states] extends."[8] Therefore, the two notions of power and jurisdiction are to be distinguished from the concept of sovereignty. The latter is fundamentally unique, indivisible, and superior to any other power.[9] To put it differently, it is "not itself bound by any laws,"[10] it is an "unlimited power."[11] By contrast, the former imply the ideas of mandate[12] and limitation.[13] A legal power is, as a matter of fact, never absolute. Not only is it conferred or attributed,[14] but it is also subject to the law. It is composed of several components.[15] First, being an attribute,[16] it necessarily involves an actor,

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[5] A. SOMEK, *Individidualism: An essay on the authority of the European Union*, (Oxford; New York: Oxford University Press, 2008), 17.
[6] Ibid., 19. See also, in the same vein, V. MICHEL, *Recherches sur les compétences de la Communauté*, (L'Harmattan, Paris, Coll. Logiques juridiques, 2003), 26.
[7] L. AZOULAI, "Introduction," in *Deconstructing federalism through competences*, (EUI Working Papers LAW 2012/06), 2.
[8] New Oxford American Dictionary. For a perspective based on public international law, see F. A. MANN, "The doctrine of jurisdiction," 3 *RCADI* 1, 145 (1964-I). He distinguishes (i) the legislative jurisdiction: "the power of a State to apply its laws to cases involving a foreign element," (ii) judicial jurisdiction: "the power of a State's court to try cases involving a foreign element," and (iii) enforcement jurisdiction: "the power of one State to perform acts in the territory of another State."
[9] O. BEAUD, *Théorie de la Fédération*, (Paris: Presses universitaires de France, 2007), 40.
[10] A. RAPACZYNSKI, "From sovereignty to process: The jurisprudence of federalism after Garcia," *Supreme Court Review* 341, 347 (1985).
[11] O. BEAUD, "Compétence et souveraineté," in *La Compétence*, (Ed.) AJDA, (Litec, Coll. 'Colloques & Débats' 2008), 5, 14.
[12] Ibid.
[13] F. C. MAYER, "The debate on European powers and competencies. Seeing the trees but not the forest," (available from http://www.whi-berlin.eu/documents/whi-paper1803.pdf), 4.
[14] Ibid.
[15] N. MACCORMICK, *Institutions of Law, An Essay in Legal Theory*, (Oxford University Press, New York, 2007), 156; G. TUSSEAU, "Theoretical deflation: the EU order of competences and power-conferring norms theory," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press, 2014), 39, 46; V. CONSTANTINESCO, *Compétences et pouvoirs dans les Communautés européennes. Contribution à l'étude de la nature juridique des Communautés*, (Paris, L.G.D.J., Bib. de droit international, t. LXXIV, 1974), 71s.

a holder, who can legally exercise it. It is not, indeed, a legal norm, but rather a "relation-type notion," useful to describe the interplay between a legal object and a subject.[17] Second, a legal power "refers to the area of reality [...] that an actor is empowered to govern."[18] This is what I describe as its 'scope of application' or jurisdiction. Its scope is itself circumscribed by three ranges of criteria: (i) territorial criteria, which define the geographical area over which the power holder may exercise its authority; (ii) material criteria, which pertain to the substantial domains over which the power holder may exercise its authority (e.g. the various aforementioned fields concerned by the European Court of Justice power-based approach); and (iii) personal criteria, which relate to those persons whose conduct is subject to the authority of the power holder. Last but not least, a legal power is subject to a procedure, which encompasses the various legal rules that the power holder must necessarily comply with to legally exercise it.

82. Fundamental distinctions and processes relating to the notion of power. Fundamental distinctions and processes relate to the notion of power and allow for a better understanding of this concept. First of all, several typologies of powers may be drawn, depending on which of its components one emphasizes. The typology most commonly accepted to examine a legal order is based on which actor holds a power. It corresponds, for instance, to the typology established by the Treaties of the European Union. Two main types may then be distinguished. On the one hand, in case one single actor holds a power, i.e. if one single body holds jurisdiction to regulate a given area and/or a range of people, this power is considered as 'exclusive.' By contrast, on the other hand, if more than one actor hold a power, it follows that the power is deemed 'shared' between these actors. These actors may share the power according to different arrangements, such as, for instance, concurrence, collaboration, or hierarchy.[19] Second of all, I have already alluded to the concept of division of powers. It consists in conferring to one – the power will be exclusive – or more – the power will be shared – actors powers that they will be legally entitled to exercise. An important issue relating to the division of authority among several actors is that of the settlement of jurisdictional conflicts. A legal order must not only

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[16] O. BEAUD, "Compétence et souveraineté," in *La Compétence*, (Ed.) AJDA, (Litec, Coll. 'Colloques & Débats' 2008), 15.
[17] Ibid., 11.
[18] G. TUSSEAU, "Theoretical deflation: the EU order of competences and power-conferring norms theory," above, n. 15, 46.
[19] G. SCELLE, "Critique du soit-disant domaine de compétence exclusive," *RDILC*, 365, 374 (1933); C. ROUSSEAU, "L'aménagement des compétences en droit international," *RGDIP* 420, 459-460 (1930).

comprise rules coordinating the various power holders, but also set out how jurisdictional conflicts ought to be adjudicated – e.g. does the exercise by an actor of its power exclude the exercise of another actor's power? Or may they exercise them concurrently? – and by whom – e.g. the judiciary or the political power? A final aspect pertaining to the notion of power that I refer to throughout my thesis is the fundamental distinction that must be kept in mind between the existence and the exercise of a power.[20] The former relates to the three aforementioned territorial, material, and personal criteria, while the latter refers to the process during which the holder of a power makes use of it by producing the legal norms she is entitled to. As far as the exercise of a power is concerned, two modes must be distinguished, as shown by the following figure:

Discretionary exercise of power *Constrained exercise of power*

83. The arrow stands for the process of exercise of a given power, and reveals the degree of freedom enjoyed by its holder. What characterizes this process is the leeway that is granted to the power holder.[21] Such a leeway pertains to two elements:[22] (i) the decision to exercise a power. A power holder may exercise it at will or, on the contrary, be constrained to use it in certain circumstances and/or under certain conditions; (ii) the content of the legal rules resulting from the exercise of the power. In this regard, the power holder may again be subject to a greater or lesser degree of latitude, depending on the power-conferring norm she is subject to. As I have already pointed out, a legal power is never absolute, which concretely means that its exercise may never be entirely discretionary. Accordingly, a power may only *tend* to be discretionary. Similarly, powers that are wholly constrained in their exercise are rather rare. As a result, a distinction must be drawn between discretionary and constrained/limited powers. The criterion for distinguishing between the two lies in the absence or the vague character or

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[20] On the significance of the distinction see G. CAHIN, "La notion de pouvoir discrétionnaire appliquée aux organisations internationales," 107 *RGDIP* 535, 539 (2003); C. ROUSSEAU, "L'aménagement des compétences en droit international," above, n. 19; J. KLABBERS, "Restraints on the treaty-making powers of Member States deriving from EU law: Towards a framework for analysis," in *The European Union as an actor in international relations*, (Ed.) E. CANNIZZARO, (Kluwer Law International, 2008), 151, 154.

[21] G. SCELLE, "Critique du soit-disant domaine de compétence exclusive," above, n. 19, 379.

[22] G. CAHIN, "La notion de pouvoir discrétionnaire appliquée aux organisations internationales," above, n. 20, 544; G. SCELLE, "Critique du soit-disant domaine de compétence exclusive," above, n. 19, 379-380.

presence of regulatory instruments governing their exercise. The first hypothesis pertains to discretionary powers while the second relates to constrained/limited powers.[23]

84. A close reading of cases involving the powers retained by Member States reveals that the notion of power plays a crucial role in the Court's reasoning, especially at the applicability and the justification stages.

85. *The applicability stage.* The Court of Justice almost systematically uses formulae at the applicability stage. All the fields analyzed herein are concerned by this trend, even if the wording of the formulae varies, depending on which field is involved. Thus, in the field of *nationality*, the Court usually rules that:

> It is to be borne in mind here that, according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.
>
> (...)
>
> Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by European Union law, the national rules concerned must have due regard to the latter.[24]

In the field of *direct taxation*, it rules that:

> [A]lthough direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law.[25]

Regarding *rules governing surnames*, it rules that:

> Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law, in particular the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States.[26]

Regarding the *enforcement for the recovery of debts*, it rules that:

> [E]nforcement for the recovery of debts falls as a rule within the competence of the Member States, it is none the less the case that that competence must be exercised in compliance with Community law and, in particular, the Treaty provisions on freedom to move and reside within the territory of the Member States, as conferred by Article 18 EC.[27]

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[23] S. JOVANOVIC, Restriction des compétences discrétionnaires des Etats en droit international, (Paris, Pédone, 1988), 109.
[24] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 39 & 41.
[25] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 29.
[26] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613, 25.
[27] Case C-224/02, *Pusa*, [2004] *ECR* I-5763, 22.

In the field of *education*, it rules that:

> Whilst Community law does not detract from the power of the Member States as regards, first, the content of education and the organization of education systems and their cultural and linguistic diversity (Article 149(1) EC) and, secondly, the content and organization of vocational training (Article 150(1) EC), the fact remains that, when exercising that power, Member States must comply with Community law, in particular the provisions on the freedom to provide services.[28]

In the field of *social security*, it rules that:

> Community law does not detract from the power of the Member States to organize their social security systems.
>
> In the absence of harmonization at Community level, it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits.
>
> Nevertheless, the Member States must comply with Community law when exercising that power.[29]

As regards the *compensation of civil war victims*, it rules that:

> In that regard, it is important to bear in mind that, as Community law now stands, a benefit such as that in issue in the main proceedings, which is intended to compensate civilian war victims for physical or mental damage which they have suffered, falls within the competence of the Member States.
>
> However, Member States must exercise that competence in accordance with Community law, in particular with the Treaty provisions giving every citizen of the Union the right to move and reside freely within the territory of the Member States.[30]

Regarding the *right to strike*, it rules that:

> Even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law.[31]

Taken together, and despite their various wordings, the formulae convey the same two basic principles, which both revolve around the notion of power. They are, firstly, a way for the Court of Justice to single out the powers retained by Member States, and, by the same token, to acknowledge that these powers do remain in the ambit of Member States or, in other words, that Member States have exclusive jurisdiction to exercise them. The Court is ambivalent with

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[28] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 70.
[29] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 44-46.
[30] Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 21-22.
[31] Case C-438/05, *Viking*, [2007] *ECR* I-0779, 40.

respect to the foundations of this principle. In the fields of nationality, direct taxation, surnames, recovery of debts, and compensation of civil war victims, it simply asserts it, without any additional justification. Things are, however, slightly different in the remaining fields. In the case of education, it seems to base the principle on the Treaty provisions which explicitly exclude harmonization at European Union level as far as the content of education and vocational training, as well as their organization, are concerned.[32] The principle seems to stem, in the area of social security, from the fact that there is, to date, no harmonization at European Union level. Last but not least, the Court referred to the notion of 'scope of the Community competence' to infer that the right to strike, which falls outside this scope, remains within the ambit of Member States. However, secondly, immediately after stating the first principle, the Court of Justice mitigates it. Indeed, the formulae also express the idea that the European Union legal order is such as to compel Member States to comply with the law of free movement when exercising their retained powers. In short, if these powers fall within the exclusive jurisdiction of Member States, the latter may not exercise them in a purely discretionary manner or without taking into account their obligations deriving from European Union law.

86. The justification stage. As in traditional free movement cases, the justification stage, which encompasses the proportionality test, plays a key role in cases involving powers retained by Member States. This is logically brought about by the Court's broad interpretation of the scope of European Union law as well as of the concept of restriction.[33] Yet, the approach endorsed by the Court, tinged with the notion of power, differs from its established case law in at least two important aspects. First, instead of focusing exclusively on the national measure at issue, the Court expands the spectrum of its control in such a way as to encompass the manner in which Member States *exercise* their retained powers. In the field of direct taxation, for instance, it expressly held that:

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[32] Articles 165 & 166 TFEU.

[33] See, e.g. N. REICH, "How proportionate is the proportionality principle in the internal market case law of the ECJ?," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W. MICKLITZ and B. de WITTE, (Cambridge; Antwerp: Intersentia; Oxford, 2011), 83-111; and C. BARNARD, "Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?," in *The Outer Limits of European Union Law*, (Eds.) C. BARNARD & O. ODUDU, (Oxford: Hart, 2009), 273-305.

> [A]s far as the exercise of the power of taxation so allocated is concerned, the Member States must comply with the Community rules, and, more particularly, respect the principle of national treatment.[34]

Similarly, in the field of nationality, it ruled that:

> The fact nevertheless remains that, if the situation comes within the scope of Community law, the exercise by Member States of their retained powers cannot be discretionary. It is subject to the obligation to comply with the Community rules.[35]

These two statements show that the Court of Justice does not only develop a reasoning focusing on the facts of the case at hand. It also gives general guidance regarding the conditions of exercise of the powers retained by the Member States. This leads, second, to the other peculiar feature of the Court's approach. Indeed, the assessment of proportionality is also centered on the idea of *adjustment*, as expressly stated, for instance, in the field of social security:

> [T]he achievement of the fundamental freedoms guaranteed by the EC Treaty inevitably requires Member States to make some *adjustments* to their systems of social security.[36]

As will be seen in Chapter 3,[37] the assessment of proportionality is all about imposing adjustment requirements on Member States, which pertain to the conditions of exercise of their retained powers – thereby echoing the principles expressed in the formulae.

87. *The scope of the Court's control.* Accordingly, the scope of the control carried out by the Court is of a different nature when retained powers are involved. First, in traditional free movement cases, the Court is first and foremost interested in settling conflicts of norms. It does not directly rule on the issue relating to the interplay between national and European Union spheres of powers. Second, traditional free movement cases have significant underlying implications for the relationship between the European Union and its Member States, as they affect the division of powers between the two levels of government. As noticed by several authors, the Court's decisions affects the vertical division of powers by allocating regulatory powers either to the Member States or to the European Union[38] or, in sum, by establishing

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[34] Case C-385/00, *De Groot*, [2002] *ECR* I-11819, 94 (Emphasis added).
[35] Case C-192/99, *Kaur*, [2001] *ECR* I-1237, 20 (Emphasis added).
[36] Case C-490/09, *Commission v. Luxembourg*, [2011] *ECR* I-247, 45 (Emphasis added). See also Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509, 102; and Case C-372/04, *Watts*, [2006] *ECR* I-4325, 121.
[37] See, *Infra*, Chapter 3, §§ 177s.
[38] J. SNELL, "Who's got the power? Free movement and allocation of competences in EC law," 22: 1 *YEL* 323 (2003): "Decisions of the Court on the free movement of goods, persons, services and capital have an impact on [...] the vertical [...] division of power in the Community. They allocate regulatory competences either to Member States or to the Community, and in this way partly determine the level of centralization in the Community."

who, between the various entities, has the power to regulate.[39] As a result, the scope of the Court's control, in traditional free movement cases, concerns the division of powers between the European Union and its Member States. However, in cases involving powers retained by Member States, the Court explicitly focuses on the question of whether Member States have exercised their retained powers consistently with European Union law. Therefore, it does not address the issue as to whether they *held a regulatory power in the first place* – it simply assumes so. Accordingly, in cases involving powers retained by Member States, the scope of the Court's control relates to the conditions of exercise of the national powers concerned by the power-based approach.

3. The resulting implications

88. *A structural approach to free movement cases involving powers seen as retained by Member States.* The use made by the Court of Justice of the notion of power has the fundamental effect of bringing its approach closer to a structural approach, which consists in basing its reasoning on the constitutional and institutional links binding the European Union, the Member States, and the individuals. This is evidenced by the fact that the Court uses the same specific *modus operandi* – i.e. the use of the notion of power as well as the distinction between existence and exercise – in cases traditionally seen as relating to the division of authority between the European Union and the Member States. A first parallel may be drawn, in this respect, with the reasoning developed by the Court in *Casagrande*.[40] This ruling is different from decisions involving retained powers of Member States, insofar as it is a case where the European Union had adopted a act of secondary legislation, and where it was the exercise of European powers that allegedly contravened the vertical division of powers between the European Union and the Member States. However, it also bears substantial similarities with cases concerned by the power-based approach. Member States challenged the legality of Article 12 of Regulation 1612/68 on freedom of movement for workers within the Community, which concerned access to education of children of European Union workers, on the grounds that "educational policy

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[39] M. P. MADURO, *We the Court: the European Court of Justice and the European Economic Constitution: A critical reading of Article 30 of the EC Treaty*, (Oxford: Hart, Evanston, Ill., USA : Distributed in the United States by Northwestern University Press, 1998), 1: "When reviewing national measures with an effect on trade under Article 30, the European Court of Justice must both decide whether there should be regulation and, if so, who will have the power to regulate. [...] The extent of regulatory powers left to Member States will largely depend on the scope given to Article 30."

[40] Case 9/74, *Casagrande* [1974], *ECR* 773.

and educational grants were within [their] competence."[41] Thus, they inferred the illegality of this provision from the fact that it affected the existence of their powers: since education fell within national spheres of powers, no European Union act of secondary legislation could pertain, directly or indirectly, to this field. The Court took a different view:

> [A]lthough educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training.[42]

Admittedly, it acknowledged that educational and training policy fell within the ambit of the Member States or that, in other words, the Community was excluded from the personal scope of this power. But this recognition did not prevent it from further stating that, in case the exercise of Community powers conflicts with 'the measures taken in the execution of Member States' powers, the former must trump the latter. Here again, it required Member States to adjust the conditions of exercise of their powers in such a way as to allow the Community to exercise its own, and, in particular, by applying the non-discrimination principle.[43] Therefore, similarly to cases involving powers retained by Member States, the distinction between the existence and the conditions of exercise of power played a crucial role in *Casagrande*. It is used by the Court as a quasi-justification to put limits upon the conditions of exercise of national powers and, accordingly, to circumscribe their discretionary character. The Court traditionally interprets cases involving similar issues to those raised in *Casagrande*, i.e. cases in which the legality of acts of secondary legislation is challenged on the grounds that they impinge upon national powers, through a structural perspective. The Court indeed inquires whether the European legislator has acted in accordance with the conferral principle, and ultimately seeks to coordinate national and European Union spheres of powers.[44]

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[41] Case 9/74, *Casagrande* [1974], *ECR* 773, 10.
[42] Ibid., 12.
[43] Ibid., 14: "As regards Article 12 of Regulation No 1612/68, although the determination of the conditions referred to is a matter for the authorities competent under national law, they must however be applied without discrimination between the children of national workers and those of workers who are nationals of another Member State who reside in the territory." See J. H. H. WEILER, "The Transformation of Europe," in *The Constitution of Europe: Do the new Clothes have an Emperor? And other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999), 47-50.
[44] See, for instance, two seminal cases: Case C-376/98, *Germany v. European Parliament and Council*, [2000] *ECR* I-8419, and Case C-58/08, *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, [2010] ECR I-04999.

89. The Court of Justice also follows the same logic, based on the distinction between existence and exercise of power, in the field of external relations, as evidenced, for instance, by the *Centro-Com* judgment.[45] This case concerned the EC Sanctions Regulation, which prohibited trade between the Community and the Republics of Serbia and Montenegro, in accordance with the Resolution of the UN Security Council instituting a trade embargo. The Court of Justice was asked whether a national measure adopted by the United Kingdom was compatible with Article 113 EC, given that this measure went beyond the requirements of the EC Regulation implementing the Resolution.[46] One of the main arguments put forward by the United Kingdom was that its measure could go beyond the Sanctions Regulation because it fell within Member States' retained powers in the field of foreign and security policy.[47] Thus, similarly to the facts of *Casagrande*, *Centro-Com* involved a act of secondary legislation. However, this time, focus was put on the national measure suspected to have impinged on European Union powers. The Court used, once again, the distinction between existence and exercise as a justification to impose obligations upon Member States when they exercise their foreign and security policy powers:

> The Member States have indeed retained their competence in the field of foreign and security policy. [...]
>
> None the less, the powers retained by the Member States must be exercised in a manner consistent with Community law. [...]
>
> [W]hile it is for the Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article 113 of the Treaty.[48]

Cases relating to external relations are "looked at through a competence prism,"[49] and, in the opinion of P. EEKHOUT, they are characterized by the fact that:

> Instead of a broad economically-oriented, teleological, and contextual approach to implied powers, the Court has preferred a more doctrinal, constitutional, and institutional approach, which focuses on the autonomy and protection of the EU legal order.[50]

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[45] Case C-124/95, The *Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] *ECR* I-81.
[46] For further details, see, *inter alia*, C. VEDDER & H.-P. FOLZ, 35 *C. M. L. Rev.* 209–226 (1998); R. PAVONI, "UN Sanctions in EU and national law: the *Centro-Com* case," 48 *Int'l & Comp. L.Q.* 582 (1999).
[47] Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] *ECR* I-81, 23.
[48] Ibid., 24, 25 & 27 respectively.
[49] P. EECKHOUT, "Bold constitutionalism and beyond," in *The Past and Future of EU Law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Eds.) M. P. MADURO & L. AZOULAI, (Oxford: Hart, 2010), 219. The same idea is expressed by G. DE BAERE, *Constitutional principles of EU external relations*, (Oxford; New York: Oxford University Press, 2008), 10.

90. Of course, the Court of Justice has not totally jettisoned its traditional approach when powers retained by Member States are involved. It still interprets the four fundamental freedoms in light of the effects on the internal market brought about by the national measure. This also entails that it recognizes individual rights attached to European Union citizenship through a teleological and contextual approach. But it couples these approaches with a structural reasoning. The above has shown, indeed, that, in cases involving powers retained by Member States, the "reference to the state competences has been reintroduced and legitimized."[51] Within the framework of its power-based approach, the Court of Justice relies on structural arguments, defined by C. L. BLACK, in the context of US Constitutional law, as implementing a "method of inference from the structures and relationships created by the Constitution in all its parts or in some principal part."[52] P. BOBBITT has added, in the same vein, that these arguments "embody a macroscopic prudentialism [...] arising from general assertions about power and social choice."[53] The aforementioned formulae used by the European Court of Justice are nothing more than assertions about power. They moreover reveal that, in the eyes of the Court, the relationship between the European Union and the Member States, as established by the treaties, is such as to justify compliance with European Union law when Member States exercise their retained powers. Likewise, when the Court of Justice imposes requirements upon the Member States at the justification stage,[54] it takes into account the constitutional features and the institutional balance of the European Union. As a result, the Court sees the conflicts characterizing the cases involving the powers retained by Member States as genuine conflicts of powers. Therefore, it ends up playing a role consisting in coordinating the national and European Union spheres of powers.

91. The Court's specific focus on Member States. The second implication of the shift in the Court of Justice reasoning is intrinsically linked to the previous one. Since the Court adopts a more structural-oriented approach, more concerned with the relationship between national and European Union spheres of powers, it focuses more specifically on Member States than in

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[50] P. EECKHOUT, *EU External Relations Law*, (Oxford; New York: Oxford University Press, 2011), 118.
[51] L. AZOULAI, "The European Court of Justice and the duty to respect sensitive national interests," in *Judicial activism at the European Court of Justice: causes, responses and solutions*, (Eds.) M. DAWSON, B. DE WITTE & E. MUIR, (Cheltenham: Edward Elgar, 2013), 167, 184.
[52] C. L. BLACK, *Structure and relationship in constitutional law*, (Louisiana State University Press, 1969), 7.
[53] P. BOBBITT, *Constitutional Fate: Theory of the Constitution*, (New York: Oxford University Press, 1982), 74.
[54] See, *Infra*, §§ 177s.

traditional free movement cases. As recalled earlier,[55] in the latter, the Court tends to put great emphasis on the bonds between individuals and the European Union through the recognition of individual rights. In this respect, it is often led to instrumentalize national legal systems and policies in order to create or deepen these bonds. It thus adopts an economic-oriented approach, focused on the integration of national markets, when it recognizes individual economic rights. Similarly, its reasoning is more social-oriented when the facts of the case pertain to social issues. These trends are not absent from the reasoning of the Court when powers retained by Member States are involved. However, as a result of the adoption of a structural approach, the Court of Justice pays more attention to the relationships: (i) between Member States and individuals; (ii) between Member States and the European Union; and (iii) among Member States. As seen in Section 1, the powers concerned by the Court's power-based approach are constitutive components of Member State autonomy. Accordingly, the Court must be wary of not undermining the bonds between Member States and the members of their political and social communities, for it could, otherwise, imperil their autonomy.

CONCLUSION OF CHAPTER 1.

92. On the one hand, this first chapter has identified the fields concerned by the Court of Justice power-based approach. Even if the Court does not laid down explicit criteria for distinction, Section 1 has revealed that the fields analyzed herein nonetheless share common significant structural features. Not only do they fall within the ambit of Member States, but they are also based on the same structural principles. They are indeed built upon the principle of closure and the erection of boundaries, which take the form of inclusion and exclusion rules. On the other hand, Section 2 has demonstrated that, when the Court of Justice singles out powers retained by Member States, it operates a shift, by reasoning in structural terms, the notion of power and the distinction between existence and exercise playing a defining role. All things considered, the Court seems to adjudicate the disputes involving what it sees as powers retained by Member States from a structural perspective, thereby brining them, to a certain extent, closer to traditional constitutional cases than traditional free movement cases.

93. *Identifying the original legal framework applied by the Court to national retained powers.* While Chapter 1 has provided an overview of the Court of Justice power-based approach, Chapters 2

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[55] See, *Supra*, § 79.

and 3 look more closely at its two other fundamental features. Chapter 2 focuses on the applicability stage of the cases involving powers retained by Member States, while Chapter 3 analyzes their justification stage.

CHAPTER 2. THE EXTENSION OF EU LAW SCOPE OF APPLICATION

INTRODUCTION OF CHAPTER 2.

94. This chapter sheds light on the second defining feature of the Court of Justice power-based approach. This feature takes the form of an extension of the scope of application of European Union law through the distinction between existence and exercise of the powers retained by Member States.

95. *The function of the scope of application in free movement cases.* The applicability stage is the first step of free movement cases. It invariably precedes the restriction and justification stages, and gives the Court of Justice an opportunity to examine whether the national measure that is suspected of breaching the free movement principle falls within the scope of European Union law. The inquiry of the Court of Justice the applicability of the fundamental freedoms and European Union citizenship provisions has a decisive function within the European Union legal order. It is the means through which the Court enforces the enumerated powers principle, which holds that all the powers not conferred on the European Union by the Treaty remain within the hands of Member States. In case of positive intervention by the institutions of the European Union, the latter must respect the enumerated powers principle and, therefore, demonstrate that the Treaty contains an appropriate legal basis for the adoption of an act of secondary legislation.[1] Similarly, in free movement cases, the majority of which correspond to cases where the institutions of the European Union have not intervened, the Court checks whether there exist connecting factors between the personal, material, spatial, and temporal

[1] S. PRECHAL, S. DE VRIES & H. VAN EIJKEN, "The principle of attributed powers and the 'scope of EU law'," in *The Eclipse of Legality in Europe*, (Eds.) L. BESSELINK, F. PENNINGS & S. PRECHAL, (Alphen aan den Rijn, Kluwer Law International, 2011), 213-214. See also C. BARNARD, *The substantive law of the EU: The four freedoms*, (Oxford, New York: Oxford University Press, 2007), 568s; G. DE BURCA & P. CRAIG, *EU Law: Text, cases and materials*, (Oxford: Oxford University Press, 2011), 73s.

scopes of the potentially applicable fundamental freedom – or European Union citizenship provision – and the national measure.[2] If one of the connecting factors is missing, the Court concludes that European Union law is inapplicable. The directly applicable Treaty provisions have, as a matter of principle, a limited scope, for otherwise it would negate the enumerated powers principle. The rules used to determine the applicability of European Union law are therefore intrinsically linked to the European principle of legality or, in other words, to the rule of law, understood, as S. PRECHAL *et al.* put it, as "the requirement that any act of government that imposes unilateral obligations on citizens must have a basis in law, that is, must have a statutory basis."[3]

96. *The traditional issues raised in cases involving powers retained by Member States.* Some of the cases involving powers retained by Member States raise 'traditional' applicability issues. Education and social security cases based on the freedom to provide services have sparked, in particular, significant debates with respect to the notion of remuneration.[4] These cases make clear that the Court of Justice is indifferent to the nature of the national powers involved in free movement cases, and that the four economic freedoms as well as the provisions on European Union citizenship may apply to national welfare services. In education cases, Member States have argued that educational activities did not amount to an economic activity because they were not provided for remuneration. They have developed a similar line of reasoning in social security cases where they have claimed that the freedom to provide services could not apply to hospital and non-hospital medical services – either because they are provided in kind,[5] or subsequently reimbursed to patients,[6] or provided by national health services, which are wholly funded from taxation.[7] In other words, in both cases, Member States' arguments amount to claiming that the inapplicability of European Union law should stem from the fact that education and health care systems are not subject to the market. The Court came up with different answers in the two fields.

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[2] H. D. JARASS, "A Unified Approach to the Fundamental Freedoms," in *Services and Free Movement in EU Law*, (Eds.) M. ANDENAS & W.-H. ROTH, (Oxford, New York: Oxford University Press, 2002), 142.
[3] S. PRECHAL, S. DE VRIES and H. VAN EIJKEN, "The principle of attributed powers and the 'scope of EU law'," above, n. 1, 214.
[4] For a general overview, see G. DAVIES, "Welfare as a service," 29 *Legal Issues of Economic Integration* 27-40 (2002).
[5] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 48; Opinion in Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509, 24.
[6] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 49.
[7] Opinion in Case C-372/04, *Watts*, [2006] *ECR* I-4325, 43.

97. Education cases. Regarding first the field of education, the Advocate General in *Gravier* suggested for the first time to draw a distinction between state education and education provided by a private organization in order to subject only the latter to the provisions on the freedom to provide services.[8] The Court of Justice did not discuss this issue, and decided, on the basis of Article 7 EEC – now Article 18 TFEU, that the 'minerval,' an additional fee applied to nonresident students in Belgium, was contrary to European Union law. The same fee was at stake in *Humbel*, a subsequent case, which gave the opportunity to the Court to distinguish between national education systems and private organizations providing education. It indeed held that the former does not provide services for remuneration:

> First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural, and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.[9]

Conversely, establishments of higher education essentially funded out of private funds are deemed to provide services for remuneration.[10] Thus, in education cases, the Court of Justice uses two criteria when assessing whether the remuneration requirement is fulfilled: i) the source of funding: whether the private financing of a school covers a large proportion of its costs; and ii) the purpose of the activity: whether the school intends to make an economic profit.[11] As a result, the Court accepted at least partially the line of reasoning developed by Member States.

98. Social security cases. This is not the case with respect to social security rulings. In this field, the Court has long decided that medical activities fall within the scope of the freedom to provide services.[12] It subsequently confirmed its early rulings in cases where the national social security system itself was accused of infringing the freedom to provide services. In a series of judgments, the Court held that, under certain circumstances, the fact that coverage of cross-

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[8] Opinion in Case 293/83, *Gravier*, [1985] *ECR* 593, 603.
[9] Case 263/86, *Humbel*, [1988] *ECR* 5365, 18.
[10] See Case C-109/92, *Wirth*, [1993] *ECR* I-6447, 17: "However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration." This reasoning was, for instance, confirmed in Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 39-45.
[11] See Opinion in Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 35.
[12] Cases 286/82 & 26/83, *Luisi & Carbone*, [1984] *ECR* 377, 16 and Case C-159/90, *Society for the Protection of Unborn Children Ireland*, [1991] *ECR* I-4685, 16-21.

border health care by the state of affiliation was made conditional upon obtaining prior authorization restricted the free movement principle. The Member States challenged the applicability of European Union law and, in so doing, they based their arguments on the relationship between the patients and their social security system of affiliation. They inferred that affiliated patients either do not pay medical services or that they are reimbursed in their states of affiliation.[13] However, the Court of Justice followed a very different line of reasoning. It ignored the aforementioned relationship and focused instead on the fact that the patients who resorted to cross-border health care did pay for receiving medical treatment, as evidenced, for instance, by this statement:

> [T]he medical treatment at issue in the main proceedings, which was provided in Member States other than those in which the persons concerned were insured, did lead to the establishments providing the treatment being paid directly by the patients.[14]

Therefore, the Court is simply indifferent to the nature of the relationship that links patients and their systems of affiliation. It held in *Watts*, a case involving the British National Health System, that in order to rule on the applicability of the freedom to provide services, there was:

> [N]o need in the present case to determine whether the provision of hospital treatment in the context of a national health service such as the NHS is in itself a service within the meaning of those provisions.[15]

As a result, the Court of Justice successively ruled that the freedom to provide services applies, irrespective of whether patients are affiliated to a reimbursement system,[16] a benefit-in-kind system,[17] or a national health service,[18] and regardless of whether they receive non-hospital,[19] hospital,[20] or whether they receive medical care while traveling abroad.[21]

99. All in all, the Court found that the freedom to provide services is applicable (or partially applicable) to fields as peculiar as education and social security. This gives rise to a substantial

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[13] The Advocate General in Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 30s shared this view.
[14] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 55.
[15] Case C-372/04, *Watts*, [2006] *ECR* I-4325, 91. The Advocate General expressed a similar view. See his opinion at 53-55.
[16] Case C-120/95, *Decker*, [1998] *ECR* I-1831 & Case C-158/96, *Kohll*, [1998] *ECR* I-1931.
[17] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473; Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509.
[18] Case C-372/04, *Watts*, [2006] *ECR* I-4325.
[19] Case C-120/95, *Decker*, [1998] *ECR* I-1831 & Case C-158/96, *Kohll*, [1998] *ECR* I-1931.
[20] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473; Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509; Case C-372/04, *Watts*, [2006] *ECR* I-4325.
[21] Case C-211/08, *Commission v. Spain*, [2010] *ECR* I-5267.

extension of the scope of the economic freedom. However, even if the outcome of the approach developed by the Court is remarkable, the reasoning followed by the Court with respect to the scope of the traditional notion of remuneration is in itself not unusual. Indeed, it is in line with its traditional extensive interpretation of the scope of the four freedoms and European Union citizenship provisions.[22]

100. The specific issues raised in cases involving powers retained by Member States. By contrast, most of the cases involving retained powers raise specific issues that are absent from traditional free movement cases, since the Court of Justice deems European Union law applicable in fields where the European Union has no, or very limited, or 'unexercised' jurisdiction. In this respect, some of the Member States, supported by certain scholars, see the applicability of European Union law as the materialization of illegitimate intrusions into national spheres of powers. They often challenge the applicability of European Union law on peculiar grounds. In substance, they claim that the inapplicability of European Union law should stem from the limited jurisdiction of the European Union in the fields analyzed herein. As a result, the applicability stage turns out to be a significant issue in cases concerned by the power-based approach. This is moreover confirmed by the fact that, as opposed to traditional free movement cases, the Court of Justice systematically addresses the issue of applicability.

101. Outline of Chapter 2. The purpose of this second chapter is to show that, without fundamentally departing from its traditional approach, the Court extends the scope of application of European Union law significantly and in an original way when it is called upon to rule on cases involving powers retained by Member States. In Section 1, I shed light on the arguments developed by Member States, which are first and foremost based on the lack of jurisdiction of the European Union in the fields analyzed herein. In Section 2, I investigate the line of reasoning adopted by the Court of Justice, and I demonstrate that, except in the field of education, the Court deals with the arguments of Member States by dissociating the scope of application of European Union law from the scope of European Union powers.

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[22] As acknowledged by the Court of Justice itself on many occasions. See, for instance, Case 66/85, *Lawrie-Blum*, [1986] *ECR* 2121, 16: "Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the terms 'worker' in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. Since it defines the scope of that fundamental freedom, the Community concept of a 'worker' must be interpreted broadly."

SECTION 1. THE ARGUMENTS PUT FORWARD BY MEMBER STATES

102. In this first section, I review the various arguments developed by Member States in cases involving their retained powers. To this end, I first describe their overall strategy, and I then focus on the content of their arguments. All in all, they reflect a dual understanding of the interplay between the European Union and the national legal orders.

1. Overall litigation strategy of the Member States

103. *"The more, the merrier."* To begin with, the applicability stage is a highly contested issue when powers retained by Member States are involved. Suffice to think, for instance, of *Rottmann*[23] in the field of nationality, *Watts*[24] in the field of social security, *Bidar*[25] in the field of education, *Viking Line*[26] in the field of social rights, or *Garcia Avello*[27] in the field of the rules governing surnames. The applicability of European Union law to these areas was in each case very contentious. In this respect, not only do Member States almost systematically challenge the idea that European Union law applies to matters where they retain principal responsibility, but they are do so in large numbers. In cases involving powers retained by Member States, many governments submit written observations before the Court of Justice.[28] This feature is of significant importance. It is first a sign of Member States' concern that their vital interests are at stake, and of their determination to protect their interests – and in particular their financial interests, as will be seen in the following Chapter.[29] Second, this also reflects Member States' attempt to influence the Court of Justice's decision-making process. M.-P. GRANGER[30] has explored the latter issue, and it appears that governments resort increasingly to this strategy, the

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[23] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449.
[24] Case C-372/04, *Watts*, [2006] *ECR* I-4325.
[25] Case C-209/03, *Bidar*, [2005] *ECR* I-2119.
[26] Case C-438/05, *Viking*, [2007] *ECR* I-0779.
[27] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613.
[28] See, for instance, Opinion in Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509, 23-24: No less than twelve Member States submitted observations.
[29] See *Infra*, §§ 168s.
[30] M.-P. GRANGER, "When governments go to Luxembourg...: the influence of governments on the Court of Justice," 29 *Eur. Law Rev.* 1-31 (2004); M.-P. GRANGER, "Les stratégies contentieuses des Etats devant la Cour," in *Dans la fabrique du droit européen:* scènes, acteurs et publics de la Cour de justice des Communautés européennes, (Eds.) A. VAUCHEZ & P. MBONGO, (Coll. Droit de l'Union européenne, Brussels: Bruylant, 2009), 64-124. See also U. EVERLING, "The Member States of the European Community before their Court of Justice," 9 *ELRev.* (1984) 215-241; M. BULTERMAN & C. WISSELS, "Strategies developed by – and between – national governments to interact with the ECJ," in *Judicial activism at the European Court of Justice: causes, responses and solutions*, (Eds.) M. DAWSON, B. DE WITTE & E. MUIR, (Cheltenham: Edward Elgar, 2013), 264-278.

aim of which is at least to put the Court under the pressure to develop a sound and convincing reasoning.[31]

2. Correspondence between scope of application and scope of powers

104. Reliance on the conferral principle. A second decisive feature of the strategy developed by Member States in cases involving their retained powers relates to the fact that they have brought similar arguments before the Court of Justice in the various fields analyzed herein. Altogether, these arguments boil down to claiming that, since the European Union has no, or very limited, jurisdiction in these fields, European Union law should not apply to measures taken in the exercise of these national powers. This is illustrated by *Tas-Hagen*, a case involving the compensation of civil war victims. The United Kingdom government argued that the Treaty provisions on European Union citizenship could not apply because:

> [R]eliance on Article 18(1) EC presupposes that the situation concerned relates to a matter covered by Community law and that Community law is also applicable in that respect 'ratione materiae.'[32]

Member States have developed the same type of reasoning in most of the fields, such as social security,[33] direct taxation,[34] nationality,[35] social rights,[36] the compensation of civil war victims,[37] or the enforcement for the recovery of debts.[38] In addition, it is significant that national courts themselves happen to express doubts as to the hypothetical applicability of European Union law in fields where European Union action is excluded or inexistent, such as direct taxation:

> Noting that direct taxation falls within the exclusive powers of the Member States, the national court expresses doubts as to the possibility of applying Article 48 to national legislation in this sphere. In particular, '... nowhere does the EEC Treaty confer express authority to harmonize the direct taxes of the Member States.'[39]

In addition to their similarity, Member States' arguments are also specific to the fields involving powers retained by Member States, and are usually not used in traditional free movement cases. Member States have designed several strategies in order to challenge the applicability of

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[31] M.-P. GRANGER, "Les stratégies contentieuses des Etats devant la Cour,", above, n. 30, 87.
[32] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 28.
[33] See, for instance, Case C-158/96, *Kohll*, [1998] *ECR* I-1931, 16.
[34] See, for instance, Case C-204/90, *Bachmann*, [1992] *ECR* I-249, 10.
[35] See, for instance, Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 37.
[36] See, for instance, Case C-438/05, *Viking*, [2007] *ECR* I-0779, 39s.
[37] See, for instance, the Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 28.
[38] See the Opinion in Case C-224/02, *Pusa*, [2004] *ECR* I-5763, 12.
[39] Opinion in Case C-279/93, *Schumacker*, [1995] *ECR* I-225, 16.

European Union law. These strategies revolve, in one way or another, around the conferral principle.

105. Thus, unsurprisingly, Member States have based some of their arguments on Treaty provisions excluding explicitly European Union action. For instance, one of the arguments brought before the Court in *Bidar*, a case on higher education involving the financial support of incoming students, relied on Article 149 EC (now Article 165 TFEU), the first paragraph of which only confers complementary action to the European Union.[40] Similarly, in *Laval*, the Danish government referred to Article 137§5 EC (now Article 153§5 TFEU), according to which Article 153 TFEU "shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs." The same government inferred from this provision that "the Community has no power directly or indirectly to regulate" the right to take collective action.[41] Likewise, in *Rottmann*, the Member States made reference to Declaration 2, annexed to the Maastricht Treaty, and claimed that nationality matters fell within the powers retained by Member States.[42] The silence of the Treaty has also been used to infer the inapplicability of European Union law, as evidenced by the aforementioned statement of the national court in *Schumacker*.[43] Last but not least, Member States have resorted to arguments which, although based on the conferral principle, are nonetheless of a less formalistic nature. They have asserted, on numerous occasions, that the inapplicability of European Union law flows from the impossibility to establish a connecting factor between the fundamental freedoms guaranteed by the Treaty and the material scope of the national measure at issue. This reasoning was well summarized by the Advocate General in *Morgan & Bucher*, another case on higher education involving the refusal by Germany to confer a study grant on resident students willing to study abroad:

> Several of the written observations (...) claim that the European Union has no jurisdiction over study grants granted by the Member States. Since Community matters are not involved, the rights conferred by Article 18 EC are unconnected with the facts of the questions referred for a preliminary ruling and no reply should be given to the national court.[44]

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[40] Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 37.
[41] Opinion in Case C-341/05, *Laval*, [2007] *ECR* I-11767, 48. See also Opinion in Case C-438/05, *Viking*, [2007] *ECR* I-0779, 20 and Case C-438/05, *Viking*, [2007] *ECR* I-0779, 39.
[42] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 37.
[43] Case C-279/93, *Schumacker*, [1995] *ECR* I-225.
[44] Opinion in Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161, 79 (Emphasis added).

This statement shows once again that, in the eyes of Member States, the applicability of European Union law, to be established, must be linked to the existence of powers held by the European Union in the field involved. In other words, they see the scope of application of European Union law as strictly corresponding to the scope of the powers of European Union law.

106. The roots of Member States' line of reasoning. This specific line of reasoning does not find its roots in cases involving powers retained by Member States. Member States have, as a matter of fact, maintained similar positions in other cases. A review of the Court of Justice case law shows that it goes back to an early ruling, *Commission v. France*, decided in 1969 in the field of state aid.[45] This case concerned a preferential rediscount rate for exports granted by the Banque de France to French exported products alone. In two decisions, the European Commission authorized this aid, but made it conditional upon several requirements that France failed to comply with.[46] The Commission subsequently launched infringement proceedings. Against this background, the French government advanced the following argument:

> [T]he French Republic alleges that "the rules of the Treaty are deficient in the monetary sphere" and states that the fixing of the discount rate falls directly within monetary policy which is a matter in which the Member States alone are competent and that therefore by starting the proceedings [...] the Commission acted unlawfully by arrogating to itself jurisdiction which the Treaty denies it.[47]

Thus, as early as 1969, a Member State was using the conferral principle with the view to challenge the applicability of European Union law. Indeed, it already linked the lack of European Union jurisdiction directly with the inapplicability of European Union law.

107. The expression of a dual understanding. Altogether, the various arguments developed by Member States reflect the same understanding of the interplay between the respective legal orders of the European Union and of the Member States. This understanding implies the need for a strict correspondence between the applicability of European Union law in a given field, and the existence of European powers in the very same field.[48] This type of argument may be

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[45] Cases 6 & 11/69, *Commission v. France*, [1969] *ECR* 523.
[46] Ibid., 1-8.
[47] Ibid., 10. See also Ibid., 12: the French government defends the view that the Commission acted within a "sphere which belongs exclusively to the jurisdiction of the Member States."
[48] See Case C-341/05, *Laval*, [2007] *ECR* I-11767, 86: "The Danish and Swedish governments submit that the right to take collective action in the context of negotiations with an employer falls outside the scope of Article 49 EC, since, pursuant to Article 137(5) EC, as amended by the Treaty of Nice, the Community has no power to

described as "dual." It indeed relies on the assumption that the respective spheres of jurisdiction of the European Union and of the Member States are independent from each other, and that there is *and* should be a strict dissociation between the two. Thus, this is tantamount to claiming that each entity – i.e. the European Union and the Member States – should be supreme only within its own spheres of powers. This reveals Member States' view that they should enjoy absolute freedom to define and exercise their retained powers. They understand their powers as being discretionary, the exercise of which should not be constrained by the European legality principle or, in other words, should fall outside the Court of Justice own jurisdiction. The conditions of such an exercise should therefore only be subject to domestic judicial review. Accordingly, the arguments developed by Member States in cases involving their retained powers also reflect their understanding of the primacy principle. Fundamentally, Member States argue that European Union law should trump national laws only within the spheres of European Union powers, while Member States should be supreme within the spheres of their retained powers – this entails that the European Union primacy principle should not apply to spheres where the Member States have exclusive jurisdiction. They therefore promote a strict interpretation of the primacy principle, which coincides with the definition given by J. H. H. WEILER:

> The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within its sphere of competence.[49]

In response to these arguments, the Court of Justice has accepted that the scope of the powers of the European Union can be used as a yardstick to define the scope of application of European Union law only on very few occasions. Indeed, it has developed, for the most part, a different way of reasoning, thereby expressing a different understanding of the interplay between the respective legal orders of the European Union and of the Member States.

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regulate that right." See also D. RITLENG, "Les États membres face aux entraves," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 304.

[49] J. H. H. WEILER, "The Transformation of Europe," in *The Constitution of Europe: Do the new Clothes have an Emperor? And other Essays on European Integration*, (Cambridge: Cambridge University Press), 1999, 21.

SECTION 2. THE COURT OF JUSTICE LINE OF REASONING

108. In all the rulings analyzed herein, the Court finds that European Union law is applicable. The purpose of this Section is to assess how it proceeds to justify the applicability of European Union law in fields where the European Union has nonetheless no, or very limited, jurisdiction. To this end, I first shed light on the defining feature of the assessment of the Court of Justice in the applicability stage of cases involving powers retained by Member States. This assessment is based on the distinction between existence and exercise of power. I then discuss the implications of such an approach, and I demonstrate that it leads to the disjunction of the scope of application of European Union law from the scope of the powers held by the European Union.

1. A reasoning based on the distinction between existence and exercise of power

109. Apart from some of the rulings decided in the field of education, the Court of Justice constantly rejects the arguments developed by Member States. It systematically rules that European Union law is applicable. In doing so, it follows an interesting and consistent approach, based on the distinction between existence and exercise of the powers retained by Member States. As mentioned earlier, this approach consists in stating formulae at the applicability stage. It moreover consists in looking into the effects of the national measures right from the assessment of applicability.

a. Two concurrent approaches in the education field

110. The Court of Justice has developed different strategies at the applicability stage of cases involving the field of education. Education has indeed undergone many changes over the years. The Court initially developed an approach based on the correspondence between European Union jurisdiction and the applicability of European Union law, thereby echoing the arguments traditionally developed by the Member States. Nowadays, it still follows this approach to some extent, but it also happens to base its reasoning on the stating of formulae.

111. The correspondence between the scope of application of EU law and the scope of EU powers. Interestingly, at the outset of its case law on education, i.e. in the 1980s, the Court of Justice linked the applicability of European Union law with the scope of the powers held by the then European Community, and made the former conditional upon the latter. This is well

illustrated, for instance, by *Gravier*,[1] one of the rulings involving the 'minerval' Belgian fee, imposed in this case on nonresident students registered in Belgium for a four-year course in a non-university institute of higher education, to the exclusion of resident students. The Court was called upon to decide whether access to, and participation in, courses of vocational training fell within the scope of the Treaty. To address this issue, it determined whether a link between European Union powers and vocational training could be found. It eventually held that:

> [A]lthough educational organization and policy are not as such included in the spheres which the Treaty has entrusted to the Community institutions, access to and participation in courses of instruction and apprenticeship, in particular vocational training, are not unconnected with Community law.[2]

The Court established such a connection on the basis of European Union primary and secondary law. It referred to Article 128 EEC,[3] which empowered the Community to "establish general principles for the implementation of a common policy of occupational training," as well as to various acts of secondary legislation adopted in pursuance of this power, such as regulations, Council decisions and resolutions.[4] Such reasoning boils down to understanding national and European Union powers as belonging to two distinct spheres, which may not interfere with one another. There are, on one end of the spectrum, national retained powers – educational organization and policy – where Member States enjoy absolute freedom, and which fall outside the reach of European Union law. On the other end of the spectrum, another sphere can be found, which comprises the powers of the European Union – the vocational training regulatory powers held by the Community –, which corresponds to the scope of application of European Union law. In *Gravier,* the broadening of the scope of European Union law stemmed from an extensive interpretation of the scope of European Union powers.

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[1] Case 293/83, *Gravier*, [1985] *ECR* 593.
[2] Ibid., 19 (Emphases added).
[3] Ibid., 21.
[4] Ibid., 20s: Articles 7 and 12 of Regulation 1612/68 of the Council of 15 October 1968 on Freedom of movement for workers within the Community, Council Decision 63/266/EEC of 2 April 1963 laying down principle for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market, the 'general guidelines' laid down by the Council in 1971 for drawing up a Community program on vocational training, the resolution of the Council and of the Ministers for education meeting the Council of 13 December 1976 concerning measures to be taken to improve the preparation of young people for work and to facilitate their transition from education to working life and the Council Resolution of 11 July 1983 concerning vocational training policies in the European Community in the 1980s.

112. It is noteworthy that the Court happened to use the very same approach, based on the correspondence between European Union powers and the scope of application of European Union law, to rule out the applicability of European Union law. In *Lair*[5] and *Brown*,[6] the question was posed whether nonresident students could qualify for educational grants. The Court of Justice answered in the negative on the following grounds:

> At the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7. It is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty.[7]

It based once again its reasoning on the idea of separate and exclusive spheres, and on the conferral principle. Here, a restrictive interpretation of European Union powers led to excluding the application of European Union law. The Court subsequently reversed these rulings through the same line of reasoning. *Bidar*,[8] decided in 2005, raised the issue of whether financial assistance granted to students for maintenance costs and training continued to fall outside the reach of European Union law. The plaintiff argued that the extension of the scope of application of European Union law resulted from the extension of Community powers in the field of education.[9] And, indeed, the Court of Justice, following its Advocate General,[10] referred to Articles 3(1)(g) and 149 EC (now Article 165 TFEU) and concluded that European Union law applied to financial assistance for students.[11]

113. All in all, in the field of education, the Court of Justice continued to exclusively follow this initial approach until *Commission v. Austria*, decided in 2005.[12] This case involved Austrian provisions imposing on holders of secondary education diplomas obtained in other Member States conditions that were different than those applicable to holders of Austrian diplomas. The Court agreed with the European Commission that the reasoning developed in *Gravier*

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[5] Case 39/86, *Lair*, [1988] *ECR* 3161.
[6] Case 197/86, *Brown*, [1988] *ECR* 3205.
[7] Case 39/86, *Lair*, [1988] *ECR* 3161, 15; and Case 197/86, *Brown*, [1988] *ECR* 3205, 18 (Emphases added).
[8] Case C-209/03, *Bidar*, [2005] *ECR* I-2119.
[9] Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 35.
[10] See in particular its Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 50: "The inclusion of these provisions on education is therefore indicative of the fact that the subject of assistance within maintenance costs now falls within the substantive scope of the EC Treaty."
[11] Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 38s.
[12] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969.

applied to the facts of the case, and it rejected the Austrian contention whereby the Austrian measure concerned the recognition of secondary education diplomas, a field falling within the powers retained by Member States.[13] Therefore, in the first series of cases decided in the field of education, the Court of Justice reasoning is based on the same rationale as that developed by the Member States. There seemed to be a consensus on the assumption that the scope of application of European Union law was to be established with respect to the same benchmark that was used for determining the scope of European Union powers.

114. The emergence of the distinction between existence and exercise of power. The Court of Justice subsequently departed from its original standpoint and, as a result, from Member States' understanding of the interplay between the European Union and national legal orders. In *Commission v. Austria* itself, Advocate General JACOBS developed an original line of reasoning – to which the Court did not allude in its ruling. He proceeded with the assessment of European Union law applicability and, in so doing, he wondered whether the Austrian measure fell within the scope of the Treaty, *or* within the powers retained by Member States in the field of education. Following the Court's traditional approach, he concluded that European Union law was applicable in this case.[14] But he added an interesting statement, which reads as follows:

> [E]ven if the contested national provisions were, as the Republic of Austria claims, to fall within the sphere of competences retained by Member States in the field of education, Member States are still bound to exercise their retained powers in a manner consistent with Community law, which includes respect for the principle of equal treatment.[15]

The Advocate General referred, for the first time in the field of education, to the distinction between existence and exercise of power. Stating this distinction boiled down to asserting that even if the European Union had no jurisdiction in the matter at hand, Member States should still comply with European Union law when exercising their powers. In other words, this was a way of saying that there was no need for establishing a formal correspondence between European Union powers and the scope of application of European Union law. Thus, the Advocate General used this distinction in such a way as to go beyond possible limitations inherent to the limited scope of the Treaty. He therefore initiated the first move towards a more pragmatic approach at the applicability stage of education cases. The Court of Justice, in turn, took over the distinction in the form of formulae employed in *Schwarz* and *Commission v.*

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[13] Ibid., 28-34.
[14] Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 15-18.
[15] Ibid., 19 (Emphasis added).

Germany.[16] However, it did not state them at the applicability stage, but at the justification stage of its rulings.[17] It is only in a subsequent case, *Morgan & Bucher*,[18] decided in 2007, relating to the financial assistance of students studying abroad, that it used a formula stating the distinction between existence and exercise at the applicability stage.

115. The current lack of consistency in the Court of Justice approach. Four cases were decided in the field of education after *Morgan & Bucher*, and a close look shows that the Court of Justice does not consistently adopt one approach over another. In *Förster*, which related once again to students' financial assistance, both the Advocate General and the Court applied the findings of *Bidar* at the applicability stage, without even specifically addressing the issue of power.[19] Nor does *Zanotti*[20] include the formula. This case pertained to gross tax deduction of the costs of attending a university course in another Member State. In *Zanotti* the Court of Justice primarily focused on the issue of whether the Treaty provision on the freedom to provide services applied.[21] Things are however different as far as *Bressol*[22] is concerned. It was decided in 2010 and it involved a Belgian Decree regulating the number of students in certain programs in the first two years of undergraduate studies in higher education. While the Advocate General followed an approach based on the correspondence between European Union powers and the scope of application of European Union law,[23] the Court of Justice combined two perspectives. It stated the formula based on the distinction between existence and exercise of power,[24] and it moreover showed that, according to previous case law, access to higher education fell within the material scope of the Treaty.[25] Last but not least, mentioned should also be made of *Commission v. Austria*, decided in 2012.[26] The measure at issue in this case granted price reductions for local public transport under conditions that nonresident students could generally not fulfilled. The Court first held that, under *Bidar*,[27] *Grzelczyk*,[28] and *D'Hoop*,[29] the Austrian measure fell within

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[16] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849; Case C-318/05, *Commission v. Germany*, [2007] *ECR* I-6957.
[17] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 70; Case C-318/05, *Commission v. Germany*, [2007] *ECR* I-6957, 86.
[18] Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161, 24.
[19] See Opinion in Case C-158/07, *Förster*, [2008] *ECR* I-850, 41 (but see also at 55 where the Advocate General alludes to the responsibilities of the Member States), and Case C-158/07, *Förster*, [2008] *ECR* I-8507, 36s.
[20] Case C-56/09, *Zanotti*, [2010] *ECR* I-4517.
[21] Ibid., 29s.
[22] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 28.
[23] Opinion in Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 33s.
[24] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 28.
[25] Ibid., 30s.
[26] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969.
[27] Case C-209/03, *Bidar*, [2005] *ECR* I-2119.

the material scope of the Treaty in that it concerned the maintenance costs of students. It did not state the traditional education formula.[30] However, it did state a formula relating to social security,[31] in response to Austria's contention that the measure should be seen as a family benefit for the purposes of Regulation 1408/71.

116. Implications. The example of education is very useful for a better understanding of the overall reasoning of the Court of Justice. The rulings decided in this field reflect the various options that may be chosen by the Court when it is called upon to rule on the applicability of European Union law in fields falling within powers deemed as retained by Member States. Each approach described above has its own implications, which reveal different policy orientations that may be adopted by the Court. On the one hand, the initial approach of the Court of Justice, based on the correspondence between European Union jurisdiction and the scope of application of European Union law, is twofold. It first comprises a rather formal dimension. The applicability of European Union law is made conditional upon Treaty provisions empowering the European Union and/or the existence of acts of secondary legislation. As a result, broadening the scope of European Union law implies construing the Treaty provisions and/or acts of secondary legislation extensively. Thus, the expansion of the scope of application of European Union law seems to be limited – at least formally – by the conferral principle: the scope of application of European Union law does not go beyond the scope of the powers held by the European Union. But this approach also brings to light, at the same time, a flexible aspect. It may indeed lead the judge to *either* broaden the scope of European Union law *or* to circumscribe it by admitting that it is limited. On the other hand, the Court's approach based on the distinction between existence and exercise of power seems much more far-reaching than the initial one. This way of reasoning, as will be seen below, fundamentally implies dissociating the ambit of European Union law from European Union jurisdiction, the former being broader than the latter. It moreover implies that the conferral principle is no longer used as a yardstick. However, despite the unlimited potential of this approach, it also somewhat constrains the Court of Justice. The latter is indeed led to

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[28] Case C-184/99, *Grzelczyk*, [2001] *ECR* I-6193.
[29] Case C-224/98, *D'Hoop*, [2002] *ECR* I-6191.
[30] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 42-43.
[31] Ibid., 47: "Although Member States retain the power to organize their social security schemes, with the result that, in the absence of harmonization at European Union level, it is for them to determine the conditions concerning the right or duty to be insured with a social security scheme as well as the conditions for entitlement to benefits, in exercising those powers, they must none the less comply with the law of the European Union."

systematically rule out Member States' arguments based on the inapplicability of European Union law, and to conclude that European Union law is applicable, regardless of the field involved. Quite paradoxically, it leaves it with little room for applying its power of discretion with respect to the applicability stage.

b. The other fields: the quasi-systematic use of the formulae

117. Apart from the field of education, the Court of Justice has constantly rejected the arguments developed by Member States based on the correspondence between the scope of application of European Union law and the scope of the powers held by the European Union. In so doing, it has followed an interesting and consistent approach, based on the distinction between existence and exercise of the powers retained by Member States. As seen earlier, this approach consists in stating formulae at the applicability stage, which express the idea that even if certain fields fall within national retained powers, Member States must nonetheless comply with European Union law when they exercise them. The analysis of the Court of Justice case law shows that the formulae, which rest upon the distinction between existence and exercise of power, fulfill the same function, have a common origin, and rest on common conceptual foundations.

118. The function of the formulae. In the various fields analyzed herein, the formulae generally emerged in response to Member States' challenge of the applicability of European Union law, on the grounds that they retained main responsibility. Therefore, the formulae fulfill a precise function in the Court of Justice reasoning.[32] The Court uses them in support of the application of European Union law, as confirmed by the Court itself in *Rottmann*:

> The proviso that due regard must be had to European Union law [...] enshrines the principle that, in respect of citizens of the Union, the exercise of that powers, in so far as it affects the rights conferred and protected by the legal order of the Union [...] is amenable to judicial review carried out in the light of European Union law.[33]

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[32] See, in this respect, A. MAITROT DE LA MOTTE, "L'entrave fiscale," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 103, who makes the same observation as far as the formula in direct taxation is concerned. He indeed underlines that the use of the formula is not insignificant, but corresponds, on the contrary, to a method found by the Court of Justice to solve the difficulties relating to the 'meeting' of European law with national tax laws. See also L. AZOULAI, "La formule des compétences retenues des Etats membres devant la Cour de Justice de l'Union européenne," in *Objectifs et compétences dans l'Union européenne*, (Ed.) E. NEFRAMI, (Brussels: Bruylant, 2013, Droit de l'Union Européenne), 341, 343.

[33] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 48.

The formulae are conferred a *function of justification*, as evidenced, for instance, by the Opinions under *Schumacker* and *Laval*.[34] In the former case,[35] pertaining to direct taxation, the Advocate General first applied a formal reasoning, comparable to that of the Court of Justice in its early education rulings and to Member States' arguments. He indeed started from the premise that the then Article 95 EEC (now Article 114 TFEU) did not apply to matters relating to income tax. But he further added that it was nonetheless possible to rely on Article 100 EEC (now Article 115 TFEU), even though unanimity was required, and inferred that European Union law was applicable.[36] However, he did not stop there and, on top of his initial demonstration, he continued with an argument based on the distinction between the existence and the exercise of power:

> Social security, direct taxation or, for example, the conditions for the award of university diplomas are matters for the Member States. They are nevertheless required to adopt, in those areas, rules which respect the great freedoms laid down by Community law.[37]

This argument thus seems to be used as a means to go beyond what formal reasoning would allow, subject to the inherent limitations of the restricted scope of European Union powers. In other words, the Advocate General saw this argument as irrefutable. And, true, up to now, no national government has ever managed to come up with arguments powerful enough to counter this line of reasoning.

119. Similarly, in *Laval*, the Advocate General discussed the relationship between Article 137§5 EC and the hypothetical application of European Union law to the facts of the case. In his opinion, Article 137§5 EC was to be read exclusively in conjunction with the other paragraphs of Article 137, and should not "determine the scope of all provisions of the Treaty."[38] And, in the same manner as Advocate General LÉGER in *Schumacker*, he expressed the view that:

> That said, even if Article 137(5) EC were interpreted as reserving exclusive competence to the Member States regarding regulation of the right to resort to collective action, that provision would not mean that, in the exercise of that competence, the Member States did

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[34] See also the Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969.
[35] Case C-279/93, *Schumacker*, [1995] *ECR* I-225.
[36] Opinion in Case C-279/93, *Schumacker*, [1995] *ECR* I-225, 17s.
[37] Ibid., 24.
[38] Opinion in Case C-341/05, *Laval*, [2007] *ECR* I-11767, 55.

> not need to satisfy themselves that the fundamental freedoms of movement provided for by the Treaty are respected within their territory.[39]

The use of the formulae as a justification of the applicability of European Union law is consistent in all the fields analyzed herein, except the education domain. National governments generally stop challenging the applicability of European Union law once the Court of Justice has made it clear that it would systematically reject claims based on the lack of power on the part of the European Union. Nevertheless, rulings relating to national retained powers almost always contain formulae, even when the applicability issue is not specifically addressed. Thus, on top of their justification function, formulae also seek to recall the basic principle according to which the exclusive character of the powers retained by Member States does not give grounds for the inapplicability of European Union law.

120. The common origin of the formulae. I have already set forth the various wordings of the formulae in Chapter 1.[40] It turns out that the whole of the formulae reported above have a common origin. True, they appeared at different periods of time. The most recent formula appeared in the field of nationality, in *Rottmann*, decided in 2010.[41] In the areas relating to education and the right to strike, the Court started to state the formulae in 2007, in *Morgan & Bucher*[42] and *Viking Line*[43] respectively. The formula relating to the compensation of civil war victims was first stated in 2006, in *Tas-Hagen*;[44] the one pertaining to the enforcement for the recovery of debts dates from the *Pusa*[45] case handed down in 2004. As for the rules governing surnames, the formula appeared in the 2003 *Garcia Avello*[46] ruling. In the case of cross-border health care, the formula emerged earlier, in 1998, in *Decker & Kohll*.[47] In the end, it seems that the first 'consolidated' formula was used within the field of direct taxation, in the 1995 *Schumacker*[48] case. However, as they emerged, the Court reasoned by analogy, by making cross-references to formulae that were previously used in other areas. Thus, the Court of Justice

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[39] Ibid., 59.
[40] See, *Supra*, § 85.
[41] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 39 & 41.
[42] Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161.
[43] Case C-438/05, *Viking*, [2007] *ECR* I-0779.
[44] Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451.
[45] Case C-224/02, *Pusa*, [2004] *ECR* I-5763.
[46] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613.
[47] Case C-120/95, *Decker*, [1998] *ECR* I-1831; Case C-158/96, *Kohll*, [1998] *ECR* I-1931.
[48] Case C-279/93, *Schumacker*, [1995] *ECR* I-225.

referred to *Garcia Avello*[49] in *Rottmann*[50] and *Pusa*.[51] It also alluded, whether directly or indirectly, to the cross-border health care formula in *Garcia Avello*,[52] *Morgan & Bucher*[53] and *Viking Line*.[54] As for *Decker & Kohll*,[55] they comprise a direct reference to *Schumacker*.[56] Accordingly, this shows that the Court has transferred, and adapted, the direct taxation formula and its underlying principles to the other fields analyzed herein. The Court of Justice not only asserts formulae in the framework of its power-based approach. L. AZOULAI has shown, in this respect, that it is a significant feature of, and that it plays an important role for, the entirety of its case law – in this context it is sufficient to think, for instance, of the seminal *Dassonville* formula.[57] But the use of the formulae at the applicability stage of the rulings involving powers retained by Member States is nonetheless a defining component of the power-based approach. It is indeed a sign that the Court applies a similar line of reasoning to assess the applicability of European Union law in the various fields at issue.

121. The conceptual foundations of the formulae. One might think, at this stage, that the formulae only serve a rhetorical function. But the European Court of Justice case law shows, instead, that they rest on deep-rooted conceptual foundations. In this respect, it is noteworthy that the first formula, as used in *Schumacker*,[58] makes reference to another ruling, which forms part of the seminal *Factortame* cases: *Commission v. United Kingdom* of 4 October 1991.[59] The facts are well known. They involved several fishing companies, incorporated under the laws of

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[49] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613.
[50] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449.
[51] Case C-224/02, *Pusa*, [2004] *ECR* I-5763.
[52] The 'Garcia Avello formula', Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613, 25, refers to Case C-336/94, *Dafeki*, [1997] *ECR* I-6761, and Case C-135/99, *Elsen*, [2000] *ECR* I-409. *Dafeki* concerned German provisions under which certificates of civil status are accorded different probative value, depending on whether they are German or foreign. At 16-20, the Court acknowledged that there was differences and variations between the national legal orders but nonetheless set limits on Member States, stating that the "exercise of the rights arising from the freedom of movement of workers must be effective." The *Elsen* case, at 33, contained the social security formula and a direct reference to *Decker & Kohll*.
[53] The Morgan formula refers to the *Schwarz* formula, used at the justification phase and that in turn refers to Case C-372/04, *Watts*, [2006] *ECR* I-4325, a social security case.
[54] The Viking formula refers to the *Decker & Kohll* formula, as well as to direct taxation cases that comprise the formula.
[55] Case C-120/95, *Decker*, [1998] *ECR* I-1831; Case C-158/96, *Kohll*, [1998] *ECR* I-1931.
[56] Case C-279/93, *Schumacker*, [1995] *ECR* I-225.
[57] Case 8/74, *Dassonville*, [1974] *ECR* 837, 5: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions." See L. AZOULAI, "La fabrication de la jurisprudence communautaire," in *Dans la fabrique du droit européen: scènes, acteurs et publics de la Cour de la justice des Communautés européennes*, (Eds.) P. MBONGO & A. VAUCHEZ, (Brussels: Bruylant, 2009), 153, 163-165.
[58] Ibid.
[59] Case C-246/89, *Commission v. United Kingdom* [1991] ECR I-4585.

the United Kingdom, whose most of directors and shareholders were Spanish nationals. The passage of the Merchant Shipping Act 1988 prevented them from reregistering their fishing vessels in the United Kingdom – this law was passed to combat "quota hopping" i.e. the practice whereby fishing companies flew British flags to benefit from its fishing quotas, but which, in reality, lacked any genuine link with this country. These days more remembered for its implications for the primacy principle, the powers of national courts and the British principle of parliamentary supremacy, the *Factortame* series also contains important consequences with respect to cases involving powers retained by Member States. The Court held in *Commission v. United Kingdom* that:

> [A]s Community law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member States must comply with the rules of Community law.[60]

This statement is highly reminiscent of the formulae used by the Court in free movement cases involving powers retained by Member States. In a similar way, the Court based the justification of the applicability of European Union law to an area – the registration of vessels – where the then European Economic Community had no jurisdiction by relying on the distinction between the existence of the powers and their conditions of exercise.

122. In this regard, it is worth examining the opinion of Advocate General MISCHO, who strongly influenced the Court's rulings. MISCHO devoted specific paragraphs to the "scope of the competence of the Member States with regard to the registration of fishing boats."[61] The first steps of his reasoning consist in distinguishing between the existence and the exercise of Member States' powers.[62] What is very interesting here is *how* he came up with this distinction. Indeed, he inferred from previous cases relating to Member States' monetary powers that:

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[60] Ibid., 15.
[61] Opinion in Case C-246/89, *Commission v. United Kingdom* [1991] *ECR* I-4585, 5-24.
[62] Ibid., 5-6:
"5. It is uncontested that as Community law stands at present competence to determine the conditions for the registration of fishing boats is vested in the Member States. The Court confirmed this in its judgment of 19 January 1988 in *Pesca Valentia* (Case 223/86 *Pesca Valentia* v *Minister for Fisheries and Forestry*, [1988] *ECR* 83, paragraph 13), in which it held that although the Community regulations on fisheries refer to fishing vessels 'flying the flag' of a Member State or 'registered' there, they leave those terms to be defined in the legislation of the Member States."
"6. This does not mean, however, that the Member States may exercise that competence in complete liberty without regard to the principles of Community law."

> Consequently, without having to decide whether the right of registration is a retained power or whether the Community could legislate at any time in that field, it must be held that in exercising that competence the Member States must comply with the general rules of the Treaty.[63]

His conclusion is based on reasoning by analogy. He suggested that what applied in the field of monetary policy also held true for the registration of vessels. Indeed, he referred to an assertion made by the Court on several occasions in cases pertaining to the field of monetary policy:

> [T]he fact that Member States retain certain monetary powers does not entitle them to take unilateral measures prohibited by the Treaty.[64]

123. Such a principle, according to which Member States may not rely on the retained character of their powers to take unilateral measures in the monetary policy field, goes back to the aforementioned Cases 6 & 11/69 *Commission v. France*.[65] These decisions have had decisive implications for the enshrinement of the distinction between existence and exercise of national powers in the Court's case law. As two commentators noted at the time, they reflect "a clash of two concepts on the nature of the economic integration in the Communities."[66] The French Republic, as seen above, relied on a "premise of a complete sovereignty in the monetary field" while the European Commission argued that "these powers had to be exercised in such a manner that no conflict could arise with the exigencies of the Common Market."[67] The Court adopted the view of the European Commission view and held that:

> The exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty.[68]

This assertion is of major importance. For the first time, the European Court of Justice had to answer the question as to whether the exclusive character of the powers retained by Member States automatically legitimated possible encroachments upon powers of the then European Economic Community when the former were being exercised. The Court answered negatively by putting forward two main arguments. First, admitting unilateral actions would negate

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[63] Ibid., 8.
[64] Case 127/87, *Commission v. Greece*, [1988] *ECR* 3333, 7, quoted in MISCHO's opinion at 7. See also Case 57/86, *Greece v. Commission*, [1988] *ECR* 2855, 9: "As regards the argument that the repayment of interest is merely monetary in character, it is sufficient to point out that the Court has held [...] that the exercise by the Member States of the powers retained by them in the monetary field do not permit them unilaterally to adopt measures prohibited by the Treaty."
[65] Cases 6 & 11/69, *Commission v. France*, [1969] *ECR* 523.
[66] BRINKHORST L.J. & VEROUGSTAETE I.M., 7 *C. M. L. Rev.* 486 (1970).
[67] Ibid.
[68] Cases 6 & 11/69, *Commission v. France*, [1969] *ECR* 523, 17.

European powers.[69] Accordingly, this would be at odds with the principle of effectiveness. Second, this would be contrary to the principle of loyal cooperation.[70] In other words, the Court refused to recognize the existence of a "nucleus of sovereignty that Member States c[ould] invoke, as such, against the Community."[71]

124. This way of reasoning very much resembles the approach developed by the Court of Justice in *De Gezamenlijke Steenkolenmijnen in Limburg*, decided in 1961 in the framework of the European Coal and Steel Community.[72] This case also concerned the field of state aid. The Federal Republic of Germany had granted an aid to miners in the form of tax benefits. Unsurprisingly, the Court started by alluding to the conferral principle:

> Under the Treaty, those sectors of the economy of the Member States which do not come within the province of the Community are not subject to the decisions of the High Authority.[73]

The Court subsequently found that social policy and fiscal policy fell within these sectors, but, interestingly enough, it also noted that Member States could detrimentally affect the conditions of competition in the coal or steel industry through the exercise of their retained powers.[74] It went on by adding that "in order to safeguard the existence of the Common Market," European Institutions should be able to shape the exercise of national retained powers.[75] Following this line of reasoning, it finally held that the then Article 67, which endeavored to "ensure the establishment, maintenance and observance of normal competitive conditions," was:

> [D]esigned to enable the jurisdiction of the Community to impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to

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[69] Ibid., 15: "Articles 108(3) and 109(3) confer powers of authorization or intervention on the Community institutions which would be otiose if the Member States were free, on the pretext that their action related only to monetary policy, unilaterally to derogate from their obligations under the provisions of the Treaty and without being subject to control by the institutions."

[70] Ibid., 16: "the solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty, is continued for the benefit of the states in the procedure for mutual assistance provided for in Article 108 where a Member State is seriously threatened with difficulties as regards its balance of payment."

[71] Terms borrowed from K. LENAERTS, "Constitutionalism and the many faces of federalism," 38: 2 *The American Journal of Comparative Law* 220 (1990). See also, by the same author, K. LENAERTS, *Le juge et la Constitution aux États-Unis d'Amérique et dans l'ordre juridique européen*, (Brussels: Bruylant, 1988), 482s.

[72] Case 30/59, *De Gezamenlijke Steenkolenmijnen*, [1961] *ECR* 1.

[73] Ibid., 23.

[74] Ibid., 24.

[75] Ibid., 24.

> prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised.[76]

Accordingly, the idea was already present in 1961 that intrusions into national spheres of powers are necessary to preserve the effectiveness of European Union law.

125. This inquiry into the roots of the formulae used in contemporary free movement cases involving powers retained by Member States is revealing. It shows, first of all, that the principles embodied in these formulae were originally developed in cases pertaining to the field of state aid. These principles are therefore not an exclusive feature of free movement cases involving retained powers. The Court of Justice has, instead, imported them from other fields – and adapted them. This is confirmed by the fact that, nowadays, it also follows this reasoning in a range of external relations cases. *Centro-com*,[77] which concerned sanctions adopted by the European Union against Serbia and Montenegro, and in particular the decision of the Bank of England to preclude a British bank from transferring money from a Yugoslav account to a company governed by Italian law, is a good illustration. After explicitly referring to Cases 6 & 11/69,[78] the Court held that:

> Consequently, while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy provided for by Article 113 of the Treaty.[79]

Thus, not only did the reasoning developed in the 1961 and 1969 rulings pave the way for the approach prevailing in free movement cases involving powers retained by Member States, it also laid the foundations of cases pertaining to other fields of European Union law. Second of all, this inquiry also shows that, taken together, the formulae reflect the Court's understanding of European integration and its ongoing willingness to preserve the jurisdiction of the European Union. Member States may not ignore the obligations arising from the Treaty, by acting unilaterally, if the exercise of their retained powers jeopardizes the integrity of European powers and, ultimately, the European integration process.

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[76] Ibid., 24 (Emphasis added).
[77] Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] *ECR* I-81. See, *Supra*, § 89.
[78] Ibid., 25.
[79] Ibid., 27. It is interesting to note that the Court of Justice developed this specific way of reasoning in response to the argument developed by the UK whereby "the national measures at issue in the main proceedings were taken by virtue of its national competence in the field of foreign and security policy and that performance of its obligations under the Charter and under resolutions of the United Nations falls within that competence." (See Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] *ECR* I-81, 23).

c. An effect-based approach

126. The approach developed by the Court of Justice at the applicability stage of cases involving powers retained by Member States distinguishes itself from traditional free movement cases in another respect. Indeed, the distinction drawn between existence and exercise of power reveals that the Court thinks in terms of *effects* not only at the restriction stage, but also in the course of the assessment of whether European Union law is applicable to the facts of the case.

127. Traditional cases. As recalled earlier,[80] in free movement cases, the traditional assessment of the applicability of European Union law consists in inquiring whether there exist connecting factors between the personal, material, spatial, and temporal scopes of the fundamental freedom and the national measure at hand. As far as the material scope is concerned, the Court examines whether a link between the object of the national measure and the material scope of the fundamental freedom can be established. Thus, for instance, for the Treaty provision on free movement of goods to apply, the Court verifies that the national measure that is suspected of infringing Article 34 TFEU does regulate goods that meet the definition given by the Court of Justice in its previous case law i.e. that the regulated goods are "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions."[81] In terms of powers, this means that the Court verifies that the object of the national power at hand can be linked with the material scope of one of the fundamental freedoms. If not, the Court rules out the applicability of European Union law.

128. Cases involving powers retained by Member States. A review of the cases involving powers retained by Member States shows that the Court proceeds differently at the applicability stage. The Court of Justice does not seek to establish a link between the respective objects of the national measures taken in the exercise of retained powers and the material scope of one of the fundamental freedoms. Instead, it systematically starts from the premise that the various fields analyzed herein fall within the ambit of national powers. To take one example, in the field of nationality, it states, for instance, that "it is for each Member State [...] to lay down the conditions for the acquisition and loss of nationality."[82] However, as seen earlier, it also

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[80] See, *Supra*, §§ 95s.

[81] Case 7/68, *Commission v. Italy*, [1968] *ECR* 423.

[82] And, in the field of direct taxation: "direct taxation falls within their competence;" surnames: "the rules governing a person's surname are matters coming within the competence of the Member States"; enforcement for the recovery of debts: "enforcement for the recovery of debts falls as a rule within the competence of the Member

constantly mitigates this assertion and adds directly afterwards that Member States must comply with European Union law while exercising their powers. The Court of Justice is not interested in the retained powers themselves, but in the *effects* that their exercise may have on the fundamental freedoms. Symmetrically, this implies that the Court is not interested in the object of the national measures adopted in the exercise of such powers, but in their *effects*. Therefore, the Court somehow acknowledges that the national measures taken in the exercise of retained powers have an *object* distinct from the material scope of the fundamental freedoms, which explains why the assessment of applicability differs from traditional cases. This emerges clearly from the following statement of *Decker*, the first case on cross-border health care. Alluding to *Duphar*,[83] where it was held for the first time that European Union law was applicable to the field of social security, the Court recalled that:

> The Court has held that measures adopted by Member States in social security matters which may affect the marketing of medical products and indirectly influence the possibilities of importing those products are subject to the Treaty rules on the free movement of goods.[84]

As it results from this statement, the applicability of European Union law does not stem from the existence of a link between the object of the national measure and the material scope of the fundamental freedom, but from the effects caused by the national measure on the free movement of goods.[85] In other words, for European Union law to be applicable, it is enough for the Court to find that the exercise of national retained powers affects one of the fundamental freedoms. This is a significant departure from its traditional approach. This effect-based line of reasoning is indeed reminiscent of the approach traditionally followed at

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States"; education: "Community law does not detract from the power of the Member States as regards, first, the content of education and the organization of education systems and their cultural and linguistic diversity [...] and, secondly, the content and organization of vocational training"; social security: "Community law does not detract from the power of the Member States to organize their social security systems"; compensation of civil war victims: "a benefit [...] which is intended to compensate civilian war victims for physical or mental damage [...] falls within the competence of the Member States;" and the right to strike: "in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down conditions governing the existence and exercise of the [right to strike]."

[83] Case 238/82, *Duphar*, [1984] *ECR* 523.

[84] Case C-120/95, *Decker*, [1998] *ECR* I-1831, 24. (Emphases added) See also, in the same vein, the Opinion in Case C-204/90, *Bachmann*, [1992] *ECR* I-249, 25: "it is only to the extent to which such rules have an impact on those freedoms that they come within the scope of Community law."

[85] See, in the same direction, D. RITLENG, "Les Etats membres face aux entraves," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 305.

the restriction stage of free movement cases.[86] Usually, the Court remains neutral and does not prejudge the restrictive character of the national measure at the applicability stage. Only once the applicability of European Union law is established does it examine the possible restrictive effects of the measure. However, by relying on the effects of the measure at the applicability stage in free movement cases involving powers retained by Member States, the Court alters its line of reasoning and thinks in terms of effects with anticipation. This is supported by the fact that in cases on retained powers, it generally does not dwell at length on the restriction stage. This peculiarity of the Court's approach ultimately results in blurring the dividing line between the first two steps of its reasoning.

2. A reasoning leading to the disjunction of the scope of application of European Union law from the scope of EU powers

129. The predominant approach of the Court of Justice at the applicability stage of free movement cases involving powers retained by Member States results in a substantial extension of the scope of application of European Union law, which raises significant concerns with respect to Member State autonomy.

a. The tremendous extension of the scope of application of European Union law

130. The scope of application of EU law is broader than and distinct from the scope of EU powers. The Court of Justice's particular approach at the applicability stage of free movement cases involving powers retained by Member States makes it very clear that the scope of application of European Union law is broader than the scope of European Union powers. Advocate General KOKOTT's Opinion under *Tas-Hagen*,[87] a case relating to the conditions of compensation of civil war victims, is quite interesting in this respect. The Advocate General dedicated a substantial part of her opinion to the analysis of the meaning and reach of the Court's applicability stage reasoning. She noted, in particular, the following:

> Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law.[88]
>
> [T]he classic fundamental freedoms apply also to matters in respect of which the Treaty grants the Community no powers or otherwise contains rules.[89]

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[86] See, e.g., Case 16/83, *Prantl*, [1984] *ECR* 1299; Case C-284/93 *Alpine Investments BV*, [1995] *ECR* I-1141; Case C-76/90, *Säger*, [1991] *ECR* I-4221; Case C-415/93, *Bosman*, [1995] *ECR* I-4921.
[87] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451.
[88] Ibid., 33.

She subsequently added that:

> [I]t would be equally inconsistent with the notion of Union citizenship as the fundamental status of all Union citizens, which they enjoy irrespective of any economic activity, if the Member States did not have to observe Union citizens' right to free movement in all areas but merely in individual matters in respect of which the Treaty grants the Community specific powers or other rules of Community law exist.[90]

In light of these rather straightforward statements, it is possible to make several observations. First, they show that, in the Advocate General's eyes, no distinction needs to be drawn between rulings involving the economic freedoms and those involving European Union citizenship. The same paradigm should apply in both cases. Second, she openly acknowledges that scope of application of European Union law and scope of European Union powers are to be distinguished – which confirms what A. DASHWOOD already noted back in 1996:

> What I mean by 'Community powers' are the authorizations the Treaty has given the institutions to do things. Discovering the limits of those authorizations is not the same as discovering the limits of the Treaty's scope of application.[91]

As far as free movement cases involving powers retained by Member States are concerned, "discovering the limits of the Treaty's scope of application" consists in focusing on the effects of the national measure at hand: the Court of Justice deems European Union law applicable as soon as the exercise of national powers affects the fundamental freedoms or, in other words, as soon as a measure affects the exercise of the fundamental freedoms. Accordingly, not only is the scope of application of the provisions relating to the fundamental freedoms and European Union citizenship *broader* that the scope of European Union powers, but it is also *distinct*.

131. This need for distinguishing between scope of European Union law and scope of European Union powers is also expressed in the literature relating to the law of the external relations of the European Union. As pointed out earlier,[92] the Court of Justice also happens to distinguish between existence and exercise of external powers. A range of authors have noticed that it increasingly relies on the scope of European Union law, seen as distinct from the scope of European Union powers in the field of external relations, in order to impose obligations of a new kind on Member States. These authors show that European Union law imposes

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[89] Ibid., 35.
[90] Ibid., 38.
[91] A. DASHWOOD, "The limits of European Community powers," *Eur. Law Rev.* 114 (1996).
[92] See, *Supra*, § 89.

obligations on Member States not only when the exclusive powers of the European Union or the powers shared between the Member States and the European Union are at stake, but also when national external retained powers are involved.[93] M. CREMONA, in particular, refers to examples such as the "bilateral agreements concluded by a Member State on its own account" or the "agreement to which the Community (as well as the Member States) is a party."[94] In the field of external relations, the duty of cooperation therefore requires Member States to comply with the Union interest, seen as covering the scope of the law of the external relations of the European Union, and not only the scope of European Union external powers.[95] Here again, the former is to be understood as being broader than, and distinct from, the latter.

132. All in all, the examples of the power-based approach and of the external relations of the European Union reveal that the Court of Justice is quick to distinguish between the scope of European Union law and the jurisdiction held by the European Union to conclude on the applicability of European Union law. And it does so with respect to the various fields of the law of the European Union, such as the law of free movement or the law of external relations.

133. The Court's understanding of the interplay between the European Union and national legal orders.[96] As seen in Section 1, following a dual understanding of the interplay between the European and national legal orders, the Member States are of the view that European Union and national powers fall within two exclusive and autonomous spheres of powers which should be strictly separated out. Each entity – the European Union and the Member States – is supreme within its own spheres of powers. Therefore, such a perspective calls for a strict interpretation of the principle of primacy. However, free movement cases involving powers retained by Member States, as well as external relations cases involving powers of the same nature, reveal that the Court's understanding of the interplay between the European Union

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[93] See, *inter alia*: G. DE BAERE, *Constitutional principles of EU external relations*, (Oxford; New York: Oxford University Press, 2008), 258; R. HOLDGAARD, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*, (Alphen aan den Rijn: Kluwer Law International, 2008), 125s; M. CREMONA, "Defending the Community interest: The duties of cooperation and compliance," in EU Foreign Relations Law: Constitutional Fundamentals, (Eds.) M. CREMONA & B. DE WITTE, (Oxford/Portland: Hart Publishing, 2008), 125-169; E. NEFRAMI, "The duty of Loyalty: Rethinking its scope through its application in the field of EU external relations," 47: 2 *C. M. L. Rev.* 342 (2010).

[94] M. CREMONA, "Defending the Community interest: The duties of cooperation and compliance," above, n. 93, 153.

[95] This is the main argument of M. CREMONA in "Defending the Community interest: The duties of cooperation and compliance," above, n. 93. See also E. NEFRAMI, "The duty of Loyalty: Rethinking its scope through its application in the field of EU external relations," above, n. 93, 333s.

[96] See, *Infra*, §§ 422s.

and national legal orders is fundamentally different. Indeed, by applying European Union law requirements to fields not falling directly within European Union powers, the Court of Justice considers European and national spheres of powers inextricably intertwined. In other words, it acknowledges that there are different spheres of powers, but it also assumes that they may interact. The exercise of the powers retained by Member States does have effects on European Union powers, which justifies the applicability of European Union law. For if Member States could act unilaterally within their own spheres of powers, they would be likely to affect the jurisdiction of the European Union and to ultimately jeopardize them. It is on this basis that Advocate General KOKOTT justified, in *Tas-Hagen*, the intrusions of European Union law into national spheres of powers:

> [T]he fact that [EU law] can produce its effects primarily in fields which are not (yet) harmonized is consistent with the spirit and purpose of the fundamental freedoms and precisely an expression of their direct applicability. To make the application of a fundamental freedom subject to the existence of a harmonizing measure would ultimately be to deprive it of direct effect.[97]

According to this statement, disconnecting the scope of European Union law from the scope of European Union powers is necessary to preserve the direct effect – and hence the effectiveness – of the fundamental freedoms. Such an understanding entails that Member States may not claim to be supreme within their own spheres of powers. Even when they exercise their retained powers, they must comply with the obligations derived from European Union law, and, therefore, with the primacy principle. In other words, as M. CREMONA pointed out with respect to the field of external relations, the objectives of the Treaty are to be attained "through action not only of the Community itself but also by the Member States."[98] However, it may be feared that the Court of Justice's approach in free movement cases involving powers retained by Member States – as well as in the field of external relations – results in the undermining of Member State autonomy.

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[97] Opinon under Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 36.

[98] M. CREMONA, "Defending the Community interest: The duties of cooperation and compliance," above, n. 93, 126. A. DASHWOOD, "The limits of European Community powers," above, n. 91, 114, already noted that "the Member States, too, have a part to play through the observance of rules that require them sometimes to take action, but more often to refrain from exercising, or from exercising fully, powers that would normally be available to them as incidents of sovereignty."

b. The risk of eroding Member State autonomy

134. A Pandora's box? The Court of Justice faces a very sensitive dilemma. On the one hand, allowing Member States to act unilaterally within the spheres of their retained powers would jeopardize the effectiveness of European Union law, and therefore the exercise of European Union powers, as well as individual rights deriving from the fundamental freedoms and European Union citizenship provisions. And yet, on the other hand, continuously extending the scope of European Union law results in a substantial extension of European legality,[99] which may ultimately result in the entrenching of an unlimited scope of application of European Union law. The Court of Justice approach, based on the distinction between the existence and exercise of powers, does indeed inevitably pave the way for the applicability of European Union law: it seems quite impossible to come up with arguments capable of countering the reasoning whereby the exercise of national powers may affect European Union powers. As L. AZOULAI puts it, "there is virtually no area of economic and social life which escapes, in principle, the effect of the Treaty rules."[100] In other words, any matter may potentially fall within the scope of application of the economic freedoms and/or European Union citizenship provisions. Accordingly, this approach goes against the commonly accepted idea that European integration is only a partial phenomenon, in the sense that it only covers limited sectors of activity. According to this view, it is not meant to encompass the entirety of the traditional roles of a state.[101]

135. The obligation to justify national policy choices. Admittedly, broadening the scope of application European Union law by applying the free movement principle each time a national measure has effects on European Union rules does not necessarily result in finding that the measure is contrary to European Union law. But the Court of Justice's way of reasoning does have significant implications for the Member States. Indeed, as will be shown in the following chapters, free movement cases involving powers retained by Member States are characterized, like traditional free movement cases, by the fact that the Court of Justice makes a very broad

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[99] This phenomenon of constant extension of the scope of EU law has been considerably amplified since the introduction of European Union citizenship, as shown by E. SPAVENTA, "Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects," 45 *C. M. L. Rev.* 13-45 (2008).

[100] L. AZOULAI, "The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization," 45:5 *C. M. L. Rev.* 1340 (2008).

[101] P. PESCATORE, "Fédéralisme et intégration: Remarques liminaires," (1973) in *Études de Droit Communautaire Européen 1962-2007*, (Brussels: Bruylant, 2008), 454.

interpretation of the notion of restriction and concludes, in the vast majority of cases, that the national measure at issue is restrictive. Logically, the European judge then subjects the national measure to the proportionality test, which may be very intrusive. At this stage, Member States bear the burden of proof. They must demonstrate that their measures are justified by legitimate goals recognized by the Court itself, and that they are moreover necessary and proportionate. This often boils down to requiring Member States to justify national policy choices in fields where the European Union has nonetheless no, or very limited, jurisdiction. This approach, based on the disjunction of the scope of application of European Union law from the scope of European Union powers, therefore leads the Court to indirectly rule on Member States own policy choices that are embodied in their national measures.[102] The fear that Member State autonomy is weakened by these intrusions into national spheres of jurisdiction is all the more significant since, as seen in the previous chapter, powers retained by Member States pertain to core components of Member State political and social autonomy.

CONCLUSION OF CHAPTER 2.

136. Chapter 2 has shed light on the second fundamental feature of the Court of Justice's power-based approach. It has set out the various paradigms relating to the determination of the scope of application of European Union law. According to the Member States, and to certain cases involving the field of education, there is a correspondence between scope of application and scope of European Union powers. However, the Court's current prevailing approach consists in dissociating the two, and in applying European Union law each time a national measure adopted within the exercise of powers retained by Member States has effects on European powers.

137. The concerns raised by the Court of Justice original approach. The predominant line of reasoning of the Court of Justice raises several ranges of issues. These issues pertain, first of all, to the grounds on which the Court of Justice approach may be justified. The example of the field of education sheds light on a fundamental difference between the various approaches that may be taken by the Court. An approach based on the correspondence between national and

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[102] Several authors have pointed this out. See, for instance, L. AZOULAI, "Le rôle constitutionnel de la CJCE tel qu'il se dégage de sa jurisprudence," *Revue Trimestrielle de Droit Européen* 35 (2008), who talks about a *"cadre de comparution."* See also D. RITLENG, "Les Etats membres face aux entraves," above, n. 85; K. LENAERTS, "L'encadrement par le droit de l'Union européenne des compétences des Etats membres," in *Mélanges Jacquet*, (Paris: Dalloz, 2010); V. MICHEL, *Recherches sur les compétences de la Communauté*, (Paris: L'Harmattan, 2003).

European powers has the advantage of being rooted in the principle of conferral. However, the approach based on the distinction between existence and exercise of power as well as on the effect of national measures may only be justified by the abstract principles of effectiveness and *effet utile*, which may seem, in the eyes of the lay man, as much looser and much more difficult to capture than the rather formal conferral principle.[103] Second of all, these issues also pertain to the fear of seeing Member State autonomy undermined. Admittedly, the idea of applying European Union law to spheres composed of powers retained by Member States is not new. It goes back to early cases decided in the 1960s.[104] But the fundamental new factor to be taken into account is that this approach continuously spreads to new areas relating to the core of Member State political and social autonomy. The Court's approach may therefore be described as increasingly intrusive.

138. Assessing the nature of the intrusions of EU law into national spheres of powers. While Chapter 2 has shown how the Court of Justice broadens the scope of application of European Union law in such a way as to enable intrusions into national spheres of powers relating to Member States autonomy, Chapter 3 focuses more specifically on the nature of these intrusions. The third main feature of the Court's power-based approach is characterized by the fact that the Court of Justice carries out a 'mutual adjustment resolution.'

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[103] See, on the rationale behind the power-based approach, *Infra*, §§ 360s.

[104] In this regard, P. PESCATORE already alluded to it as early as 1972: P. PESCATORE, *Le droit de l'intégration: Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés européennes*, (Leiden: A.W. Sijthoff, 1972).

CHAPTER 3. A MUTUAL ADJUSTMENT RESOLUTION

INTRODUCTION OF CHAPTER 3.

139. Purposes of Chapter 3. Chapter 3 focuses on the third and last fundamental feature of the Court of Justice's power-based approach. This feature relates to the issue as to how, in practice, the Court settles jurisdictional disputes involving the free movement principle and the powers deemed as retained by Member States. My main point here is that this settlement can be best described as a 'mutual adjustment resolution.' This concept aims to reflect the two fundamental components of the Court of Justice approach. On the one hand, the Court softens its traditional approach in several significant respects. However, on the other hand, it compels Member States to comply with European Union law by imposing constraining and particular obligations, that I designate as 'adjustment requirements.'

140. Approach. Chapter 3 is in line with the approach I have followed so far. It consists in drawing comparisons between cases involving retained powers and traditional free movement cases. I assume, once again, that the Court of Justice uses its traditional 'free movement concepts,' but that it alters them in such a way as to cope with the specific issues raised by cases involving powers retained by Member States. While Chapter 1 covered the overall reasoning of the Court, and Chapter 2 pertained to the applicability stage, Chapter 3 deals more specifically with the restriction and justification stages of the rulings analyzed herein.

141. Outline of Chapter 3. In Section 1, I start by identifying the first facet of the Court of Justice's 'mutual adjustment resolution.' To this end, I show that, when retained powers are involved, the Court adjusts its own approach towards more flexibility than in traditional free movement cases. In Section 2, I focus on the second facet of the Court's approach, by shedding light on the content of the adjustment requirements placed upon Member States.

SECTION 1. THE COURT OF JUSTICE SELF-IMPOSED ADJUSTMENTS

142. A review of the cases involving powers retained by Member States reveals that the Court of Justice tends to be more flexible than it generally is with respect to the two steps of the

justification stage, i.e. the admission of justifications, and the assessment of proportionality. In this context, Section 1 shows that the Court combines two complementary types of leeway, which relate to the nature of the acceptable grounds of justification, and to the intensity of the assessment of proportionality respectively.

143. The proportionality test. Before going into further details, I shall recall the main features of the proportionality test, which I refer to frequently in the following paragraphs. Authors generally describe the structure of the proportionality inquiry as being divided into the three following steps:[1] (i) the suitability test, which consists in articulating the State's interest[2] or, in other words, in verifying whether the ends of the measure justify the means;[3] (ii) the necessity test, under which the Court weighs the competing European Union and national interests, and focuses on the question of whether there exist less restrictive measures;[4] and, finally, (iii) the proportionality test *stricto sensu*, according to which a measure is deemed disproportionate if the restriction it causes is "out of proportion to the intended objective or the result achieved."[5] In addition, scholars normally agree that, as far as traditional free movement cases are concerned, "the proportionality principle does not have just one specific form, but is, on the contrary, flexible."[6] The review of national measures may be strict, rather deferential, or somewhere between the two.[7] The Court generally takes into account several factors, which explains why the intensity of the proportionality test varies from case to case. They relate to the nature of the

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[1] See Case C-55/94, *Gebhard*, [1995] *ECR* I-4165, 37: "[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

[2] G. DE BÚRCA, "The principle of proportionality and its application in EC Law," 13 *YEL* 105, 113 (1993).

[3] C. BARNARD, "Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?," in *The outer limits of European Union law*, (Eds.) C. BARNARD & O. ODUDU, (Oxford: Hart Publishing, 2009), 282; J. H. JANS, "Proportionality revisited," 27: 3 *LIEI* 239, 240 (2000).

[4] G. DE BÚRCA, "The principle of proportionality and its application in EC Law," above, n. 2, 113; C. BARNARD, "Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?," above, n. 3, 282; J. H. JANS, "Proportionality revisited," above, n. 3, 240.

[5] J. H. JANS, "Proportionality revisited," above, n. 3, 241; G. DE BÚRCA, "The principle of proportionality and its application in EC Law," above, n. 2, 113. However, as noted by W. VAN GERVEN, "The effect of proportionality on the actions of Member States of the European Community: National viewpoints from continental Europe," in *The principle of proportionality in the laws of Europe*, (Ed.) E. ELLIS, (Oxford/Portland: Hart 1999), 37, the Court often only refers to the first two elements of the proportionality test.

[6] J. H. JANS, "Proportionality revisited," above, n. 3, 263. See also G. DE BÚRCA, "The principle of proportionality and its application in EC Law," above, n. 2, 111; N. HÖS, "The principle of proportionality in the *Viking* and *Laval* cases: An appropriate standard for judicial review?," (*EUI Working Papers*, Law 2009/6), 5.

[7] G. DE BÚRCA, "The principle of proportionality and its application in EC Law," above, n. 2, 111.

interests involved as well as their subject matter,[8] and to the seriousness of the infringement caused by the national measure.[9] They reflect the two main concerns kept in mind by the Court. First, the Court takes into account the sensitive division of powers between the judiciary and the legislature.[10] It is likely to adopt a deferential approach when a case involves key-policy choices that only the legislator, democratically accountable, can reasonably make and enforce. On the contrary, it is prone to scrutinize legal issues more rigorously.[11] Second, and perhaps more importantly, the Court of Justice also takes into account the federal dimension that characterizes the division of powers between the European Union and its Member States.[12] All in all, G. DE BÚRCA has summarized the Court's approach as follows:

> The more important the Community interest, and the more restrictive the impact of the measure upon it, the more likely the Court is to look closely for a less restrictive measure, but this will also depend on the nature of the State's aim in adopting the measure.[13]

Therefore, the Court makes various uses of the proportionality principle. For instance, it may develop an economic cost/benefit analysis, a 'not manifestly appropriate' test or the 'no less restrictive means' test, the latter being the sign of strict scrutiny.[14] It may also decide to leave the actual assessment of proportionality to the national courts, which is a sign of a rather deferential approach.[15]

144. I have divided Section 1 into two parts. The first paragraph sets out specific examples illustrating the Court of Justice's flexible assessment of proportionality when powers retained by Member States are involved. The second paragraph attempts to draw a more general pattern characterizing the entirety of the power-based approach.

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[8] Ibid., 114; N. HÖS, "The principle of proportionality in the *Viking* and *Laval* cases: An appropriate standard for judicial review?," above, n. 6, 6; J. H. JANS, "Proportionality revisited," above, n. 3, 246.
[9] N. HÖS, "The principle of proportionality in the *Viking* and *Laval* cases: An appropriate standard for judicial review?," above, n. 6, 6; J. H. JANS, "Proportionality revisited," above, n. 3, 264; G. DE BÚRCA, "The principle of proportionality and its application in EC Law," above, n. 2, 148.
[10] J. H. JANS, "Proportionality revisited," above, n. 3, 264.
[11] G. DE BÚRCA, "The principle of proportionality and its application in EC Law," above, n. 2, 111.
[12] Ibid., 112.
[13] Ibid., 146, 147. See also T. TRIDIMAS, "Proportionality in Community law: Searching for the appropriate standard of scrutiny," in *The principle of proportionality in the laws of Europe*, (Ed.) E. ELLIS, (Oxford/Portland: Hart 1999), 76-77.
[14] N. HÖS, "The principle of proportionality in the *Viking* and *Laval* cases: An appropriate standard for judicial review?," above, n. 6, 5.
[15] J. H. JANS, "Proportionality revisited," above, n. 3, 255. For another typology, see, for instance, N. REICH, "How proportionate is the proportionality principle in the internal market case law of the ECJ?," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W. MICKLITZ & B. DE WITTE, (Cambridge; Antwerp: Intersentia; Oxford, 2011), 101.

1. Specific examples of flexible assessment of proportionality

145. To begin with, the Court of Justice has, in some cases involving powers retained by Member States, either granted full discretion to Member States, tolerated restrictions on access, or recognized that Member States should enjoy broad margins of appreciation. This departs from most of its traditional free movement cases, even if flexible assessments of proportionality are nevertheless not entirely absent from notable decisions[16] relating, for instance, to the fields of lotteries,[17] waste regulation,[18] public distribution of medicinal products,[19] or supply of petroleum products.[20]

146. The recognition of full discretion. This first hypothesis, which consists in recognizing that Member States have full discretion in a given area, is very marginal in the Court of Justice's traditional case law. It has concerned, so far, only one case on powers retained by Member States. This decision, *Kaur*,[21] related to the issues of attribution of nationality and the content of the rights attached to it. Mrs. Kaur was born in Kenya in 1949, and hence became citizen of the United Kingdom and colonies. British law subsequently changed, and she became a British Overseas citizen. However, this status did not confer the right to enter or remain in the United Kingdom. Accordingly, she could not exercise any right derived from European Union law. She claimed that European Union citizenship required the United Kingdom to change the criteria for attribution as well as the content of nationality in such a way as to allow her to move and reside freely within the European Union.[22] The Advocate General took a different view and argued that European Union law was not applicable to the facts of the case because the requirement of a cross-border element was lacking.[23] The Court reached a similar conclusion but used a very different line of reasoning. It relied entirely on a 1972 Declaration annexed to the Treaty of accession of the United Kingdom, further to which this Member State was to define unilaterally the category of United Kingdom nationals falling within the scope of the

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[16] See, for instance, L. AZOULAI, "The European Court of Justice and the duty to respect sensitive national interests," in *Judicial activism at the European Court of Justice: causes, responses and solutions*, (Eds) M. DAWSON, B. DE WITTE & E. MUIR, (Cheltenham: Edward Elgar, 2013), 167, 184-185.
[17] Case C-275/92, *Schindler*, [1994] *ECR* I-1039.
[18] Case C-2/90, *Commission v. Belgium*, [1992] *ECR* I-4471.
[19] Case C-369/88, *Delattre*, [1991] *ECR* I-1487.
[20] Case 72/83, *Campus Oil*, [1984] *ECR* 2727.
[21] Case C-192/99, *Kaur*, [2001] *ECR* I-1237. See H. TONER, 39 *C. M. L. Rev.* 881-893 (2002).
[22] Opinion in Case C-192/99, *Kaur*, [2001] *ECR* I-1237, 26.
[23] Ibid., 33.

European Union Treaties.[24] In other words, the Court refused to place any limitation on the discretion enjoyed by the United Kingdom with respect to the rules on acquisition of nationality.

147. The Court of Justice latitude with respect to restrictions on access. The second hypothesis, also marginal, pertains to cases in which the Court has shown some latitude with respect to restrictions on access. These cases relate to the issue of access to higher education in Austria and Belgium respectively. These Member States both apply the principle of unrestricted access to their higher educational systems, which implies, as seen earlier, that access is open to any holder of a secondary-school certificate.[25] However, these two countries used to reserve the application of this principle for their own residents. The Court found that these two national rules violated the free movement principle. Indeed, Austria imposed different conditions on the holders of secondary education diplomas obtained in other Member States.[26] As for Belgium, it adopted a Decree regulating the number of students in certain programs in the first two years of undergraduate studies in higher education.[27] This Decree laid down a *numerus clausus* for enrolment by nonresidents, and defined residents as individuals having both their principal residence in Belgium, and the right of permanent residence in Belgium. Surprisingly enough, the Court of Justice has not wholly excluded the possibility for Member States to maintain restrictions of this nature – even though it has subjected this possibility to many substantive and procedural requirements.[28]

148. In *Commission v. Austria*, the Court accepted the justification based on the safeguarding of the homogeneity of the Austrian higher or university education system.[29] The reason why it found the measure disproportionate is because:

> [N]o estimates relating to other courses have been submitted to the Court [...]. The Republic of Austria has conceded that it does not have any figures [proving that the existence of the Austrian education system in general in the safeguarding of the homogeneity of higher education in particular would be jeopardized]. Moreover, the

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[24] Case C-192/99, *Kaur*, [2001] *ECR* I-1237, 23-27. See §27: "in order to determine whether a person is a national of the United Kingdom of Great Britain and Northern Ireland for the purposes of Community law, it is necessary to refer to the 1982 Declaration which replaced the 1972 Declaration."
[25] See, *Supra*, § 51.
[26] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969. See, e.g. C. RIEDER, 43 *CMLR* 1711-1726 (2006).
[27] Case C-73/08, *Bressol*, [2010] *ECR* I-2735.
[28] See, *Infra*, §§ 181s.
[29] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 50s.

> Austrian authorities have accepted that the national legislation in question is essentially preventive in nature.[30]

Therefore, had Austria been able to provide statistical evidence showing that the flow of nonresident students risked jeopardizing the organization of its higher educational system, the Court would probably have been inclined to give this Member State more leeway with respect to the conditions of access. Nonetheless, this risk must be not only potential, but also actual.[31]

149. Nor has the Court wholly precluded the possibility of Belgium restricting access to its educational system in *Bressol*, where it has adopted a similar approach. Here, Belgium relied on a justification based on public health. It argued that implementing unrestrictive access for nonresidents would cause a "significant reduction in the quality of teaching in the medical and paramedical courses,"[32] as well as a "shortage of qualified medical personnel throughout the territory."[33] The Advocate General herself acknowledged that:

> It is conceivable that circumstances might arise in which a real, serious and imminent threat to the quality of university education in a specific sector was shown to exist. The court might, in such a case, wish to re-examine whether indirectly discriminatory measures to counter such a threat are in principle capable of objective justification.[34]

As for the Court, it held that:

> [W]hen specifically assessing the circumstances of the case in the main proceedings, the referring court must take into account the fact that, where there is uncertainty as to the existence of extent of the risks to the protection of public health in its territory, the Member State may take protective measures without having to wait for the shortage of health professionals to materialize [...]. The same applies with regard to the risks of the quality of education in that field.[35]

150. Thus, the Court has admitted that two main grounds could, under specific circumstances, justify restrictions on access in the field of education. Member States must demonstrate that giving full effect to free movement rights would put the organization of their educational system at risk or would imperil public health. Therefore, in *Commission v. Austria* and *Bressol*, the Court departed from its traditional approach, according to which restrictions on access are generally considered as causing the most serious threats to the free movement

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[30] Ibid., 65.
[31] N. NIC SHUIBHNE & M. MACI, "Proving public interest: the growing impact of evidence in free movement case law," 50 *C. M. L. Rev.* 965, 983-984 (2013).
[32] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 56.
[33] Ibid., 59.
[34] Opinion in Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 112.
[35] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 70.

principle.[36] The flexible character of the Court's approach is all the more surprising that the Austrian and Belgian measures amounted to indisputable differences in treatment. They indeed clearly aimed at preventing nonresident students from accessing their educational systems under the same conditions as residents.

151. The margin of appreciation doctrine. The last particular hypothesis where the Court of Justice has given more leeway to the Member States than it usually does, the margin of appreciation doctrine, is more common than the two previous ones. This doctrine consists in recognizing that Member States have margins of appreciation. The Court makes use of it in both positive integration cases and traditional free movement cases.[37] As far as cases involving powers retained by Member States are concerned, it has used it in two main instances. It has first applied the principles stemming from *Omega*[38] in *Wittgenstein*,[39] a case on rules governing surnames, which concerned the Austrian constitutional rule prohibiting the bearing of any title of nobility. A German national whose surname included a former title of nobility had adopted an Austrian national in Germany. In this latter country, existing titles become part of the family name. The Austrian authorities refused to acknowledge the title of nobility, and obliged the Austrian national to change her name in Austria. The Court found that the Austrian measure infringed European Union citizenship provisions. While reviewing proportionality, it recalled that the concept of public policy as justification was to be interpreted strictly.[40] However, in a similar fashion to *Omega*, it held that:

> The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one area to another. The competent national authorities must therefore be allowed a wide margin of discretion within the limits imposed by the Treaty.[41]

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[36] C. BARNARD, *The substantive law of the EU: The four freedoms*, (Oxford, New York: Oxford University Press, 2007), 776.

[37] See e.g. M. FOROWICZ, "State Discretion as a Paradox of EU Evolution," (*EUI Working Paper* MWP) 2011/27; J. A. SWEENEY, "A 'margin of appreciation' in the internal market: Lessons from the European Court of Human Rights," 34: 1 *Legal Issues of Economic Integration* 27-52 (2007).

[38] Case C-36/02, *Omega*, [2004] *ECR* I-9609.

[39] Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693.

[40] Ibid., 86.

[41] Ibid., 87. And it added, at 91: "it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State."

Wittgenstein thus shows that the Court is inclined to recognize wide margins of discretion for Member States when "morally and culturally sensitive matters are at issue."[42]

152. The Court of Justice has also used this doctrine in such a way as to reflect the necessity of respecting the division of powers between the European Union and its Member States. This is particularly striking in cases relating to the compensation of civil war victims, where the Court has twice acknowledged that:

> With regard to benefits that are not covered by Community law, Member States enjoyed a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to society, while at the same time complying with the limits imposed by Community law.[43]

This statement confirms that the absence of European Union power justifies the existence of a wide margin of appreciation for Member States. To hold otherwise would result in the imperilment of the organization of the system of such benefits and could indeed create a legal loophole where neither the Member States, nor the European Union could lay down award criteria, or, if the Court were to define such criteria itself, in judicial activism, i.e. the substitution of the Court for the legislator.

153. The Court has made a similar use of the margin of appreciation doctrine in other fields analyzed herein, even if it has not always phrased it in a similar manner.[44] In *Rottmann*, the Court recognized that Member States can, as a matter of principle, withdraw a decision of naturalization obtained by deception.[45] Similarly, as far as students' financial support is concerned, Member States are free to lay down award conditions – provided that they are non-discriminatory.[46] Likewise, they can require cross-border patients to obtain prior authorizations in order to receive treatment in hospital environment or in non-hospital environment if such

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[42] J. A. SWEENEY, "A 'margin of appreciation' in the internal market: Lessons from the European Court of Human Rights," above, n. 37, 28.

[43] Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 36; Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 38. See also the Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 41, 61.

[44] M. FOROWICZ, "State Discretion as a Paradox of EU Evolution," above, n. 37, 3: "The European Court of Justice has used synonymously various concepts which appear to have the approximate meaning of discretion. Some of the terms used include "margin of appreciation", "discretion", "margin of discretion", "power of discretion", "discretionary power", "it is for", "free to determine" or "latitude"."

[45] As seen earlier, the Court has indeed recognized in Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 59 that: "it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalization when that nationality has been obtained by deception."

[46] See e.g. Case C-209/03, *Bidar*, [2005] *ECR* I-2119.

treatments involve the use of major medical equipment.[47] Thus, even if, admittedly, the Court imposes adjustment requirements upon Member States,[48] it allows them, at the same time, to maintain entry/exit barriers. Another good illustration of this trend is direct taxation. In *Gilly*,[49] the appellants claimed that the Franco-German Convention entailed discriminatory taxation. France was their state of residence and the state of employment of Mr. Gilly. As for Mrs. Gilly, she worked in Germany and her income was taxed in this latter country. In accordance with the Convention between the two Member States, France taxed the whole of their income but granted them the right to a tax credit equal to the amount of the French tax in respect of tax paid abroad. The appellants argued that it was contrary to European Union law because this tax credit was inferior to the actual taxes that Mrs. Gilly had to pay in Germany. Both the Advocate General and the Court of Justice rejected their claim on the grounds that the "unfavorable consequences" arising from the application of the Convention were:

> [T]he result in the first place of the differences between the tax scales of the Member States concerned, and, in the absence of any Community legislation in the field, the determination of those scales is a matter for the Member States.[50]

The adjustment requirements imposed upon Member States do not amount to compelling them to alter their tax rates. Instead, they are free to determine the latter in a discretionary manner – provided that they do not discriminate between, for instance, residents and nonresidents.[51]

2. General pattern characterizing the power-based approach

154. Aside from the examples I have just mentioned, it is possible to identify a more general pattern reflecting the flexibility displayed by the Court of Justice. This pattern relates to the nature of the acceptable grounds of justification, and their assessment.

155. Traditional free movement cases. As a general rule, Member States may rely on two main categories of justifications to justify measures that are deemed restrictive by the Court. Initially,

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[47] See e.g. Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473; Case C-512/08, *Commission v. France*, [2010] *ECR* I-8833.
[48] See, *Infra*, §§ 177.
[49] Case C-336/96, *Gilly*, [1998] *ECR* I-2793.
[50] Ibid., 47. See the Opinion in Case C-336/96, *Gilly*, [1998] *ECR* I-2793, 19.
[51] This is confirmed by a case relating to corporate tax law. In Case C-311/97, *Royal Bank of Scotland*, [1999] *ECR* I-2651, above, the Court condemned a Greek tax provision according to which foreign companies were taxed at a 40% rate while domestic companied were taxed at a 35% rate. The Court was indifferent to the level of the tax, but took into account the fact such level did not equally burden domestic and foreign companies.

they could only refer to the derogations expressly laid down in the Treaty.[52] These derogations may be invoked with respect to discriminatory as well as indistinctly applicable measures. However, the Court has always interpreted them very restrictively.[53] They are therefore limited in scope. Member States may also justify their measures on the basis of mandatory requirements, a concept that was introduced in the seminal *Cassis de Dijon* case.[54] The Court created this second category concurrently with the obstacle approach, as a way to counterbalance the substantial extension of the scope of restrictions, which, from then on, encompassed both discriminatory and indistinctly applicable measures.[55] Public interest justifications give more latitude to Member States, since they allow them to protect a wider range of interests than express derogations. However, they may theoretically only be admitted if the restrictive measure is indirectly discriminatory or indistinctly applicable. The Court having never laid down precise criteria, the conditions for raising a public interest justification are quite unclear.[56] Overall, it would appear to be rather liberal, since it rarely rejects grounds put forward by the Member States before entering the proportionality stage.[57]

156. The analysis of the Court's traditional free movement cases nonetheless tends to show that the justifications admitted so far share three main features despite the variety of interests that they aim to protect. First, they must respect values that are shared and protected by a vast majority of Member States. Most of the justifications admitted encompass interests that are not protected at the European Union level, but that *could*, at some point, be protected at such a level. In this respect, it is often contended that there exists a functional link between the recognition of a public interest justification and the conferring of new harmonizing powers to

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[52] See Article 36 TFEU (derogations regarding the free movement of goods), Article 45§3 TFEU (derogations regarding the free movement of workers), Article 52 TFEU (derogations regarding the freedom of establishment), Article 62 TFEU (derogations regarding the freedom to provide services) and Article 65 TFEU (derogations regarding the free movement of capital).

[53] E. SPAVENTA, "On discrimination and the theory of mandatory requirements," 3 *The Cambridge Yearbook of European Legal Studies* 457, 466 (2000).

[54] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649.

[55] See L. W. GORMLEY, "The genesis of the rule of reason in the free movement of goods," in *The rule of reason: rethinking another classic of European legal doctrine*, (Ed.) A. A. M. SCHRAUWEN, (Groningen: Europa Law Pub., 2005), 19-33; C. BARNARD, *The substantive law of the EU. The Four Freedoms*, above, n. 36, 116; J. SCOTT, "Mandatory or imperative requirements in the EU and the WTO," in *The law of the single European market: Unpacking the premises*, (Eds.) C. BARNARD & J. SCOTT, (Oxford, Hart Publishing, 2002), 269; V. HATZOPOULOS, "Exigences essentielles, impératives ou impérieuses: *une* théorie, *des* théories ou pas de théorie du tout?," 34 *Revue Trimestrielle de Droit Européen* 191 (1998).

[56] V. HATZOPOULOS, "Exigences essentielles, impératives ou impérieuses: *une* théorie, *des* théories ou pas de théorie du tout?," above, n. 55, 191s.

[57] Ibid., 191s; V. HATZOPOULOS, "Recent developments of the case law of the ECJ in the field of services" 37 *C. M. L. Rev.* 43, 78 (2000).

the European legislator.[58] All in all, authors generally agree to describe the function of justifications as a means to temporarily protect interests that will subsequently be safeguarded at some point at the European Union level.[59] This leads to the identification of their second common feature. For justifications to be admitted, they must quite logically be compatible with the underlying principles and aims of the Treaty. Finally, they must not pursue economic aims. According to a well-enshrined principle, "[i]t is settled case-law that *economic grounds* can never serve as justification for obstacles prohibited by the Treaty."[60] The Court's stand on this issue is based on the basic idea that:

> If Member States were able to rely on economic grounds [...] they could stop the free movement the moment its impact is felt. Allowing Member States to limit free trade for economic reason would defeat the objective of the EC Treaty to replace purely national markets with a more efficient European one.[61]

157. Free movement cases involving retained powers. The Court of Justice case law involving powers retained by Member States reveals that the recognized justifications depart from the general framework laid down above in several important respects. Listing the justifications that the Court has recognized so far helps shed light on their peculiarities:

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[58] M. FALLON, *Droit matériel général de l'Union européenne*, (Brussels: Bruylant-Academia; Athens: Sakkoulas, 2002), 146. Case C-200/96, *Metronome Musik*, [1998] *ECR* I-1953 constitutes, for instance, a good illustration of a 'communitarization' of interests previously recognized by the Court's negative integration case law.[58] In this case, the legality of Directive 92/100/EEC of 19 November 1992 on rental right and lending right, and on certain rights relating to copyright in the field of intellectual property was challenged on the grounds that it was contrary to fundamental rights and constitutional law, in particular the freedom to pursue a trade or profession. The Court rejected the argument on the basis that: "Those objectives [the economic and cultural development of the Community and the guarantee that authors and performers can receive appropriate income and amortize their investments] in fact conform with the objectives of general interest pursued by the Community. It should be borne in mind, in particular, that the protection of literary and artistic property, which is a category of industrial and commercial property within the meaning of Article 36 of the Treaty, constitutes a ground of general interest which may justify restrictions on the free movement of goods [...]." (At 23) Thus, the Court inferred that the Directive at hand was legal mainly because it aimed to protect the same interests as those encompassed by a mandatory requirement.

[59] See L. GORMLEY, "The genesis of the rule of reason in the free movement of goods," above, n. 55, 23: "The rule of reason is a reflection of the lacunae that (still) exist in the present state of interpretation of the Community. Thus the Court has sought to ensure that interests or values which are clearly compatible with the basic aims of the Treaty do not go unprotected in the period before their protection has been assured at the Community level." See also M. FALLON, *Droit matériel général de l'Union européenne*, above, n. 58, 140.

[60] Case C-367/98, *Commission v. Portugal*, [2002] *ECR* I-4731, 52. (Emphasis added)

[61] J. SNELL, "Economic aims as justification of restrictions on free movement," in *The rule of reason: rethinking another classic of European legal doctrine*, Ed. A.A.M. SCHRAUWEN, (Groningen: Europa Law Pub., 2005), 48.

	Acceptable Grounds of Justification
(i) Nationality	Protection of the special relationship of solidarity and good faith between a Member State and its nationals and also the reciprocity of rights and duties [Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 51].
(ii) Direct Taxation	Effectiveness of fiscal supervision [Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649, 8]; Coherence of the tax system [Case C-204/90, *Bachmann*, [1992] *ECR* I-249, 21]; Prevention of tax avoidance by preventing wholly artificial arrangements [Case C-264/96, *Imperial Chemical Industries (ICI)*, [1998] *ECR* I-4695, 26]; Balanced allocation of tax jurisdiction [Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 46].
(iii) Rules governing surnames	Principle of immutability of surnames as a means designed to prevent risks of confusion as to identity or parentage of persons [Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613, 40s]; Objective of integration [Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613, 40s]; Nationality is an objective criterion which makes it possible to determine a person's surname with certainty and continuity and which ensures that persons of a particular nationality are treated in the same way and that the surnames of persons of the same nationality are determined in an identical manner [Case C-353/06, *Grunkin & Paul*, [2008] *ECR* I-7639, 30]; Constitutional identity in conjunction with public policy [Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693, 83]; Protection of the national language [Case C-391/09, *Vardyn & Wardyn*, [2011] *ECR* I-3787, 87].
(iv) Enforcement for the recovery of debt	N/A.
(v) Cross-border health care	Control of health expenditure, balancing the budget of the social security system / possible risk of undermining a social security system's financial balance [Case C-158/96, *Kohll*, [1998] *ECR* I-1931]; Guarantee of the quality of medical services, balanced medical and hospital service open to all insured people [Case C-158/96, *Kohll*, [1998] *ECR* I-1931]; Maintenance of treatment capacity or medical competence on national territory is essential for public health, and even the survival of, the population [Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 70].
(vi) Higher education	Ensuring that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State [Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 56]; Safeguarding the homogeneity of the higher university education system [Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 50], which must be examined in the light of the public health argument [Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 54]; Objective of ensuring that students complete their courses in a short period of time, thus contributing to the financial equilibrium of the education system of the MS concerned [Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161, 36].
(vii) Compensation of civil war victims	Aim of solidarity [Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 35]; Ensuring that there is a connection between the society of the Member State concerned and the recipient of a benefit [Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 37]; Necessity to verify that the recipient continues to satisfy the conditions for the grant of that benefit [Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 37]; Desire to provide a benefit that takes into account differences between Member States such as differences in the cost of living [Case C-221/07, *Zablocka*, [2008] *ECR* I-9029, 39]; Need to ensure effective monitoring of the employment and social situation of beneficiaries [Case C-221/07, *Zablocka*, [2008] *ECR* I-9029, 39].
(viii) Right to take collective action	Right to take collective action for the protection of workers of the host State against possible social dumping [Case C-341/05, *Laval*, [2007] *ECR* I-11767, 103].

This table shows that the acceptable grounds of justification relating to the eight fields analyzed herein may be divided into three categories. First, these grounds comprise at least two justifications that are of the same nature as grounds traditionally accepted in negative integration cases. The 'prevention of risks of confusion as to identity or parentage of persons' and 'ensuring that persons of a particular nationality are treated in the same way and that the surnames of persons of the same nationality are determined in an identical manner' comply with the three usual criteria that are necessary for the admission of justifications. They correspond to values shared by Member States, which could even be potentially protected at European Union level.[62] They are moreover compatible with the principles and aims laid down in the Treaty, and they do not pursue economic aims. However, the two other categories are specific to cases involving powers retained by Member States. They aim to protect the essential functions of the state, and economic interests respectively.

a. Flexible assessment of justifications relating to essential functions of the State

158. Meaning. The second category encompasses grounds of justification that correspond to objectives aiming to preserve functions that are essential to the state, taken as an autonomous entity, which holds an existence independent from that of the European Union. It first comprises the last category – as will be seen below, economic grounds essentially aim to protect national budgetary interests. In addition, it is also composed of justifications seeking to preserve Member States' political functions and/or social functions.

159. The preservation of the state's political functions – Rules governing surnames. As shown by the following examples, the justifications accepted by the Court of Justice reflect the need for safeguarding the survival of Member States as independent and autonomous political entities. Member States have relied on such grounds of justification in many of the fields analyzed herein. In *Wittgenstein*,[63] the Court of Justice accepted for the first time the argument whereby the Austrian constitutional rule aimed to protect the constitutional identity of the state, read in conjunction with public policy:

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[62] See Article 81§2 TFEU in the field of judicial cooperation in civil matters: "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: [...] (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction."
[63] Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693.

> [I]n accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.[64]

It concluded that:

> By refusing to recognize the noble elements of a name such as that of the applicant in the main proceedings, the Austrian authorities responsible for civil status matters do not appear to have gone further than is necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them.[65]

Several factors may have influenced the reasoning of the Court of Justice. First, the fact that the Austrian rule has a constitutional status within the Austrian legal order must have been of significant importance. This constitutional rule moreover reflects Austria's own historical past. Second, it is also notable that the Austrian rule at issue is unconditional. Contrary to *Garcia Avello* and *Grunkin & Paul*,[66] the Austrian legal order does not comprise any procedure that would allow nationals or non-nationals to bear a title of nobility. Therefore, *Wittgenstein* shows that, as far as rules governing surnames are concerned, the Court's power-based approach does not require Member States to set up arrangements that do not already exist in their legal systems. Instead, it requires them to extend the possibility to rely on existing mechanisms to non-nationals or nonresidents.

160. This is confirmed by the latest case decided in this field, *Vardyn & Wardyn*.[67] The central issue of this decision was whether a person who belongs to an ethnic minority or a national of another Member State may invoke European Union law for the purposes of requiring the authorities of a Member State to use his/her mother tongue, contrary to the constitutional principles in force in that State for safeguarding the official national language. The facts of *Vardyn & Wardyn* indeed involved the refusal of the Lithuanian authorities to modify several civil documents of a Lithuanian national and a Polish national according to the Polish alphabet. The Court applied a 'serious inconvenience test'[68] and ruled that most of these refusals[69] did not constitute a restriction on the right to move and reside freely. In a very

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[64] Ibid., 92 (Emphasis added).
[65] Ibid., 93 (Emphasis added).
[66] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613; Case C-353/06, *Grunkin & Paul*, [2008] *ECR* I-7639. See, *Infra*, § 217.
[67] Case C-391/09, *Vardyn & Wardyn*, [2011] *ECR* I-3787.
[68] See H. VAN EIJKEN, 49 *C. M. L. Rev.* 809, 816s (2012).
[69] Namely the refusal to revise the name of the wife on her birth certificate and her name on the marriage certificate, the refusal to revise entries in civil documents and the omission of the Polish diacritical marks in the husband's name.

unusual way, it left it to the national court to decide whether the refusal of the Lithuanian authorities to amend the marriage certificate "in order that the joint surname of the husband and wife is entered both uniformly and in a manner which complies with the spelling rules" of Poland, the husband's Member State of origin amounted to a restriction. The Court of Justice gave some guidance to the national court in case it were to find a restriction. In this regard, it referred once again to Article 4(2) TEU.[70] It indeed regarded the protection of the Member State's official language as falling within its national identity and held that:

> [I]t will be for the national court to decide whether such refusal reflects a fair balance between the interests in issue, that is to say, on the one hand, the right of the applicants in the main proceedings to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official national language and its traditions.[71]

Accordingly, the Court adopted a very cautious approach, both at the restriction and proportionality stages. It nonetheless did not completely depart from the principles stemming from *Garcia Avello* and *Grunkin & Paul*, and noted that:

> [T]he surnames of nationals of the other Member States may, in Lithuania, be written using characters of the Roman alphabet which do not exist in the Lithuanian alphabet.[72]

Thus, contrary to the absolute Austrian rule that was at issue in *Wittgenstein*, the Lithuanian law did not wholly preclude the use of characters of the Roman alphabet, which could tend to increase the appellants' chances of success.

161. The approach undertaken by the Court is, in this respect, very peculiar. The Court is indeed generally inclined to assess very strictly the proportionality of measures that lay down absolute or almost absolute exclusions and/or prohibitions. A recent illustration can be found in *Anton Las*.[73] In this ruling, a Belgian rule was at issue, according to which cross-border employment contracts concluded in the Dutch-speaking part region were to be drafted in Dutch exclusively. The Court acknowledged that:

> According to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. In accordance with Article 4(2) TEU, the Union must also respect the

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[70] Case C-391/09, *Vardyn & Wardyn*, [2011] *ECR* I-3787, 86.
[71] Ibid., 91.
[72] Ibid., 93.
[73] Case C-202/11, *Anton Las*, [2013] *To be published*.

> national identity of its Member States, which includes protection of the official language or languages of those States.[74]

However, it nevertheless found that the national measure was contrary to the free movement of workers because it was too absolute. It noted, in particular, that less restrictive means than an absolute obligation were available, such as a piece of legislation that "would *also* permit the drafting of an authentic version of such contracts in a language known to all the parties concerned."[75] By contrast, in the cases involving powers retained by Member States, the Court has developed an opposite approach. It justified the disproportionate character of the national measures in *Garcia Avello* and *Grunkin & Paul* on the grounds that the national legal orders at issue comprised mechanisms that could have allowed the appellants to see their surnames recognized. Conversely, it considered that the measures in *Wittgenstein* and *Vardyn & Wardyn* were proportionate because the Austrian and Lithuanian legal orders did not contain such pre-existing arrangements. Thus, the Court endorses a deferential approach when Member States rely on interests that are highly related to their national identity – the constitutional identity, the protection of the national language – and that are, in addition, unconditionally protected by their legal systems – through the implementation of intangible principles.

162. The preservation of the state's political functions – Nationality and direct taxation. Many other cases analyzed herein confirm the Court's tendency to give substantial weight to justifications aiming to protect the political functions of the state. They concern, in particular, the peculiar relationships that bind each Member State with its own population, as well as the Member States' specific and unique conceptions of such relationships. This is perceptible in the field of nationality. As seen earlier,[76] the Court recognized in *Kaur* that the United Kingdom had full discretion to determine its own nationals and their status. It thus acknowledged that this Member State could, in accordance with international law, and "in the light of its imperial and colonial past," unilaterally define:

> [S]everal categories of British citizens whom it has recognized as having rights which differ according to the nature of the ties connecting them to the United Kingdom.[77]

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[74] Case C-202/11, *Anton Las*, [2013] *To be published*, 26.
[75] Case C-202/11, *Anton Las*, [2013] *To be published*, 32 (Emphasis added).
[76] See, *Supra*, § 146.
[77] Case C-192/99, *Kaur*, [2001] *ECR* I-1237, 20.

In *Kaur*, the Court thus refused to interfere with the specific relationships that connect individuals to the United Kingdom. In *Rottmann*, it furthermore added that:

> A decision withdrawing naturalization because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.[78]

These two cases accordingly show that the Court of Justice wishes to preserve the political autonomy and independence of Member States by granting them a large or full discretion to define the 'special' relationship that bonds them to their population. As underlined by Advocate General POIARES MADURO in *Rottmann*:

> With nationality, the State defines its people. What is at stake, through the nationality relationship, is the formation of a national body politic.[79]

163. Similarly, in the field of direct taxation, the Court of Justice has recognized justifications that are intrinsically linked to Member States' tax jurisdiction and their ability to exercise their powers. Justifications such as the 'effectiveness of fiscal supervision' or 'the prevention of tax avoidance by preventing wholly artificial arrangements' indeed aim at enabling Member States to effectively subject the taxpayers to their taxing jurisdiction, despite the fact that they are involved in a cross-border situation.[80]

164. The preservation of the state's social functions. Justifications relating to the essential functions of the state also seek to protect national solidarity mechanisms. The Court has accepted the 'necessity to demonstrate a certain degree of integration into the society of the host state' in the field of education, the 'maintenance of treatment capacity or medical competence on national territory is essential for the public health, and even the survival of, the population' in the field of cross-border health care, the 'aim of solidarity' in the field of compensation of civil war victims and the 'right to take collective action for the protection of workers of the host state against possible social dumping.' This set of justifications concerns the conditions under which Member States grant social benefits, understood in the broad sense of the term. In cases relating to cross-border health care, education, and the compensation of civil

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[78] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 51 (Emphasis added).
[79] Opinion in Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 17.
[80] A. MAITROT DE LA MOTTE, "L'entrave fiscale," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, Coll. Droit de l'Union européenne, 2011), 120-122.

war victims, the Court has never challenged the principle that for social benefits to be granted, there must exist a specific relationship between the Member State providing them and the beneficiaries. Thus, despite the substantial requirements imposed upon Member States in the field of cross-border health care, the Court of Justice has repeatedly held that:

> [I]t is [...] for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme [...] and, second, the conditions for entitlement to benefits [...].[81]

And, as a matter of principle, patients must be previously affiliated to a social security scheme in order to claim cross-border health care rights. European Union law does not call into question the conditions of affiliation to a national social security scheme, which are solely for the Member States to define.

165. This idea is even more evident in cases relating to students' financial support. In *Bidar*, the Court held for instance that it is:

> [L]egitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.[82]

It accordingly followed its Advocate General, for whom "the link is to be found in the degree of affinity which the applicant for this assistance has with the educational system and the degree of his integration into society."[83] In *Bidar*, the Court found that the British condition to be 'settled' was disproportionate because it wholly precluded nationals from other Member States from acquiring this status.[84] However, in *Förster*, it found that a five-year requirement was legitimate.[85] Member States may impose the same kind of requirement with respect to financial support to study abroad.[86] Therefore, European Union law does not require Member States to break the links that bind them, as welfare states, to their beneficiaries. In other words, the Court of Justice does not call into question the fact that Member States set out award conditions that reflect the special relationship existing between themselves and individuals who receive social benefits.

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[81] See, for instance, Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 45.
[82] Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 57.
[83] Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 60. See A. ILIOPOULOU, "Entrave et citoyenneté de l'Union," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 214.
[84] See also Case C-158/07, *Förster*, [2008] *ECR* I-8507, 47.
[85] In Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 59, the Court of Justice held that: "the existence of a certain degree of integration may be regarded as established by a finding that the student has resided in the host Member State for a certain length of time." Compare with Case C-158/07, *Förster*, [2008] *ECR* I-8507, 54.
[86] See Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161, 45.

166. The same holds true with respect to the relationship between Member States and civil war victims. In *Nerkowska*, for instance, the Court held that:

> It is thus lawful for a Member State to restrict, by means of conditions related to the nationality or to the place of residence of the person concerned, the compensation granted to civilian victims of war or repression to persons who are regarded as showing a certain degree of connection to the society of that Member State.[87]

Here again, the Court acknowledges that Member States may restrict the benefit of an allowance to individuals sharing specific bonds with their societies. This shows that it is inclined to take into account the fact that social benefits, which fall within the powers retained by Member States, are often inextricably linked to the specific relationship that exists between a State and its population. In other words, in the framework of its power-based approach, the Court of Justice concedes that solidarity is first and foremost national. In the European Union, Member States are, as a matter of fact, the sole entities carrying out redistributive policies.

167. All in all, the set of justifications relating to the essential functions of the state is primarily centered on the political and social bonds existing between Member States and their community of individuals and/or their territory. Even more importantly, these justifications aim to protect the specific features, peculiar to each Member State, of these relationships. In other words, they relate to the need to protect and preserve Member States understood as autonomous political entities.[88]

b. Flexible assessment of justification relating to economic interests

168. The last category of justifications corresponds to hypotheses where the Court, despite its well-established principle, has accepted justifications that in fact protect *economic interests*. These justifications can be found in the fields of direct taxation, compensation of civil war victims, cross-border health care, and education.

169. Direct taxation. As far as direct taxation is concerned, the Court has never acknowledged that they could amount to economic aims.[89] However, as V. HATZOPOULOS points out, "the

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[87] Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 39. See Opinion in Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 22. See also the Opinion of the Advocate General in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 58, and the Court in the same case, 34-35.

[88] D. RITLENG, "Les Etats membres face aux entraves," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 306.

[89] See for instance, regarding the balanced allocation of tax jurisdiction, Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 44: "As regards the first justification, it must be borne in mind that the reduction in tax revenue

legitimate interest pursued by tax measures will be economic in nature, since it pertains to the organization and the levy of taxes within a Member State."[90] The initial approach of the Court in this field was very strict. The Court found, for instance, that a national measure was justified in only one of the cases relating to personal income taxation.[91] But, a closer look at cases involving corporations – based on the freedom of establishment – reveals that the Court has gradually softened its approach since it accepted, in *Marks & Spencer*,[92] the justification relating to the balanced allocation of tax jurisdiction.[93] Since then, Member States have relied on this ground in fourteen other cases, and the Court found in six of them that the national measures were proportionate.[94] Cases in which the justification has been accepted share a common feature. They all involve national measures relating to the relief or consolidation of group companies. These tax mechanisms exist in most Member States, and consist in granting a group of companies the right to be fiscally treated as one company. They notably allow groups to move their profits and losses within the group freely. However, they are generally granted to domestic groups only. In all the cases where Member States relied on the preservation of the balanced allocation of taxing jurisdiction to justify their tax mechanisms, the plaintiffs claimed that the benefit of these mechanisms should have been extended to groups that are established in several Member States – through subsidiaries or permanent establishments. However, each time, the Court has held that the national mechanisms could be justified in light of the balanced allocation of tax jurisdiction. In this regard, it stated that:

> That element of justification may be allowed (...) where the system in question is designed to prevent conduct capable of jeopardizing the right of the Member States to exercise their taxing powers in relation to activities carried on in their territory.[95]

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cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom."

[90] V. HATZOPOULOS, "Fiscalité directe des États membres et 'libertés personnelles' reconnues par le Traité CE," *RDUE* 1995, No. 4 at 147-148.

[91] Case C-204/90, *Bachmann*, [1992] *ECR* I-249.

[92] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837.

[93] On this justification and its peculiarities, see L. BOUCON, La préservation de la répartition équilibrée du pouvoir d'imposition entre les Etats membres. De quelques détours sur la genèse d'une raison impérieuse d'intérêt général récemment consacrée par la Cour de Justice des Communautés européennes, (Master Thesis, Panthéon-Assas University, 2009).

[94] Case C-470/04, *N.*, [2006] *ECR* I-7409; Case C-231/05, *OyAA*, [2007] *ECR* I-6373; Case C-414/06, *Lidl Belgium* [2008] *ECR* I-3601; Case C-182/08, *Glaxo Wellcome*, [2009] *ECR* I-8591; Case C-311/08, *Société de Gestion Industrielle (SGI)*, [2010] *ECR* I-487; and Case C-337/08, *X Holding BV*, [2010] *ECR* I-1215.

[95] Case C-231/05, *Oy AA*, [2007] *ECR* I-6373, 54.

The Court thus closely associates the justification with the rights of Member States to exercise their taxing jurisdiction and to allocate in a discretionary manner their taxing jurisdictions.

170. However, far from accepting any Member State's claim based on the balanced allocation of the power to impose taxes between Member States, it has set a fundamental condition for the justification to apply. This condition is linked to what can be described as a symmetry requirement, according to which Member States must deal with profits and losses symmetrically. In *Marks & Spencer*, since the United Kingdom did not take into account the profits incurred by the nonresident subsidiaries of resident parent companies, the Court did not require this Member State to take into account the latter's losses. It developed a similar line of reasoning in *Lidl Belgium*, which involved losses incurred by nonresident permanent establishments. When the Court rules on the balanced allocation of tax jurisdiction, its underlying motives seem to be at least partly economic. It admittedly recalled in *Marks & Spencer* that:

> [T]he reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom.[96]

But, on the other hand, it noticed on several occasions that:

> To give companies the right to elect to have their losses taken into account in the Member State in which they are established or in another Member State would seriously undermine a balanced allocation of the power to impose taxes between the Member States, since the tax base would be increased in the first State, and reduced in the second, by the amount of the losses surrendered.[97]

And it added in *Oy AA*:

> [T]o accept that an intra-group cross-border transfer, [...], may be deducted from the taxable income of the transferor would result in allowing groups of companies to choose freely the Member State in which the profits of the subsidiary are to be taxed, by removing them from the basis of assessment of the latter and, where that transfer is regarded as taxable income in the Member State of the parent company transferee, incorporating them in the basis of assessment of the parent company.[98]

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[96] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 44.
[97] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 46; Case C-231/05, *Oy AA*, [2007] *ECR* I-6373, 55; Case C-414/06, *Lidl Belgium*, [2008] *ECR* I-3601, 32.
[98] Case C-231/05, *Oy AA*, [2007] *ECR* I-6373, 56.

Thus, the balanced allocation of tax jurisdiction is a way for the Court to prevent European group companies from forum shopping, for it would otherwise undermine the allocation of tax jurisdiction between Member States, thereby risking a decrease in their tax revenue.

171. Compensation of civil war victims. In the same way as the field of direct taxation, the Court has never acknowledged that the justifications aimed to protect financial interests. But the grounds relating to the 'necessity to verify that the recipient continues to satisfy the conditions for the grant of that benefit,' the 'desire to provide a benefit that takes into account differences between Member States such as differences in the cost of living,' and the 'need to ensure effective monitoring of the employment and social situation of beneficiaries' allow Member States to constrain the conditions under which such benefits are granted, and therefore to control public spending.

172. Cross-border health care. Since *Kohll*, the Court has recognized that the 'risk of undermining the financial balance of a social security system' constitutes an overriding reason in the general interest.[99] It has even acknowledged that it amounted to protecting economic interests:

> It must be recalled that aims of a purely economic nature cannot justify a barrier to the fundamental principle of freedom to provide services [...]. However, it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind."[100]

Together with two other justifications,[101] this ground has allowed Member States to maintain the obligation to obtain prior authorizations, thereby restricting the exercise of free movement rights, in several hypotheses. Soon after *Decker* and *Kohll*,[102] the Court indeed acknowledged in *Geraets-Smits & Peerbooms* that national measures requiring prior authorizations for treatments received in hospital environment abroad were proportionate. It underlined that:

> [B]y comparison with medical services provided by practitioners in their surgeries or at the patient's home, medical services provided in a hospital take place within an infrastructure

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[99] Case C-158/96, *Kohll*, [1998] *ECR* I-1931, 41.
[100] Case C-158/96, *Kohll*, [1998] *ECR* I-1931, 41. See also Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 32; Case C-414/06, *Lidl Belgium*, [2008] *ECR* I-3601, 46; and Case C-231/05, *Oy AA*, [2007] *ECR* I-6373, 56.
[101] Namely the 'guarantee of the quality of medical services, balanced medical and hospital service open to all insured people' (See Case C-158/96, *Kohll*, [1998] *ECR* I-1931, 52) and the 'maintenance of treatment capacity or medical competence on national territory essential for the public health, and even the survival of, the population' (See Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 70).
[102] Case C-120/95, *Decker*, [1998] *ECR* I-1831; Case C-158/96, *Kohll*, [1998] *ECR* I-1931.

> with, undoubtedly, certain very distinct characteristics. It is thus well known that the number of hospitals, their geographical distribution, the mode of their organization and the equipment with which they are provided, and even the nature of the medical services which they are able to offer, are all matters for which planning must be possible.[103]

Even if the Court did not expressly mentioned it, the reason for ensuring planning, as far as treatments received in hospital environment are concerned, lies in the fact that they require tremendous financial investments from Member States. The Court did not go as far as to prohibit prior authorizations because this could have had substantial financial implications, and this could have ultimately risked jeopardizing the organization of national social security schemes. Therefore, in the field of cross-border health care, the underlying concerns behind the main distinctions established by the Court[104] are also of an economic nature.

173. This is confirmed by a recent decision, *Commission v. France*.[105] In this case, the Commission issued infringement proceedings against France on the grounds that this Member State maintained a prior authorization requirement with respect to medical services provided outside a hospital setting involving the use of major medical equipment. Following its Advocate General, the Court dismissed the Commission's action and held that:

> [T]he French Republic and the United Kingdom, taking as an example positron emission tomography, used in the detection and treatment of cancer, have emphasized that that equipment represents costs of hundreds of thousands, even millions, of euro, in both its purchase and in its installation and use.[106]
>
> If persons insured under the French system could, freely and in any circumstances, obtain at the expense of the competent institution, from service providers established in other Member States, treatment involving the use of major medical equipment corresponding to that listed exhaustively in the Public Health Code, the planning endeavors of the national authorities and the financial balance of the supply of up-to-date treatment would as a result be jeopardized.[107]
>
> That possibility could lead to under-use of the major medical equipment installed in the Member State of affiliation and subsidized by it or yet to a disproportionate burden on that Member State's social security budget.[108]

Member States' financial interests have motivated the entirety of the Court's reasoning in a striking manner. In this decision, the Court gave up what was thought as a well-established

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[103] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 76.
[104] See, *Infra*, §§ 186s.
[105] Case C-512/08, *Commission v. France*, [2010] *ECR* I-8833.
[106] Ibid., 39 (Emphasis added).
[107] Ibid., 40 (Emphasis added).
[108] Ibid., 41 (Emphasis added).

distinction between hospital environment and non-hospital environment.[109] As a result, it is presently more accurate to say that Member States may maintain prior authorization requirements so long as the treatments covered by such obligations involve substantial financial investments.

174. Education. The Court has also been inclined to protect Member States' financial interests in the field of education, but to various extents. It was relatively explicit with respect to students' financial support in *Bidar*:

> [A]lthough the Member States must, in the organization and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State.[110]

Member States' financial solidarity is conditional upon the degree of integration of incoming students into their society. Therefore, the Court did not place Member States under an absolute obligation to grant assistance to non-nationals/nonresidents. It gave them some leeway to refuse to grant assistance. Likewise, it accepted in *Morgan & Bucher*, a case concerning the exportation of financial support in the form of grant to study abroad, the justification based on the "unreasonable burden which could lead to a general reduction in study allowances granted in the Member State of origin."[111] It moreover limited the scope of the export of financial support in the form of tax relief:

> The Court has already held that, in order to avoid an excessive financial burden it is legitimate for a Member State to limit the amount deductible in respect of tuition fees to a given level, corresponding to the tax relief granted by that Member State, taking account of certain values of its own, for attendance at educational establishments situated in its territory.[112]

175. Turning now to the conditions of access to a higher educational system, so far, the Court has never accepted a justification based on economic grounds. However, it does not seem to reject this specific ground of justification on principle. In *Bressol*, the Member States relied on *Bidar* and contended that allowing nonresidents to benefit from unrestricted access

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[109] See, *Infra*, §§186s.
[110] Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 56.
[111] Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161, 42.
[112] Case C-56/09, *Zanotti*, [2010] *ECR* I-4517, 54.

would entail excessive burdens on the financing of higher education.[113] Advocate General SHARPSTON unequivocally rejected this claim, and stressed that there was a fundamental difference between access to financial aid to cover the costs of education and access to education itself.[114] In relation to the latter, she argued that:

> [T]he possibility for a student from the European Union to gain access to higher or university education in another Member State under the same conditions as nationals of that Member State constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty. What the Court held as regards residence requirements for financial assistance in *Bidar* cannot therefore be transposed to the present case.[115]

The Court ultimately also rejected Belgium's justification,[116] but on different grounds than those of the Advocate General. It based its reasoning on the fact that the financial burden was not "an essential reason which justified the adoption" of the contested measure. It underlined that:

> [T]he financing of education is organized through a 'closed envelope' system in which the overall allocation does not vary depending on the total number of students.[117]

In other words, the Court took into account the fact that opening the access of the educational system would not have an impact on the financing of education. But, conversely, it can also be inferred from this statement that, were the Member States able to demonstrate a risk on the financing of education, the Court of Justice could be inclined to accept economic grounds, even when an issue as fundamental as access is at stake.

176. Thus, in the fields of direct taxation, compensation of civil war victims, cross-border health care, and education, the Court breaks with its traditional approach and accepts that the proportionality of national measure can be assessed in light of economic grounds. As J. SNELL pointed out:

> [I]n certain circumstances, the constitutional structure of the Union as a divided power system may mandate a more permissive approach towards economic aims. Member States remain solely or primarily responsible for many important policy areas. Sometimes the only reasonable practical way of discharging these responsibilities involves the adoption of

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[113] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 49.
[114] Opinion in Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 80.
[115] Ibid., 82.
[116] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 51.
[117] Ibid., 50.

> measures the immediate aim of which is economic but that ultimately serve as a means for pursuing a legitimate public interest aim.[118]

Therefore, the flexible character of the Court's approach with respect to the acceptable grounds of justification and their assessment may be explained by several factors. First, the constitutional division of authority in the European Union is such that it is necessary to recognize a wider margin of appreciation for the Member States. Second, and maybe even more importantly, the survival of a State as political entity depends on its ability to raise revenue. Similarly, welfare policies, such as health care and education, are essential attributes of the European Union Member States.[119] Comparable conclusions can be drawn with respect to justifications relating to the essential functions of the state. Both sets of justifications ultimately reflect the need for preserving Member State autonomy.

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[118] J. SNELL, "Economic aims as justification of restrictions on free movement," above, n. 61, 49.
[119] A. ILIOPOULOU, "Entrave et citoyenneté de l'Union," above, n. 83, 210.

SECTION 2. THE ADJUSTMENTS REQUIRED FROM MEMBER STATES

177. The second dimension of what I have called the 'mutual adjustment resolution,' which characterizes free movement cases involving powers retained by Member States, relates to the obligations placed upon Member States. These obligations are the other side of the coin; they mirror the Court of Justice 'self-imposed adjustments.' They also are the reflection of the flexible dimension of the Court's power-based approach. The purpose of this second section is to identify their nature, as well as their defining features. In a nutshell, the obligations placed upon Member States can be described as 'adjustment requirements.' They are only rarely unconditional, and they reflect, most of the time the need to take into account Member States' political, social, and economic interests as they were depicted in Section 1. Therefore, they consist in requiring Member States to *make series of adjustments* in such a way as to comply with European Union law. But, conversely, neither do they compel Member States to exercise their powers where they have decided not to, nor do they prevent them from exercising their powers in situations where they have decided they would.

178. I have drawn a typology of the various adjustments required from Member States. This typology takes into account two interrelated variables: the types of obligations imposed on Member States, as well as the variations in the intensity of the proportionality test carried out by the Court. I have divided it into two main categories: substantive and procedural adjustment requirements.

1. Substantive adjustment requirements

179. At first glance, the content of the substantive requirements imposed on Member States in cases involving their retained powers could be seen as not substantially differing from traditional free movement cases. Obligations resulting from the Court of Justice constructions relate, for instance, to the imperatives of opening and recognition, which are cornerstones of free movement law. However, a closer look reveals that the Court imposes these obligations in a way that differs from its traditional approach, as shown by the following illustrations.

a. Obligations to open

180. The first range of adjustment requirements imposed on Member States in the framework of the power-based approach relates to the obligations of opening. Under certain circumstances, the Court of Justice has compelled Member States to 'open' their higher

education systems to nonresident students, to 'open' financial assistance to outgoing students, to 'open' their social security schemes in such a way as to allow outgoing patients to receive treatments abroad, and to 'open' their tax systems in order to take into account taxpayers involved in cross-border situations within the European Union. In order to shed light on the specific features of these obligations, I distinguish between two factors that tend to limit their reach: the preservation of the sustainability of national systems, and the degree of integration into society.

i. Obligations subject to the preservation of the sustainability of national systems

181. Access to higher education. The Court of Justice has long established the principle of equal access to education and vocational training, thereby compelling Member States to adjust the conditions of access to higher education with respect to nonresident students. This principle originally stems from cases involving the Belgian higher educational system, where the Court ruled that Belgium could not impose additional fees, the 'Minerval,' solely on nonresidents. At that time, only one Treaty provision pertained explicitly to education. It was Article 128 EEC,[1] which related to vocational training.[2] One of the main issues raised in cases such as *Forcheri*,[3] *Gravier*,[4] *Blaizot*,[5] or *Commission v. Belgium*[6] concerned the delineation of the scope of the notion of 'vocational training.' The Court interpreted the latter extensively, such as to encompass further educational establishment approved and subsidized by a Ministry of national education,[7] non-university institutes of higher education,[8] and university studies.[9] It ruled that, as far as access to courses offered by these institutions was concerned, Member States could not impose higher tuition fees upon nonresident students.

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[1] Article 128 EEC: "The Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, lay down general principles for implementing a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market."
[2] See, *Supra*, §§ 49s.
[3] Case 28/83, *Forcheri*, [1984] *ECR* 1425.
[4] Case 293/83, *Gravier*, [1985] *ECR* 593.
[5] Case 24/86, *Blaizot*, [1988] *ECR* 379.
[6] Case 42/87, *Commission v. Belgium*, [1988] *ECR* 5445; Case C-47/93, *Commission v. Belgium*, [1994] *ECR* I-1593.
[7] Case 28/83, *Forcheri*, [1984] *ECR* 1425.
[8] Case 293/83, *Gravier*, [1985] *ECR* 593.
[9] Case 24/86, *Blaizot*, [1988] *ECR* 379.

182. More contemporary cases have specified the extent to which Member States must adjust the conditions of access to their higher educational systems, and the content of the obligations to guarantee equal access. They concern Austria and Belgium respectively. As seen earlier,[10] these two Member States have opted for the principle of unrestricted access, but they imposed additional conditions on nonresident students. The Court ruled in both *Commission v. Austria* and *Bressol* that the national measures restricted the free movement principle. Austria relied on several grounds of justification, relating to the need to safeguard the homogeneity of the Austrian higher or university education system and the need to prevent abuse of Community law. The Advocate General and the Court of Justice accepted them in principle, but they found that the Austrian measure was nonetheless disproportionate. Advocate General JACOBS underlined that:

> To accept the justifications relied on by Austria would amount to allowing Member States to compartmentalize their higher education systems.[11]

The Court echoed its Advocate General, ruling that:

> [I]t need merely be observed that the possibility for a student from the European Union, who has obtained his secondary education diploma in a Member State other than Austria, to gain access to Austrian higher or university education under the same conditions as holders of diplomas awarded in Austria constitutes the very essence of the principle of freedom of movement for students guaranteed by the Treaty.[12]

These statements confirm the idea that restrictions on access, which have a very detrimental effect on the principle of free movement, are subject to a strict proportionality test. This explains why the Advocate General adopted a 'no less restrictive means' test, and went as far as to suggest alternative measures. He even acknowledged that:

> Clearly the adoption of these less discriminatory measures would require change to the current system of unrestricted public access.[13]

Yet, the Court of Justice did not endorse such a strict approach. It did reject Austria's line of reasoning,[14] but on different grounds. Rather, it focused on procedural aspects,[15] and took the view that Austria had not provided evidence that the homogeneity of the Austrian education system would be jeopardized if access were to be equally granted to residents and nonresidents.

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[10] See, *Supra*, §§ 147s.
[11] Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 53. (Emphasis added)
[12] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 70. (Emphasis added)
[13] Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 53 (Emphasis added).
[14] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 66.
[15] Ibid., 65.

It turns out that, if the creation of restrictions on access is 'essentially preventive in nature,' then Member States must adjust the conditions of access to their open educational systems in such a way as to grant any student from the European Union holding a secondary-school diploma a right of access. The Advocate General put forward several alternatives, which are worth stating because they give an idea of the reach and content of the adjustments that Member States could be required to implement. In the Advocate General's view, Member States could, for instance, establish an entry examination or a minimum grade, or check the correspondence of the foreign qualifications with those required from holders of Austrian diplomas.[16] Therefore, the effects of *Commission v. Austria* are likely to be very burdensome, since they might ultimately lead Austria to significantly alter the conditions of access to its education system.

183. In *Bressol*, Advocate General SHARPSTON followed a very strict approach, reminiscent of Advocate General JACOBS' Opinion under *Commission v. Austria*. She first recalled that:

> Individual Member States may wish to maintain unlimited access to higher education. They are of course at perfect liberty to do so. If so, they must however be prepared to offer unlimited free access for *all* EU students regardless of nationality.[17]

The Advocate General confirmed that Member States are at liberty to organize their higher education systems, and, in particular, to set out conditions on access. However, she stressed that these conditions may not be discriminatory. And, if the replacement of discriminatory conditions is too burdensome for Member States, they must be ready to give up the unrestricted access principle.[18] By contrast, the Court of Justice followed an approach that seems, to say the least, more equivocal.[19] On the one hand, it acknowledged that the quotas set up by Belgium could be justified in light of the protection of public health. It moreover did not really assessed proportionality, and left it almost entirely to the national court: "it is for the referring court to establish that there are genuine risks to the protection of public health."[20] On the other hand, the Court of Justice specified how the national court must carry out the

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[16] Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 52. See also Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 61.
[17] Opinion in Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 106.
[18] Ibid., 108.
[19] For different points of view, see, for instance, S. GARBEN, "Case C-73/08, Bressol, Chaverot and Others v. Gouvernement de la Communauté française," 47 *C. M. L. Rev.* 1493, 1508 (2010); S. GROSBON, "Libre circulation et systèmes de sélection universitaire: une équation complexe," *RAE-LEA* 640 (2009-2010).
[20] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 66.

proportionality test. It reaffirmed that such risks must be actual, supported by detailed statistical data,[21] and that Member States bear the burden of proof.[22] The assessment of proportionality also requires national courts to check the suitability of the national measures.[23] The Court finally invited the national courts to engage into a 'no less restrictive means' test.[24] In particular, if it stems from statistical evidence that the restriction on access of nonresident students is necessary, Member States may nevertheless not arbitrarily select these students. In this respect, the Court pointed out that "nonresident students [...] are selected [...] by drawing lots which, as such, does not take into account their knowledge or experience,"[25] and it required the national court to assess whether the non-taking into account of students' personal skills was necessary.

184. Thus, in *Commission v. Austria* and *Bressol*, the Court of Justice's stance on conditions on access to national education systems is not entirely clear. In *Commission v. Austria*, the Court patently rejected the argument put forward by Austria, even if it opened the door to the possibility of justifying the restrictive measure. In *Bressol*, it confirmed that European Union law might ultimately compel Member States to alter the basic principle they have opted for with respect to access.[26] However, it held that:

> Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students.[27]

It moreover only set out broad guidelines to be followed by the national court. All in all, proportionality was assessed pretty strictly in *Commission v. Austria*, and subsequently turned into being more deferential – despite the fact that, in both *Commission v. Austria* and *Bressol*, the national measures overtly discriminated between residents and nonresidents. But both cases are characterized by the fact that the Court placed great emphasis on the need to preserve and safeguard the sustainability of educational systems. As a result, Member States are required to adjust their criteria if they do not comply with the equal treatment principle, but only to the extent that this does not alter the organization of their education systems.

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[21] Ibid., 71-73.
[22] Ibid., 74.
[23] Ibid., 75-76.
[24] Ibid., 79.
[25] Ibid., 80.
[26] Ibid., 29.
[27] Ibid., 53.

185. Higher education: Exportation of financial assistance. The same holds true with respect to exportation of financial assistance. *Schwarz*[28] and *Commission v. Germany*[29] involved a German tax mechanism, whereby payments of school fees to certain private schools established in Germany, but not payments to schools located in the rest of the Community territory, could be treated as special expenditure, leading to a reduction of income tax. *Schwarz* concerned two parents who sent their children to a school in Scotland for exceptionally gifted children. The German authorities refused to grant them a tax relief on the grounds that the school was not established in Germany. The Court of Justice found that the German legislation amounted in both cases to unjustified restrictions. It used the same technique as in other cases involving powers retained by Member States by imposing adjustment requirements upon the *exercise* of national educational powers, as shown by the Advocate General in *Schwarz*:

> Community law recognizes that the Member States have discretion in organizing their national education. [...] As a consequence, the Member States may lay down their own criteria, based on national ideas, which they expect the schools to fulfill in order to perform this function.[30]
>
> There cannot therefore be any objection from the point of view of Community law [...] to linking indirect state assistance through the grant of tax advantages of the fulfillment of these criteria, against which schools in other EC countries must also be measured.[31]

Thus, the Court's rulings had the effect of compelling Germany to open its tax mechanism in such a way as to encompass EU cross-border situations. Here again, Member States are at liberty to set out their own criteria. They must however comply with the non-discrimination principle, and they are precluded, in this respect, from automatically excluding cross-border situations.[32] The Court seems to have been influenced by a significant feature of the German mechanism to conclude that it was in breach of European Union law. This mechanism, as a matter of fact, did not aim to subsidize German schools, but German taxpayers. But the Court would have probably reached a very different conclusion had the German tax advantage

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[28] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849.
[29] Case C-318/05, *Commission v. Germany*, [2007] *ECR* I-6957.
[30] Opinion in *Schwarz*, Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 45 (Emphasis added).
[31] Ibid., 46 (Emphasis added).
[32] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 72: "that article makes the deductibility of part of the school fees subject to the approval, authorization or recognition in Germany of the private school concerned, without fixing an objective criterion allowing it to be determined which types of school fees charged by German schools are deductible."
At 73: "It follows that any private school established in a Member State other than the Federal Republic of Germany, merely by reason of the fact that it is not established in Germany, is automatically excluded from the tax advantage at issue in the main proceedings, whether or not it meets criteria such as the charging of school fees of an amount that does not give rise to the selection of pupils according to parental means."

concerned German schools. In *Schwarz* and *Commission v. Germany*, the extension of the scope of the tax arrangement could ultimately not have amounted to compelling a Member State to directly finance the educational system of another Member State. As a result, the obligation to open is once again not unconditional. It is subject to the need to preserve the financing of national education systems. This obligation of opening has been confirmed in *Zanotti*. This case concerned deductions from gross tax of the costs of attending a university course provided in another Member State. The Court applied the findings of *Schwarz* and *Commission v. Germany* and recalled that:

> In the absence of harmonization measures, it is for the Member States, in exercising their powers, to lay down the criteria for calculating deductible university tuition fees, provided that the relevant rules comply with the provisions of the EC Treaty and, in particular, in a case such as that in the main proceedings, do not dissuade taxpayers resident in Italy, from attending university courses offered by establishments situated in other Member States.[33]

186. Cross-border health care. As seen earlier,[34] national security schemes are based on the principle of territoriality. Patients may only receive treatment on the territory of their Member State of affiliation. This principle is however not inflexible. Even before the Court of Justice initiated its case law relating to cross-border health care, most of Member States' legal systems provided for mechanisms whereby, in case of scheduled treatments, and under strict conditions, patients could receive treatment abroad. These conditions notably included the obligation to be granted an authorization before receiving cross-border treatments. In this respect, national authorities used to grant these authorizations to patients discretionarily.[35] It is precisely on this point that national laws and practices have been challenged before the Court of Justice. To this end, patients have relied on the freedom to provide services in a vast majority of cases. *Decker* and *Kohll*[36] were the first rulings where the Court was called upon to rule on the compatibility of measures relating to cross-border health care with the free movement principle. *Decker* concerned a Luxembourg national who purchased a pair of spectacles with corrective lenses from an optician established in Belgium.[37] The Luxembourg authorities refused to reimburse him on the grounds that he had not obtained prior authorization. The Court ruled

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[33] Case C-56/09, *Zanotti*, [2010] *ECR* I-4517, 64.
[34] See, *Supra*, § 49.
[35] See, *Supra*, §§ 61s my points on Regulation 883/2004.
[36] Case C-120/95, *Decker*, [1998] *ECR* I-1831; Case C-158/96, *Kohll*, [1998] *ECR* I-1931. See VAN DER MEI A. P. "Cross-border access to medical care within the European Union – Some reflections on the judgments in *Decker* and *Kohll*," 5 *Maastricht J. Eur. & Comp. L.* 277-297 (1998).
[37] It is to be noted that Case C-120/95, *Decker*, [1998] *ECR* I-1831 is based on the free movement of goods.

that this amounted to an unjustified restriction. The facts of *Kohll* were slightly different from those of *Decker*. This time, Luxembourg authorities refused to authorize the appellant's daughter to receive dental treatment in Germany. The appellant thus directly challenged their refusal, which the Court once again found to be contrary to European Union law.

187. Following these two initial decisions, the Court of Justice clarified the reach, as well as the meaning, of the newly recognized principles. The clarification concerned, on the one hand, the scope of application of European Union law. In *Geraets-Smits & Peerbooms*,[38] it was confirmed that European Union law applied to facts involving a compulsory sickness insurance scheme. In *Müller-Fauré & Van Riet*,[39] the Court came up with the same solution with respect to compulsory insurance schemes providing only benefits-in-kind. Last but not least, it also included the British National Health Service in *Watts*.[40] Consequently, any national social security scheme, regardless of its peculiarities, must comply with the rulings of the Court of Justice. In addition, the Court made it clear in *Geraets-Smits & Peerbooms* that treatments provided both outside hospital environment – as it was the case in *Decker* and *Kohll* – and in hospital environment fall within the scope of European Union law.

188. On the other hand, the Court has brought clarifications with respect to the limits placed upon Member States' discretionary powers by imposing specific adjustment requirements. The effects of *Decker* and *Kohll* are, at first glance, far-reaching. These two cases preclude Member States from exercising their powers to impose obligations relating to the prior obtaining of authorizations. However, this extensive requirement to open national social security schemes is limited in scope. It only concerns the purchase of medical goods and treatments received abroad in non-hospital environment. The Court did not go that far in cases pertaining to hospital environment[41] and treatments received in non-hospital environment

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[38] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473. See, e.g., E. STEYGER, "National health care systems under fire (but not too heavily)," *Legal Issues of Economic Integration* (2002) 29(1): 97-107.

[39] Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509. See, e.g., A. P. VAN DER MEI, "Cross-border access to medical care: Non-hospital care and waiting lists," 31: 1 *Legal Issues of Economic Integration* 57-67 (2004); M. FLEAR, 41 *CMLR* 209-233 (2004).

[40] Case C-372/04, *Watts*, [2006] *ECR* I-4325. See, e.g., S. VAN RAEPENBUSCH, "L'état de la jurisprudence de la CJCE relative au libre accès aux soins de santé à l'intérieur de l'Union européenne après l'arrêt du 16 mai 2006, *Watts*, C-372/04," *Gazette du Palais*, vendredi 8, samedi 9 décembre 2006, 8-14; L. AZOULAI, "En attendant la justice sociale, vive la justice procédurale! À propos de la libre circulation des patients dans l'Union (CJCE 16 mai 2006, *Watts*, Aff. C-372/04)," *Revue de droit sanitaire et social* 843-851 (2006); M. COUSINS, "Patient mobility and national health systems," 34: 2 *Legal Issues of Economic Integration* 183-193 (2007).

[41] E.g. Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473.

involving the use of major medical equipment.[42] In these instances, Member States may still require patients to obtain prior authorizations. In *Geraets-Smits & Peerbooms*, it held, for example, that:

> [A] requirement that the assumption of costs, under a national social security system, of hospital treatment provided in another Member State must be subject to prior authorization appears to be a measure which is both necessary and reasonable.[43]

In other words, they are still at liberty to exercise their regulatory powers. But they are nevertheless subjected to a specific range of adjustment requirements.

189. The Court has indeed carried out strict proportionality tests with respect to the conditions under which Member States may limit the grant of prior authorizations. In a similar way to the other fields analyzed herein, it seeks to circumscribe Member States' arbitrariness: "a scheme for prior authorization cannot legitimize discretionary decisions which are liable to negate the effectiveness of provisions of Community law."[44] The following statement reveals the exact content of the adjustments required from Member States. It pertains to the substantive conditions under which national authorities may grant or refuse prior authorizations:

> [I]n order for a prior administrative authorization scheme to be justified [...] it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.[45]

Member States are thus compelled to comply with the principles of objectivity and non-discrimination. The Court has controlled the proportionality of several substantive conditions laid down by Member States in light of these principles. For instance, the Netherlands set out a rule whereby prior authorizations could only be granted in relation to treatments considered as 'normal' in the professional circles concerned.[46] The Court regarded this requirement as being too general, and as being, accordingly, open to several interpretations, thereby creating uncertainty.[47] It compelled the Dutch authorities to interpret this condition "on the basis of what is sufficiently tried and tested by international medical science," and to apply the criteria

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[42] Case C-512/08, *Commission v. France*, [2010] *ECR* I-8833; Case C-255/09, *Commission v. Portugal*, [2011] *ECR* I-547.
[43] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 80. See also Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509; and Case C-372/04, *Watts*, [2006] *ECR* I-4325.
[44] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 90. See also Case C-372/04, *Watts*, [2006] *ECR* I-4325, 115.
[45] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 90.
[46] Ibid.
[47] Ibid., 91-92.

objectively, and regardless of the place of establishment of the treatment providers.[48] In *Müller-Fauré & Van Riet*, it acknowledged that national authorities could subject an authorization to a condition relating to the necessity of cross-border treatments, as long as treatments were not provided by the state of affiliation with undue delay.[49] Cases involving cross-border health care therefore impose substantial requirements upon Member States. The Court seems to start from a premise similar to that of cases on higher education. It does not preclude Member States of their powers if the removal of obstacles jeopardizes the organization, functioning and/or financing of national social security systems. However, it strictly supervises the conditions under which Member States may maintain mechanisms restricting the free movement principles by subjecting them to the aforementioned adjustment requirements, and by controlling whether individual conditions comply, in practice, with European Union law.

190. Direct taxation. The Court of Justice has also imposed significant obligations on Member States with respect to their taxing powers. Here again, Member States are compelled to treat cross-border situations no less favorably than purely internal situations, provided that this does not jeopardize the sustainability of national tax systems. Broadly speaking, they must comply with the equal treatment principle in respect of (i) residents' foreign-source income, and (ii) nonresidents' domestic-source income. In other words, they must open their tax systems to cross-border situations. This results in obligations to grant the same tax advantages to residents receiving foreign income, and to nonresidents receiving domestic income, provided that residents and nonresidents are found objectively comparable.[50] The following illustrations show that four main areas of national tax systems are affected by the Court of Justice case law: exit tax arrangements, individual income taxation, corporate income taxation, and dividend taxation.

191. Direct taxation. (i) Exit taxes. Exit taxes "serve to secure taxation in respect of unrealized income accrual (tax deferrals) which may otherwise escape taxation in the accrual jurisdiction as a result of the taxpayer (and all other connecting factors, especially the source of income)

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[48] Ibid., 94-97.
[49] Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509, 89.
[50] K. LENAERTS & L. BERNARDEAU "L'encadrement communautaire de la fiscalité directe," 33 *Cahiers de Droit Européen* 19, 42 (2007); S. KINGSTON, "A light in the darkness: recent developments in the ECJ's direct tax jurisprudence," 44:5 *CMLR* 1321, 1331 (2007); D. WEBER, "In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC," 34 *Intertax* Vol. 585, 587 (2006).

leaving that jurisdiction."[51] Thus, they have the effect of imposing additional burden on individuals or companies wishing to move to other Member States, and, as such, the Court of Justice has seen them as 'outbound' restrictions.[52] Nonetheless, the Court does not require Member States to remove them entirely from their tax systems, but rather to adjust the conditions under which emigrating taxpayers must pay exit taxes, as shown by *N. v. Inspecteur*.[53] This case concerned an individual taxpayer transferring his residence from the Netherlands to the United Kingdom. The Dutch administration subjected the granting of deferment of the exit tax to the provision of guarantees, and did not take full account of reductions in value capable of arising after the transfer of residence. The Court found that this system was disproportionate, but it accepted, as a matter of principle, the conservatory assessment.[54] As a result, as far as individuals' emigration is concerned, Member States are precluded from requiring payments or security for future payment. They must moreover take into account post-emigration decreases in value. The Court did not go as far with respect to companies. In *National Grid Indus*,[55] it held that exit taxes could be justified. It started by confirming that requirements relating to conservatory assessments were proportionate. It went on by adding that Member States may not subject emigrating companies to immediate payment. Instead, choice must be given to companies between immediate payment of exit taxes or deferred payment. However, in the case of deferred payment, Member States may subject companies to both interest calculation and security for later payment. They are moreover not compelled to take into account post-emigration decreases in value. The main reason why the Court seems to have softened its original approach lies in its concern to preserve the sustainability of national tax systems which, in the case of exit taxes, requires to preserve the right of the home state to exercise its taxing jurisdiction:

> The transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer [...]. [An exit tax system] is intended to prevent situations capable of jeopardizing the right of the Member State of origin to exercise its powers of taxation in relation to

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[51] B. J. M. TERRA & P. J. WATTEL *European Tax Law*, (6th Ed., Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), 955.
[52] See e.g. Case C-9/02, *De Lasteyrie du Saillant*, [2004] *ECR* 2409, 46 (individuals); Case C-64/11, *Commission v. Spain*, [2013] *To be published* (companies).
[53] Case C-470/04, *N.*, [2006] *ECR* I-7409.
[54] Ibid., 46.
[55] Case C-371/10, *National Grid Indus*, [2011] *ECR* I-12273.

> activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States.[56]

192. Direct taxation. (ii) Individual income taxation. The Court of Justice case law also compels Member States to adjust individual income taxation rules. This trend concerns the taxation of nonresidents, as well as well as the taxation of residents. As far as nonresidents are concerned, the Court has ruled that the equal treatment principle applies to, for instance: tax scales – residents and nonresidents must be subjected to the same tax scale;[57] the repayment of payroll tax exceeding the final income tax liability;[58] the tax burden of nonresident providers of services;[59] withholding taxes on the pension of nonresident retired civil servants;[60] and the taking into account of negative income from real estate.[61] Likewise, nonresidents must be granted the same income-related deductions or credits as residents,[62] as well as the same deductions relating to the expenses incurred in earning their income.[63] To put it differently, Member States must grant nonresidents the same tax advantages as residents each time nonresidents and residents are in objectively comparable situations. Similarly, residents must be granted the same deductions if they pay contributions to foreign pension funds or foreign life insurance companies.[64] Last but not least, Member States must extend the benefit of tax advantages aiming to stimulate investment to residents investing or borrowing abroad.[65]

193. Therefore, the Court of Justice subjects Member States to substantial obligations of opening when it comes to personal income tax. As soon as it finds that residents and nonresidents are in comparable situations, it tends to overturn national measures. *Bachmann* is one of the few exceptions where it upheld a national tax arrangement on the grounds that it fulfilled the need to maintain the coherence of a national tax system.[66] This case concerned a

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[56] Ibid., 46.
[57] Case C-107/94, *Asscher*, [1996] *ECR* I-3089.
[58] Case C-175/88, *Biehl*, [1990] *ECR* I-1779.
[59] Case C-234/01, *Gerritse*, [2003] *ECR* I-5933.
[60] Case C-520/04, *Turpeinen*, [2006] *ECR* I-10685.
[61] Case C-152/03, *Ritter-Coulais*, [2006] *ECR* I-1711; Case C-182/06, *Lakebrink*, [2007] *ECR* I-6705; Case C-527/06, *Renneberg*, [2008] *ECR* I-7735.
[62] See e.g. Case C-175/88, *Biehl*, [1990] *ECR* I-1779; Case C-279/93, *Schumacker*, [1995] *ECR* I-225; Case C-234/01, *Gerritse*, [2003] *ECR* I-5933.
[63] See e.g. Case C-345/04, *Centro Equestre da Leziria Grande Lda*, [2007], *ECR* I-1425.
[64] See e.g. Case C-150/04, *Commission v. Denmark*, [2007] *ECR* I-1163; Case C-522/04, *Commission v. Belgium*, [2007] *ECR* I-5701.
[65] See e.g. Case C-484/93, *Svensson*, [1995] *ECR* I-3955; Case C-35/98, *Verkooijen*, [2000] *ECR* I-4071; Case C-242/03, *Weidert & Paulus*, [2004] *ECR* I-7379.
[66] Case C-204/90, *Bachmann*, [1992] *ECR* I-249.

Belgian law according to which the deductibility for income tax purposes of insurance contribution was made conditional upon the contributions being paid in Belgium. The Court pointed out that there was a "connection between the deductibility of contributions and the liability to tax of sums payable by the insurers under pension and life assurance contracts."[67] It moreover added that the loss of revenue resulting from the deductions was offset by the taxation of pensions, annuities or capital sums, and concluded that this arrangement could be justified.[68] However, the Court only accepted the cohesion justification once in the field of personal income tax,[69] and it even seems to have reversed its *Bachmann* findings in *Commission v. Denmark*, a case decided in 2007.[70] In this case, it held that Denmark breached the free movement of workers and the freedom of establishment by implementing a tax arrangement whereby tax deductions and tax exemptions with respect to life insurance and pensions were granted only to taxpayers who had contracted with institutions established in Denmark.

194. Direct taxation. (iii) Corporate income taxation. As far as corporate income taxation is concerned, a distinction might be drawn between obligations incumbent on host states and obligations incumbent on home states. As soon as host states subject both resident companies and branches of nonresident parent companies to corporation tax, they must comply with the equal treatment principle when implementing tax schemes and granting tax benefits.[71]

195. As for home states, they must adapt, to some extent, group taxation schemes and Controlled Foreign Companies (CFC) legislations.[72] In this respect, the Court starts from the premise that parent companies, which are systematically resident in the home state, regardless of whether they hold foreign or domestic subsidiaries/branches, are comparable.[73] *Papillon* gives a good illustration of the type of obligations that Member States must comply with in relation to group taxation schemes.[74] This case involved a French tax consolidation scheme available to

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[67] Ibid., 21.
[68] Ibid., 23-27.
[69] See A. CORDEWENER, G. KOFLER & S. VAN THIEL, "The clash between European freedoms and national tax law: Public interests defences available to the Member States," 46 *CMLR* 1951, 1969s (2009); K. LENAERTS & L. BERNARDEAU "L'encadrement communautaire de la fiscalité directe," above, n. 50, 99s.
[70] Case C-150/04, *Commission v. Denmark*, [2007] *ECR* I-1163.
[71] See e.g. Case C-383/05, *Talotta*, [2007] *ECR* I-2555 (fiscal profit determination rules); Case C-330/91, *Commerzbank*, [1993] *ECR* I-4017 (interest compensation on late repayments of overpaid taxes), Case C-311/97, *Royal Bank of Scotland*, [1999] *ECR* I-2651 (taxation rates).
[72] For a detailed analysis of the obligations imposed on Member States with respect to their CFC legislations, see e.g. B. J. M. TERRA & P. J. WATTEL *European Tax Law*, above, n. 51, 1011s.
[73] Ibid., 1005.
[74] Case C-418/07, *Société Papillon*, [2008] *ECR* I-8947.

parent companies and their subsidiaries, provided that the former held more than 95% of the shares of the latter. Société Papillon was denied the benefit of the consolidation scheme on the grounds that it held more than 95% of the shares of a sub-subsidiary through an intermediate 100% subsidiary established in another Member State. France argued that this scheme could be justified by the balanced allocation of tax jurisdiction and the need to ensure the coherence of the tax system. The Court rejected France's line of reasoning. It first noted that cross-border loss compensation was not at issue and thus did not accept the first justification.[75] It then acknowledged that if France was compelled to 'open' its consolidation scheme, this could affect the coherence of that regime. But less restrictive measures existed that could ensure that losses would not be taken into account twice.[76] In pursuance of Directive 77/799/EC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, France could indeed request the information needed relating to the parent's subsidiary located in another Member State.[77]

196. Adjustments required from Member States with respect to group of companies are subject to significant limitations.[78] They may not, in particular, result in compelling Member States to accept cross-border loss relief if they do not have jurisdiction with respect to losses and if, symmetrically, they do not exercise their tax jurisdiction on the corresponding profits generated by nonresident subsidiaries/branches. This limitation stems from *Mark & Spencer*, where the United Kingdom company argued that the United Kingdom tax administration should allow deductions of foreign subsidiary losses on the ground that it allowed such deduction with respect to losses of foreign branches and losses of resident subsidiaries. The Court held that:

> [T]o give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly jeopardize a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred.[79]

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[75] Ibid., 34-40.
[76] Ibid., 41-61.
[77] Ibid., 55.
[78] See, *Infra*, §§ 264s.
[79] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 46.

It moreover added that Member States could prevent losses to be taken into account twice,[80] and that limiting the benefit of group relief to companies subject to United Kingdom tax was necessary to avoid the risk of tax avoidance.[81] The Court subsequently decided that the *Marks & Spencer* limitation applied to losses generated by foreign branches where, in pursuance of a bilateral treaty, the parent company's state excluded from its tax jurisdiction the losses and profits of foreign branches.[82] Therefore, Member States are relieved of their obligations to extend tax advantages to cross-border groups of companies if such an extension had the effect of jeopardizing the balanced allocation of their taxing jurisdictions. This is another reflection of the Court of Justice concern with respect to the need to safeguard the sustainability of national tax systems.

197. Direct taxation. (iv) Dividend taxation. As far as dividends are concerned, the Court of Justice does not subject Member States to the same requirements, depending on whether inbound or outbound dividends are involved. It results from decisions such as *Lenz*[83] or *Manninen*[84] that Member States are required to prevent economic double taxation[85] of inbound dividends if they do so with respect to internal dividends. However, Member States do not have to undo double juridical taxation,[86] as shown, for instance, by *Kerckhaert-Morres*.[87] In this case, Belgium had decided to tax both domestic and foreign dividends at a flat income tax rate of 25% without credits. The plaintiffs complained, on the grounds that they were subjected to both the 15% French withholding tax, and the Belgian 25% income tax. Since Belgium did not credit its own withholding tax, the Court of Justice ruled that it could not be compelled to grant a tax advantage that did not exist with respect to internal dividends. Indeed, it held that:

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[80] Ibid., 47.
[81] Ibid., 49.
[82] Case C-414/06, *Lidl Belgium*, [2008] *ECR* I-3601.
[83] Case C-315/02, *Lenz*, [2004] *ECR* I-7063.
[84] Case C-319/02, *Manninen*, [2004] *ECR* I-7477.
[85] Economic double taxation occurs when the same object is taxed twice in the hands of different persons. With respect to cross-border dividends, it typically occurs when dividends are first taxed in the source state (generally through a withholding tax due by the issuing company) and then in the shareholder state (generally through corporation tax due by the shareholder).
[86] Juridical double taxation occurs when the same person is subjected to two different taxes with respect to the same object.
[87] Case C-513/04, *Kerckhaert-Morres*, [2006] *ECR* I-10967. See also e.g. Case C-128/08, *Damseaux*, [2009] *ECR* I-6823.

> In circumstances such as those of the present case, the adverse consequences which might arise from the application of an income tax system such as the Belgian system [...] result from the exercise in parallel by two Member States of their fiscal sovereignty.[88]

The Court of Justice case law relating to inbound dividends is particularly interesting as it shows that, if the Court may compel Member States to *extend* existing tax advantages in such a way as to comply with the equal treatment principle, it does not require them, however, to *set up* tax advantages in order to remove the 'adverse consequences' arising from the parallel exercise of two taxing jurisdictions. As for outbound dividends, Member States are required to treat nonresident shareholders no less favorably than resident shareholders, regardless of whether economic double taxation[89] or juridical economic taxation are at issue.[90]

198. The above demonstrates that, as far as the fields of education, social security, and direct taxation are concerned, European Union law imposes significant adjustment requirements upon Member States. They all relate to the obligations to open national systems in such a way as to take into account EU cross-border situations. However, these obligations are systematically limited by the need to preserve the sustainability, i.e. the internal coherence, of national systems. The following shows that the degree of integration into society is another factor capable of limiting the obligations to open.

ii. Obligations subject to the degree of integration into society

199. Higher education: Nonresident students' financial assistance. Traditionally, most Member States excluded nonresident students from the grant of financial assistance. The Court's case law has undergone significant changes in this respect. At the outset, the Court decided that students' financial assistance did not fall within the scope of European Union law. In *Lair* and *Brown* it indeed ruled that:

> [A]t the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7.[91]

In *Raulin*, it drew an important distinction between grants covering costs of access – i.e. enrolment and tuition fees – and grants allowing students to enjoy financial independence. It

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[88] Case C-513/04, *Kerckhaert-Morres*, [2006] *ECR* I-10967, 20.
[89] See e.g. Case C-373/04, *Test Claimants in Class IV of the ACT Group Litigation*, [2006] *ECR* I-11673.
[90] See e.g. Case C-265/04, *Bouanich*, [2006] *ECR* I-923; Joined Cases C-283/94, C-291/94 and C-292/94, *Denkavit International*, [1996] *ECR* I-5063; Case C-379/05, *Amurta*, [2007] *ECR* I-9569.
[91] Case 39/86, *Lair*, [1988] *ECR* 3161, 15; Case 197/86, *Brown*, [1988] *ECR* 3205, 18.

found that the former were subject to the non-discrimination principle,[92] and confirmed that Member States were free to regulate the latter. In case an individual challenged the conditions of award of a grant covering both, the Court added that:

> It is for the national courts to determine what proportion of the financial assistance granted is intended to cover the costs of access to vocational training.[93]

Therefore, these first cases recognized that Member States enjoyed a wide margin of discretion to set out award conditions, even when such conditions overtly discriminated between residents and nonresidents.

200. But the Court of Justice clearly departed from this initial stance in *Bidar* and *Förster*.[94] This change followed two important decisions, which involved broader issues relating to the conditions of award of social benefits. *Grzelczyk*[95] concerned a non-Belgian EU national who studied in Belgium, and who challenged the Belgian authorities' refusal to grant him a social benefit in the form of minimum subsistence allowance – the 'minimex' – that was nonetheless guaranteed by Belgian law to Belgian nationals. Belgium contested the applicability of European Union law by relying on the previous Court of Justice case law on education.[96] But the Court rejected this line of reasoning.[97] It took into account the specific facts of the case: the applicant had himself taken care of his costs of maintenance, accommodation and studies during the first three years of his studies. However, the pursuance of his fourth year no longer enabled him to take over jobs. This led the Court to compel Belgium to grant him the minimex, and thus to broaden the scope *materiae personae* of the award conditions. It proceeded in a similar fashion in *D'Hoop*.[98] This time, Belgium refused to grant a 'tideover allowance' intended for young unemployed people seeking their first job on the ground that the applicant

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[92] Case C-357/89, *Raulin*, [1992] *ECR* I-1027, 27.
[93] Ibid., 28.
[94] Case C-209/03, *Bidar*, [2005] *ECR* I-2119; Case C-158/07, *Förster*, [2008] *ECR* I-8507.
[95] Case C-184/99, *Grzelczyk*, [2001] *ECR* I-6193. See, e.g. D. MARTIN, "A big step forward for Union Citizens, but a step backwards for legal coherence," 4 *European Journal of Migration and Law* 136-144 (2002); A. ILIOPOULOU & H. TORNER, 39 *CMLR* 609-620 (2002).
[96] Opinion in Case C-184/99, *Grzelczyk*, [2001] *ECR* I-6193, 36; Case C-184/99, *Grzelczyk*, [2001] *ECR* I-6193, 25.
[97] Case C-184/99, *Grzelczyk*, [2001] *ECR* I-6193, 35: "since Brown the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty and added to Title VIII of Part Three a new chapter 3 devoted to education and vocational training. There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since Brown, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements."
[98] Case C-224/98, *D'Hoop*, [2002] *ECR* I-6191.

– a Belgian national – had not attended secondary school in Belgium. The Court considered that this amounted to a breach of European Union citizenship provisions and thus compelled Belgium, once again, to broaden the scope of award conditions. *Grzelczyk* and *D'Hoop* did not specifically pertain to students' financial assistance. They nonetheless paved the way for the defining move that occurred in *Bidar*.[99]

201. This case concerned a French national who attended high school as well as university in the United Kingdom. While this Member State granted him assistance in relation to his tuition fees, it refused him a loan for maintenance costs on the grounds that he was not 'settled' in the United Kingdom.[100] The Court, following its Advocate General, reversed its previous case law and found that students' financial assistance fell within the scope of the Treaty.[101] It also considered that the settled-status requirement breached European Union citizenship provisions.[102] Therefore, for the first time, a Member State was compelled to extend the benefit of student financial support in order to comply with European Union law. The Court's reasoning imposed new adjustment requirements on Member States, thereby restricting national discretionary powers. In this respect, it subjected Member States' powers relating to the award of students' financial assistance to both negative and positive obligations. The Court underlined that Member States might not "require the students concerned to establish a link with [their] employment market."[103] More importantly, neither may they "preclude any possibility of a national of another Member State" from obtaining a status that would allow them to benefit from financial assistance.[104] Positive obligations consist in compelling Member States to grant assistance – provided it does not become an unreasonable financial burden – if the students concerned are able to demonstrate a certain degree of integration into their

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[99] Case C-209/03, *Bidar*, [2005] *ECR* I-2119. See, e.g., O. GOLYNKER, "Student loans: the European concept of social justice according to Bidar," 31: 3 *Eur. Law Rev.* 390-401 (2006); C. BARNARD, 42 *C. M. L. Rev.* 1465-1489 (2005); D. V. TSIROS, "Maintenance assistance for migrant students: European Union citizenship, equal treatment and the attribution of social rights under the *Bidar* judgment and beyond," 63 *RHDI* 948 (2010).

[100] See Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 55: "In order to be eligible for maintenance assistance economically inactive EU citizens are required to be 'settled' in the United Kingdom within the meaning of national immigration law. Periods spent receiving full-time education are not taken into consideration for calculating the period of being settled. Settled status must also be demonstrated by the possession of a residence permit. This same condition of 'being settled' does not apply to British nationals. They only need to have been ordinarily resident within the United Kingdom for the three years prior to commencing their studies."

[101] See Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 35-50; Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 38-43.

[102] Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 53. See *Supra*, §§ 110s.

[103] Ibid., 58.

[104] Ibid., 60.

society. In this regard, the Court specified that this could be "regarded as established by a finding that the student has resided in the host Member State for a certain length of time."[105] *Bidar* nonetheless gave rise to certain uncertainties relating to the assessment of the degree of integration.

202. The Court of Justice settled some of them in *Förster*.[106] This case concerned a German national studying in the Netherlands. She performed paid work in this country, and subsequently became economically inactive. She applied for financial assistance, but the Dutch authorities rejected her application on the grounds that she neither retained the status of a Community worker, nor fulfilled the requirement of lawful residence in the Netherlands for a continuous period of at least five years. It is to be noted that Mrs. Förster moved to the Netherlands for the sole purpose of pursuing higher education. Despite the fact that the factual background of *Förster* is different than *Bidar*'s, the Court held that the principles stemming from *Bidar* were applicable.[107] It rejected the Member States' argument whereby a distinction should be drawn between individuals who move to another Member State with the primary objective of pursuing studies there – and who should be subject to Directive 93/96 – and individuals who settle in another Member State for other reasons, and subsequently decide to take up studies – and who may rely on European Union citizenship provisions.[108] The Court moreover confirmed that Member States may not place non-nationals in a situation where they are wholly precluded from enjoying the right to assistance to cover their maintenance costs. They must take into account the students' actual degree of integration.[109] However, the Court did not follow its Advocate General with respect to the conditions of assessment of the degree of integration. Advocate General MAZÁK seemed to have endorsed Mrs. Förster's claim that:

> Member States should assess in each individual case whether the person concerned demonstrates a sufficient degree of integration into society of the host Member State, account being taken of personal factors.[110]

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[105] Ibid., 59.
[106] Case C-158/07, *Förster*, [2008] *ECR* I-8507. See M. ROSS, "The struggle for European Union citizenship: Why solidarity matters," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W. MICKLITZ & B. DE WITTE, (Cambridge; Antwerp: Intersentia; Oxford, 2011), 291; S. DE LA ROSA, "La citoyenneté européenne à la mesure des intérêts nationaux. À propos de l'arrêt Förster," 45 *Cahiers de Droit Européen* 549-567 (2009).
[107] Case C-158/07, *Förster*, [2008] *ECR* I-8507, 44.
[108] See Opinion in Case C-158/07, *Förster*, [2008] *ECR* I-8507, 99.
[109] Case C-158/07, *Förster*, [2008] *ECR* I-8507, 47.
[110] Opinion in Case C-158/07, *Förster*, [2008] *ECR* I-8507, 93.

He indeed considered that criteria used by Member States to grant financial assistance could not be "so general in scope that [they] systematically exclude students." They "must be indicative of the degree of integration into society."[111] The Advocate General understood the latter obligation as precluding the Netherlands from imposing a five-year residence requirement on the grounds that "it can reasonably be assumed that a number of students may have established a substantial degree of integration into society well before the expiry of that period."[112] He thus implied that Member States should assess the personal situations of students on a case-by-case basis, and not by using automatic criteria. Nonetheless, the Court concluded that the five-year residence requirement imposed by Dutch authorities was proportionate.[113] There is thus a discrepancy between *Bidar* and *Förster*. The former seemed to strictly restrict Member States' assessment of the 'degree of integration' by imposing on them the obligation to grant financial assistance on a case-by-case basis. But the latter gives more leeway to national authorities, which are allowed to set out general criteria, such as a five-year residence requirement. These criteria, by definition, do not systematically enable students to demonstrate that they are actually integrated into their host society.

203. Higher education: Financial assistance of students studying abroad. The field of higher education has also raised issues relating to the exportation of social benefits. Here, cases concern students willing to study abroad who are denied the right to export financial support offered by their home state. The obligations placed upon home states mirror in some respects those that have been imposed upon Member States hosting nonresident students. The first case, *Wirth*, was decided in the early nineties.[114] A German national, resident in Germany, took over musical studies in the Netherlands, due to the lack of places available in Germany. He requested an educational grant but the German authorities turned it down. As noted by the Advocate General, this was the first case in which a home country was accused of discriminating.[115] The Court applied the principles stemming from *Lair* and *Brown*,[116] and held that:

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[111] Ibid., 128.
[112] Ibid., 129.
[113] Case C-158/07, *Förster*, [2008] *ECR* I-8507, 54: "A condition of five years' continuous residence cannot be held to be excessive having regard [...] to the requirements put forward with respect to the degree of integration of non-nationals in the host Member State."
[114] Case C-109/92, *Wirth*, [1993] *ECR* I-6447.
[115] Opinion in Case C-109/92, *Wirth*, [1993] *ECR* I-6447, 41.

> [A]t the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the Treaty.[117]

It thus refused to put any limitation on Member States' discretion. But it reversed its position, after *Bidar*[118] was decided, in *Schwarz* and *Commission v. Germany*.[119]

204. In *Morgan & Bucher*,[120] a subsequent case, two German students, willing to take over studies in the United Kingdom and the Netherlands respectively, were refused grants specifically designed for students studying abroad. In the case of Ms Morgan, it was on the grounds that the course of study was not the continuation of the original course. As for Ms Bucher, it was because she had not been permanently resident in a border location. The Court found in both cases that the German rules amounted to unjustified restrictions. Advocate General COLOMER strictly assessed the proportionality of the German rule by engaging into a 'no less restrictive means' test.[121] The Court also found that the requirement whereby students should spend one year at an establishment of higher education in Germany before being entitled to receive assistance for an education or training course attended in another Member State was disproportionate. On the one hand, it found that most of the grounds of justification laid down by Germany were inconsistent or inappropriate.[122] On the other hand, it accepted Germany's argument whereby Member States can subject the award of a grant to study abroad to the proof that the students demonstrate a certain degree of integration in order to safeguard the financing of their education systems.[123] But it nevertheless held that the condition imposed by the rule at issue was too general and too exclusive:

> [T]he degree of integration into its society which a Member State could legitimately require must, in any event, be regarded as satisfied by the fact that the applicants in the main proceedings were raised in Germany and completed their schooling there.[124]

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[116] Case 39/86, *Lair*, [1988] *ECR* 3161; Case 197/86, *Brown*, [1988] *ECR* 3205.
[117] Case C-109/92, *Wirth*, [1993] *ECR* I-6447, 25.
[118] Case C-209/03, *Bidar*, [2005] *ECR* I-2119.
[119] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849; Case C-318/05, *Commission v. Germany*, [2007] *ECR* I-6957. See, e.g. F. KAUFF-GAZIN, "Education et droit communautaire: le marché prend-il le pas sur l'intérêt général?" *Rec. Dalloz* 666 (2008); N. NIC SHUIBHNE, 45 *C. M. L. Rev.* 771-786 (2008).
[120] Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161. See, e.g., M. DOUGAN, "Cross-border educational mobility and the exportation of student financial assistance," 33: 5 *Eur. Law Rev.* 723-738 (2008).
[121] Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161.
[122] Ibid., 35, 37, 40 and 47.
[123] Ibid., 42-43.
[124] Ibid., 45.

This statement has therefore the effect of substantially extending the scope *ratione personae* of the German rule. It entitles almost any German national to benefit from grants to study abroad. It is notable that, as far as students' financial support is concerned, requirements imposed on home states differ in some respects from those imposed on host states. As seen earlier, in case of entry restrictions, the Court does not compel Member States to take into account the personal circumstances of nonresident students. However, the statement above indicates that home states must take into consideration factors such as whether their students have been raised and/or completed their schooling on their territory, i.e. elements that relate to personal circumstances. The requirement imposed on home states is accordingly more burdensome.

205. Compensation of civil war victims. Three cases deserve attention in this field. They all involved national regulations subjecting the recipients of this type of benefit to a residence condition. *Tas-Hagen*[125] pertained to a rule enacted by the Netherlands requiring the beneficiaries to reside in that Member State at the time they submitted their application. In *Nerkowska*,[126] the Polish legislation required beneficiaries to reside on the national territory throughout the period of payment of the benefit. As for *Zablocka*,[127] it concerned a German law that excluded from its scope the payment of certain benefits to surviving spouses of civil war victims when the latter were domiciled in the territory of certain specific Member States. The Court of Justice regarded each of these measures as being contrary to European Union citizenship provisions. It nonetheless accepted the idea that Member States may limit the grant of these social benefits on the basis of the solidarity principle. This results in the obligation put on individuals to demonstrate a certain degree of integration into society.[128] But discretion does not mean arbitrariness and the Court limited, once again, the freedom enjoyed by Member States. As Advocate General SHARPSTON pointed out in *Tas-Hagen*, "the residence requirement may not be 'too general and exclusive'."[129] In this context, the Court put emphasis on the fact that:

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[125] Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451.
[126] Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993.
[127] Case C-221/07, *Zablocka*, [2008] *ECR* I-9029.
[128] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 57; Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 34; Opinion in Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 21; Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 35.
[129] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 64.

> [A] criterion requiring residence cannot be considered a satisfactory indicator of the degree of connection of applicants to the Member State granting the benefit when it is liable [...] to lead to different results for persons resident abroad whose degree of integration into the society of the Member State granting the benefit is in all respects comparable.[130]

Applying this principle to the facts of *Tas-Hagen*, the Court found that the Dutch criterion was not "a satisfactory indicator of the degree of attachment of the applicant to the society."[131] The condition imposed by this Member State notably excluded all the people who had lived and worked there for a long period of time but who subsequently decided to spend their retirement abroad.[132] It reached the same conclusion in *Nerkowska*.[133] Another ground of justification relating to the need to ensure effective monitoring was also accepted. However, the Court developed a 'no less restrictive means' approach and underlined, for instance, in *Nerkowska*, that nothing precludes Member States from requesting their nationals to undergo a check on a regular basis.[134] In addition, it ruled that such an objective could not justify that residence in certain Member States only excluded the recipients from the benefits offered by Germany.[135] Therefore, in cases relating to the compensation of civil war victims, the counter-limit pertaining to the degree of integration of individuals into society is strictly assessed.

b. Obligations to take into account personal circumstances

206. Besides the obligations to open, the Court has also placed obligations to take into account personal circumstances on Member States. These obligations concern the aforementioned fields in which the Court uses the degree of integration into society criterion, as well as the fields of nationality, direct taxation, cross-border health care, and the enforcement for the recovery of debts. They prevent Member States from automatically excluding EU cross-border situations. If they want to do so, they must justify their decisions on the basis of personal assessments – i.e. if the personal skills of a student justify a refusal to admit her into university; if a student willing to study abroad cannot demonstrate a sufficient degree of integration into the society of the home state; if a host state cannot be reasonably expected to take into account the 'personal and family circumstances' of nonresidents because they do not receive most of their income on its territory; if the personal circumstances of a patient do not

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[130] Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451.
[131] Ibid., 39.
[132] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 67.
[133] Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 43.
[134] Ibid., 45.
[135] Case C-221/07, *Zablocka*, [2008] *ECR* I-9029, 42s.

justify the necessity to receive treatment abroad; if a civil war victim cannot provide evidence of a sufficient degree of integration into the society of her home state or if the personal circumstances of an individual are such as to not prevent a Member State from withdrawing its decision of naturalization/its nationality.

207. Nationality. Rottmann[136] involved an individual who originally had Austrian citizenship. He took up residence in Germany and was eventually naturalized in this country. This caused him to lose his Austrian nationality in accordance with Austrian nationality law. However, German authorities later on withdrew his naturalization on the grounds that he had acquired German nationality by deception. He indeed hid at that time that an arrest warrant had been issued against him. The applicant claimed that such a decision was in breach of European Union law because it would result in the loss of European Union citizenship, and the rights attached to it. Both the Advocate General and the Court concluded that European Union law was applicable to the facts of the case.[137] They moreover acknowledged in substance that:

> [I]t is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalization when that nationality has been obtained by deception.[138]

However, the Court of Justice added two important statements, absent from the Opinion of Advocate General POIARES MADURO. First, it submitted the withdrawal decision to the proportionality principle.[139] It followed, in this regard, an ambivalent approach. On the one hand, it referred several times to the national court, which is a sign of quite a deferential

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[136] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449. See, for detailed comments, J. SHAW (Ed), "Has the Court of Justice challenged Member State sovereignty in nationality law?" *EUI RSCAS Working Papers*, 2011/62. See also: D. KOCHENOV, 47 *CMLR* 1831-1846 (2010); H. VAN EIJKEN, "European citizenship and the competence of Member States to grant and to withdraw the nationality of their nationals," 27: 72 *Merkourios* 65-69 (2010); H. U. J. D'OLIVEIRA, "Decoupling nationality and Union citizenship?" 7 *European Constitutional Law Review*, 138-160, (2011); G. R. DE GROOT & A. SELING, "The consequences of the *Rottmannn* judgment on Member State autonomy – The European Court of Justice's avant-gardism in nationality matters," 7 *European Constitutional Law Review* 138-160 (2011).

[137] It is to be noted that they followed different lines of reasoning to reach this conclusion. The Advocate General based the applicability on the fact that Mr. Rottmannn could move to Germany in the first place because he used his right to free movement (See §§16-17 of his opinion). As for the Court, it did not seek to establish any cross-border element: "It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalization [...] and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of EU law." (§42)

[138] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 59.

[139] Ibid.

approach.[140] But, on the other hand, it gave several important guidelines with respect to the review of the decision to withdraw naturalization. National courts should indeed take into account several elements:

> [T]he consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regards to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalization decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.[141]

The Court seems to suggest that, even when a decision of naturalization has been acquired by deception, national authorities may not automatically withdraw their decision. Instead, they must take into account the personal background of the individual concerned by the decision. Second, the Court of Justice underlined that the principles stemming from its judgment: "apply both to the Member State of naturalization and to the Member State of the original nationality."[142] In other words, the limitations put on Member States' discretion with respect to the withdrawal of naturalization affect symmetrically national discretionary powers relating to the conditions of loss of nationality. Therefore, both home states and host states are subject to the obligation to take into account the individual's personal circumstances.

208. Direct taxation: Individual income taxation. Cases relating to individual income taxation have raised significant issues as to the fiscal treatment to be given to nonresidents. The Court of Justice recognizes, as a matter of principle, that, as far as direct taxation is concerned, the situations of residents and nonresidents are not comparable.[143] It has however decided since *Biehl*[144] that the state of employment of nonresidents must grant them the same tax benefits as

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[140] Ibid., 55, 58.
[141] Ibid., 56.
[142] Ibid., 62. See, *contra*, the opinion of the Advocate General, §34: "Finally, as regards the restoration of Austrian nationality, Community law does not impose any such obligation, even though, failing such restoration, the application in the main proceedings remains stateless and, therefore, deprived of Union citizenship. To decide otherwise would be to disregard the fact that the loss of Austrian citizenship is the consequence of the personal decision of the citizen of the Union deliberately to acquire another nationality and that Community law also does not preclude the Austrian legislation under which an Austrian loses his citizenship when he acquires, at his request, a foreign nationality."
[143] See for instance Case C-279/93, *Schumacker*, [1995] *ECR* I-225, 31.
[144] In this case, unlike residents, nonresidents employed in Luxembourg were not entitled to the repayment of overdeductions of income tax. The Court held for the first time that: "A national provision such as the one at issue is liable to infringe the principle of equal treatment in various situations. That is so in particular where no income arises during the year of assessment to the temporarily resident taxpayers resident taxpayer in the country he has left or in which he has taken up residence. In such a situation, that taxpayer is treated less favorably than a

residents, provided that they receive most of their income in the source state. It explained in *Schumacker* that in relation to tax benefits, Member States must adjust their national tax systems in such a way as to take into account the 'personal and family circumstances' of nonresidents. For, otherwise, neither the state of residence, nor the state of employment, would take into account such personal and family circumstances.[145] Following this, the Court had several occasions to clarify under which circumstances host states must take into account nonresidents' personal circumstances.

209. It started by extending the scope of the *Schumacker* principle in *Wielockx*,[146] where it held that it also applied to nonresident self-employed persons. In *Gschwind*, it ruled for instance that earning 42% of the total income in the state of employment did not entitle the nonresident worker to claim the same tax benefits as resident workers.[147] It thus upheld the German measure at issue, whereby national treatment would be granted to nonresidents if they earned more than 90% of their total income in the source state. In *Wallentin*,[148] the Court confirmed that if a taxpayer receives all of his income in a Member State where he does not habitually resides, the latter must take into account his personal and family circumstances in such a way as to grant him a tax allowance. This holds all the more true for taxpayers who did not receive any taxable income in their state of residence, even though they worked in another Member State for a short period of time. The Court of Justice also broadened the scope of the obligations put on the states of employment. In *Ritter Coulais*, it followed its Advocate General, according to whom:

> [N]on-residents' ability to pay tax, which depends not only on account being taken of their personal and family circumstances, but also on account being taken of their total income and losses, should not be assessed differently by the competent authorities on the sole ground of place of residence, where resident and nonresident taxpayers alike receive all or virtually all their taxable income in the taxing State.[149]

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resident taxpayer because he will lose the right to repayment of the overdeduction of tax which a resident taxpayer always enjoys." (§16)

[145] Case C-279/93, *Schumacker*, [1995] *ECR* I-225, 36. See also the Advocate General Opinion at 90, who underlined that the readjustment imposed on the state of employment would not result in taking into account the taxpayer's personal circumstances twice, thereby creating an advantage on free movers only.

[146] Case C-80/94, *Wielockx*, [1995] *ECR* I-2493.

[147] Case C-391/97, *Gschwind*, [1999] *ECR* I-5451, 32.

[148] Case C-169/03, *Wallentin*, [2004] *ECR* I-6443.

[149] Opinion in Case C-152/03, *Ritter-Coulais*, [2006] *ECR* I-1711, 98.

The Court definitely confirmed this extension in *Lakebrink*.[150] For the purposes of determining the tax rate applicable to income taxable in Luxembourg, Luxembourg authorities did not take into account income losses from the letting of properties located in other Member States and belonging to a European Union national who, although not resident in Luxembourg, did receive the major part of his taxable income in this Member State. The Court concluded that this mechanism was discriminatory,[151] and ruled that:

> [T]he ground [...] on the basis of which the Court made its finding of discrimination in Schumacker concerns [...] all the tax advantages connected with nonresident's ability to pay tax which are not taken into account either in the State of residence or in the State of employment [...] since the ability to pay tax may indeed be regarded as forming part of the personal situation of the nonresident within the meaning of the judgment in Schumacker.[152]

Thus, states of employment must grant the same tax advantages to resident and nonresidents workers, so long as they are connected with the taxpayers' ability to pay taxes and provided that they are not taken into account twice. Therefore, the Court places residents and nonresidents almost on the same footing.

210. This requirement may even lead the Court to compel Member States to revise the terms of the tax conventions they bilaterally conclude with each other. In *Renneberg*,[153] the Court indeed held that the principles stemming from *Schumacker* and the following cases applied to a situation where the failure to take into account the personal situation of nonresidents was the result of the application of a tax convention. Here, in accordance with the Convention concluded between Belgium and the Netherlands, rental income losses in respect of a property located in Belgium of a Belgian resident could not be taken into account by the Netherlands, the state of employment. Both the Court and its Advocate General contended that the Netherlands should nevertheless grant the same tax benefits to residents and nonresidents i.e. they should be able to take into account such losses. As summarized by Advocate General MENGOZZI:

> Member States which are parties to a bilateral tax convention should [...] be under a genuine obligation to prevent a situation in which aspects of the ability to pay tax of a

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[150] Case C-182/06, *Lakebrink*, [2007] *ECR* I-6705.
[151] Ibid., 35.
[152] Ibid., 34 (Emphasis added).
[153] Case C-527/06, *Renneberg*, [2008] *ECR* I-7735.

> taxpayer of one of those Member States [...] are not taken into account by either of those States.[154]

Accordingly, not only are Member States under an obligation to comply with European Union law when they adopt unilateral tax regulations, but also when they enter into international tax agreements.

211. Another aspect of the case law relating to direct taxation deserves attention. The Court of Justice underlined in *Zurstrassen*[155] that the state of residence is under the obligation to take into account the personal and family circumstances of taxpayers even if this entails to take into consideration cross-border elements. Here, the appellant's spouse and children were resident in Belgium, while he was resident in Luxembourg. The latter state taxed him as a single person because his family was not resident. The Court held that Luxembourg was the:

> [O]nly State which can take account of Mr. Zurstrassen's personal and family circumstances since he is not only resident in that State but, additionally, is paid almost the entire earned income of the household there.[156]

This case confirms that the defining criterion that Member States must take into account when granting tax benefits is no longer that of residence. Rather, they must assess whether taxpayers receive most of their income on their territory or not. Cases decided in the field of direct taxation accordingly have significant effects on the exercise of Member States' powers. They have imposed an important range of obligations relating to the personal circumstances of taxpayers, which have become increasingly burdensome.

212. Cross-border health care. Likewise, in the field of cross-border health care, the Court has emphasized, on several occasions, on the obligation to take into account the personal circumstances of patients. Thus, in *Watts* it held that:

> [A] refusal to grant prior authorization cannot be based merely on the existence of waiting lists enabling the supply of hospital care to be planned and managed on the basis of predetermined general clinical priorities, without carrying out in the individual case in question an objective medical assessment of the patient's medical condition, the history and probable course of his illness, the degree of pain he is in and/or the nature of his disability at the time when the request for authorization was made or renewed.[157]

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[154] Opinion in Case C-527/06, *Renneberg*, [2008] *ECR* I-7735, 95.
[155] Case C-87/99, *Zurstrassen*, [2000] *ECR* I-3337.
[156] Ibid., 23.
[157] Case C-372/04, *Watts*, [2006] *ECR* I-4325, 119. See also Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509, 90: "In order to determine whether treatment which is equally effective for the patient can be obtained without undue delay in an establishment having an agreement with the insured person's fund, the national

It results from this statement that Member States are free to define predetermined general clinical priorities. But they must adjust these priorities according to a set of factors pertaining to patients' personal conditions. In any case, they are required to justify their decisions on the basis of detailed arguments relating to patients' personal circumstances.

213. Enforcement for the recovery of debts. The enforcement for the recovery of debts also relates to the issue of exportation of benefits. In *Pusa*,[158] a Finnish national receiving a Finnish invalidity pension lived and paid income tax in Spain. He challenged a Finnish regulation on the grounds that the attachment order on his pension, relating to a debt in Finland, did not take into account the taxes paid in Spain. The Court ruled that, if it turned out that the appellant's income tax paid in Spain was not taken into account, this would amount to an unjustified restriction.[159] It thus placed the obligation upon home states to adjust their respective laws on enforcement in such a way as to take into account the tax payable in other Member States i.e. debtors' ability to meet their basic needs. However, the Court also imposed obligations even in the case where they do take into consideration taxes paid abroad. It indeed subjected the condition "under which the debtor is required to prove that he has paid or must pay within a given period in his State of residence a specified amount as tax on his pension"[160] to the requirement that the national rules must "not make it impossible in practice or excessively difficult to exercise the right to have the proper amount taken of the tax in question."[161]

c. Obligations of recognition

214. Another range of substantive requirements imposed on Member States relates to the obligations of recognition. It concerns the field of nationality and the rules governing surnames.

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authorities are required to have regard to all the circumstances of each specific case and to take due account not only of the patient's medical condition at the time when authorization is sought and, where appropriate, of the degree of pain or the nature of the patient's disability which might, for example, make it impossible or extremely difficult for him to carry out a professional activity, but also of his medical history."

[158] Case C-224/02, *Pusa*, [2004] *ECR* I-5763.

[159] Ibid., 29.

[160] Ibid., 42.

[161] Ibid., 44.

215. Nationality. It should first be recalled that the exercise of the rights conferred by free movement provisions is conditional upon the holding of the nationality of one of the Member States. As Advocate General LÉGER pointed out,

> The nature of the ties connecting a person to a Member State determines in large measure the rights which that person may enjoy under Community law. This reality is expressed through the term national of a Member State, which is a concept central to the Community legal order, since possession of that status determines many of those rights as derived from the general principles of Community law.[162]

In contrast to the free movement of goods, individuals must hold the nationality of at least Member State in order to enjoy the rights derived from the free movement principle, including European Union citizenship. As a result, the holding of the nationality of at least one Member State constitutes the 'key of access to the European legal order.' In this context, it is not surprising that the European Court of Justice had to rule on several occasions on cases raising issues relating to nationality. It confirmed each time that rules governing nationality fall within the powers retained by Member States.[163] However, it stressed in *Micheletti*, first case pertaining to this field, that:

> [I]t is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.[164]

In *Micheletti*, the plaintiff was the holder of two nationalities, granted by Argentina and Italy respectively. He applied for a permission to establish himself in Spain as a dentist holding the nationality of another Member State. However, the Spanish authorities refused to recognize his Italian nationality on the ground that Argentina, a non-member country, was his habitual place of residence. This case thus concerned the conditions of recognition of nationality. The Court, following its Advocate General, held that:

> [I]t is not permissible to interpret Article 52 of the Treaty to the effect that, where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State.[165]

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[162] Opinion in Case C-192/99, *Kaur*, [2001] *ECR* I-1237, 1.
[163] Case C-369/90, *Micheletti*, [1992] *ECR* I-4239; Case C-192/99, *Kaur*, [2001] *ECR* I-1237, 19; Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 39.
[164] Case C-369/90, *Micheletti*, [1992] *ECR* I-4239, 10 (Emphasis added). See H. U. J. D'OLIVEIRA, 30 *C. M. L. Rev.* 623-637 (1993).
[165] Case C-369/90, *Micheletti*, [1992] *ECR* I-4239; 11. See also Opinion in Case C-369/90, *Micheletti*, [1992] *ECR* I-4239, 4.

Therefore, the Court rejected the habitual place of residence criterion, which is however usually accepted in public international law. In other words, it shaped the conditions of recognition of nationality. The obligation of recognition is far-reaching, since it has the effect of preventing Member States from laying down any other criterion than the holding of the nationality of one of the Member States of the European Union.

216. Rules governing surnames. Cases relating to rules governing surnames provide another example of the obligation of recognition. In the four cases relating to this field,[166] European Union citizens resident in a given Member State were denied the right to have their names changed or recognized according to laws and practices of other Member States. *Garcia Avello*[167] involved children born in Belgium, holding both Belgian and Spaniard nationalities. Belgian authorities refused to register their surnames following the Spanish tradition of having two surnames – that of the father and that of the mother. The Court found that this refusal restricted European Union citizenship provisions and rejected all the justifications put forward by Belgium. It indeed compelled this Member State to adapt its conception of the principle of the immutability of surnames in such a way as to implement the principle of mutual recognition:

> [W]ith regard to the principle of the immutability of surnames as a means designed to prevent risks of confusion as to identity of parentage of persons [...] it is not so indispensable to the point that it could not adapt itself to a practice of allowing children who are nationals of one Member State and who also hold the nationality of another Member State to take a surname which is composed of elements other than those provided for by the law of the first Member State and which has, moreover, been entered in an official register of the second Member State.[168]

One decisive factor that the Court of Justice seems to have taken into consideration to reach this conclusion lies in the fact the Belgian practice at issue already allowed "derogations from application of the Belgian system of handing down surnames in situations similar to that of the children of the applicant in the main proceedings."[169] As a result, the principle of the immutability of surnames as implemented by Belgian authorities was not intangible. In other words, the Court did not require Belgium to introduce an *ad hoc* mechanism, but to extend the

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[166] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613; Case C-353/06, *Grunkin & Paul*, [2008] *ECR* I-7639; Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693; Case C-391/09, *Vardyn & Wardyn*, [2011] *ECR* I-3787.
[167] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613.
[168] Ibid., 42.
[169] Ibid., 44.

existing grounds of derogations. In this sense, it followed Advocate General JACOBS who stressed that:

> Belgium has a procedure whereby surnames can be changed if sufficiently serious grounds are present. The only point of which Belgian practice appears to conflict with Community law lies in the systematic refusal to consider a situation such as that of Mr. Garcia Avello and his children as constituting such grounds.[170]

217. Advocate General SHARPSTON and the Court developed a very similar line of reasoning in *Grunkin & Paul*.[171] This case involved a child born in Denmark, from two German nationals, who also held German nationality but who was a Danish resident. He was registered in Denmark under the surname 'Grunkin-Paul.' The German authorities refused to recognize his surname on the grounds that the law of the state of nationality applies to surnames, and that German law did not allow the bearing of double-barreled surnames. Unsurprisingly, the Advocate General and the Court of Justice disagreed with the German line of reasoning. They both started from the premise that the German legal order did not wholly exclude the possibility to bear double-barreled surnames. Accordingly, recognizing the Danish practice entails to extend the scope of existing procedures. The Advocate General stated, in this respect, that:

> [M]y approach would not require any major change to Germany's substantive or choice of law rules in the field of names, but would simply require them to allow greater scope for recognizing a prior choice of name validly made in accordance with the law of another Member State. To that extent, it involves no more than an application of the principle of mutual recognition which underpins so much of Community law.[172]

The Court shared this view, and held that:

> German law does not wholly preclude the possibility of conferring double-barreled surnames on children of German nationality. As the German government confirmed at the hearing, where one of the parents has the nationality of another State, the parents may choose to form the child's surname in accordance with the law of that State.[173]

Therefore, the application of European Union law to national rules governing surnames requires Member States to recognize laws and practices in force in other Member States by extending the scope of existing procedures of recognition. However, as already noted with respect to *Wittgenstein* and *Vardyn & Wardyn*, this obligation of recognition is limited in scope.

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[170] Opinion in Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613, 75.
[171] Case C-353/06, *Grunkin & Paul*, [2008] *ECR* I-7639.
[172] See also Opinion in Case C-353/06, *Grunkin & Paul*, [2008] *ECR* I-7639, 91.
[173] Ibid., 79.

It indeed only applies when national legal orders already contain a procedure allowing recognition. Thus, it consists in extending the scope of these existing procedures, but it does not compel Member States to introduce *ad hoc* mechanisms of recognition.

218. Nationality and surnames compared. Consequently, obligations placed upon Member States with respect to the rules governing surnames are less burdensome than those imposed in the field of nationality. But the various obligations of recognition all differ from the principle of recognition, as it is traditionally understood in traditional free movement cases. While the latter concerns national regulatory systems, the former consists in compelling Member States to unilaterally recognize foreign legal acts.

d. Obligations to adjust international agreements

219. Last but not least, mention must also be made of obligations placed on Member States to adjust their own international agreements.

220. Adjustment requirements apply to Member States' external retained powers. The scope of the adjustment requirements imposed on the exercise of Member States' retained powers is not limited to Member States' internal powers, but also encompasses their external powers. Thus, the Court of Justice has constrained, on several occasions, the exercise of Member States' taxing powers with respect to the implementation of bilateral tax treaties. *Gilly*,[174] decided in 1998, concerned a German national, employed in Germany in the public sector, and residing in France with her husband, a French national employed in France. In pursuance of the France-Germany tax treaty, she was taxed both in Germany on income received there, and in France on her total income. The same convention also stipulated that France had to provide Mrs. Gilly with double taxation relief through a tax credit. This mechanism did not fully prevent double taxation though, because the German tax rate was higher than the French rate. The Court of Justice, for the purposes of assessing whether this tax arrangement laid down by a bilateral tax treaty, regarded the treaty as national law. The Court is therefore indifferent to the nature of the national measure, be it a unilateral rule or a bilateral treaty. However, it did not agree with the plaintiffs that the implementation of the tax treaty was restricting the free movement of workers. The Court took the view that the fact that Mrs. Gilly was subjected to a higher tax than French residents employed in France was the result of a divergence in the level of taxation

[174] Case C-336/96, *Gilly*, [1998] *ECR* I-2793.

between France and Germany, which were both free to "define the criteria for allocating their powers of taxation as between themselves, with a view to eliminating double taxation,"[175] and to determine such level of taxation.[176]

221. However, in a subsequent case, *Saint-Gobain*, the Court of Justice ruled that the implementation of a tax treaty created a non-justifiable restriction, thereby constraining Member States' external tax powers.[177] This decision concerned the German-US tax treaty, which provided for double tax relief for US dividends. This tax advantage was only granted to companies residing in Germany, which had the effect of excluding branches of nonresident companies. In order to justify this difference in treatment between branches of resident companies and branches of nonresident companies, Germany argued that Member States should be recognized exclusive and discretionary powers with respect to the conclusion and implementation of tax treaties:

> [T]he conclusion of bilateral treaties with a non-member country does not come within the sphere of Community competence. Taxation of income and profits falls within the competence of the Member States, which are therefore at liberty to conclude bilateral double-taxation treaties with non-member countries.[178]

The Court reiterated the principle stemming from *Gilly*, but it added that "[a]s far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless may not disregard Community rules."[179] It went on by stating that:

> The national treatment principle requires the Member State which is party to the treaty to grant to permanent establishments of nonresident companies the advantages provided for by that treaty on the same conditions as those which apply to resident companies.[180]

In other words, European Union law requires Member States to extend the benefits provided for in tax treaties concluded with third countries to permanent establishments of nonresident companies.

222. Following *Saint-Gobain*, one could legitimately question whether the European Court of Justice would introduce most-favored-nation treatment with respect to tax treaty benefits. It

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[175] Ibid., 30.
[176] Ibid., 34.
[177] Case C-307/97, *Saint-Gobain*, [1999] *ECR* I-6161.
[178] Ibid., 54.
[179] Ibid., 57.
[180] Ibid., 58.

answered negatively in the *D.* case.[181] This case concerned a German national and resident, whose assets consisted of assets in Germany and 10% of real property in the Netherlands. He was subject, in this latter country, to net wealth tax as nonresident taxpayer. Since he was not resident, he was not granted a tax allowance, contrary to residents who were eligible. Neither Belgium nor Germany had a net wealth tax at that time. However, under the Belgium-Netherlands tax treaty, Belgian residents were entitled to a tax allowance. There was not such provision in the Germany-Netherlands tax treaty. In this respect, the plaintiff claimed that his situation was comparable to that of a Belgian nonresident and that he was discriminated against since he was not entitled to benefit from a tax allowance. The Court rejected his argument, on the grounds that "the fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting Member States is an inherent consequence of bilateral double taxation conventions."[182]

223. Therefore, the adjustments required from Member States with respect to their tax treaties are limited in scope. Member States must indeed extend the benefits of tax advantages to residents, but not to nonresidents. This was confirmed in *Gottardo*, a case concerning a bilateral social security convention between Italy and Switzerland.[183] Under this convention, Italian authorities took into account, for the purpose of entitlement to old-age benefits, periods of insurance completed in Switzerland, a non-member country. However, this benefit was denied to Mrs. Gottardo, on the sole ground that she was not an Italian national. The Court ruled that this amounted to inequality of treatment, and after referring to *Saint-Gobain* it held that:

> [W]hen a Member State concludes a bilateral international convention on social security with a non-member country which provides for account to be taken of periods of insurance completed in that non-member country for acquisition of entitlement to old-age benefits, the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.[184]

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[181] Case C-376/03, *D. v Inspecteur van de Belastingdienst*, [2005] *ECR* I-5821. See e.g. D. WEBER, "Most-Favoured-Nation Treatment under Tax Treaties Rejected in the European Community: Background and Analysis of the *D* case. A proposal to include a most-favoured-nation clause in the EC Treaty," 33: 10 *Intertax* 429-444 (2005).
[182] Case C-376/03, *D. v Inspecteur van de Belastingdienst*, [2005] *ECR* I-5821, 61.
[183] Case C-55/00, *Gottardo*, [2002] *ECR* I-413.
[184] Ibid., 34.

In the same manner as it took the view in *Saint-Gobain* that the granting of benefits to nonresident companies did not compromise Germany's obligations towards the United States, it stressed the fact, in *Gottardo*, that its ruling would not compromise Italian commitments vis-à-vis Switzerland.[185]

224. The confirmation of other rulings decided in the field of external relations. *Saint-Gobain* and *Gottardo* are reminiscent of other rulings pertaining to the core of Member States' external powers, understood as powers that are not external counterparts of internal powers, such as direct taxation or social security. I have already referred to *Centro-Com* in Chapter 2. I have shown that, in order to establish that European Union law was applicable to a United Kingdom measure falling within United Kingdom foreign policy powers, the Court of Justice used the same strategy as in cases involving internal powers retained by Member States.[186] In this case, the application of European Union law also resulted in compelling the United Kingdom to comply with its international obligations differently, "since effective application of the sanctions can be ensured by other Member States' authorization procedures, as provided for in the Sanctions Regulation."[187] The Court of Justice admitted that the scope of the adjustment requirements imposed on the United Kingdom could be limited if they had the effect of preventing this Member State from performing "its obligations towards non-member countries under an agreement concluded prior to entry into force of the Treaty or prior to [its] accession."[188]

225. The *Open Skies* judgments also deserve to be mentioned.[189] Whereas *Saint-Gobain* and *Gottardo* imposed obligations on Member States at the stage of implementation of their bilateral agreements, the *Open Skies* cases pertain to the conditions of conclusion of international

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[185] Ibid., 37.
[186] See, *Supra*, § 125.
[187] Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] *ECR* I-81, 48.
[188] Ibid., 61. On Article 351 TFEU, see e.g.: R. HOLDGAARD, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*, (Alphen aan den Rijn: Kluwer Law International, 2008), 136s; E. NEFRAMI, "Renforcement des obligations des Etats membres dans le domaine des relations extérieures," *Revue Trimestrielle de Droit Européen* 601-621 (2009); M. CREMONA, "Defending the Community interest: The duties of cooperation and compliance," in *EU Foreign Relations Law: Constitutional Fundamentals*, (Eds.) M. CREMONA & B. DE WITTE, (Oxford/Portland: Hart Publishing, 2008), 133-134, 347-348.
[189] Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98, "*Open Skies Judgments,*" [2002] *ECR* I-9427. See P. J. SLOT & J. DUTHEIL DE LA ROCHÈRE, 40 *C. M. L. Rev.* 697-713 (2003).

agreements falling within Member States' retained powers.[190] Eight Member States, including Germany, had amended, in the framework of their air transport powers, bilateral agreements with the United States, which granted traffic rights and laid down other rights and obligations. These agreements contained clauses on the ownership and control of airlines, as well as minority shareholders provisions. Under the former, airlines that could be granted operating authorizations and technical permissions had to be substantially owned and effectively controlled by a contracting party or by nationals of the contracting party or both. Under the latter, the United States could waive its right to withhold or revoke the necessary authorizations to airlines designated by, for instance, Germany, if German natural or legal persons did not hold more than 50% of the capital. Unsurprisingly, the Court found that these agreements contravened the freedom of establishment, since non-national airlines from other Member States were excluded from the *Open Skies* agreements.[191] However, unlike cases such as *Saint-Gobain* and *Gottardo*, the Member States parties to these agreements could not themselves adjust the conditions of their implementation, since the bilateral treaties enabled the United States to breach European Union law.[192] Therefore, as R. HOLDGAARD points out, "Member States could not ensure at the level of implementation that their international commitments complies with internal Community law. If this is the case, Member States cannot assume the international commitment."[193] To put it differently, "[e]ach Member State concerned therefore had to revise its Open Skies agreement to ensure their compliance with the EC provisions on freedom of establishment."[194] To sum up:

> In all these cases, although Member States have not lost the competence to conclude bilateral agreements, their freedom of action was constrained, either in effectively extending the implementation of the agreement to other Community nationals, or in being required to insist that the third country extended the benefits of the agreement to Community nationals established in their territories. In effect, the ostensibly bilateral agreement acquires a Community dimension.[195]

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[190] R. HOLDGAARD, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*, above n. 188, 132, 135.
[191] Case C-476/98, *Commission v. Germany*, [2002] *ECR* I-9855, 153.
[192] Ibid., 149-150.
[193] R. HOLDGAARD, *External Relations Law of the European Community: Legal Reasoning and Legal Discourses*, above n. 188, 135.
[194] C. HILLION, "*ERTA*, *ECHR* and *Open Skies*: Laying the grounds of the EU system of external relation," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Eds.) M. P. MADURO & L. AZOULAI, (Oxford : Hart Publishing, 2010), 231.
[195] M. CREMONA, "Defending the Community interest: The duties of cooperation and compliance," above, n. 188, 139.

Accordingly, the aforementioned cases are another manifestation of the consistency in the Court of Justice approach. Not only does it impose adjustment requirements on Member States' internal retained powers, but also on their external retained powers. These cases also confirm that the Court of Justice tends to apply the same reasoning when powers retained by Member States are involved, regardless of whether the powers are internal or external, and regardless of whether it interprets the fundamental freedom provisions or other treaty provisions, such as Article 207 TFEU on the commercial policy of the European Union or Article 351 TFEU relating to Member States' prior international agreements.

2. Procedural requirements

226. Aside from the substantive adjustments required from Member States, the Court of Justice has also imposed obligations of a procedural nature in three of the fields analyzed herein: cross-border health care, higher education, and direct taxation. Interestingly enough, these obligations echo procedural requirements that the Court of Justice has imposed on Member States in traditional free movement cases. In *Commission v. Germany*, for instance, the Court held that traders must be entitled to apply for an authorization to maker products lawfully manufactured and marketed in another Member State "under a procedure which is easily accessible to them and can be concluded within a reasonable time,"[196] and that it must be moreover open to them "to challenge before the Courts an unjustified failure to grant authorization."[197]

227. Cross-border health care. From a procedural perspective,[198] a prior authorization scheme will be deemed proportionate if it is:

> [B]ased on a procedural system which is easily accessible and capable of ensuring that a request for authorization will be dealt with objectively and impartially within a reasonable time and refusals to grant authorization must also be capable of being challenged in judicial or quasi-judicial proceedings.[199]

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[196] Case 178/84, *Commission v. Germany*, [1987] *ECR* 1227, 45.
[197] Case 178/84, *Commission v. Germany*, [1987] *ECR* 1227, 46.
[198] See, in this respect, P. KOUTRAKOS, "Health care as an economic service under EC law," in *Social welfare and EU law*, (Eds.) M. DOUGAN & E. SPAVENTA, (Hart publishing, Oxford and Portland, Oregon, 2005), 117s; L. AZOULAI, "En attendant la justice sociale, vive la justice procédurale! À propos de la libre circulation des patients dans l'Union (CJCE 16 mai 2006, *Watts*, Aff. C-372/04)," above, n. 40, 843-851.
[199] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 90; Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509, 83; Case C-372/04, *Watts*, [2006] *ECR* I-4325, 116. The Court added in Case C-372/04, *Watts*, [2006] *ECR* I-4325, 117: "refusals to grant authorization, or the advice on which such refusals may be based, must refer to the specific provisions on which they are based and be properly reasoned in accordance with them.

Member States must comply with four main procedural principles: objectivity, transparency, reasonable time principle, and the right to appeal. In *Watts*, for instance, the Court unequivocally condemned the British National Health Service because it did not set out "the criteria for the grant or refusal of the prior authorization."[200]

228. Higher education: Financial assistance of nonresident students. Similarly, in the field of higher education, the Court of Justice subjected Member States to the obligation of adopting criteria that are clear and known in advance:[201]

> [S]uch as to guarantee a significant level of legal certainty and transparency in the context of the award of maintenance grants to students.[202]

This last statement is reminiscent of Advocate General GEELHOELD's opinion in *Bidar*:

> Member States [...] must ensure that the criteria and conditions for granting such assistance do not discriminate directly or indirectly between their own nationals and other EU citizens, that they are clear, suited to attaining the purpose of the assistance, are made known in advance and that the application is subject to judicial review.[203]

229. Direct taxation. Last but not least, *Commission v. Luxembourg*,[204] decided in 1995, gave the Court the opportunity to place a last range of obligations on Member States in the field of direct taxation. Here, the Court found that Luxembourg had not drawn the necessary legal conclusions from *Biehl*[205] because it had not amended its legislation accordingly. As the Advocate General pointed out:

> [W]here a Member State's legislation is incompatible with Community law, it must enact a clear amendment to that legislation in order to remedy the incompatibility.[206]

Where a tax arrangement is clearly set out in a specific national provision with respect to residents, Member States must adopt a similar provision with respect to nonresidents.

Likewise, courts or tribunals hearing actions against such refusals must be able, if they consider it necessary for the purpose of carrying out the review which it is incumbent on them to make, to seek the advice of wholly objective and impartial independent experts."

[200] Case C-372/04, *Watts*, [2006] *ECR* I-4325, 118.

[201] Ibid., 56.

[202] Ibid., 57.

[203] Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 32 (Emphases added).

[204] Case C-151/94, *Commission v. Luxembourg*, [1995] *ECR* I-3685.

[205] Case C-175/88, *Biehl*, [1990] *ECR* I-1779.

[206] Opinion in Case C-151/94, *Commission v. Luxembourg*, [1995] *ECR* I-3685, 17. This was confirmed by the Court at 21: "although the special situation of temporary residents may objectively justify the adoption of specific procedural arrangements to enable the competent tax authorities to determine the tax rate applicable to national income, it cannot justify the exclusion of that category of taxpayer from the entitlement, otherwise by means of a non-contentious procedure, to repayment of tax, where excess amounts of tax deducted are repayable as of right to permanent residents."

Therefore, it stems from *Commission v. Luxembourg* that Member States are here again under the procedural obligations of clarity and transparency.

230. The positive character of the adjustment requirements. Section 2 has shed light on the content of the obligations placed upon Member States when they exercise their retained powers. They are of two main types: substantive and procedural, and they consist in imposing adjustment requirements on Member States. They are moreover not unconditional, thereby reflecting the need to take into account Member States' fundamental interests or, in other words, the need to preserve Member State autonomy. In addition, they differ from the obligations imposed by the traditional free movement cases in one fundamental respect. In traditional free movement cases, the Court of Justice imposes prohibitions on Member States, by interpreting the free movement provisions as negative rules.[207] Put differently, it sees the free movement provisions as setting out bans on a certain range of Member States' conduct. By contrast, the above has shown that, far from systematically imposing negative obligations, free movement cases involving national retained powers rather impose *positive* obligations upon Member States. As noted by S. PRECHAL *et al.*, the Court indeed engages into:

> [P]rocesses in which provisions aimed at the regulation of powers of the Member States – the 'negative' rules like Treaty freedoms and general principles of law – turn into power creating norms, in the sense that they are used to create new, positive obligations for the Member States.[208]

231. In a nutshell, adjustment requirements all amount to dictating to Member States *how* to take into account EU cross-border situations, even in sensitive fields relating to the core of their political, social, and economic autonomy. In this respect, Section 2 has revealed that they are not equally burdensome for Member States. Their constraining character varies, depending on the intensity of the Court's assessment of proportionality. In a first range of cases, the Court has allowed Member States to maintain restrictive measures, but only to a certain extent, and

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[207] D. O'KEEFFE & A. F. BAVASSO, "Four freedoms, one market and national competence: In search of a dividing line," in: *Liber Amicorum in Honour of Lord Slynn of Hadley*, (The Hague, 2000), 544; V. MICHEL, "Le législateur européen et l'entrave," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 283.

[208] S. PRECHAL, S. DE VRIES & H. VAN EIJKEN, "The principle of attributed powers and the 'scope of EU law'," in *The Eclipse of Legality in Europe*, (Eds.) L. BESSELINK, F. PENNINGS & S. PRECHAL, (Alphen aan den Rijn, Kluwer Law International, 2011), 246. Interestingly, the same remarks have been pointed out in the context of the United States. See, for instance, A. COX, *The Role of the Supreme Court in American Government*, (Oxford: Clarendon Press, 1976), 76s; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *A framework for studying the controversy concerning the federal courts and federalism*, (1986, available from: http://www.library.unt.edu/gpo/acir/Reports/information/m-149.pdf), 25-26.

provided that certain detailed conditions, laid down by the Court itself, are met. In the field of cross-border health care, for instance, Member States may require prior authorizations with respect to hospital environment and non-hospital environment involving the use of major medical equipment, but they must adjust their legislation in a way that complies with substantive requirements, such as the taking into account of patients' personal circumstances and procedural requirements. Similarly, Member States are compelled to take into account individual taxpayers' ability to tax. They are also required to adapt the conditions of award of certain social benefits, such as student financial support or benefits relating to the compensation of civil war victims. These conditions must comply with the equal treatment principle, and they must in any case enable students demonstrating a certain degree of integration, or civil war victims sharing specific bonds with they home country, to be included into national social schemes. The Court of Justice has imposed more burdensome adjustment requirements in another range of cases. It is noteworthy, for instance, that it assessed proportionality rigorously in *Micheletti*.[209] It imposed a quasi-unconditional obligation of recognition. This may be at least explained to a certain extent by the fact that this ruling did not involve a substantive area of nationality law. The Spanish measure was moreover in breach of a fundamental principle of the European Union legal order, the principle of mutual recognition. The Court also followed a hard line approach in cases relating to cross-border treatments outside hospital settings, and not involving the use of major medical equipment, since Member States may no longer impose prior authorization requirements. The same holds true for cases relating to direct taxation. The Court has almost always systematically overturned national measures, except when they are necessary to safeguard the sustainability of national tax systems. By contrast, at the other end of the spectrum, *Rottmann*[210] recognized that Member States retain discretionary powers to withdraw a decision of naturalization obtained by deception, or to issue a decision of loss of nationality, implying that substantive areas of nationality law are less affected by European Union law than procedural ones. But the Court has nonetheless required both home and host states to take into account the personal circumstances of the individual concerned. In cases relating to corporate income taxation, it applied a rather flexible proportionality test with respect to group relief mechanisms. Indeed, it accepted that they could be reserved for groups the companies of which were established on the

[209] Case C-369/90, *Micheletti*, [1992] *ECR* I-4239.
[210] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449.

territory of the same Member State, provided that the symmetry requirement was complied with.

232. The far-reaching effects of the adjustment requirements. To put it differently, the Court of Justice approach may be literally described, to borrow N. Reich's words, as 'quasi-legislative:' "the Court uses the 'proportionality' principle to impose measures of a legislative nature on Member States."[211] Cases involving powers retained by Member States are characterized by the fact that the Court of Justice, most of the time, enters into very detailed analyzes at the proportionality stage and, even when it recognizes that Member States enjoy discretion, it tends to describe how they ought to comply with European Union law. Therefore, its approach may appear very intrusive, and as interfering with national key-policy choices.

CONCLUSION OF CHAPTER 3.

233. A 'mutual incorporation of interests.' This third chapter has identified the last fundamental feature of the Court of Justice power-based approach, which can be described as a 'mutual adjustment resolution.' This specific way of settling jurisdictional disputes between the European Union and its Member States reflects the need to strike a balance between European Union and national interests, when the national interests involved are crucial to preserve Member State autonomy, and even their existence as independent polities. On the one hand, Member States are compelled to incorporate European Union interests into their legal systems in order to take into account EU cross-border situations, through constraining substantive and procedural adjustment requirements. On the other hand, the Court of Justice is more inclined than in traditional free movement cases to give weight to national interests, which pertain to the core of Member State political, social, and economic autonomy. In sum, this 'mutual adjustment resolution' consists in a 'mutual incorporation of interests.'

234. The issues raised by the 'mutual adjustment resolution.' However, the Court of Justice's 'mutual adjustment resolution' is not without certain issues or questions. First, it raises concerns as to the legitimacy of the European judge to impose such detailed and comprehensive obligations upon Member States. Indeed, in cases involving retained powers, the Court sometimes seems to behave more like a legislator than a judicial adjudicator. The

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[211] N. REICH, "How proportionate is the proportionality principle in the internal market case law of the ECJ?," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W. MICKLITZ & B. DE WITTE, (Cambridge; Antwerp: Intersentia; Oxford, 2011), 101.

second range of issues pertains to Member State autonomy. One might indeed wonder whether the Court of Justice approach may ultimately undermine Member States' political, social, and economic crucial interests.

CHAPTER 4. THE ECJ POWER-BASED APPROACH JURISDICTIONAL IMPLICATIONS

INTRODUCTION OF CHAPTER 4.

235. Purpose of Chapter 4. When individuals challenge national mechanisms relating to the powers retained by Member States, they seek, in substance, to challenge the *boundaries* of such arrangements. However, as seen earlier, the existence of boundaries in the form of inclusion and exclusion rules is essential for the preservation of the internal coherence of national retained powers,[1] and, therefore, for the safeguard of the political and social autonomy of Member States. The Court's power-based approach thus raises the issue as to whether it has the effect of undermining national autonomy, and/or whether it ultimately results in the broadening of the scope of European Union powers. As K. LENAERTS points out:

> [E]ach federal system is constantly faced with the task of keeping the appropriate balance between the autonomy of the component entities [...] and the effectiveness of the central government [...].[2]

That being said, the purpose of the present chapter is to shed light on the implications of the Court of Justice's power-based approach for the actors in European integration by focusing on their respective spheres of jurisdiction.

236. Approach. The approach followed is twofold. First of all, in line with the general analytical framework of the thesis, Chapter 4 primarily focuses on two of the actors of European integration: the Member States and the European Union respectively, to the exclusion of individuals. I only deal with the implications generated by the Court's approach for the latter – i.e. the recognition of new political, economic, and social individual rights –

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[1] See, *Supra*, §§ 57s.
[2] K. LENAERTS, "Constitutionalism and the many faces of federalism," 38: 2 *The American Journal of Comparative Law* 205 (1990).

incidentally.[3] Second of all, the first section of this chapter comprises a constitutional comparative law dimension, the purpose of which is to help identify the distinctive effects that follow cases involving powers retained by Member States. In order to do so, I rely on the fundamental assumption that traditional free movement cases bring about *preemptive effects* on national laws deemed to restrict the free movement principle. It might seem odd, at first glance, to refer to the notion of preemption to describe cases which, by definition, involve direct constitutional conflicts between Treaty provisions and national laws. However, I maintain that the effects of the traditional free movement case law of the Court of Justice do not fundamentally differ from the effects of cases usually analyzed in light of the 'classic' preemption doctrine. Since the preemption doctrine is rooted in the US legal order, I rely on US constitutional theory to support this assumption, and in particular to substantiate the concept of 'preemptive effects.'

237. Outline of Chapter 4. Chapter 4 is divided into two sections. First, I assess the issue as to whether the common assumption according to which the Court power-based approach is tantamount to a disempowerment of Member States. Second, I turn to the European Union and, in particular, to the fact that negative integration has been followed by (un)successful attempts at positive integration in fields relating to cross-border health care and the right to strike. Does this mean, as a result, that a possible effect of the Court's approach is the empowerment of the European Union?

SECTION 1. THE APPARENT DISEMPOWERMENT OF MEMBER STATES

238. V. CONSTANTINESCO asserted long ago that the modification of the conditions of the exercise of a power ultimately impacts both the substance of this power, and the division of powers between the two levels of government:

> [A]ny alteration of the conditions of exercise of power inevitably affects the latter. [...] The shift from a discretionary power towards a constrained power is not without consequences but, on the contrary, it does reshape the power, not to say the division of powers.[4]

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[3] See, *Supra*, §§ 19s.

[4] V. CONSTANTINESCO, *Compétences et pouvoirs dans les Communautés européennes. Contribution à l'étude de la nature juridique des Communautés*, Paris, L.G.D.J., Bib. de droit international, t. LXXIV, 1974, 77. ("toute modification du mode d'exercise de la compétence rejaillit inévitablement sur celle-ci. [...] La substitution d'une compétence liée à une compétence discrétionnaire n'est donc pas un changement sans conséquences mais au contraire constitue un réaménagement véritable de la compétence voire de la répartition des compétences.") See also K. LENAERTS "L'encadrement par le droit de l'Union européenne des compétences des Etats membres," in *Mélanges Jacquet*,

Against this backdrop, the purpose of the present section is to assess whether this statement is verified with respect to the cases concerned by the power-based approach. One of the first reactions that one may have when looking at the cases involving powers retained by Member States is to claim that they amount to "a loss of sovereign powers."[5] However, a closer look reveals, in my view, that things are in fact more intricate than they might at first seem. For if they do have the effect of reshaping the personal and territorial scopes of Member States' powers, the cases concerned by the power-based approach also simultaneously bring to light (i) that Member States are not deprived of their powers; (ii) the concern of the Court of Justice to protect the integrity of the material scope of the retained powers. To this end, I rely on the traditional distinction between the substance – formed of the personal, territorial, and material scopes – and the exercise of a power, as well as on the effects induced by the power-based approach on the substance of the powers retained by Member States. I claim that these effects are distinct from the preemptive effects usually brought about by traditional free movement cases.

1. A brief exposé of the preemptive effects of traditional free movement cases

239. Identifying the effects of traditional free movement cases calls for revisiting the usual paradigms of interpretation of traditional free movement cases. I do not, of course, deny the merits of other ways of interpreting these cases.[6] But I am of the view that analyzing them in light of the doctrine of preemption allows for an assessment of the effects of the application of European Union law on national powers, which ultimately leads to a somewhat more accurate understanding of the relationship between the European Union and its Member States. To this end, I start by reviewing the existing literature relating to the doctrine of preemption in both US constitutional law – where the doctrine originated – and European Union constitutional law. Then, in light of this preliminary assessment, I provide an analysis of traditional free movement cases through the lens of the doctrine of preemption.

(Paris: Dalloz, 2010), and, in the field of external relations, where a similar assertion was made, E. NEFRAMI, "The duty of Loyalty: Rethinking its scope through its application in the field of EU external relations," 47 *C. M. L. Rev.* 337 (2010).

[5] S. PRECHAL, "Competence creep and general principles of law," 3: 1 *Review of European and Administrative Law*, 6 (2010).

[6] See, *Supra*, §§ 19s.

a. The 'classic' preemption doctrine

240. General definition of preemption. As one US scholar points out, preemption directly pertains to the vertical relationship between different levels of government. It is a "key mechanism for ordering relations among different levels government."[7] Simply put, saying that US federal law, or European Union law, preempts state, or Member State, law means that the former trumps, supersedes, or displaces the latter,[8] either to a certain extent or wholly.[9] In other words, the preemption doctrine relates to the ability of US federal law, or European Union law, to preclude the corresponding powers of the states, or Member States.[10] Before going into greater detail, a fundamental distinction must be drawn. It pertains to the relationship between the concepts of preemption and supremacy/primacy. Primacy constitutes a tool to resolve conflicts of norms, while preemption is a mechanism aiming at settling jurisdictional disputes between the European Union and its Member States – or, in the US legal order, between the federal government and the states.[11]

241. US Constitutional law. Historically, the US Supreme Court began to shape the doctrine of preemption at the outset of the 20th century.[12] The *Lochner* Court[13] applied the preemption principle for the first time in two landmark cases: *Southern Railway Co v. Reid*, decided in 1912,[14] and *Southern Railway v. Railroad Commission of Indiana*, decided in 1915.[15] It stated in the latter that federal power "is such that when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject."[16] The year 1933 marks a turning point in the Supreme Court line of reasoning. In *Mintz v. Baldwin*, the Court took congressional intent as the determining factor to establish whether or not federal law preempted state law.[17] The years following this decision are, in this respect, characterized by a reversal of the presumption:

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[7] T. W. MERRILL, "Preemption and institutional change," 102 *Northwestern Univ. L. Rev.* 727-780 (2008).
[8] R. A. EPSTEIN & M. S. GREVE, "Introduction: Preemption in Context," in *Federal Preemption: States' powers, national interests*, (Eds.) R. A. EPSTEIN & M. S. GREVE, (Washington DC, AEI Press, 2007), 1.
[9] V. D. DINH, "Reassessing the law of preemption," 88 *Geo. L.J.* 2085 (2000).
[10] A. GOUCHA SOARES, "Pre-emption, conflicts of powers and subsidiarity," 23 *Eur. Law Rev.* 132 (1998).
[11] A. GOUCHA SOARES, "Pre-emption, conflicts of powers and subsidiarity," above, n. 10, 134.
[12] V. D. DINH, "Federal displacement of state law: The nineteenth-century view," above, 9, 27.
[13] The *Lochner* era corresponds to the years 1887-1937. See S. GARDBAUM, "The breadth vs. the depth of Congress's Commerce power: The curious history of preemption during the *Lochner* era," in *Federal Preemption: States' powers, national interests*, (Eds.) R. A. EPSTEIN & M. S. GREVE, (Washington DC, AEI Press, 2007).
[14] *Southern Railway Co v. Reid* 222 U.S. 424 (1912).
[15] *Southern Railway v. Railroad Commission of Indiana* 236 U.S. 439 (1915).
[16] Ibid., 446.
[17] *Mintz v. Baldwin* 289 U.S. 346 (1933).

Congress is deemed not to have intended to displace state law, unless otherwise stated. As the Supreme Court stated in *Rice v. Santa Fe Elevator Corp.*, decided in 1947 and seen as the "canonical statement of modern preemption doctrine:"[18]

> [I]n a field which the States have traditionally occupied [...] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.[19]

242. The contemporary preemption doctrine. Nowadays, American scholars distinguish between different categories of preemption. These categories reveal two factors. First, they place emphasis on the intent of Congress to displace state law: Is such intent express or implied? Second, they also shed light on the extent to which state law is displaced, i.e. the extent to which states are deprived of their lawmaking powers. The typologies drawn up by the various authors vary to a certain degree,[20] but it is nonetheless possible to mention four most often quoted categories. First, authors systematically refer to express preemption. As the name suggests, this category corresponds to cases where Congress has expressly declared its intention to displace state law. It may do so either by including a preemption clause or a savings clause into the text of a statute.[21] Assessing express preemption requires the Supreme Court to make statutory constructions.[22] Second, authors single out conflict preemption, which covers situations where state law conflicts with federal law to such an extent that "it is physically impossible to comply with both federal and state requirements." It is in the framework of conflict preemption that the distinction between preemption and supremacy may seem blurred, because the Supreme Court resolves such conflicts through the application of the Supremacy Clause.[23] Third, scholars also distinguish obstacle preemption. It corresponds to cases where state law does not conflict with specific provisions of a federal statute, but with its purposes and objectives. In the same way as conflict preemption, federal law only displaces conflicting state laws.[24] Last but not least, the final category generally quoted is that of field preemption. It

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[18] R. A. EPSTEIN & M. S. GREVE, "Conclusion: Preemption doctrine and its limits," in *Federal Preemption: States' powers, national interests*, (Eds.) R. A. EPSTEIN & M. S. GREVE, (Washington DC, AEI Press, 2007), 315.
[19] *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218 (1947) 230.
[20] R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, (Oxford University Press, 2009), 99, ft. 97.
[21] T. W. MERRILL, "Preemption and institutional change," above, n. 7, 738.
[22] V. D. DINH, "Reassessing the law of preemption," above, 9, 2100.
[23] Ibid., 2102; J. GOLDSMITH, *Statutory foreign affairs preemption*, (J. M. Olin Law & Economics Working Paper No. 116 (2nd Series)), 23-24; T. W. MERRILL, "Preemption and institutional change," above, n. 7, 739.
[24] V. D. DINH, "Reassessing the law of preemption," above, n. 9, 2105; J. GOLDSMITH, "Statutory foreign affairs preemption," above, n. 23, 24; T. W. MERRILL, "Preemption and institutional change," above, n. 7, 739.

involves cases where Congress has not explicitly expressed its intent to preempt.[25] The effects of field preemption go beyond conflict and obstacle preemptions, because federal law is deemed to displace state law even if state law does not conflict with either a statutory provision or the purposes and objectives of the statute.[26] This type of preemption has therefore the effect of depriving states of their lawmaking powers in an entire area. It may accordingly have significant implications for the states. It furthermore potentially confers tremendous powers to the Supreme Court, since it relies on a judicial assessment of congressional intent. In *Rice v. Santa Fe Elevator Corp.*, the Supreme Court restricted the effects of field preemption to two instances: "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"[27] or "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[28]

243. EU Constitutional law. While US preemption doctrine is nowadays deep-seated – even if it still gives rise to significant jurisdictional controversies between the states and the federal state – the Court of Justice of the European Union has never explicitly referred to the concept of preemption in its case law.[29] A range of scholars nonetheless refers to this notion in the European context, and claims that the exercise by the European Union of its powers may have, under certain circumstances, preemptive effects.[30]

244. "The emergent doctrine of European Union preemption." M. WAELBROECK is the first author who attempted to theorize the European preemption doctrine.[31] He distinguished between two

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[25] L. H. TRIBE, *American Constitutional Law*, (New York: N.Y.: Foundation Press, 2000), 1176.
[26] V. D. DINH, "Reassessing the law of preemption," above, n. 9 2105; J. GOLDSMITH, "Statutory foreign affairs preemption," above, n. 23, 24. This is what L. H. TRIBE, *American Constitutional Law*, above, n. 25, 1176 designates as "implied preemption": "Congress, through the structure or objectives of its enactments, has by implication precluded a certain kind of state regulation in the area."
[27] *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218 (1947) 230.
[28] Ibid.
[29] See R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, above, n. 20, 190-191; S. WEATHERILL, "Pre-emption, harmonization and the distribution of competence to regulate the Internal Market," in *The Law of the Single European Market. Unpacking the premises*, (Eds.) C. BARNARD & J. SCOTT, (Hart Publishing, 2002), 58.
[30] Thus, as early as 1981, J. H. H. WEILER, "The Community System: the Dual Character of Supranationalism," 1 *Yearbook of European Law* 267, 277 (1981) already spoke of the possibility for the then European Community to preempt Member States "from taking any action at all."
[31] M. WAELBROECK, "The emergent doctrine of Community pre-emption – Consent and re-delegation," in *Courts and Free Markets: Perspectives from the United States and Europe*, (Eds.) E. STEIN & T. SANDALOW, (Oxford: Clarendon Press, 1982), Vol. 2.

types of preemption: the 'conceptualist-federalist' approach and the 'pragmatic' approach. Under the former, the existence of European Union powers automatically excludes Member States' powers. In the same way as what prevailed under the *Lochner* era in the United States, European Union powers are seen as necessarily exclusive. The latter approach is different, as it assumes that European Union and national powers are concurrent. The Court thus accepts that Member States exercise their powers so long as this exercise does not conflict with European Union jurisdiction. After this initial analysis, the majority of the few scholars who focused on preemption issues drew on US preemption doctrine. These scholars have indeed modeled EU types of preemption after the US preemption doctrine, by directly importing US preemption types.[32] Despite their added value, these different attempts do not fully reflect, however, the developments in relation to governance as they occur in the context of the European Union.

245. Developments affecting harmonization in the European Union legal order. An important change in philosophy has affected the approach to harmonization in the European Union. The early years of the Community were characterized by the fact that the Community institutions, when exercising their regulatory powers, harmonized Member States rules in an exhaustive manner. Since then, this original approach has been abandoned to a large extent, and has been replaced by an approach based on minimum harmonization, partial harmonization, and optional harmonization. Nowadays, European Union powers are no longer seen as latently exclusive but, instead, as shared with Member States. The example of minimum harmonization is striking. While the European Union sets minimum standards, Member States are free to impose stricter ones.[33] This explains why A. ARENA contends that harmonization models should be seen as markers of preemption types, and should replace US ones.[34] An exception should however be made of exhaustive harmonization. Once such an act of secondary legislation has been adopted, Member States are entirely precluded of their powers. It thus corresponds to field preemption. Minimum harmonization does not go as far as field

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[32] See, *inter alia*, E. D. CROSS, "Preemption of Member State law in the European Economic Community: A framework for analysis," 29 *C. M. L. Rev.* 447-472 (1992); R. SCHÜTZE, "Supremacy without preemption? The very slowly emergent doctrine of Community preemption," 43 *C. M. L. Rev.* 1023 (2006); A. GOUCHA SOARES, "Preemption, conflicts of powers and subsidiarity," above, n. 10.

[33] C. BARNARD, *The substantive law of the EU: The four freedoms*, (Oxford, New York: Oxford University Press, 2013), 662s.

[34] A. ARENA, *The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen*, (Jean Monnet Working Paper 03/10), 67s.

preemption, since Member States may concurrently exercise their powers, but it does not allow them to adopt lower standards. Partial harmonization does not preclude Member States from adopting measures not covered by European Union measures. As for optional harmonization, it preempts Member States' powers to the extent that cross-border situations are concerned.

246. After having provided a brief overview of the doctrine of preemption in the American and European contexts, I will now rely on the notion of preemption to reassess the traditional paradigms of interpretation of traditional free movement cases.

b. The paradigms of interpretation of traditional free movement cases revisited

247. Scholars do not explicitly acknowledge that free movement provisions have a preemptive dimension, but they do frequently underline that the case law of the Court of Justice relating to these provisions is likely to have significant implications for Member States' regulatory capacity.[35] The purpose of the present paragraph is twofold. First, it aims to show that the notion of preemption provides a useful tool to analyze free movement cases and, in particular, their implications for the interplay between European and national spheres of powers when no act of secondary legislation has been adopted. Second, it aims to reappraise the traditional ways of interpreting free movement cases.

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[35] W. VAN GERVEN, "Constitutional aspects of the European Court's case law on Articles 30 and 36 EC as compared with the US Dormant Commerce Clause," in *Mélanges en l'honneur de Michel Waelbroeck*, (Eds.) M. DONY & A. DE WALSCHE, (Brussels, Bruylant, 1999), 1638: this scholar describes the provisions on the free movement of goods as "constitutional restrictions on state economic regulation," or (1632) the now Article 34 TFEU as "a toll for policing the borderline between legitimate and illegitimate regulation." In the same vein, R. DEHOUSSE, "Integration v. Regulation? On the dynamics of regulation in the European Community," 30: 4 *Journal of Common Market Studies* 385 (1992), once put emphasis on the fact that the current Article 45 TFEU has "had a strong impact on the Member States' room for maneuver." Likewise, J. SNELL "Who's got the power? Free movement and allocation of competences in EC law," 22: 1 *YEL* 323 (2003) underlines that "[a] decision that a national measure amounts to a restriction on free movement allocates the competence to regulate to the Community." Authors have also developed the "regulatory gap theory," which sees negative integration as not sufficiently counterbalanced by positive integration. See, in the first place, F. W. SCHARPF, "Negative and positive integration in the political economy of European welfare states," in *Governance in the European Union*, (Eds.) G. Marks *et al*, (London: Sage, 1996), 15-39. He speaks at 15 of a "competency gap." J. H. H. WEILER, "The Transformation of Europe," in *The Constitution of Europe: Do the new Clothes have an Emperor? And other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999), 67 already referred to a "regulatory gap." See also, *inter alia*, R. DEHOUSSE, "Integration v. Regulation? On the dynamics of regulation in the European Community," 30: 4 *Journal of Common Market Studies* 385 (1992); N. BERNARD, "La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence," *Cahiers de Droit Européen* 11-45 (1998). Last but not least, when free movement cases are analyzed through the principle of mutual recognition, emphasis is put on the horizontal effects of European Union on the respective regulatory capacities of host and home states.

248. The cons. To my knowledge, free movement cases have never been explicitly analyzed in light of the preemption doctrine. Some authors have nonetheless directly or indirectly expressed arguments against this idea. These arguments may be summarized as follows. At least two authors are of the view that preemption is a legislative, and not a constitutional phenomenon. While the former concerns conflicts between national laws and European Union acts of secondary legislation, the latter would cover direct conflicts between national measures and Treaty provisions,[36] such as those involved in free movement cases. L. W. GORMLEY underlines, in this respect, that "specific Union action [...] is necessary to generate the result of preemption."[37] In other words, preemption would only materialize through the adoption of acts of secondary legislation. Similarly, R. SCHÜTZE restricts the scope of his analysis to legislative preemption, on the grounds that "the European Court of Justice has – in parallel with the U.S. Supreme Court – moved to an intent rationale for the doctrine of preemption."[38] Another argument put forward is of a more technical nature. It pertains to the jurisdiction of the European Court of Justice in preliminary rulings. In free movement cases, the Court cannot invalidate national measures. It can only require Member States to disapply them "to the extent of the inconsistency" with European Union law. To put it differently, "[t]he national norm may still be operative in areas that are not covered by European law."[39] Therefore, Member States are not, technically, under the obligation to remove national laws that are deemed to be in violation of free movement provisions. Despite these two powerful sets of arguments, I nonetheless argue that the settlement of conflicts involving Treaty provisions may have, under specific conditions, comparable effects to that of conflicts involving acts of secondary legislation.[40] To this end, I first focus on the US legal order.

249. Constitutional preemption in the US legal order. In the US legal order, constitutional preemption covers two types of situation: cases where the US Constitution explicitly excludes

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[36] A. ARENA, *The doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen*, above, n. 34, 11.
[37] L. W. GORMLEY, "Free movement of goods and preemption of state power," in *A Constitutional Order of States? (Essays in Honour of Alan Dashwood)*, (Eds.) A. ARNULL *et al.*, (Oxford; Portland Or.; Hart Publishing, 2011), 371.
[38] R. SCHÜTZE, "Supremacy without preemption? The very slowly emergent doctrine of Community preemption," above, n. 32, 1039.
[39] A. VERHOEVEN, *The European Union in search of a democratic and constitutional theory*, (The Hague; London; Kluwer Law International, 2002), 310. See also L. W. GORMLEY, "Free movement of goods and preemption of state power," above, n. 37, 371.
[40] M. WAELBROECK, "The emergent doctrine of Community pre-emption – Consent and re-delegation," above, n. 31, for instance, did not distinguish between legislative and constitutional preemptions in his analysis. See also E. D. CROSS, "Preemption of Member State law in the European Economic Community: A framework for analysis," above, n. 32, 453.

state action, as well as cases where the US Constitution implicitly deprives states of their lawmaking powers.

250. Explicit constitutional provisions. H. A. FREEMAN has pointed out that "[o]ne avenue by which the states may be precluded from acting in some given area is by the express command of the Constitution."[41] The US Constitution includes provisions that explicitly preclude state action. Article 1, Section 10 is, in this respect, the most straightforward since it is entitled "Powers Prohibited of States."[42] Several Amendments to the Constitution also significantly limit state action, such as the 13th Amendment, which abolished slavery, as well as the 14th Amendment. Last but not least, the 15th Amendment deprives the states – as well as the federal state – of the power to deny or abridge the right of US citizens to vote. All in all, these provisions "'preempt' certain state action."[43]

251. The dormant Commerce Clause. In addition, US constitutional theorists sometimes admit that constitutional preemption may as well stem from negative implications of constitutional grants of powers, the first of which being the dormant Commerce Clause. It is the closest US equivalent to the economic freedoms of the European Union legal order.[44] Since the US Constitution does not explicitly prohibit states from discriminating against or from excessively burdening interstate commerce, the Supreme Court has inferred such prohibitions from the Commerce Clause, even if taken literally it only grants Congress the power to regulate commerce, without alluding to the states.[45] For various authors, the prohibitions derived from the dormant Commerce Clause may be described as constitutional preemption, since the deprivation of the states' powers flows from the Constitution itself.[46] Admittedly, a fundamental difference exists between the traditional preemption doctrine set out above and the dormant Commerce Clause. As already noted by R. SCHÜTZE with respect to the European

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[41] H. A. FREEMAN, "Dynamic federalism and the concept of preemption," 21 *DePaul L. Rev.* 630, 632 (1971-1972). See also A. HILL, "The law-making power of the federal courts: Constitutional preemption," 67 *Columbia L. Rev.* 1024, 1030-1031 (1967).

[42] "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

[43] H. A. FREEMAN, "Dynamic federalism and the concept of preemption," above, n. 41, 633.

[44] See, in this respect, W. VAN GERVEN, "Constitutional aspects of the European Court's case law on Articles 30 and 36 EC as compared with the US Dormant Commerce Clause," above, n. 35.

[45] The Commerce Clause reads as follows: The Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Article 1, Section 8 of the US Constitution).

[46] See, for instance, N. ORKIN, "Constitution preemption, *Goldstein v. California*, and other aspects of preemption," 16 *PTC J. Res. & Ed.* 15 (1974).

Union legal order, the former "rests on an imputation of intent to Congress" while the latter "rests on an imputation of intent to the Constitution."[47]

252. However, the 'classic' preemption doctrine and the dormant Commerce Clause share fundamental features. First, they are two sides of the same coin: "[b]oth doctrines work to preserve the United States as a single integrated commercial market in the face of state legislation that threatens to create multiple markets of suboptimal scale."[48] They are indeed assessed by the Supreme Court against a backdrop of the same basic assumptions, notably the fact that one of the main purposes of the US Constitution is to establish an integrated market.[49] In other words, they are both mechanisms governing the vertical relationship between the federal government and the states as they both "define states' constitutional authority to regulate in areas of concurrent jurisdiction."[50] Second, several authors have pointed out that the traditional preemption doctrine and the dormant Commerce Clause are similar in their effects. Here it is worth quoting V. D. DINH at length:

> The law of preemption should not be analyzed as conceptually discrete and distinctive doctrines, but rather can be properly assessed only as part of a spectrum of interrelated mechanisms whereby federal law displaces state law. The spectrum includes not only the core statutory preemption doctrines but also mechanisms whereby state law is displaced even without any relevant congressional action.[51]

This author draws a spectrum consisting of doctrinal mechanisms through which federal law displaces state law, the variable being whether Congress has acted or not.[52] He sets out express preemption, which corresponds to "congressional action *par excellence*," conflict preemption, obstacle preemption, field preemption, federal common law and, finally, dormant commerce. He justifies the soundness of this spectrum with reference to the fact that these various doctrines all have preemptive effects. They are indeed all capable of displacing state law. Focusing specifically on the dormant Commerce Clause, V. D. DINH claims that it "can be seen as a variation of field and obstacle preemption," since the Supreme Court considers that

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[47] T. W. MERRILL, "Preemption and institutional change," above, n. 7, 733.
[48] Idem.
[49] Ibid., 745.
[50] C. M. SHARKEY, "Against freewheeling, extratextual obstacle preemption: Is justice Clarence Thomas the lone principled federalist?," 5: 1 *NYU Journal of Law & Liberty* (2010); NYU School of Law, *Public Law Research Paper* No. 10-20, 70-71.
[51] V. D. DINH, "Reassessing the law of preemption," above, n. 9, 2097.
[52] Ibid., 2098. See also C. M. SHARKEY, "Against freewheeling, extratextual obstacle preemption: Is justice Clarence Thomas the lone principled federalist?," above, n. 50, 71, who talks about a "continuum" between federal preemption and dormant Commerce Clause.

federal law displaces state law either because the latter stands as an obstacle, or because it falls within a "regulated field of national interest."[53] Thus, if focus is put on the *effects* of US constitutional doctrines, preemption should not be limited to situations involving an act adopted by Congress. Similarly to V. D. DINH's analysis, J. GOLDSMITH found, for instance, that in the field of foreign relations, "dormant" preemption, which "operates like statutory preemption without a statute," could occur in three cases: dormant foreign affairs preemption, dormant foreign commerce clause, and federal common law of foreign relations.[54]

253. Constitutional preemptive effects of free movement cases in the EU legal order. The purpose of the remainder of this section is to show that the same conclusions can be drawn with respect to the European Union legal order. To this end, I shed light on the preemptive dimension of free movement provisions before showing that the European Court of Justice case law on free movement gives rise to two preemption types.

254. Preemptive dimension of free movement provisions. Just like the US preemption doctrine and the dormant Commerce Clause are two sides of the same coin, the European Union emergent doctrine of preemption and the provisions relating to the economic freedoms and European Union citizenship are complementary within the European Union legal order. Thus, positive and negative integrations both pursue the same purpose: economic unity, through the establishment of the single market.[55] Likewise, European Union citizenship is a step towards political unity in the European Union, and as such requires both the adoption of acts of secondary legislation and the enforcement of the rights defined in Article 21 TFEU even in the absence of such acts. A close look at the Treaty provisions on free movement shows that they include an explicit preemptive dimension. Unlike the Commerce Clause, all free movement provisions make it plain that discriminations relating to European Union citizenship, the free movement of goods, persons, services, and capital "shall be prohibited,"[56] even in the absence of European Union acts of secondary legislation. The Court of Justice has specified on

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[53] V. D. DINH, "Reassessing the law of preemption," above, n. 9, 2111.
[54] J. GOLDSMITH, "Statutory foreign affairs preemption," above, n. 23, 22-23.
[55] Case 15/81, *Schul*, [1982] *ECR* 1409: "The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market."
[56] European Union citizenship: Article 21 TFEU read in conjunction with Article 18 TFEU; Free movement of goods: Articles 34 and 35 TFEU; Free movement of workers: Article 45 TFEU – this provision refers to the "abolition of any discrimination"; Freedom of establishment: Article 49 TFEU; Freedom to provide services: Article 56 TFEU; Free movement of capital: Article 63 TFEU.

numerous occasions that such prohibitions applied regardless of whether European Union acts of secondary legislation had been adopted or not.[57] These provisions therefore deprive Member States of their power to discriminate. Not only do they require them not to adopt discriminatory measures, but they also require them to abolish measures that are discriminatory in character. The following paragraph shows that the constructions employed by the Court of Justice have made full use of this preemptive dimension of the Treaty provisions.

255. Preemption types. Here, I argue that traditional free movement cases generate two distinct types of preemptive effects, depending on the nature of the national measure subject to the Court's scrutiny. To this end, I rely on the fundamental distinction established in *Cassis de Dijon*[58] between discriminatory and indistinctly applicable measures. Since conflicts between free movement provisions and discriminatory laws and conflicts between free movement provisions and indistinctly applicable measures are of a different nature, they give rise to distinct preemptive effects. In this respect, US preemption doctrine is particularly useful in identifying the two types of conflicts.

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[57] See, for instance, Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649.

[58] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649. The Court of Justice gradually recognized that the provisions relating to both the four traditional freedoms and European Union citizenship have direct effect (Goods: Case 74/76, *Iannelli*, [1977] *ECR* 557; workers: Case 41/74, *Van Duyn*, [1974] *ECR* 1337; freedom of establishment: Case 2/74, *Reyners*, [1974] *ECR* 631; services: Case 33/74, *Van Binsbergen*, [1974] *ECR* 1299; freedom of capital: Joined Cases C-163, 165 & 250/94, *Sanz de Lera*, [1995] *ECR* I-4821; European Union citizenship: Case C-413/99, *Baumbast*, [2002] *ECR* I-7091). This initial step allowed the Court to interpret these provisions very extensively. Nowadays, the Court finds that two main types of national measures amount to restrictions. First, national measures are deemed contrary to EU law when they are directly discriminatory or, in other words, when their application results in creating differences in treatment based on nationality. The same holds true with respect to indirectly discriminatory national measures. They are not based on nationality, but on other criteria, such as the place of residence (See, for instance, Case 15/69, *Ugliola*, [1969] *ECR* 363, 6). They nonetheless have the effect of placing heavier burdens on non-nationals. The Court's approach was originally based on the principle of non-discrimination alone. This method broadly consists in undertaking a comparison, "requiring out-of-state goods, persons, services, and capital to enjoy the same treatment as their in-state equivalents." (C. BARNARD, *The substantive law of the EU: The four freedoms*, above, n. 33, 18) Thirdly, in the seminal *Dassonville* and *Cassis de Dijon* cases, the Court of Justice substantially broadened the scope of the notion of restriction. It held in the former that: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions." (Case 8/74, *Dassonville*, [1974] *ECR* 837, 5) Even indistinctly applicable measures could be deemed contrary to the provisions relating to the free movement of goods. Following these two cases, the Court gradually extended this so-called 'obstacle-based approach,' which focuses on the effects of the national measures rather than on their object, to the other freedoms. It did so as regards the freedom to provide services in *Säger* (Case C-76/90, *Säger*, [1991] *ECR* I-4221), the free movement of workers in *Bosman* (Case C-415/93, *Bosman*, [1995] *ECR* I-4921), the freedom of establishment in *Gebhard* (Case C-55/94, *Gebhard*, [1995] *ECR* I-4165), and the free movement of capital in *Könle* (Case C-302/97, *Könle*, [1999] *ECR* I-3099).

256. Constitutional conflict preemption. Also described as "distinctly applicable measures," discriminatory measures distinguish between European Union citizens, goods, workers, self-employed, companies, services, and capital, which cross a border and those who/which do not, to the detriment of the former. They correspond to a basic form of protectionism. As a result, they directly conflict with free movement provisions since they directly breach the explicit prohibitions to discriminate. When the Court of Justice deems these measures to be contrary to European Union law, it therefore prohibits Member States from discriminating or, to put it differently, it deprives them of their power to discriminate. This corresponds to what US preemption doctrine describes as 'conflict preemption,' since it is "physically impossible" to comply simultaneously with national requirements and European Union free movement law.

257. Constitutional obstacle preemption. The second hypothesis where the application of the free movement provisions generates preemptive effects corresponds to cases where indistinctly applicable measures are involved. This time, preemption occurs not because national laws are in direct conflict with the content of free movement provisions – since they are not, strictly speaking, discriminatory. Rather, national laws are preempted because, similarly to obstacle preemption under the US preemption doctrine, they "stand as an obstacle to the accomplishment" of the purposes and objectives of the free movement provisions. This is clearly reflected in cases where the Court of Justice first applied its obstacle approach, which includes indistinctly applicable measures within the scope of the prohibitions laid down by the free movement provisions. With respect to the freedom to provide services, for instance, the turning point occurred, as is well know, in *Säger*.[59] Under German law, specific services provided to patent owners could only be provided by patent agents having a qualification. This measure, though indistinctly applicable, had nonetheless the effect of making it more difficult for companies established in other Member States to provide this type of services. Against this background, the Court of Justice held that:

> It should first be pointed out that Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or

[59] Case C-76/90, *Säger*, [1991] *ECR* I-4221.

> otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[60]

It justified this substantial expansion and this departure from the literal meaning of what is now Article 56 TFEU by stating that:

> In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services.[61]

This statement demonstrates that the approach followed by the Court of Justice is comparable to that of the Supreme Court when it applies the doctrine of obstacle preemption. The European Court indeed seeks to safeguard the full effectiveness of the Treaty provision – or, as US constitutional theory would put it, its "accomplishment" – the object – or "purpose" or "objective" – of which is to guarantee the freedom to provide services.[62]

258. The preemptive effects of constitutional conflict preemption. Constitutional conflict preemption occurs in free movement cases involving direct or indirect discrimination, which may not be justified by the derogations laid down by the Treaty. A few examples show to what extent European Union law precludes Member States of their power to discriminate. Historically, the Court of Justice case law first concerned the free movement of goods. From an early date the Court prevented Member States from treating imported or exported goods less favorably than domestic products. As C. BARNARD shows, for instance, it deprived Member States of their power to impose additional requirements on the imported/exported goods, to adopt rules limiting channels of distribution or to give preference to domestic goods.[63] The same goes for the three other economic freedoms: direct, as well as indirect, discrimination, is prohibited. Direct discrimination corresponds, for the most part, to discrimination based on nationality. Thus, *Reyners* involved a Belgian law according to which only nationals could

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[60] Ibid., 12.
[61] Ibid., 13 (Emphases added).
[62] For another illustration in relation to the freedom of establishment see, for instance, Case C-415/93, *Bosman*, [1995] *ECR* I-4921, 94: "[T]he Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State." (Emphases added) and 95: "Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned." (Emphasis added).
[63] C. BARNARD, *The substantive law of the EU: The four freedoms*, (Oxford, New York: Oxford University Press, 2013), above, n. 33, 81s.

become lawyers.[64] The Court found that this measure breached the free movement principle, meaning, in terms of power, that the application of European Union law had the effect of preempting Belgian law. To comply with European Union law, Belgium indeed had no other choice than to remove its discriminatory provision. Likewise, the Court of Justice case law also prohibits indirect discriminations. Indirectly discriminatory measures are based on criteria other than nationality, such as residence or language, but have in fact the same results as directly discriminatory measures. For instance, in *Commission v. Italy*,[65] the Court found that, with respect to entrance museum rates, Italian authorities could not grant advantageous rates to people residing within the territories of these authorities because this disadvantaged nonresident tourists from other Member States. Therefore, this line of reasoning had the effect of depriving the Italian Republic of its ability to distinguish between residents and nonresidents.

259. The preemptive effects of constitutional obstacle preemption – Free movement of goods. Constitutional obstacle preemption encompasses rulings involving indistinctly applicable measures, which may not be justified by overriding reasons of legitimate interest. A few examples shed light on its peculiar effects. To begin with, it is worth revisiting *Cassis de Dijon*[66] in light of the notion of preemption. Under German law, fruit liqueurs could be marketed as such only if they contained at least 25% of alcohol. A German importer was barred from importing a French product whose the alcohol content was between 15 and 20%. He invoked the free movement of goods principle and asked the German Court to set this rule aside. The Court of Justice held that "[i]n the absence of common rules relating to the production and marketing of alcohol, [...] it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory,"[67] meaning that an absence of legislative preemption entails, as a matter of principle, absence of constitutional preemption. However, it immediately added that:

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[64] Case 2/74, *Reyners*, [1974] *ECR* 631.
[65] Case C-388/01, *Commission v. Italy*, [2003] *ECR* I-721.
[66] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] ECR 649.
[67] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649, 662.

> Obstacles to movement within the Community resulting from disparities between the national laws [...] must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements.[68]

In other words, constitutional obstacle preemption may occur, even in the absence of legislative preemption, if national laws are not justified by mandatory requirements. Thus, the effects of the Court's findings in *Cassis de Dijon* on Germany's regulatory capacity were very constraining. In order to conform to European Union law, Germany was compelled to remove its indistinctly applicable rule. In addition, it should be noted that the main effect of the application of Article 34 TFEU is depriving *host states*, and not *home states*, of their regulatory powers. According to the principle of mutual recognition, all products lawfully produced and marketed on the territory of a Member State are allowed to move freely within the European Union, without being subjected to regulatory burdens in addition to those imposed by the home Member State.[69] Accordingly, the preemptive effects of Article 34 TFEU are twofold.[70] They are first horizontal, since they deprive host states of their regulatory powers.[71] But they also are vertical in the sense that they pave the way for legislative preemption or, in other words, for harmonization at European Union level.

260. The preemptive effects of constitutional obstacle preemption – Other freedoms. When interpreting the provisions on the free movement of persons and services, the Court also follows an obstacle-based approach. Admittedly, the restrictive nature of indistinctly applicable measures is not assessed through the same test as in the context of the free movement of goods – even though it is still a test based on the *effects* of national laws.[72] But Articles 45, 49, and 56 TFEU also have preemptive effects. In case of restrictions on exit, home states are precluded of the power to adopt indistinctly applicable measures restricting outgoing moves. In case of restrictions on entry, a distinction should be drawn. The preemptive effects of the freedom to

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[68] Ibid., 662 (Emphasis added).

[69] Ibid., 664. See also S. WEATHERILL, "Pre-emption, harmonization and the distribution of competence to regulate the Internal Market," above, n. 29, 43; K. A. AMSTRONG, "Mutual recognition," in *The law of the single European market: Unpacking the premises*, (Eds.) C. BARNARD & J. SCOTT, (Oxford, Hart Publishing, 2002), 225-278.

[70] See H. C. H. HOFMANN, "Control of powers in an integrated legal system," in *The Outer Limits of EU Law*, (Eds.) C. BARNARD & O. ODUDU, (Cambridge University Press, Cambridge, 2008), 47.

[71] This basically corresponds to J. SNELL's assertion in J. SNELL, "Who's got the power? Free movement and allocation of competences in EC law," above, n. 35, 330: "The result is that one, and only one, rule governs any given activity, unless the application of the second rule can be justified."

[72] Ibid., 327. See, more generally: C. PRIETO, "Entrave et accès au marché," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011); E. DUBOUT, "Entrave et discrimination," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011).

provide services are similar to those of the free movement of goods. Since the principle of mutual recognition applies, they primarily concern the regulatory capacity of host states. However, provisions on the free movement of persons induce preemptive effects on national laws adopted by both home and host states. This is well illustrated, for instance, in *Caixabank*, a case based on the freedom of establishment.[73] French law prohibited the remuneration of sight accounts. The Court of Justice held that this measure was a non-justified restriction on the freedom of establishment with respect to foreign companies pursuing activities in France via a subsidiary. It concluded that:

> Article 43 EC precludes legislation of a Member State which prohibits a credit institution which is a subsidiary of a company from another Member State from remunerating sight accounts in Euros opened by residents of the former Member State.[74]

This ruling clearly barred France, the home state, from exercising its power to prohibit the remuneration of sight accounts. It should be noted that traditional free movement cases based on European Union citizenship should be put aside. The Court is surely moving towards a 'restriction approach,' catching indistinctly applicable measures in this field too. However, the cases where it followed such an approach all involve powers retained by Member States,[75] the effects of which are in turn identified in the following paragraph.

261. Discrete and common features. The above has thus shed light on the fact that traditional free movement cases are the source of different preemption types, which vary in degree. Since constitutional conflict preemption only pertains to discriminatory measures, its scope is narrower than the scope of constitutional obstacle preemption. The latter has the effect of imposing greater constraints on Member States than the former, since it pertains to indistinctly applicable measures. However, the two preemption types share a basic common feature, which reveals a fundamental aspect of the Court of Justice's assessment of free movement cases. In both cases, the Court seeks to determine *whether* Member States can legitimately exercise their regulatory powers. Admittedly, the Court, when it appraises the justification stage, is led to look into *how* Member States have exercised their powers, but it always does so with a view to

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[73] Case C-442/02, *Caixabank*, [2004] *ECR* I-8961.
[74] Ibid., 24 (Emphasis added).
[75] C. BARNARD, *The substantive law of the EU: The four freedoms*, above, n. 33, 465s counted four cases where the Court of Justice followed a restriction approach: Case C-224/02, *Pusa*, [2004] *ECR* I-5763; Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451; Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993; and Cases C-11/06 & 12/06, *Morgan & Bucher*, [2007] *ECR* I-9161.

answering the question as to *whether* Member States had the power to regulate in the first place. To go back to the example of *Caixabank*, the reasoning developed by the Court of Justice is tantamount to claiming that France did not have the power to prohibit foreign companies pursuing activities in France via a subsidiary from remunerating sight accounts. To comply with European Union law, France had no other choice than to merely remove this prohibition. In other words, under the constitutional conflict and obstacle preemption models, the only way Member States can comply with the free movement principle is to relinquish their regulatory powers.

2. The lack of preemptive effects of the cases involving powers retained by Member States

262. In what follows, I defend the view that, in contrast to traditional free movement cases, cases concerned by the power-based approach lack preemptive effects. If they *do* affect the substance of the powers retained by Member States, they do so differently. Instead of depriving Member States of their powers, they result in reshaping the personal and territorial scopes of the latter, but only to the extent that this does not jeopardize their material scopes.

a. The non-alteration of the decision to assert jurisdiction

263. The limited reach of adjustment requirements. If adjustment requirements can be described as positive obligations of a constraining character,[76] they have, however, at the same time, a limited reach. Indeed, they do not amount to rules governing the decision of a Member State to assert, or not to assert, jurisdiction over a subject matter. The decision to assert jurisdiction fundamentally belongs to the Member States, and, as such, it remains discretionary. To put it in more concrete terms, this means, for instance, that the case law of the Court of Justice does not oblige Member States to set up from scratch mechanisms relating to student financial assistance or to the compensation of civil war victims. It is only to the extent that these social benefits already exist that they can be possibly made available to individuals exercising their European Union free movement rights. Similarly, adjustment requirements do not require Member States to lay down new tax advantages, which would be specifically aimed at compensating residents or nonresidents engaged in European Union cross-border situations who would be under more burdensome tax obligations than the persons not exercising their free movement rights. In a

[76] See, *Supra*, § 230.

similar vein, the Court does not expect Member States to introduce specific arrangements in order to allow European Union citizens to change surnames according to other Member States' laws or practices. The initial decision to set them up belongs to national authorities. To put it differently, it is only once that it is established that Member States have asserted jurisdiction that the Court of Justice power-based approach comes into play, and might require Member States to adjust their national arrangements.

264. The example of direct taxation. The example of direct taxation will help clarify what I mean by the decision to assert jurisdiction. Scholars focusing on the Court of Justice case law relating to direct taxation often base their demonstrations on the distinction between *assumption* of taxing jurisdiction and *exercise* of taxing jurisdiction.[77] They generally accept that, while the former remains within the hands of Member States, the latter must comply with European Union law requirements.[78] In this respect, it is useful to quote B. J. M. TERRA & P. J. WATTEL at length. They define Member States' obligations to comply with European Union law as follows:

> If a Member State assumes the same jurisdiction over the cross-border position (the nonresident or the foreign-source income) as it does over the domestic position (the resident or the domestic income), then it must subsequently also exercise that jurisdiction so assumed in the same manner as in domestic positions. [...] The scope of taxation to which residents are subjected, is the outer limit for subjection of nonresidents, and the scope of taxation to which domestic income is subjected, is the outer limit for subjection of foreign-source income.[79]

This statement confirms that European Union law does not compel Member States to exercise their taxing jurisdiction. This entails, as the Court has acknowledged on numerous occasions, that Member States are free to determine the factors and criteria necessary for the definition of their taxing jurisdiction. It is only once they have done so that they are subjected to the European Union free movement principle. The examples relating to cross-border loss relief and dividend taxation concretize this idea.

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[77] B. J. M. TERRA & P. J. WATTEL, *European Tax Law*, (6th Ed. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), 892.

[78] See e.g. K. LENAERTS & L. BERNARDEAU "L'encadrement communautaire de la fiscalité directe," 33 *Cahiers de Droit Européen* 19, 33 (2007); S. KINGSTON, "The boundaries of sovereignty: the ECJ's controversial role in applying internal market law to direct tax measures," 9: 1 *Cambridge Yearbook of European Legal Studies* 310 (2012); B. J. M. TERRA & P. J. WATTEL *European Tax Law*, above, n. 77, 892; D. WEBER, "In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC," 34: 12 *Intertax* 585, 586 (2006).

[79] B. J. M. TERRA & P. J. WATTEL *European Tax Law*, above, n. 77, 892-893.

265. As far as companies are concerned, most Member States have set up group taxation schemes enabling groups of companies to be treated, from a fiscal perspective, as a single entity. Through these means, companies belonging to the same group can offset profits and losses both horizontally and vertically. However, these advantages are most of the time reserved for groups the companies of which are all located in the same Member State. This limitation was directly challenged for the first time in the aforementioned *Marks & Spencer* case.[80] As seen earlier, this decision concerned the refusal of United Kingdom tax authorities to allow the United Kingdom parent to deduce the losses of its EU nonresident subsidiaries. The Court decided that this refusal, so long as it did not involve the definitive losses, could be justified in light of three justificatory elements: the need for the preservation of the allocation of the power to impose taxes between the Member States, the risk of tax avoidance, and the danger that losses would be deducted twice. The Court reached this conclusion after taking into account a decisive feature. Indeed, not only had the UK decided not to exert its taxing jurisdiction with respect to foreign subsidiaries' losses (hence its refusal to take them into account), but it also had unilaterally refused to exercise its taxing powers on foreign subsidiaries' corresponding profits. In this regard, the Court noted that:

> [T]he preservation of the allocation of the power to impose taxes between Member States might make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses.[81]

This statement boils down to claiming that European Union law may not compel a Member State to exercise its taxing jurisdiction where it has unilaterally – or through a tax treaty – decided not to. The same reasoning subsequently led the Court of Justice, in *Lidl Belgium*, to agree with Germany's refusal to allow a resident parent company to (temporarily) deduct the losses of its Luxembourg branch. Indeed, in accordance with the Germany-Luxembourg tax treaty, Germany had not extended its taxing jurisdiction to the profits and losses generated in Luxembourg.[82] However, if European Union law does not constrain Member States with respect to the assertion of taxing jurisdiction through connecting factors such as residence, nationality, territory or asset location, the Court of Justice insists on the obligation of coherence, which is placed on the Member State refusing cross-border loss relief. Member

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[80] See, *Supra*, § 169.
[81] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 45.
[82] Case C-414/06, *Lidl Belgium*, [2008] *ECR* I-3601, 28.

States are not under the obligation to take into account foreign losses *provided* that they also disregard corresponding profits.[83] There must be symmetry in the taking into account of losses and profits, as the Court implied in *Lidl Belgium*:

> [T]he objective of preserving the allocation of the power to impose taxes between the two Member States concerned, which is reflected in the provisions of the Convention, is capable of justifying the tax regime at issue in the main proceedings, since it safeguards symmetry between the right to tax profits and the right to deduct losses.[84]

266. This very symmetry requirement explains why, for instance, the Court of Justice has recently overturned a Member State's refusal to take into account losses that did not have a genuine cross-border origin. In *Philips Electronics*,[85] the United Kingdom refused the transfer, by means of group relief, of losses incurred by the United Kingdom branch of a Netherlands company, to a United Kingdom group company, on the grounds that they could have been used abroad – the Dutch legislation indeed provided for a temporary use of foreign branches' losses by the parent company. The Court held that neither the transfer of losses, nor the fact that losses could be used twice, would affect the taxing jurisdiction of the United Kingdom. It first recalled that the objective of preserving the allocation of powers between the Member States was "designed [...] to safeguard the symmetry between the right to tax profits and the right to deduct losses."[86] However, since the United Kingdom had asserted jurisdiction with respect to both losses and profits of the UK branch of the Netherlands company:

> [T]he power of the host Member State [...] to impose taxes is not at all affected by the possibility of transferring, by group relief, and to a resident company, the losses sustained by a permanent establishment situated in its territory.[87]
>
> [Likewise,] the risk that those losses may be used both in the host Member State where the permanent establishment is situated and also in the Member State where the nonresident company has its seat has no effect on the power of the Member State where the permanent establishment is situated to impose taxes.[88]

What was at issue in *Philips Electronics* was the way the United Kingdom exercised its taxing jurisdiction, and not its sovereign power to decide whether to exercise its jurisdiction.

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[83] O. MARRES, "The principle of territoriality and cross-border loss compensation," 39 *Intertax* 112 (2011).
[84] Case C-414/06, *Lidl Belgium*, [2008] *ECR* I-3601, 33.
[85] Case C-18/11, *Philips Electronics*, [2012] *To be published*.
[86] Ibid., 24.
[87] Ibid., 25.
[88] Ibid., 30.

267. The same distinction between the assertion and exercise of taxing jurisdiction underlies the Court of Justice's reasoning with respect to dividend taxation. As shown earlier,[89] as far as inbound dividends are concerned, the Court of Justice requires Member States to undo economic double taxation, but it does not impose such requirement with respect to juridical double taxation. *Kerckhaert-Morres*[90] concerned the second hypothesis. Belgium had decided to subject both domestic and foreign dividends to a 25% income tax. The plaintiffs were also subjected to a French 15% withholding tax. They argued that the French withholding tax was more burdensome for them since it was not offset in Belgium. The Court did not agree and found that there was no restriction because Belgium treated domestic and foreign dividends indistinctively. It went on by noting that the plaintiffs' situation was the result of the exercise in parallel by two Member States of their fiscal sovereignty.[91] To be sure, Belgium exercised its taxing jurisdiction consistently: it taxed dividends in the same way, regardless of their origin, and, in any case, it did not grant any tax credit. Consequently, adjusting the conditions of exercise of Belgium's tax powers could not offset the plaintiffs' heavier burdens. These burdens could only be alleviated if one of the Member States involved was required to alter the way it asserted its tax jurisdiction. Yet, as noted by the Court:

> Community law, in its current state and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community.[92]

268. Things are different with respect to inbound dividends, which are subject to economic double taxation. In *Manninen*,[93] Finland had decided to exercise its taxing jurisdiction on inbound dividends by granting shareholders who received dividends a tax credit in order to offset the corporation tax paid by the company distributing the dividends. However, it restricted the award of this tax advantage to shareholders receiving dividends paid by resident companies, while it subjected shareholders of nonresident companies to a 29% income tax. In contrast to Belgium in *Kerckhaert-Morres*, Finland did not treat domestic and foreign dividends in the same way, despite the fact that it had asserted its taxing jurisdiction. Therefore, the Court of Justice took the view that this was constitutive of an unjustified restriction. Its

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[89] See, *Supra*, § 197.
[90] Case C-513/04, *Kerckhaert-Morres*, [2006] *ECR* I-10967
[91] Ibid., 20.
[92] Ibid., 22.
[93] Case C-319/02, *Manninen*, [2004] *ECR* I-7477.

decision therefore resulted in requiring Finland to exercise its taxing power differently, in such a way as to subject the two categories of dividends to the same tax obligations. This could be achieved through the extension of the tax credit to shareholders of nonresident companies, or the complete removal of the tax advantage (which would place it in the same situation as Belgium in *Kerckhaert-Morres*).

269. The lack of preemptive effects of adjustment requirements. The above has established that free movement cases involving powers retained by Member States differ fundamentally from traditional free movement cases. In the former, the application of the free movement principle does not amount to compelling Member States to assert, or not to assert, jurisdiction. As a result, unlike the obligations imposed on Member States in traditional free movement cases, adjustment requirements do not have the effect of depriving Member States of their retained powers. To put it differently, the power-based approach lacks preemptive effects. Two basic features characterizing adjustment requirements may therefore seem to conflict with each other. On the one hand, adjustment requirements must be regarded as positive obligations imposed upon Member States,[94] thereby reflecting the constraining and far-reaching nature of the Court of Justice's approach. On the other hand, they also seem less burdensome than obligations usually imposed on Member States in traditional free movement cases, since they do not deprive Member States to be deprived of their powers. Ultimately, these two conflicting features reflect clearly the 'mutual adjustment resolution' operated by the Court of Justice. The interpretation of free movement provisions prompts it to impose positive obligations on Member States in new and sensitive areas, but it simultaneously adapts its own approach by not attaching preemptive effects to the adjustment requirements.

b. Identification of the effects induced by the power-based approach

270. If, admittedly, Member States remain free to assert, or not to assert, jurisdiction, the intrusions of European Union law into their retained spheres of powers nonetheless affects the substance of the latter. In this respect, it must be borne in mind that the fields analyzed herein are built upon the same basic principles: the building of boundaries and the principle of closure.[95] Consequently, one fundamental aspect of the exercise of the powers retained by

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[94] See, *Supra*, § 230.
[95] See, *Supra*, § 67.

Member States is made up of the enactment of inclusion and exclusion rules, which must themselves comply with the personal and territorial scopes of these powers.[96] The personal scope is generally circumscribed with reference to the criteria of nationality or residence, while the territorial scope usually corresponds to the geographical territory of each Member State.[97]

271. The reshaping of the personal and territorial scopes of the powers retained by Member States. The alteration of the conditions of exercise of the powers retained by Member States, as identified in the previous chapter,[98] induces two types of implications: (i) on the one hand, the application of European Union law consists in compelling Member States to include individuals exercising their free movement rights into national arrangements from which they were hitherto excluded; and/or (ii) on the other hand, the application of free movement law leads Member States to broaden the scope of their geographical inclusion rules by attaching extra-territorial effects to the exercise of their powers. As a result, the Court of Justice's power-based approach boils down to compelling Member States to broaden the scope of their personal and territorial inclusion rules, thereby narrowing the scope of the corresponding personal and territorial exclusion rules. Since the inclusion and exclusion rules adopted in the exercise of the powers retained by Member States must comply with the personal and territorial scopes of these powers, the redrawing of the former necessarily entails the reshaping of the latter. Therefore, the power-based approach brings about 'bottom up effects,' whereby the substance of the powers retained by Member States is modified through the alteration of their conditions of exercise.

272. The effects of the power-based approach limited by the concern to safeguard the integrity of the material scope of the retained powers. I am of the view that the Court of Justice is well aware of the potential destructive effects of its power-based approach, which explains why it is inclined to

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[96] G. DAVIES, "Higher education, equal access, and residence conditions: Does EU law allow Member States to charge higher fees to students not previously resident?," 12 *Maastricht J. Eur. & Comp. L.* 227, 229 (2005). As noted by M. DOUGAN, "Expanding the frontiers of Union Citizenship by dismantling the territorial boundaries of the national welfare states?," in *The outer limits of European Union law*, (Eds.) C. BARNARD & O. ODUDU, (Oxford: Hart Publishing, 2009), 119: "in a world of limited resources, there is an inherent need for each state to establish the criteria for membership of, and exclusion from, its welfare society."

[97] G. DAVIES, "Higher education, equal access, and residence conditions: Does EU law allow Member States to charge higher fees to students not previously resident?," above, n. 96, 229-230; M. DOUGAN, "The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon," in (Eds.) R. NIELSEN *et al.*, *Integrating Welfare Functions into EU Law: From Rome to Lisbon*, (Copenhagen: DJØF Publishing, 2009), 154.

[98] See, *Supra*, §§ 177s.

mitigate these effects when necessary. What follows goes against the tide, and intends to demonstrate that the cases involving powers retained by Member States affect the personal and territorial scopes of these powers, but only to the extent that they do not jeopardize their material scopes. In other words, these rulings make it clear that the Member States play a defining role that ought to be safeguarded by, and within, the European Union legal order.

273. Nationality. As far as the field relating to nationality is concerned, the issue at stake is whether the power-based approach results in an autonomization of European Union citizenship from Member States' nationalities. Article 20 TFEU makes it crystal clear that European Union citizenship is "derived and complementary in character in relation to nationality:"[99]

> Every person holding the nationality of a Member state shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

Most authors agree that the Court's case law has the effect of interfering into a field that was traditionally considered as falling within Member States' exclusive spheres of action.[100] Some of them are of the view that the Court's stand challenges the contingent character of European Union citizenship by "reversing the relationship between the possession of a nationality of a Member State and Union citizenship,"[101] and maintain that Member States have lost control of their nationality policies.[102] The ultimate effect of the rulings decided in the field of nationality would be to prevent Member States from determining who their nationals are and, eventually, to bar them from defining their own body politic. In other words, these authors argue that the reshaping of the conditions of membership identified above leads to a detrimental erosion of the material scope of nationality powers. However, this standpoint should be tempered. The assessment of the legal impact of European Union law upon the material scope of nationality powers calls for careful distinctions. *Kaur*[103] established that the original decision to grant nationality exclusively belongs to Member States, and that European Union law has no

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[99] Opinion in Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 15.
[100] See, e.g. E. PATAUT, "Citoyenneté de l'Union européenne et nationalité étatique – Chronique de citoyenneté de l'Union européenne," *Revue Trimestrielle de Droit Européen* 617 (2010); DE GROOT & A. SELING G. R. "The consequences of the *Rottmannn* judgment on Member State autonomy – The European Court of Justice's avant-gardism in nationality matters," 7 *European Constitutional Law Review* 138, 150 (2011); H. VAN EIJKEN, "European citizenship and the competence of Member States to grant and to withdraw the nationality of their nationals," 27: 72 *Merkourios* 69 (2010); or D. KOCHENOV, 47 *C. M. L. Rev.* 1831, 1837 (2010).
[101] H. U. D'OLIVEIRA H. U. J. "Decoupling nationality and Union citizenship?," 7 *European Constitutional Law Review* 135 (2011).
[102] See, e.g. Ibid.
[103] Case C-192/99, *Kaur*, [2001] *ECR* I-1237. See, *Supra*, § 146.

incidence at all over this matter. Therefore, European Union law might impact nationality policies only *once* an individual has been granted the nationality of at least one Member State of the European Union. In other words, "Member States seem to be at absolute liberty to distribute their nationalities."[104] Furthermore, as A. TRYFONIDOU rightly points it out, only the "decisions of the Member States which lead to the denial of the *existence* of EU rights"[105] fall within the ambit of the Court of Justice scrutiny. In this respect, *Micheletti*[106] and *Chen*[107] made it clear that Member States are under an absolute obligation to recognize nationalities granted by other Member States of the European Union. As for *Rottmann*,[108] it is only to the extent that the concurrent exercise of two Member States jurisdictions lead to statelessness, and thus to the impossibility of exercising EU rights previously enjoyed by this individual, that Member States are encouraged to alter their traditional way of implementing nationality policies. Accordingly, the Court of Justice control is not about compelling Member States to assert or to renounce their jurisdiction. As E. MEISSE puts it, ultimately, European Union law is in line with the limitations set out long ago by public international law, according to which:

> It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[109]

If the limitations induced by European Union law are more far-reaching and effective than those emanating from public international law, it is because of the level of sophistication of the European Union legal system, which is greater than that of public international law.[110]

274. Direct taxation. It is not uncommon for cases decided in the field of direct taxation to be considered as impairing Member States' power to tax. Indeed, a number of authors point out

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[104] D. KOCHENOV, above, n. 100, 1840.
[105] A. TRYFONIDOU, "The impact of EU law on nationality laws and migration control in the EU's Member States," 25: 4 *Journal of Immigration, Asylum and Nationality Law* 358, 366 (2011). See also D. KOSTAKOPOULOU, "The European Court of Justice, Member State autonomy and European Union citizenship: conjunctions and disjunctions," in *The European Court of Justice and The Autonomy of the Member States*, (Eds.) B. DE WITTE & H.-W. MICKLITZ, (Leiden: Intersentia, 2012), 175-203.
[106] Case C-369/90, *Micheletti*, [1992] *ECR* I-4239.
[107] Case C-200/02, *Chen*, [2004] *ECR* I-9925.
[108] See J. SHAW, "Concluding thoughts: *Rottmann* in context," in "Has the Court of Justice challenged Member State sovereignty in nationality law?," J. SHAW (Ed), (*EUI RSCAS Working Papers*, 2011/62), 33.
[109] Article 1 of the Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws (Emphasis added).
[110] E. MEISSE, "Le droit de la nationalité à l'épreuve de l'intégration communautaire," in *L'Union européenne: Droit, politique, démocratie*, (Ed.) G. DUPRAT, (Paris, PUF, Coll. Politique d'aujourd'hui, 1996), 132.

that, as a result of the Court of Justice's power-based approach, Member State autonomy is undermined,[111] or at least that it is impacted profoundly.[112] It must be conceded that direct taxation rulings compel Member States, at least to a certain extent, to rethink the way they exercise their taxing jurisdiction. The reshaping of their inclusion and exclusion rules moreover results in the alteration of traditional tax concepts and tax distinctions, which used to be defined and drawn by the Member States in a discretionary manner. Decisions relating to the taxation of workers have, in particular, the effect of challenging the traditional distinction between residents and nonresidents by requiring Member States to take into account nonresident taxpayers' personal circumstances. In a similar vein, cases on 'purely artificial arrangements'[113] have forced Member States to reconsider how to combat international tax avoidance. However, the Court of Justice's approach in the field of direct taxation does not adversely affect the material scope of national taxing powers. As I have already stressed it earlier,[114] the vast majority of the Court's rulings do not compel Member States to assert or, on the contrary, to relinquish their taxing jurisdiction. Proof is provided by the fact that the Court does not allocate taxing jurisdictions among Member States.[115] As a result, European Union taxpayers may not resort to European Union law when they suffer from unfavorable consequences flowing from the concurrent exercise of Member States' taxing jurisdictions.

275. Admittedly, the Court seems to have ruled in a contrary manner in several cases, but it was probably more of a slip-up than the inception of a genuine trend in its case law.[116] Mention can be made, for instance, of *Bosal Holding BV*[117] and *Marks & Spencer*,[118] in which the interpretation of European Union law by the Court ultimately led to the redrawing of national

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[111] See, e.g., M. J. GRAETZ & A. C. WARREN, "Income tax discrimination and the political and economic integration of Europe," 115 *Yale Law Journal* 1188, 1193 (2006).
[112] R. BARENTS, "The single market and national tax sovereignty," in *Fiscal sovereignty of the Member States in an internal market. Past and future*, (Ed.) S. JANSEN, (Alphen: Kluwer Law International, 2011), 51. See also, e.g. A. MAITROT DE LA MOTTE, "L'influence du droit européen sur les concepts fiscaux nationaux," in *L'influence du droit européen sur les catégories du droit public*, (Ed.) J.-B. AUBY, (Dalloz, coll. Thèmes et Commentaires, 2010), 863-877.
[113] Case C-264/96, *Imperial Chemical Industries (ICI)*, [1998] ECR I-4695.
[114] See, *Supra*, §§ 264s.
[115] See, e.g. K. LENAERTS, "Federalism and the rule of law: Perspectives from the European Court of Justice," 33: 5 *Fordham International Law Journal* 1338, 1361 (2011); K. LENAERTS & L. BERNARDEAU, "L'encadrement communautaire de la fiscalité directe," 33 *Cahiers de Droit Européen* 19, 32-33 (2007); S. KINGSTON, "The boundaries of sovereignty: the ECJ's controversial role in applying internal market law to direct tax measures," 9: 1 *Cambridge yearbook of European legal studies* 287, 302 (2012).
[116] B.J.M. TERRA & P.J. WATTEL, *European Tax Law*, above, n. 77 897.
[117] Case C-168/01, *Bosal Holding BV*, [2003] *ECR* I-9409.
[118] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837.

taxing jurisdictions. In these cases Member States were indeed required to "assume taxing jurisdiction where they had symmetrically decided not to do so."[119] In *Bosal Holding BV*, a Dutch tax regulation provided that a parent company resident in the Netherlands could deduct costs incurred by a nonresident holding only if it could demonstrate that such costs were indirectly instrumental in making profits taxable in the Netherlands. The Member State argued that this measure did not infringe the freedom of establishment on the grounds that it did not assert its taxing jurisdiction over the holding.[120] It went on by stressing that:

> [T]he costs in connection with activities abroad, including financing costs and costs in relation to holdings, should be set off against the profits generated by those activities and the deduction of those costs is linked solely to the making or non-making of profits outside the Netherlands.[121]

The Court rejected this argument. It did not focus on whether resident and nonresident subsidiaries were in comparable situations, but rather on Dutch parent companies which, whether they owned resident or nonresident subsidiaries, were not, in any case, subject to tax with respect to the profits of their subsidiaries.[122] Thus, the Court's refusal to take into account the situation of resident and nonresident companies led it to compel a Member State to allow its company to take into account negative income occurred in another Member State, although it had not asserted a symmetrical taxing jurisdiction over the profits generated by the nonresident subsidiary, its distributions, or its capital gains.[123]

276. The Court of Justice reached a similar outcome, though in a different context, in *Marks & Spencer*. As seen earlier,[124] this case addressed the issue of cross-border loss relief.[125] The United Kingdom based its refusal to grant a parent company the possibility to set off losses

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[119] B.J.M. TERRA & P.J. WATTEL, *European Tax Law*, above, n. 77, 900. The two others found other illustrations of this 'anomaly' among the Court of Justice cases: Case C-385/00, *De Groot*, [2002] *ECR* I-11819; Case C-470/04, *N.*, [2006] *ECR* I-7409; Case C-293/06, *Deutsche Shell*, [2008] *ECR* I-1129; and Case C-527/06, *Renneberg*, [2008] *ECR* I-7735.
[120] Case C-168/01, *Bosal Holding BV*, [2003] *ECR* I-9409, 18.
[121] Ibid., 37.
[122] Ibid., 39.
[123] B.J.M. TERRA & P.J. WATTEL, *European Tax Law*, above, n. 77, 899; S. KINGSTON, "The boundaries of sovereignty: the ECJ's controversial role in applying internal market law to direct tax measures," above, n. 115, 302.
[124] See, *Supra*, § 169.
[125] See, generally, R. KOK, "Domestic and cross-border relief in the European Union," 38: 12 *Intertax* 663-672 (2010).

incurred by its nonresident subsidiaries on arguments similar to those developed by the Netherlands in *Bosal Holding BV*.[126] The Court admitted, as a matter of principle, that:

> [T]he preservation of the allocation of the power to impose taxes between Member States might make it necessary to apply to the economic activities of companies established in one of those states only the tax rules of that state in respect of both profits and losses.[127]

However, the Court reviewed the national measure in light of three justifications, namely the balanced allocation of taxing jurisdiction, the danger that losses be used twice and the risk of tax avoidance, and decided that it went beyond what was necessary if it turned out that the subsidiaries' losses could never be taken into account.[128]

277. Accordingly, in these two cases, the Court of Justice altered the allocation of Member States' taxing jurisdictions. It ultimately constrained the ability of the Netherlands and the United Kingdom to assert jurisdiction, thereby ignoring their choice not to do so in the first place. This therefore affected their ability to assert, or not to assert, their taxing jurisdiction. However, with the exception of these rather singular rulings, the Court of Justice's case law relating to the field of direct taxation is consistent with the idea that European Union law does not undermine Member States' ability to lay down the connecting factors for the allocation of their taxing jurisdiction. Following *Marks & Spencer*, the Court confirmed on several occasions that national group taxation rules may distinguish between groups whose companies are all resident in the same Member State, and groups whose companies are resident in several Member States. In *Oy AA*,[129] for instance, it ruled that a national tax scheme which subjects deductions of intra-group financial transfers from subsidiaries' taxable incomes to the condition that the parent company be resident in the same Member State complies with the freedom of establishment. Similarly, in *X Holding BV*,[130] the Court decided that a Member State could restrict the possibility for a parent company to form a single tax entity with its subsidiaries to parent companies owning resident subsidiaries only. It stressed the fact that:

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[126] Case C-446/03, *Marks & Spencer*, [2005] *ECR* I-10837, 36.
[127] Ibid., 45.
[128] Ibid., 55.
[129] Case C-231/05, *Oy AA*, [2007] *ECR* I-6373.
[130] Case C-337/08, *X Holding BV*, [2010] *ECR* I-1215.

> [A]cceptance of the possibility of including a nonresident subsidiary in such an entity would have the consequence of allowing the parent company to choose freely the Member State in which the losses of that subsidiary are to be taken into account.[131]

Or, to put it differently, such an acceptance would amount to the Member State of residence of the parent company being required to extend its taxing jurisdiction to non-subject-to-tax entities. The same reasoning underlies the rulings relating to the taxation of dividends.[132] All in all, except in a few decisions, it can be said that the Court of Justice starts from the premise that the Member States are responsible for allocating their taxing jurisdictions. They are required by European Union law to make subjects-to-tax involved in cross-border situations benefit from the same tax arrangements as those involved in purely internal matters only to the extent that this does not challenge the assertion or non-assertion of their taxing jurisdiction.

278. Rules governing surnames. Cases involving national rules governing surnames are also subject to criticism, on the basis that they would limit Member States' autonomy in the field of personal status,[133] or that they would boil down to "introducing a different concept of national membership."[134] However, a close look at the Court of Justice case law reveals that, here again, the European judge takes into account national concerns,[135] and is careful not to undermine the substance of the powers retained by Member States. Indeed, the cases where it imposed the most far-reaching requirements upon Member States, *Garcia Avello*[136] and *Grunkin & Paul*,[137] were cases where, on the one hand, the national legal systems at stake provided for the possibility to recognize other forms of names than the usual national names and, on the other hand, the Member States did not claim that the national measures represented a core national interest. Conversely, the Court of Justice took into account, in *Wittgenstein*[138] and *Vardyn & Wardyn*,[139] that the national measures related to the state's constitutional identity, to objective considerations of public policy, and to the principle of equal treatment, as well as to the

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[131] Ibid., 32.
[132] See, *Supra*, § 197.
[133] O. W. VONK, *Dual nationality in the European Union – A study on changing norms in public and private international law and in the municipal laws of four EU Member States*, (Leiden; Boston: Martinus Nijhoff Publishers, 2012), 133.
[134] G. DAVIES, "The humiliation of the state as a constitutional tactic," in *The constitutional integrity of the European Union*, (Eds.) F. AMTENBRINK & P.A.J. VAN DEN BERG, (The Hague, Asser Press, 2010), 11.
[135] E. PATAUT, "Les particularismes nationaux, les droits fondamentaux et le contenu de la citoyenneté européenne," *Revue Trimestrielle de Droit Européen* 571 (2011).
[136] Case C-148/02, *Garcia Avello*, [2003] *ECR* I-11613.
[137] Case C-353/06, *Grunkin & Paul*, [2008] *ECR* I-7639.
[138] Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693.
[139] Case C-391/09, *Vardyn & Wardyn*, [2011] *ECR* I-3787.

preservation of a national language, and to the nation's identity respectively. It thus once again protected the capacity of Member States to define their political community by setting out conditions of membership, and to safeguard interests that they themselves deem worth protecting at the national level.

279. The jeopardizing of welfare powers? Admittedly, European Union law puts increasing limitations upon national welfare powers, which were previously exercised in a discretionary fashion.[140] In this respect, several authors, alongside some Member States, fear that European Union law might endanger the sustainability of national welfare policies, and even give rise to a 'race to the bottom.'[141] Among them, G. DAVIES has probably developed the sharpest criticism:

> The logic of the state is that citizens, or residents, contribute via taxation and receive via services of various kinds. To insist that all services must be provided without reference to borders is to render the state incoherent. It breaks the link between obligation and benefit, and makes national budget control impossible.[142]

Two main sets of concerns have been raised.[143] First of all, the Court of Justice's approach would go against principles of social justice. It would primarily favor financially privileged European Union citizens, i.e. those who can afford moving to other Member States. In the case of cross-border health care, only the wealthiest could exercise the rights recognized by the Court's decisions,[144] while in the case of education, poor taxpayers would end up paying for wealthy incomers – whether access or financial support is concerned.[145] The Court's approach

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[140] F. DE WITTE, "The role of transnational solidarity in mediating conflicts of justice in Europe," above, n. 14, 694; M. DOUGAN, "Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W MICKLITZ & B. DE WITTE, (Cambridge, Intersentia, 2012), 113, 131; S. LEIBFRIED & P. PIERSON, "Semisovereign welfare states: Social policy in a multitiered Europe," in *European Social Policy - Between Fragmentation and Integration*, (Eds.) S. LEIBFRIED & P. PIERSON, (The Brookings Institution, Washington, D.C., 1995), 65.

[141] See, in the American context, R. M. HILLS, "Poverty, residency, and federalism: States' duty of impartiality toward newcomers," *Sup. Ct. Rev.* 278 (1999).

[142] G. DAVIES, "The humiliation of the state as a constitutional tactic," above, n. 134.

[143] It is to be noted that such arguments primarily concern the fields of health care and education, to the exclusion of the compensation of civil war victims, probably because the latter is not one of the core welfare policies implemented by Member States.

[144] A. P. VAN DER MEI, "Cross-border access to medical care within the European Union – Some reflections on the judgments in *Decker* and *Kohll*," 5 *Maastricht J. Eur. & Comp. L.* 277, 297 (1998); J. V. MCHALE, "Framing a right to treatment in English law? *Watts* in retrospective," 14 *Maastricht J. Eur. & Comp. L.* 263, 279 (2007).

[145] C. BARNARD, 42 *C. M. L. Rev.* 1465, 1485-1486 (2005): "The question is whether that transnational solidarity extends to cross subsidizing the costs of higher education. From an economic (as opposed to educational) perspective, student migration raises two issues: costs and places. In respect of costs, the reality is that (poor and usually non-mobile) taxpayers from the host State are supporting the further education of (already well educated, middle class) students from other Member States with whom they share little by way of community of interests. These taxpayers cannot even comfort themselves with the argument that these better educated students will

would create inequalities among Member States. Some of them being more likely than others to attract cross-border patients, this would bring about a phenomenon of overcapacity while leading to undercapacity in States sending patients.[146] Likewise, Member States, such as the United Kingdom, Ireland or Belgium, are net receivers in terms of flows of students, and face, therefore, more practical and financial burdens than Member States sending students.[147] Second of all, the Court of Justice approach would result in imposing significant financial burdens on Member States. It would impair their planning capacities with respect to cross-border health care,[148] which are vital[149] for the preservation of health care policies. The same goes with respect to education: the Court's case law would give rise to uncontrolled flows of students.[150] The following paragraphs review, in turn, the various fields analyzed herein in order to assess whether the Court of Justice does in fact undermine the material scope of national welfare powers, thereby putting the sustainability of national welfare policies at risk.

280. *Cross-border health care – Concerns induced by the Court of Justice approach.* J. NICKLESS distinguishes three variables that are useful for the assessment of the effects of the Court's case law on national health care systems: the personal scope of social health policies – the individuals covered by the social security scheme, their scope of treatment – what interventions patients are entitled to, and their scope of implementation – the authorized providers.[151] The personal scope of Member States' powers is affected by the Court's approach since patients receiving treatment abroad are still covered by the social security scheme of their state of

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contribute more to the economies of the host State when 75 percent of them subsequently return to their home State and of those who remain many do so only a relatively short period of time. In respect of the availability of places, in the U.K. at least, every incoming migrant EU student will take a place which might have been occupied by a domestic student."

[146] T. K. HERVEY, "Social solidarity: A buttress against internal market law?," in *Social Law and Policy in an Evolving European Union*, (Ed.) J. SHAW, (Oxford, Portland: Hart Publishing, 1999), 42.

[147] S. GARBEN, "Case C-73/08, Bressol, Chaverot and Others v. Gouvernement de la Communauté française," 47 *C. M. L. Rev.* 1493, 1495 (2010); M. DOUGAN, "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?," 42 *C. M. L. Rev.* 943, 956 (2005); C. BARNARD, 42 *C. M. L. Rev.* 1465, 1483-1484 (2005).

[148] A. P. VAN DER MEI, "Cross-border access to medical care within the European Union – Some reflections on the judgments in *Decker* and *Kohll*," above, n. 144, 296.

[149] R. BAETEN R. & W. PALM, "The compatibility of health care capacity planning policies with EU internal market rules," in *Health care and EU Law*, (Ed.) J. W. VAN DE GRONDEN, (The Hague: T.M.C. Asser Press; Dordrecht: Springer, 2011), 391-392.

[150] A. P. VAN DER MEI, "EU law and education: Promotion of students versus protection of education systems," in *Social welfare and EU law*, (Eds.) M. DOUGAN & E. SPAVENTA, (Hart publishing, Oxford and Portland, Oregon, 2005), 219.

[151] J. NICKLESS, "The internal market and the social nature of health care," in *The impact of EU law on health care systems*, (Eds.) M. MC KEE *et al.*, (P.I.E.-Peter Lang, Brussels, 2002), 64.

affiliation.[152] So are the two other variables. Member States are indeed no longer completely free to determine which treatments are to be covered by their social security schemes. The Court decided in *Geraets-Smits & Peerbooms* that the authorization to grant a patient the right to receive treatment abroad has to be based on "what is sufficiently tried and tested by international medical science."[153] Therefore, international criteria will trump national ones if the latter do not conform to the former. As a result, this could compel Member States to cover treatments, which not only are unavailable on their territory but are also "actively opposed by the medical profession."[154] Likewise, compliance with the equal treatment principle may, as a matter of fact, compel Member States to conclude agreements with nonresident providers.[155]

281. In view of these developments, some claim that health care rulings have the effect of reshaping the basic organizational principles of Member States' social security schemes. They first expressed their concerns when the Court of Justice ruled that the freedom to provide services was applicable, regardless of whether the national scheme involved was a benefits-in-kind scheme or not.[156] In their view, the Court's decisions would result in undermining the basic principles governing benefits-in-kind schemes because, on the one hand, this would compel Member States to open their health care systems to providers they did not have previous agreements with, and, on the other hand, this would challenge the very principle whereby benefits are provided in kind, since patients going abroad have to pay the foreign practitioners/institutions. Even greater fears were expressed with respect to the UK National Health Service (thereafter 'NHS'). The organization of the NHS displays unique features.[157] It is

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[152] See, *Supra*, §§ 186s.

[153] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473, 90-92.

[154] E. STEYGER, "National health care systems under fire (but not too heavily)," 29: 1 *Legal Issues of Economic Integration* 97, 106 (2002). See Y. JORENS, "The right to health care across borders," in *The impact of EU law on health care systems*, (Eds.) M. MCKEE *et al.* (Brussels: P.I.E.-Peter Lang, 2002), 109; and T. K. HERVEY, "The current legal framework on the right to seek health care abroad in the European Union," 9 *The Cambridge Yearbook of European Legal Studies* 261, 283-284 (2006/2007) who stresses the financial implications that could be caused by the Court of Justice case law: "The ability of patients to access, and be reimbursed for, innovative treatments that might not be recognized as reimbursable within their home Member State may imply a loss of control over the reimbursement of such new and 'unproven' (at least from the point of view of the home Member State) treatment. Such treatments tend to be more costly than established treatments [...]." See also J. V. MCHALE, "Framing a right to treatment in English law? *Watts* in retrospective," above, n. 144, 272-274. This author shows how difficult it is in practice to determine what constitutes an appropriate treatment.

[155] Y. JORENS, "The right to health care across borders," above, n. 154, 118.

[156] Case C-157/99, *Geraets-Smits & Peerbooms*, [2001] *ECR* I-5473; Case C-385/99, *Müller-Fauré & Van Riet*, [2003] *ECR* I-4509.

[157] See, for detailed analyses, J. MONTGOMERY, "Impact of European Union Law on English health care law," in *Social welfare and EU law*, (Eds.) M. DOUGAN & E. SPAVENTA, (Hart publishing, Oxford and Portland, Oregon,

a paternalistic system, characterized by medical dominance, and the absence of recognized rights for patients. General practitioners play a role of gatekeepers by referring patients in need of secondary care. Primary Care Trusts have the task of commissioning for their area, while a public body assesses the suitability of drugs and treatments. Last but not least, the system is based on waiting lists. Many patients have tried to challenge these features before the English Courts, advocating for the recognition of rights, but they have been mostly unsuccessful. In short, "considerable state control is exercised over the scope of services that can be funded under the NHS,"[158] and "English law continues to maintain a system of prior approval to ensure that the NHS funds only what professionals think suitable."[159] Therefore, the Court's cases decided in the field of cross-border health care could be seen as being contrary to the philosophy of the NHS. J. MONTGOMERY argues that they bring about "a fundamental change in the domestic law on access to health services,"[160] in the sense that they could enable individuals to by-pass waiting lists and thus undermine the resource allocation policy of the NHS. G. DAVIES is of the view that three substantial changes are induced by the Court of Justice's case law.[161] First, the NHS would be compelled to rethink its waiting-list system in such a way as to assess the personal circumstances of patients in order to comply with the obligation to not impose undue delays on patients. Second, it would have to quantify the costs of the treatments in order to reimburse patients who receive treatment abroad.[162] Finally, these adjustments might bring about internal changes by increasingly moving the NHS towards reimbursements of treatments received in private UK hospitals. For G. DAVIES, the Court of Justice case law ultimately "leads to the restructuring of public institutions."[163]

282. Cross-border health care – The Court of Justice approach put in perspective. Powerful arguments show that the impact of the Court of Justice approach is not as profound as it may

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2005), 145-156; J. V. MCHALE, "Framing a right to treatment in English law? *Watts* in retrospective," above, n. 144; J. MCHALE, "Health care, the United Kingdom and the draft Patients' Rights Directive: One small step for patient mobility but a huge leap for a reformed NHS?," in *Health care and EU Law*, (Eds.) E. SZYSZCZAK *et. al.*, (Asser/Springer, 2011), 241-265.

[158] J. MONTGOMERY, "Impact of European Union Law on English health care law," above, n. 157, 149.

[159] Ibid., 150.

[160] Ibid., 145-146.

[161] G. DAVIES, "The effect of Mrs. Watts' trip to France on the National Health Service," 18 *K.L.J.* 158-167 (2007).

[162] As noted by G. DAVIES, Ibid., 165, n. 37: "One might think that some form of price list must exist, so that the NHS can bill other Member States for the cost of treating their citizens under the Regulation 1408/71 procedure, including emergency treatment. However, many states have agreements whereby they pay lump sums per year, or even do not pay at all: the amount of cross-border benefit-in-kind treatment does not justify a complicated administrative apparatus, and often cancels itself out between states."

[163] Ibid., 166.

seem at first glance. To begin with, this is supported by empirical data. In practice, very few patients go abroad to receive cross-border treatments.[164] Y. JORENS has noted that only three categories of patients are likely to use their free movement rights: those living in border areas, those seeking complex medical services, and those having at their disposal all the necessary information.[165] Thus, the Court of Justice case law has not, so far, created substantial financial burdens on Member States' social security budgets. Neither has it jeopardized their planning capacities. Two other arguments, of a legal nature, demonstrate that the Court of Justice case law does not amount to jeopardizing national health care powers. First of all, the Court has gradually drawn distinctions so as to safeguard the material scope of Member States' powers. Indeed, distinctions between intramural and extramural treatments on the one hand, and between extramural treatments involving the use of major medical equipment and those not relying on such equipment on the other hand,[166] reveal that the Court of Justice has, from the inception of its case law, taken into account Member States' practical and financial interests. To put it differently, concerns relating to the necessity to safeguard the sustainability of national health care systems are reflected in the justifications accepted by the Court. Second of all, if, admittedly, Member States must adjust their health care systems so as to comply with European Union law, they always have the "final say."[167] They are indeed responsible for deciding, at each stage of the procedure, whether a patient may be allowed to seek cross-border health care: they rule on which treatments may be sought, on the personal circumstances of patients, and they grant prior authorizations. The recent cases decided by the Court furthermore tend to show that Member States are allowed to maintain prior authorization requirements as soon as they can demonstrate that the treatments at stake involve significant costs.

283. Higher education – Access. As seen earlier, access to higher education is based, in Belgium and Austria, on the principle of open, or unrestricted, access.[168] It could seem, at the outset, that the interpretation of the EU non-discrimination principle by the Court of Justice is such as

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[164] D. S. MARTINSEN, "Towards an internal health market with the European Court," 28: 5 *West European Politics*, 1035, 1047 (2005). This has also been underlined by J. V. MCHALE, "Framing a right to treatment in English law? *Watts* in retrospective," above, n. 144, with respect to the United Kingdom.
[165] Y. JORENS, "The right to health care across borders," above, n. 154, 100.
[166] Case C-512/08, *Commission v. France*, [2010] *ECR* I-8833.
[167] This is pointed out with respect to other contexts by C. O'BRIEN, "Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity," 33 *European law review* 643-665 (2008), but it also holds true as far as health care is concerned.
[168] See, *Supra*, §§ 147s.

to bring about fundamental changes.[169] In *Commission v. Austria*[170] and *Bressol*,[171] Advocates General JACOBS and SHARPSTON both took the stance that European Union law could compel Member States to alter the basic principle underlying the conditions of access to their higher educational systems. E. SHARPSTON went as far as to suggest, for instance, that:

> It seems to me very possible that implementing less discriminatory measures may mean abandoning the current system of unrestricted public access to higher education for all Belgians. I can well see that that will be thought undesirable and that it might well be better if [...] the flow of students across borders were regulated at Community level. In the absence of such a system, however, the fact that such changes may be necessary reflects the need to comply with the obligations arising from the principle of equal treatment under the Treaty.[172]

These views amount to acknowledging that the application of European Union law in the field of education may give rise to a substantial erosion of the material scope of Member States' powers. This was vehemently criticized by A. SOMEK in the following terms:

> [W]ith regard to the graduating students a system of university admission which is based on test scores not only engenders a far more inegalitarian effect but cannot accommodate a concern that may have lain at the heart of the Austrian system. [...] The Court thus effectively forced upon Austria a 'merit based' system of admission. Austria seems to be no longer free to pursue, as an outgrowth of its own national understanding of solidarity, a system where 'merit' is something that is earned in the course of one's studies and not before one has engaged in them.[173]

It was moreover added that the Court of Justice approach could undermine Member States' task to ensure their population access to education. Emphasis was placed on the risk that nonresident students would fill most of the places available, thereby preventing resident students from being selected by their home universities.[174] However, it is once again necessary to temper these fears. As shown earlier,[175] in both *Commission v. Austria* and *Bressol*, the Court of

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[169] K. LENAERTS, "Federalism and the rule of law: Perspectives from the European Court of Justice," above, n. 115, 1348.
[170] Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969.
[171] Case C-73/08, *Bressol*, [2010] *ECR* I-2735.
[172] Opinion in Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 108. (Emphasis added) See also Advocate General JACOBS' similar line of reasoning in his Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 51-53.
[173] A. SOMEK, "Solidarity decomposed: being and time in European citizenship," 32: 6 *Eur. Law Rev.* 787, 817-818 (2007). See also S. GROSBON, "Libre circulation et systèmes de sélection universitaire: une équation complexe," *RAE-LEA* 649 (2009-2010); S. VINCENT-LANCRIN, "Implications of Recent Developments for Access and Equity, Cost and Funding, Quality and Capacity Building," in *Internationalization and Trade in Higher Education. Opportunities and Challenges*, OCDE, 2005, 279-280.
[174] M. DOUGAN, "Cross-border educational mobility and the exportation of student financial assistance," 33: 5 *Eur. Law Journal* 723, 737 (2008).
[175] See, *Supra*, §§ 147s.

Justice endorsed an approach that was more flexible than previous cases when it was faced with access restrictions:

> Admittedly, it cannot be excluded from the outset that the prevention of a risk to the existence of a national education system and to its homogeneity may justify a difference in treatment between some students.[176]

The Court seems to have ruled out the Austrian measure primarily because the Austrian government did not come up with empirical evidence that opening access to nonresident students would imperil its higher education system. In *Bressol*, it only gave little guidance as to the outcome to the national court, thereby leaving it with significant leeway. Accordingly, this validates the assumption whereby cases pertaining to access to higher education do not alter the material scope of national powers, but rather recognize that Member States remain responsible for the organization and planning.

284. Higher education – Students' financial assistance. Two types of concerns have been expressed with respect to students' financial assistance. First, cases involving financial assistance of nonresident students as well as financial assistance of outgoing students raised fears with respect to the financial impact that would be faced by Member States. 'Free rider' arguments were also raised to criticize the Court of Justice's approach in this matter. It seems however unlikely that the obligations imposed upon Member States are such as to impose significant burdens. Students must indeed demonstrate that they share sufficient links with their host/home state. With respect to incoming students, the Court accepted in *Förster*,[177] for instance, that a five-year residence requirement was proportionate. Yet it is doubtful that migrant students may be led to study more than five years in another Member State – it takes, for instance, no more than five years to obtain a Master's degree in most of the Member States of the European Union. It is more probable that only those students who arrived prior to taking up university studies – like Mr. Bidar[178] – will be able to benefit from their host States' financial support. As a result, Member States still "have considerable discretion in setting residence/social integration requirements for benefit eligibility."[179] Second, it was further argued that the Court of Justice approach with respect to outgoing students would amount to

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[176] Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 53.
[177] Case C-158/07, *Förster*, [2008] *ECR* I-8507.
[178] Case C-209/03, *Bidar*, [2005] *ECR* I-2119.
[179] C. O'BRIEN, "Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity," above, n. 167, 653.

compelling Member States to indirectly subsidize foreign institutions, thereby breaching the territoriality principle which is at the basis of national education systems.[180] This concern was particularly expressed with respect to *Schwarz*,[181] which involved a tax-relief subsidy. However, at no point did the Court compel Member States to put money in the hands of foreign institutions. Rather, it compelled them to subsidize its own outgoing citizens.

285. Compensation of civil war victims. Cases relating to the compensation of civil war victims give rise to similar observations than those just formulated. They raise the fear that this could redraw the conditions of national membership, and that this could induce unreasonable financial burdens for Member States, which would have to subsidize nationals who no longer reside in their territories. Similar counterarguments to those already mentioned may be advanced. The Court of Justice has recognized that Member States enjoy a wide margin of appreciation to assess the "degree of connection to society."[182] It went on by acknowledging that criteria such as nationality and residence were legitimate, to the extent that they did not go beyond what was necessary.[183] Therefore, despite the European Union law requirements applying to the conditions of award of the compensation of civil war victims, Member States are still at liberty to set out inclusion and exclusion rules. Furthermore, the existence of preexisting links between the national community and the welfare recipient, as well as the necessity to submit supporting evidence, are absolute prerequisites to benefit from the state allowance.

286. As far as welfare powers are concerned, two defining features characterize the approach developed by the Court of Justice. On the one hand, the Court consistently takes into account the potentially adverse implications of its case law for national welfare systems.[184] Both the acceptance of justifications reflecting national (financial) interests and the assessment of proportionality are used by the Court to protect the sustainability of national welfare systems. On the other hand, with the exception of cases relating to access to higher education, the various rulings rely on Member States to assess whether an individual's circumstances justify that they are awarded welfare benefits. This, in turn, permits, as C. O'BRIEN accurately points

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[180] M. DOUGAN, "Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?," above, n. 147, 982.
[181] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849.
[182] See, e.g., Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 38.
[183] See, e.g., Ibid., 39.
[184] K. LENAERTS & T. HEREMANS, "Contours of a European social union in the case law of the European Court of Justice," 2: 1 *European Constitutional Law Review* 101, 114 (2006).

out, "each Member State to be the final arbiter over where the line of exclusion lies."[185] To conclude, the Court of Justice's approach in fields relating to welfare may be described as containing "a tacit recognition that the welfare state is – and will remain – a largely domestic matter."[186]

287. Conclusion of Section 1. All in all, Section 1 has established that the Court of Justice power-based approach brings about singular effects, which differ from the effects induced by traditional free movement cases. The latter are of a preemptive nature, in the sense that they affect Member States' decision to assert, or not to assert, jurisdiction and, therefore, that they deprive them of their powers. By contrast, cases involving powers retained by Member States alter the territorial and personal scopes of these powers, but without, notwithstanding a few notable exceptions, pertaining to the assertion of jurisdiction, and only to the extent that they do not jeopardize the integrity of the material scopes of these powers. This results in a discrepancy between the far-reaching scope of application of European Union law and its actual effects. As a way of conclusion, I claim that the Court of Justice's power-based approach, if it seems to limit the powers retained by Member States, amounts more to an apparent disempowerment then to an actual loss of power.

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[185] C. O'BRIEN, "Real links, abstract rights and false alarms: The relationship between the ECJ's 'real link' case law and national solidarity," above, n. 167, 664.
[186] C. BARNARD, "European Union citizenship and the principle of solidarity," in *Social Welfare and EU Law*, (Eds.) M. DOUGAN & E. SPAVENTA, (Hart Publishing, Oxford and Portland, Oregon, 2005), 157, 180.

SECTION 2. THE APPARENT EMPOWERMENT OF THE EUROPEAN UNION

288. While Section 1 has focused on the implications of the Court of Justice power-based approach for Member States powers, Section 2 concentrates on its ramifications for the European Union. On this issue, two main standpoints may be identified. For some, the application of the free movement principle in fields encompassing the powers retained by Member States "is not equivalent to a centralized action by the Community. It does not lead to a Community competence taking the place of national competences."[1] However, the action of the institutions of the European Union, supported by various doctrinal stances, runs counter to this assumption. Under this alternative view, the European Court of Justice case law may serve as a basis for empowering the European Union in fields which previously fell within the powers retained by Member States. So far, this trend has already concerned two of the fields analyzed herein. In the field of cross-border health care, the European Parliament and the Council adopted in 2011 the Directive on the application of patients' rights in cross-border health care.[2] The European Commission launched a similar attempt with respect to the right to strike in 2012.[3] But, given the strong opposition of national parliaments, it very soon had to abandon its undertaking. That being said, the purpose of Section 2 is to assess whether, and if so, to what extent, the European Court of Justice's approach ultimately leads to the conferring of new powers on the European Union. To this end, I start by shedding light on the move from negative towards positive integration. I then point to the fact that the acts of secondary legislation pertaining to the powers retained by Member States that have been (un)successfully adopted reflect a general concern to safeguard the integrity of national powers.

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[1] L. AZOULAI, "The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization," 45:5 *C. M. L. Rev.* 1340, 1342 (2008). See also, in the same vein, D. RITLENG, "Les États membres face aux entraves," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 304: "ce n'est pas tant de tels 'transferts d'attributions' qu'emporte le jeu des libertés de circulation; la 'limitation des droits souverains' des Etats membres résulte plutôt de la contrainte systématique qui leur est imposée d'exercer les compétences qu'ils conservent dans le respect du droit communautaire et, en particulier, des libertés de circulation. Il en résulte que même dans le champ de compétence nationale retenue, les Etats membres sont de moins en moins autorisés à agir librement."

[2] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care.

[3] COM(2012) 130 final, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.

1. From negative to positive integration

289. I have seen in Chapter 1 that fields relating to the powers retained by Member States are characterized by the nonexistent, or limited, character of the jurisdiction held by the European Union. Therefore, it is not self-evident that the European legislator could validly (un)successfully adopt acts of secondary legislation involving cross-border health care and the right to strike. This raises the question as to whether the European Union actually has jurisdiction to do so. In order to address this issue, I set forth, in the following paragraphs, the respective geneses of the (un)successful adoption of the two acts, the general conditions of harmonization that must be complied with, and a critical assessment of the two main arguments that are usually used to justify the validity of the respective legal bases of the acts.

a. Geneses of the (un)successful adoption of acts of secondary legislation

290. *Directive on the application of patients' rights in cross-border health care.* The European Commission began to be interested in adopting an act of secondary legislation in the field of cross-border health care in the early 2000s, when it issued a series of Communications. This prompted it to initially consider including a specific provision in the proposed Directive on services in the internal market.[4] However, it was compelled to remove it after it encountered strong resistance from the European Parliament and the Council.[5] It was subsequently decided to establish a specific legal framework for the area of health care. Then followed the traditional phases of consultation and impact assessment, which resulted in the Commission Proposal for a Directive in July 2008.[6] As underlined by the European Commission:

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[4] Article 23 of COM(2004) 2 final, Proposal for a Directive of the European Parliament and of the Council on services in the internal market: "1. Member States may not make assumption of the costs of non-hospital care in another Member State subject to the granting of an authorization, where the cost of that care, if it had been provided in their territory, would have been assumed by their social security system. [...] 2. Member States shall ensure that authorization for assumption by their social security system of the cost of hospital care provided in another Member State is not refused where the treatment in question is among the benefits provided for by the legislation of the Member State of affiliation and where such treatment cannot be given to the patient within a time frame which is medically acceptable in the light of the patient's current state of health and the probable course of the illness [...]."

[5] W. SAUTER, "The proposed patient mobility Directive and the reform of cross-border health care in the EU," *TILEC Discussion Paper No. 2008-034*, 33. This was acknowledged by the European Commission in COM(2008) 414 final, Commission Communication of 2 July 2008, Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border health care, 2.

[6] COM(2008) 414 final, Commission Communication of 2 July 2008, Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border health care.

> [T]his initiative aims at ensuring a clear and transparent framework for the provision of cross-border health care within the EU, for those occasions where the care patients seek is provided in another Member state than in their home country.[7]

This proposal, nonetheless, met with much opposition, particularly from the Member States. After much debate, the Directive was eventually adopted in March 2011. One of the main bones of contention during the adoption process relates to two jurisdictional issues. Firstly, the Member States saw the European Union as overstepping its jurisdiction. Secondly, once the idea of adopting an act of secondary legislation in itself was accepted, the issue as to the legal basis arose. The initial Proposal of the Commission indeed only referred to Article 95 EC (now Article 114 TFEU). This choice raised fears that a market-driven logic would prevail over the specific logic characterizing health care policies. In addition:

> The concern was the dominance of economic integration issues over the explicit wording of what is now Article 168(7) TFEU recognizing the limited EU competence in the area of health care, invoking concepts of subsidiarity and proportionality.[8]

A compromise was ultimately found after the European Parliament and the Council added Article 168 TFEU on top of Article 114 TFEU.[9] The Directive on the application of patients' rights in cross-border health care now comprises two legal bases, the general harmonization clause used for internal market matters, and the sector-specific clause relating to the field of public health.

291. Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. The Proposal on the exercise of the right to take collective action followed the two highly controversial rulings of the Court of Justice, *Viking*[10] and *Laval*.[11] Its purpose is to offer a legislative framework for the regulation of transnational industrial action. The European Commission argued that:

> [T]he cases brought to light the need to ensure setting the right balance between the exercise of the right to take collective action by trade unions, including the right to strike,

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[7] COM(2008) 415 final, Communication from the Commission, A Community framework on the application of patients' rights in cross-border health care.
[8] E. SZYSZCZAK, "Patients' rights: A lost cause or missed opportunity?," in *Health care and EU Law*, (Eds.) J. W. VAN DE GRONDEN *et al.*, (The Hague, T.M.C. Asser Press, 2011), 119.
[9] W. SAUTER, "Harmonization in health care: the EU patients' rights Directive," in *Social inclusion and social protection in the EU: Interactions between Law and Policy*, (Eds.) B. CANTILLON, H. VERSCHUEREN & P. PLOSCAR, (Intersentia, Law and Cosmopolitan Values, Vol. 2, 2012), 112.
[10] Case C-438/05, *Viking*, [2007] *ECR* I-0779.
[11] Case C-341/05, *Laval*, [2007] *ECR* I-11767.

> and the freedom of establishment and the freedom to provide services, economic freedoms enshrined in the Treaty.[12]

This time, it based its proposed regulation on Article 352 TFEU, the so-called flexibility clause. This choice of legal basis probably reflects the cautious approach taken by the Commission. Many indeed contained that the reasoning developed by the Court in *Viking* and *Laval* was based on the idea whereby the economic freedoms were to prevail over the right to strike, which was yet commonly recognized as a fundamental right. In using Article 352 TFEU, the Commission may have shown its concern to disconnect the issues raised by the two rulings from a purely market-driven logic. But it above all acknowledged that the Treaty does not provide the European Union with powers in matters relating to the right to take collective action. However, its efforts proved insufficient. For the first time since the entry into force of the Lisbon Treaty, enough national parliaments activated the 'yellow card procedure' under the Subsidiarity protocol.[13] One of the main concerns raised by the twelve national Parliaments was the lack of jurisdiction of the European Union.[14] In September 2012, the European Commission simply decided to withdraw its proposal.

292. A common bone of contention: the jurisdictional issue. The two proposals raised similar issues of jurisdiction. Indeed, these issues were one of the main raisons behind the withdrawal of the proposal relating to the right to take collective action. It therefore poses the more general question as to whether the Court of Justice's case law involving powers retained by Member States may legitimately serve as the basis for harmonizing the fields concerned.

b. General conditions for harmonizing

293. Before detailing thoroughly the arguments that may be put forward to justify the adoption of acts of secondary legislation in fields relating to powers retained by Member States, it is worth briefly recalling the conditions that must be met to use the two general clauses of harmonization.

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[12] COM(2012) 130 final, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, 10.

[13] F. FABBRINI & K. GRANAT, ""Yellow card, but not foul": the role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike," 50: 1 *C. M. L. Rev.* 115 (2013).

[14] X. GROUSSOT & S. GOBOJEVIC, "Subsidiarity as a procedural safeguard of federalism," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press, 2014), 239-240.

294. Article 114 TFEU. Article 114§1 TFEU confers on the European institutions a general power to adopt acts of secondary legislation "which have as their object the establishment and functioning of the internal market." Article 114§3 further provides that the Commission's proposals must "take as a base a high level of protection" when they concern "health, safety, environmental protection and consumer protection." The Court of Justice summarized the conditions that must be met to use Article 114 TFEU as follows:

> [T]he object of measure adopted on the basis of Article [114](1) must genuinely be to improve the conditions for the establishment and functioning of the internal market [...]. While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article [114 TFEU] as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market. [...] Recourse to that provision is also possible if the aim is to prevent the emergence of such obstacles to trade resulting from the divergent development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[15]

Besides these conditions, described as the "outer limit" of Article 114 TFEU,[16] the legislator must also comply with the centre of gravity doctrine, its "inner limit."[17] Under this requirement, Article 114 TFEU may not be used if another sector-specific legal basis is available.[18] The Court exceptionally accepts two or more legal bases if the aims pursued by the act are indissoluble.[19] The European legislator has used Article 114 TFEU extensively. This provision has moreover been the subject of significant jurisdictional disputes, the most notorious being *Tobacco Advertising* since, in this case, the Court of Justice decided for the first and only time that the European Union had overstepped its jurisdiction in adopting a directive aiming at regulating conditions of tobacco advertising. The challenged directive in *Tobacco Advertising* is but one example of acts of secondary legislation based on Article 114 TFEU,

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[15] Case C-58/08, *Vodafone, O2 et al v. Secretary of State for Business, Enterprise and Regulatory Reform*, [2010] *ECR* I-4999, 32-33.
[16] A. KNOOK, "Guns and tobacco. The effect of interstate trade case law on the vertical division of powers," 11 *Maastricht journal of European and comparative law* 347, 357 (2005).
[17] Ibid.
[18] Case C-300/89, *Commission v. Council*, [1991] *ECR* I-2878 (*Titanium Dioxide*). See R. BARENTS, "The internal market unlimited: Some observations of the legal basis of Community legislation," 30: 1 *C. M. L. Rev.* 101, 106 (1993).
[19] Case 165/87, *Commission v. Council*, [1988] *ECR* 5545, 11.

which do not have as their core internal market objectives but rather the pursuit of non-market aims.[20]

295. Article 352 TFEU. Article 352 TFEU – formerly 235 EEC and then 308 EC – has played a key role in the European Union legal order. While it remained dormant during the first few decades of the then Economic Community, it began to be used extensively after the Paris Summit Conference of 1972. From then on, it became a major tool to develop policies that were not formally included into the treaties.[21] Several conditions must be met to make use of Article 352 TFEU. They were originally four: (i) Union action had to be necessary; (ii) Union action had to pertain to one of the objectives set out in the Treaty; (iii) the Treaty should not have provided the necessary powers; and (iv) Union action had to concern "the course of the operation of the internal market."[22] This last condition used to be one of the main points of contention. Indeed, according to the "synthetic school" view, it had to be interpreted broadly, in light of "extra-economic" objective, while the "restrictive school" maintained that the then articles 235 EEC and 308 EC could only be used to achieve economic objectives.[23] Interestingly enough, this condition has been removed by the Lisbon Treaty, thereby extending the scope of application of the new Article 352 TFEU.[24] Henceforth, the issue that remains controversial relates to the residual dimension of the clause, and the requirement that another Treaty provision may not be used instead of Article 352 TFEU.[25]

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[20] B. DE WITTE, "A competence to protect. The pursuit of non-market aims through internal market legislation," *The Judiciary, the Legislature and the EU Internal Market*, in (Ed.) P. SYRPIS, (Cambridge/New York, Cambridge University Press, 2012), 25-46. See also G. DE BÚRCA & B. DE WITTE, "The delimitation of powers between the EU and its Member States," in *Accountability and Legitimacy in the European Union*, (Eds.) A. ARNULL & D. WINCOTT, (Oxford, Oxford University Press, 2002, Oxford Studies in European Law), 215.

[21] A. TIZZANO, "Les compétences de la Communauté," in *Trente ans de droit communautaire*, (Luxembourg, Office des publications officielles des Communautés européennes, 1982), 92; V. MICHEL, "2004: le défi de la répartition des compétences," *Cahiers de Droit Européen* 17, 36 (2003); G. DE BÚRCA & B. DE WITTE, "The delimitation of powers between the EU and its Member States," above, n. 20, 216.

[22] A. TIZZANO, "Les compétences de la Communauté," above, n. 21, 55s.

[23] C. SASSE & H. C. YOUROW, "The growth of legislative power of the European Communities," in *Courts and Free Markets: Perspectives from the United States and Europe*, (Eds.) T. SANDALOW & E. STEIN (Vol. II, Oxford, Oxford University Press, 1982), 95.

[24] A. VON BOGDANDY & J. BAST, "The federal order of competences," in *Principles of European Constitutional Law*, (Eds.) A. VON BOGDANDY & J. BAST, (Oxford: Hart Publishing, 2010), 300.

[25] P. CRAIG, *EU Administrative Law*, (Oxford; New York: Oxford University Press, 2006), 386.

c. Critical assessment of the arguments justifying the validity of the acts' legal bases

296. Health care and the right to strike are both characterized by the very limited or nonexistent nature of EU action. On the one hand, Article 168§5 TFEU expressly excludes any harmonization in the field of health care, and provides, in any case, that:

> Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them.[26]

On the other hand, Article 153§5 TFEU clearly states that:

> The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

Therefore, the adoption of acts of secondary legislation may seem to be at odds with the letter of the Treaty. However, two ranges of powerful arguments are usually put forward to go beyond the apparent contradiction. First, authors are generally of the view that there is a correlation between the respective scopes of negative and positive integrations. Second, they consider that general harmonizing clauses should prevail over saving clauses such as Article 168§5 TFEU and Article 153§5 TFEU. In what follows, I assess to what extent these two ranges of arguments are well-founded with respect to the subject matters at hand.

297. Correlation between the respective scopes of negative and positive integrations. Authors usually consider that the provisions relating to the free movement of goods, the freedom to provide services, and Article 114 TFEU form a coherent and complementary whole. J. H. H. WEILER, for instance, speaks of the "triangle of Articles [34], [36], and [114],"[27] while A. KNOOK refers to the "*cross-pollination effect* between Articles [34] and [114]."[28] Under this view, then, the scope of the powers of the European Union would coincide with the scope of application of the fundamental freedoms.[29] Therefore, the review of national measures in light of the economic freedoms would affect "the vertical division of power in the Community [...] for the benefit of

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[26] Article 168§7 TFEU.
[27] J. H. H. WEILER, "The constitution of the common market place: Text and context in the evolution of the free movement of goods," in *The Evolution of EU Law*, (Eds.) P. CRAIG & G. DE BURCA, (Oxford: Oxford University Press, 1999), 362.
[28] A. KNOOK, "Guns and tobacco. The effect of interstate trade case law on the vertical division of powers," above, n. 16, 374.
[29] A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 24, 293.

the centre."[30] Thus, for instance, the mere characterization of medical services as services within the meaning of Article 56 TFEU would have the effect of conferring harmonizing powers on the European legislator.[31] More specifically, all the mandatory requirements that are recognized by the Court of Justice as being capable of justifying the restrictive effects of national measures could form the basis of harmonizing measures at European Union level.[32] The same may be said with respect to Article 352 TFEU, which has been used, for instance, in the field of environment or consumer protections.[33] However, it is doubtful that this range of arguments may entirely give grounds for action by the European Union. Firstly, as far as cross-border health care is concerned, I have shown in Chapter 3[34] that the justifications accepted in this field differ from traditional ones. The Court of Justice has indeed recognized the "control of health expenditure," the "avoidance of the possible risk of undermining a social security system's financial balance," or the "maintenance of treatment capacity or medical competence on national territory" as legitimate justifications. These justifications clearly reflect the possibility for Member States to safeguard the integrity of their powers rather than an aim similar to that of the protection of the environment or of the consumer that could be pursued at European Union level. Secondly, it is one thing to accept that the scope of application of European Union law is broader than the scope of European Union powers, but it is another to go along with the idea that the latter may be as unlimited as the former. I have indeed shown in Chapter 2[35] that the Court of Justice's reasoning amounts to conferring an unlimited character on the scope of application of European Union law. Therefore, the argument whereby the respective scopes of negative and positive integrations coincide could ultimately lead to the claim that the scope of the powers of the European Union are boundless, thereby rendering the conferral principle meaningless.

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[30] J. SNELL, "Who's got the power? Free movement and allocation of competences in EC law," 22: 1 *YEL* 323, 324 (2003). See also D. WYATT, "Is the European Union an organization of limited powers?," in *A constitutional order of states? (Essays in EU Law in honour of Alan Dashwood)*, (Eds.) A. ARNULL, C. BARNARD *et al*, (Oxford: Hart, 2011), 3, 15.

[31] D. WYATT, "Community competence to regulate medical services," in *Social welfare and EU Law*, (Eds.) M. DOUGAN & E. SPAVENTA, (Hart Publishing, Oxford, 2005), 131-143, 142-143.

[32] B. DE WITTE, "A competence to protect. The pursuit of non-market aims through internal market legislation," above, n. 20, 31; R. BARENTS, "The internal market unlimited: Some observation on the legal basis of Community legislation," above, n. 18, 106.

[33] M. DOUGAN, "Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship," in *The European Court of Justice and the Autonomy of the Member States*, (Eds.) H.-W. MICKLITZ & B. DE WITTE , (Cambridge: Intersentia, 2012), 132.

[34] See, *Supra*, §§ 157s.

[35] See, *Supra*, §§ 134s.

298. Prevalence of general harmonizing clauses over saving clauses. Another issue relates to whether saving clauses such as Articles 153§5 or 168§5 TFEU are such as to bar, or at least limit, the jurisdiction held by the European Union under the general harmonizing clauses. For the Commission, the answer clearly lies in the negative. It argued, in turn, that:

> As confirmed by the Court, [Article 168§5] does not [...] exclude the possibility that the Member states may be required under other Treaty provisions, such as Article [56 TFEU], or Community measures adopted on the basis of other Treaty provisions, to make adjustments to their national health care and social security systems.[36]

> [T]he Court rulings have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law.[37]

As far as Article 168§5 is concerned, this stance seems to be at least partly supported by the Court of Justice's case law. Even in *Tobacco Advertising*, which ruled out European Union action, the Court stressed that:

> [P]rovided that the conditions for recourse to Articles 100a, 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other policies and Article 100a(3) expressly requires that, in the process of harmonization, a high level of human health protection is to be ensured.[38]

Thus, the Court does not consider the limitation stemming from Article 168§5 TFEU as an outer constitutional limit of the use of Article 114 TFEU, provided that the aforementioned conditions of application are met.[39] It will only preclude European Union action if Article 114 TFEU is in fact used to "circumvent the express exclusion of harmonization laid down in Article [168§5] of the Treaty."[40] But, as long as the European Union measure "makes *some* contribution to internal market aims,"[41] the Court will uphold it. Therefore, European Union

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[36] COM(2008) 414 final, Commission Communication of 2 July 2008, Proposal for a Directive of the European Parliament and of the Council on the application of patients' rights in cross-border health care, 8.
[37] COM(2012) 130 final, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, 11.
[38] Case C-376/98, *Germany v. Council*, [2000] *ECR* I-8419 (*Tobacco Advertising*), 88. See also Case C-210/03, *Swedish Match*, [2004] *ECR* I-1193, 32.
[39] S. WEATHERILL, "The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court's case law has become a 'drafting guide'," 12 *German Law Journal* 827, 833 (2011).
[40] Case C-376/98, *Germany v. Council*, [2000] *ECR* I-8419 (*Tobacco Advertising*), 79. R. SCHÜTZE, "Limits to the Union's 'Internal Market' competence(s): Constitutional comparisons," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press), 2014, 231.
[41] D. WYATT, "Community competence to regulate the internal market," in *50 years of European Treaties*, (Eds.) M. DOUGAN & S. CURRIE, (Hart Publishing, Oxford and Portland, Oregon, 2009), 104.

action may be based on Article 114 TFEU even though it primarily pursues non-market aims, which may even be the subject of saving clauses such as Article 168§5.[42] In other words, "there is no constitutional limit to the *kinds* of public policy concerns that the European legislature may take into account when enacting internal market laws."[43] This explains why the various saving clauses spread around the Treaty are viewed as only applying to the measures based on the provision in which they are located.[44] Thus, for instance, a European Union measure based on Article 168 TFEU could not validly harmonize national laws, since harmonization is expressly excluded by Article 168§5. But certain aspects of public health may be harmonized through the use of Article 114 TFEU. These various arguments may be transposed to the conditions of application of Article 352 TFEU, to an even greater extent since its scope is no longer confined to the operation of the internal market.

299. Having said that, one might nevertheless wonder whether the respective conditions of application of Articles 114 TFEU, 168 TFEU, and 352 TFEU were met in the Directive on patient's rights and in the stillborn Regulation on the right to strike. To begin with the former, it is open to question whether it might be established that the Directive contributes, even remotely, to the functioning of the internal market. Even B. DE WITTE, who ardently justifies internal market-based acts of secondary legislation not having at their core economic objectives concedes that they nonetheless "are all about market regulation" if not about "market-building."[45] It is, of course, a matter of perspective, but the patients' rights Directive turns out to relate exclusively to: (i) the definition of the respective responsibilities of Member States of treatment and Member States of affiliation, and the rights conferred on European Union patients; and (ii) the cooperation among national authorities. To be sure, nowhere does it justify how it plays a part in the elimination of obstacles to trade or distortions of competition, whether in its recitals or in the provisions themselves. In addition, one might legitimately wonder whether the choice to base the Directive on both Articles 114 TFEU and 168 TFEU is

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[42] Ibid., 139. The same holds true with respect to cultural policy: B. DE WITTE, "A competence to protect. The pursuit of non-market aims through internal market legislation," 33-34.

[43] B. DE WITTE, "A competence to protect. The pursuit of non-market aims through internal market legislation," above, n. 20, 35.

[44] A. VON BOGDANDY & J. BAST, "The federal order of competences," above, n. 24, 286; G. DAVIES, "The Community internal market-based competence to regulate health care: scope, strategies and consequences," 14 *Maastricht J. Eur. & Comp. L.* 215, 218 (2007); V. MICHEL, "La compétence de la Communauté en matière de santé publique," *Revue des Affaires européennes* 158, 182 (2003-2004).

[45] B. DE WITTE, "A competence to protect. The pursuit of non-market aims through internal market legislation," above, n. 20, 28.

not self-contradictory, and does not conflict, in any case, with the aforementioned case law of the Court of Justice.[46] Turning now to the proposed Regulation on the right to strike, it should be recalled that the Court of Justice held, with respect to Article 352 TFEU, that:

> That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article [352] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.[47]

As a result, Article 153 TFEU being a part of the "general framework created by the provisions of the Treaty," the fact that it excludes the right to strike from the harmonizing powers of the European Union should at least have been taken into consideration.

2. The safeguard of the integrity of national powers?

300. While the above has focused on the issue as to whether the Directive on patients' rights and the proposed Regulation on the right to strike are grounded on valid legal bases, I now look more closely into their substance. This inquiry reveals that, somehow paradoxically, these acts of secondary legislation both basically aim to safeguard the integrity of national powers.

a. The Patients' Rights Directive

301. A Directive aiming at protecting national powers? The various Communications issued by the European Commission in relation to cross-border health care, as well as the final version of the patients' rights Directive, strikingly reveal the concern of the European legislator to safeguard the integrity of national powers in this field. They indeed comprise multiple references to the idea that, as a matter of principle, Member States hold jurisdiction to regulate health care:

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[46] E. SZYSZCZAK, "Patients' rights: A lost cause or missed opportunity?," above, n. 8, 120. For an alternative view, see, for instance, S. DE LA ROSA, "The Directive on cross-border health care of the art of codifying complex case law," 49 *C. M. L. Rev.* 15, 27-28 (2012): "The reference to Article 168 TFEU, which provides the legal basis for supporting competences, is essentially designed to preserve the competence of states in public health and to justify cooperation instruments under the Directive."

[47] Opinion 2/94, [1996], *ECR* I-1759, 30.

> Member States retain responsibility for providing safe, high quality, efficient and quantitatively adequate health care to citizens on their territory.[48]

The second key idea at the basis of the Directive lies in the repeated assertions that European Union law respects in any case the various components of Member State jurisdiction, as illustrated by Article 1:

> 1. This Directive provides rules for facilitating the access to safe and high-quality cross-border health care and promotes cooperation on health care between Member States, in full respect of national competencies in organizing and delivering health care. [...]
>
> 4. This Directive shall not affect laws and regulations in Member States relating to the organization and financing of health care in situations not related to cross-border health care.[49]

302. The containment of the preexisting cross-border rights. Both Member States of treatment and of affiliation are put under the obligation to facilitate cross-border health care, but only to the extent that this does not undermine the integrity of their powers. This is clearly reflected in the provisions of the Directive relating to prior authorizations, which seem to go beyond the leeway already left by the Court to Member States in its case law. According to Recital 42 of the Directive:

> Given that the Member States are responsible for laying down rules as regards the management, requirements, quality and safety standards and organization and delivery of health care and that the planning necessities differ from one Member States to another, it should therefore be for the Member States to decide whether there is a need to introduce a system of prior authorization [...]. (Emphasis added)

This seems to grant Member States considerable control over patients willing to seek treatments abroad. Indeed, even if under Article 7.8 of the Directive the basic governing principle seems to prevent Member States from subjecting cross-border health care to prior authorizations, Article 8 mitigates it substantially, and goes beyond the Court of Justice traditional case law in the field of health care.[50] The initial Proposal of the Commission seemed to be more in line with the

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[48] Recital 4 of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care. See also COM(2008) 415 final, Communication from the Commission, A Community framework on the application of patients' rights in cross-border health care, 2.

[49] See also the multiple commitments to respect Member States' freedom to decide on the appropriate health care, ethical choices (Recital 7), the definition of social security benefits, organization and delivery of health care and medical care (Recitals 10 and 35), rules on the sale of medicinal products and medical devices over the Internet (Recital 17), definition of insured persons (Recital 18), determination of the extent of the sickness cover available and prevention of significant effect on the financing of national health care systems (Recital 29).

[50] S. DE LA ROSA, "The Directive on cross-border health care of the art of codifying complex case law," above, n. 46, 39s; V. HATZOPOULOS, "Actively talking to each other: the Court and the political institutions," in *Judicial*

Court's rulings, since it distinguished between non-hospital care, not subject to prior authorizations, and hospital and specialized care, subject to prior authorizations if they turned out to be necessary to preserve Member States' financial balance as well as planning and rationalization. However, in the final version of the Directive, this distinction is set aside. Instead, Member States are entitled to require prior authorizations under the following circumstances: if (i) they can establish that they are necessary to preserve the sustainability of their health care policies when patients are hospitalized for at least one night or in case of specialized and cost-intensive medical infrastructure or medical equipment; (ii) "treatments presenting a particular risk for the patient or the population" are involved; and (iii) health care "is provided by a health care provider that [...] could give rise to serious and specific concerns relating to the quality or safety of the care."[51] Interestingly, the Court of Justice anticipated the changes brought about by the Directive. In *Commission v. Spain*,[52] it refused to apply the principles of its case law to emergency care, thereby circumscribing the concept of restriction in the field of health care. In *Commission v. France*,[53] it moreover held that a Member State could legitimately impose a prior authorization requirement when the use of major equipment outside hospital setting was involved.

303. *The inclusion of novel aspects.* The patients' rights Directive comprises two novel aspects, not present in the traditional Court of Justice case law, that are even more remote from the freedom to provide services. First, it imposes on both Member States of treatment[54] and of affiliation[55] an obligation to inform patients. This would actually constitute, in the opinion of several authors, the real innovation of the Directive.[56] Second, the Directive also organizes a system of cooperation among national authorities in relation to: mutual assistance and cooperation, the recognition of prescriptions, European reference networks, rare diseases,

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activism at the European Court of Justice: causes, responses and solutions, (Eds.) M. DAWSON, B. DE WITTE & E. MUIR, (Cheltenham: Edward Elgar, 2013), 102, 135.

[51] Article 8.2 of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care.

[52] Case C-211/08, *Commission v. Spain*, [2010] *ECR* I-5267.

[53] Case C-512/08, *Commission v. France*, [2010] *ECR* I-8833.

[54] Article 4.2 of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care.

[55] Article 5 of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care.

[56] D. DELNOIJ & W. SAUTER, "Patient information under the EU patients' rights Directive," 21: 3 *European Journal of Public Health* 271 (2011); W. PALM & R. BAETEN, "The quality and safety paradox in the patients' rights Directive," 21: 3 *European Journal of Public Health* 272 (2011).

ehealth, and health technology assessment.[57] These mechanisms are somewhat reminiscent of other mechanisms of cooperation, such as the system of mutual assistance set up by the services Directive.[58] Not only does the Directive place once again emphasis on the fact that such mechanisms must respect Member State jurisdiction, but it is also remarkable that many of these mechanisms rely on the willingness of Member States to actively cooperate in the operation of the Directive.[59]

b. The Regulation on the Right to Strike

304. A similar rationale. The proposed Regulation on the Right to Strike seemed to be based on the same underlying rationale as the Patients' rights Directive. As a matter of fact, it referred repeatedly to the "role and importance of existing national practices relating to the exercise of the right to strike in practice."[60] It started from the premise, stated in proposed Article 1.2, that:

> This regulation shall not affect in any way the exercise of fundamental rights as recognized in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance with national law and practices. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take collective action in accordance with national law and practices.

The proposed Article 2 was in line with the European Court of Justice's case law, since it stated, as a general principle, that the exercise of the right to take collective action and the exercise of the freedom of establishment as well as the freedom to provide services must mutually respect each other. Therefore, this would have invited national courts to assess litigious transnational industrial actions through the lenses of the principle of proportionality. Accordingly, this could have resulted in introducing substantial changes into some national legal orders, such as those of the Nordic Member States or France and Italy, in which the standard of protection is higher,

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[57] See, for further details, T. M. HERVEY, "Cooperation between health care authorities in the proposed directive on patients' rights in cross-border health care," in *Health care and EU Law*, (Eds.) VAN DE GRONDEN J. W. *et al.*, (The Hague: T.M.C. Asser Press; Dordrecht: Springer, 2011), 161-189.

[58] Article 37.1 of the Directive 2006/123 on services in the internal market. See, on this point, L. AZOULAI, "The complex weave of harmonization," *to be published* (2014).

[59] See, for instance: Article 12.1 of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care with respect to the European reference networks; Article 15.1 of the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border health care with respect to health technology assessment; and, more generally, S. DE LA ROSA, "The Directive on cross-border health care of the art of codifying complex case law," above, n. 46, 44-45.

[60] COM(2012) 130 final, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, 13.

or that of the United Kingdom, where the standard of protection is lower. By contrast, this would have left the German legal order unaffected, since the regulation of the right to take collective action is also based on the proportionality principle.[61] Nonetheless, in spite of this, Article 2 should have been read along with the aforementioned Article 1.2. As a result, it seems that national courts would have, in any case, retained a significant degree of discretion. As for Article 3 of the proposal, it essentially required Member States to provide alternative resolution mechanisms to resolve labor disputes in order to ensure equal access to such mechanisms. Here again, the cautious approach of the European Commission was clear. Indeed, it placed emphasis on the fact that:

> The present proposal does not introduce changes into such alternative resolution mechanisms existing at national level, nor does it contain or imply an obligation to introduce such mechanisms for those Member States not having them.[62]

The Commission moreover underlined that national courts should enjoy a wide margin of discretion,[63] which was reflected in proposed Article 3.4.

305. Conclusion of Section 2. All in all, parallel conclusions to those of Section 1 may be drawn. On the one hand, the Patients' rights Directive as well as the stillborn Regulation on the right to strike reveal that the European institutions see the Court of Justice case law involving powers retained by Member States as a basis for regulating fields in relation to which Member States are traditionally seen as anjoying exclusive jurisdiction since the European Union holds no, or very limited, jurisdiction. Thus, this tends to lead to an empowerment of the European Union through the extension of its regulatory jurisdiction. However, on the other hand, the second part of Section 2 has shown that the two acts of secondary legislation have a somewhat paradoxical purpose, which consists in not affecting Member States' powers in the respective fields. Therefore, the Court of Justice case law appears to lead more to a 'seeming' empowerment than to a genuine transfer of powers from the Member States to the European Union. The Directive and the proposed Regulation indeed recurrently reaffirm that, as a matter of principle, Member States retain responsibility in the field of cross-border health care and with respect to the right to strike.

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[61] F. FABBRINI, *Fundamental rights in Europe. Challenges and transformations of a multilevel system in comparative perspective*, (EUI Ph.D. Thesis, 2012), 159, 189.
[62] Ibid.
[63] Ibid.

CONCLUSION OF CHAPTER 4.

306. While the first section of this chapter has focused on the jurisdictional implications of the Court of Justice power-based approach for the Member States, the second section has placed more specific emphasis on the European Union. While findings of Chapter 4 are consistent, they may seem, at first glance, somewhat unexpected and at odds with conventional wisdom. They reveal that neither do the cases concerned by the power-based approach in fact disempower the Member States, nor do the (un)adopted acts of secondary legislation substantially empower the European Union. Admittedly, the former affect the substance of the powers retained by Member States. But they alter the personal and territorial scopes of these powers only to the extent that this reshaping effect does not jeopardize the integrity of their material scope. In a similar way, the acts of secondary legislation that have been so far (un)successfully adopted reflect the concern of the European legislator not to intrude too deeply into the spheres of national powers, by constantly reasserting that Member States remain, as a matter of principle, principally responsible for regulating the fields of cross-border health care and the right to strike.

307. *Beyond the jurisdictional implications.* If the Court of Justice's power-based approach brings about significant jurisdictional implications, its ramifications with respect to the issue of Union's membership are even deeper. The cases concerned by this original approach are indeed a good example of what Union membership implies for the various actors of European integration.

CHAPTER 5. EUROPEAN UNION'S MEMBERSHIP

INTRODUCTION OF CHAPTER 5.

308. Purpose. The previous chapters have shown, in a nutshell, that European integration extends in core areas of Member State autonomy. Member States are subject, even in fields where they retain main responsibility, to the requirements deriving from the principle of free movement. Against this backdrop, the purpose of the present chapter is twofold. On the one hand, it intends to demonstrate that the Court of Justice's power-based approach has fundamental implications for the framing of the contours of European Union's membership, or, to put it differently, to understand what belonging to the European Union consists of, and implies. On the other hand, this chapter seeks to shed light on the various types of implications that are induced. First, the power-based approach reveals that the members of the European Union are no longer monad states, but have become, instead, members of a wider constitutional arrangement. But, second, it also indicates that Member States are not simply dissolved in a bigger whole, but do in fact preserve their identity as states. In sum, cases concerned by the Court of Justice power-based approach carry out what O. BEAUD has described as the "federal operation,"[1] characterized by a metamorphosis of the states belonging to a federation. Throughout this operation, states go through a metamorphosis process, which is twofold. They fundamentally change, but, at the same time, they also conserve their own identity.[2]

309. Approach. The approach followed in this chapter draws on the notion of federalism as I have defined it in the General Introduction.[3] In addition, it understands the Member States from a twofold perspective. First, Member States are understood as entities that are in constant interactions with the other institutional actors of the European Union. Second, they are also

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[1] O. BEAUD, *Théorie de la Fédération*, (Paris: Presses Universitaires de France, 2007), 202.
[2] Ibid., 204-205.
[3] See, *Supra*, §§ 35s.

regarded as individual independent polities, which enjoy a peculiar status within the European Union constitutional order. Last but not least, this approach resorts to the comparative tool. It uses the US constitutional order as a means to better understand the singular features of European Union's membership.

310. Outline. I have divided Chapter 5 into two parts. To begin with, I will focus on the transformation that affects the members of the European Union, and that the Court of Justice power-based approach enhances. Following this, I will then turn to the identification of the resulting position of the Member States within the European Union constitutional order.

SECTION 1. FROM MONAD TO MEMBER STATES

311. The twofold dimension of constitutional federalism. A. ERBSEN has accurately pointed out, regarding the US constitutional context, that "[c]onstitutional federalism has two distinct dimensions: the federal government must interact with the states, and states must interact with each other."[4] Indeed, as J. F. ZIMMERMAN puts it:

> The division of political power in a federal system, between the national government and the states, automatically produces relations between the latter.[5]

While the former is commonly referred to as vertical federalism, the latter – too often overlooked – is usually described as horizontal federalism. A. ERBSEN has further added that the basic principle governing federal/state relations is that of supremacy, which makes these interactions "hierarchical" in essence.[6] By contrast, interstate relations involve "entities on an equal plane of constitutional status,"[7] which makes it more difficult to understand how the members of the US federation interact, as well as to identify the governing principles of their various interactions. The same holds true with respect to the European Union constitutional order. European Union vertical federalism is first and foremost governed by the principle of primacy. And, in a similar way to what occurs in the US constitutional order, horizontal relations among the Member States of the European Union are less easily perceived since there is no overarching governing principle.

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[4] A. ERBSEN, "Horizontal federalism," 93 *Minn. L. Rev.* 493, 501 (2008).
[5] J. F. ZIMMERMAN, *Horizontal federalism. Interstate relations*, (State University of New York Press, Albany, 2011), 1.
[6] A. ERBSEN, "Horizontal federalism," 93 *Minn. L. Rev.* 493, 501 (2008).
[7] Ibid.

312. In what follows, I focus on the transformation affecting Member States that is triggered by the Court of Justice's power-based approach. O. BEAUD has shown, in this respect, that this transformation is carried out along two main lines, since the "federal operation" pertains to both the vertical relationship between a federation and its members, and the horizontal relations among the members of the federation.[8] Therefore, I first look – briefly, since I have already dealt with its main aspects in the previous chapters – at the vertical dimension of Member States' transformation i.e. at the metamorphosis of the Member States process within the context of European Union-Member States relations. Following this, I turn to the horizontal dimension of Member States' transformation – i.e. to Member States' metamorphosis process caused by Member States' interrelations.

1. The vertical dimension: European Union-Member States relations

313. *From monad to federate states.* Authors often point out that the building of the European Union, and the development of the vertical relations between the Union and its members, entails a profound alteration of the Member States.[9] In fact, the making of a federation results in the creation of a new status for each of its members.[10] The case law of the Court of Justice relating to the powers retained by Member States reveals, in this regard, that Member States are compelled to serve, in any area of their jurisdiction, European Union interests. When exercising their jurisdiction, they "must take into account any possible nexus with EU law [...] [They] are to place their policies in an EU law framework."[11] In other words, they must "think federal."[12] In this sense, the cases concerned by the power-based approach are a way for the Court of Justice to remind them that they are no longer monad states, and that they may not, as a result, act unilaterally without taking into account the wider constitutional space they have decided to create and to belong to. Thus, they must behave as genuine federate actors.

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[8] O. BEAUD, *Théorie de la Fédération*, above, n. 1, 202.
[9] O. BEAUD, "L'Europe vue sous l'angle de la fédération. Le regard paradoxal de Paul Reuter," 45 *Droits* 63, 65 (2007).
[10] C. SCHMITT, *Théorie de la Constitution*, (Trad. From German to French by L. Deroche), (Paris: Presses Universitaires de France, 1993), 513.
[11] K. LENAERTS, "Federalism and the rule of law: Perspectives from the European Court of Justice," 33 *Fordham International Law Journal* 1338, 1340 (2011). See also, in the same vein, J. H. H. WEILER, "Fédéralisme et constitutionnalisme: le *Sonderweg* de l'Europe," in *Une Constitution pour l'Europe?*, (Ed.) R. DEHOUSSE, (Presses de Science Po, 2002), 174.
[12] K. LENAERTS, "Federalism and the rule of law: Perspectives from the European Court of Justice," 33 *Fordham International Law Journal* 1338, 1340 (2011).

314. From monad to loyal states. To put things differently, the Court of Justice power-based approach contributes to turn the members of the European Union federation into loyal members, regardless of the field involved. In this respect, I have noted in Chapter 2 that this approach may be traced back to a CECA ruling decided in 1961. In *De Gezamenlijke Steenkolenmijnen in Limburg*, the Court indeed justified:

> [T]he jurisdiction of the Community to impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised.[13]

In M. BLANQUET's view, this statement, according to which the jurisdiction of the – now – European Union may legitimately affect the powers retained by the Member States, is implicitly based on the principle of loyalty.[14] The logic expressed by the Court is, as a matter of fact, reminiscent of various legal orders that base corresponding intrusions on the idea of loyalty, as well as of the case law of the European Court of Justice, which explicitly refers to the principle of loyalty.

315. To begin with, it is usually accepted, in public international law, that one of the effects of the application of the principle of good faith is the curtailing of the exercise of states' sovereignty. The Permanent Court of Arbitration held, in this respect, that good faith may:

> [Exclude] the right to legislate at will concerning the subject matter of the treaty, and [limit] the exercise of sovereignty of the State bound by a treaty with respect to that subject matter to such acts as are consistent with the treaty.[15]

In other words, "states are under an obligation to refrain both from acts defeating the object and purpose of a rule and from any other acts preventing its implementation."[16] Turning now to the principle of federal loyalty, it finds its origins in the case law of the German Constitutional Court, which usually refers to the concept of *Bundestreue*. The *Bundesverfassungsgericht* once described this principle as follows:

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[13] Case 30/59, *De Gezamenlijke Steenkolenmijnen*, [1961] *ECR* 1, 24.
[14] M. BLANQUET, *L'article 5 du Traité C.E.E. Recherche sur les obligations de fidélité des Etats membres de la Communauté.*, (LGDJ, Bibliothèque de droit international, Paris, 1998), 181.
[15] *The North Atlantic Coast Fisheries Case (Great Britain v United States of America)* (Award) [1910] XI RIAA 169, 188.
[16] I. I. LUKASHUK, "The principle *pacta sunt servanda* and the nature of obligation under international law," 83 *American Journal of International Law*, 515 (1989). See also S. JOVANOVIC, *Restriction des compétences discrétionnaires des Etats en droit international*, (Paris, Pédone, 1988), 200s.

> [B]oth the federation and the *Länder* are obliged to cooperate pursuant to the nature of the constitutional 'pact' between them and have to contribute to its consolidation as well as to the maintenance of the well-understood interests of the federation and the constituent states.[17]

The principle of federal loyalty plays a significant role in many federal systems, such as Austria, Switzerland, or Belgium – but with the notable exception of the United States. Its purpose and its scope are reminiscent of both the European Union's own principle of loyalty and the international principle of good faith, even if it goes well beyond the latter. It does not pertain to enforce formal rules relating to the vertical division of powers, but, instead, "it may put an internal limit to the exercise of a competence."[18] As noted in the German context, the principle of federal loyalty imposes duties on both the federation and the federate states that go beyond the formal obligations set out in the federal constitution.[19] It compels them to act loyally vis-à-vis each other, which means that while the federate states must respect the existence and the integrity of the federation's powers, the latter must respect the existence and the autonomy of the former.[20] In other words, they must take into account their respective interests and jurisdictions when they exercise their powers. They must also refrain from damaging each other, and must instead assist each other and cooperate.[21] In sum, the idea of loyalty stems from the necessity to require actors to take into account external interests while exercising their powers, without having to refer to formal rules on the division of powers.

316. Thus, in the same way as federal loyalty, the Court of Justice's power-based approach goes beyond the formal rules relating to the division of powers between the European Union and the Member States.[22] It consists in preventing the latter from jeopardizing the achievement

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[17] BVerfGE 6, 309, 361. For an overview of the German Constitutional Court case law on the *Bundestreue* principle, see E. ORBAN, "La Cour constitutionnelle fédérale et l'autonomie des *Länder* en République Fédérale d'Allemagne," in *Fédéralisme et Cours Suprêmes – Federalism and Supreme Courts*, (Ed.) E. ORBAN, (Brussels, Bruylant, Les presses de l'Université de Montréal, 1991), 162s; P. M. BLAIR, *Federalism and Judicial Review in West Germany*, (Oxford, Clarendon Press, 1981).

[18] A. GAMPER, "On loyalty and the (federal) constitution," 4 *ICJ-Journal* 157, 164 (2010).

[19] H. A. SCHWARZ-LIEBERMANN VON WAHLENDORF, "Une notion capitale du droit constitutionnel allemand: la *Bundestreue* (fidélité fédérale)," *Revue du Droit Public et de la Science Politique* 769, 772 (1979).

[20] M. BLANQUET, *L'article 5 du Traité C.E.E.. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, above, n. 14, 380.

[21] M. BOTHE, "The constitutional court of the Federal Republic of Germany and the powers of the German *Länder*," in *Fédéralisme et Cours Suprêmes – Federalism and Supreme Courts*, (Ed.) E. ORBAN, (Brussels, Bruylant, Les presses de l'Université de Montréal, 1991), 132-133.

[22] E. NEFRAMI, "Le rapport entre objectifs et compétences: de la structuration et de l'identité de l'Union européenne," in *Objectifs et Compétences dans l'Union européenne* (Ed.) E. NEFRAMI, (Bruylant, Brussels, 2013), 24.

of the common interest through the exercise of their powers,[23] even in the absence of a specific rule governing this type of conflicts. It therefore results in furthering the transformation of Member States into loyal federated states by making them aware that (i) even in fields where they retain principal responsibility, the exercise of their powers may result in frustrating the interests of the European Union; (ii) they must take into account their vertical interactions with the European Union when they exercise their powers in such a way as to comply with the requirements of the law of free movement.

2. The horizontal dimension: Interstate relations

317. Membership to the European Union does not only affect Member States vertically. It also transforms them horizontally. To be sure, distinguishing between the two dimensions is not always clear-cut since vertical and horizontal federalisms intersect, and are therefore intrinsically linked. First, interstate harmony[24] is as much a national interest as a European Union interest – after all, the European Union was created in the first place to create peaceful relations among the European nation states,[25] and to render them so intertwined that a disintegration would be made impossible. Second, in the same way as in the US constitutional order, federal institutions – and, as far as the power-based approach is concerned, the Court of Justice – "play a coordinating role in the exercise of concurrent state authority."[26] That being said, the following paragraphs focus primarily on the horizontal dimension of Member States' transformation. In order to shed light on its defining features, I start by identifying the types of horizontal interactions that are at hand in the cases involving powers retained by Member States. To this end, I notably rely on the work of the few US scholars who have addressed horizontal federalism issues in relation to the US constitutional order. I then establish that, as far as membership of the Union is concerned, the Court of Justice's power-based approach has the fundamental effect of furthering the links of interdependency among the Member States.

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[23] M. BLANQUET, *L'article 5 du Traité C.E.E.. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, above, n. 14, 346.
[24] On the necessity to coordinate interstate relations see, for instance, M. S. GREVE, "Federalism's frontier," 7 *Tex. L. Rev. & Pol.* 93, 95 (2002); S. FRUEHWALD, "The Rehnquist Court and horizontal federalism: An evaluation and a proposal for moderate constitutional constraints on horizontal federalism," 81 *Denv. U. L. Rev.* 289, 328 (2003).
[25] "Editorial comments. Union membership in times of crisis," 51 *CMLR* 1 (2014).
[26] A. ERBSEN, "Horizontal federalism," above, n. 4, 504.

a. Types of horizontal interactions

318. Despite their significance for better understanding the implications of membership to a federation, the lack of literature focusing specifically on interstate relations is striking, whether in the US or in the European Union. In what follows, I attempt to draw a general pattern describing the various interactions that may occur among the Member States of the European Union. This preliminary step allows me to subsequently identify the specific types of conflicts that are involved in the cases concerned by the Court of Justice power-based approach.

319. *Structural features characterizing interstate relations*. To begin with, it should be recalled that "[t]here is no transsubstantive preference rule for resolving state-state conflicts,"[27] either in the US constitutional order, or in the European Union legal order. Instead, fundamental structural features, present in most federal systems, tend to muddle interstate interactions. These relations are indeed organized along three main basic principles: (i) the principle of aggregate power, according to which all the powers not conferred on the federation belongs to the states understood as a *whole*. This logically implies that there is no way to know how the states' respective spheres of jurisdiction are to interact with each other;[28] (ii) the principle of equality: the European Union federation, like its US counterpart, is composed of equal states, the citizens of which are also equal.[29] As a result:

> Each state has an equivalently strong claim to exercise collectively held powers absent a context-specific restraint. Each state likewise has an equivalently strong claim to operate without interference from the others.[30]

(iii) last but not least, states operate in line with the territoriality principle, according to which they should be free from restraint inside their geographical borders, while not exceeding their territorial reach.[31] In other words, as A. O'M. BOWMAN sums up, "states have *de jure* symmetry."[32]

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[27] Ibid., 506.
[28] Ibid., 510.
[29] D. LAYCOCK, "Equal citizens of equal and territorial states: the constitutional foundations of choice of law," 92 *Col. Law Rev.* 249, 250 (1992); G. E. METZGER, "Congress, Article IV, and interstate relations," 120 *Harvard L. Rev.* 1468, 1517 (2007).
[30] A. ERBSEN, "Horizontal federalism," above, n. 4, 508.
[31] D. LAYCOCK, "Equal citizens of equal and territorial states: the constitutional foundations of choice of law," above, n. 29, 250; G. E. METZGER, "Congress, Article IV, and interstate relations," above, n. 29, 1520.
[32] A. O'M. BOWMAN, "Horizontal federalism: Exploring interstate interactions," 14 *J. Public Adm. Res.Theory* 535, 536 (2004).

320. The various interactions characterizing the relations among Member States. The few US scholars who have dealt with horizontal federalism issues so far all agree that interstate dynamics may take different forms, ranging, for instance, from hostility to cooperation.[33] The same holds true with respect to the relations among the Member States of the European Union. The following table synthesizes the various types of interactions that may occur among the Member States. It uses, in particular, the typology drawn by A. ERBSEN, who, to my knowledge, has provided the most comprehensive analysis of interstate relations in the US constitutional order.[34]

INTERACTION				NON-INTERACTION	
(a) Voluntary cooperation		**(b) Absence of conflicts**	**(c) Positive conflicts**	**(a) Absence of conflicts**	**(b) Negative conflicts**
(i) Positive conflicts Type of interstate cooperation contrary to European Union law	**(ii) Absence of conflicts** "Interstate harmony"	"Interstate harmony"	A. ERBSEN's typology: (i) Dominion; (ii) Havens; (iii) Exclusions; (iv) Favoritism; (v) Externalities; (vi) Rogues; (vii) Competition; (viii) Overreaching.	"Interstate harmony"	"Underreaching"

321. Instances of interaction. The starting point of my reasoning lies in the fact that Member States may either interact or simply not interact. To begin with, they may interact according to three ways:

(a) V*oluntary cooperation*, such as, for instance, international agreements or treaties. Voluntary cooperation may result in (i) *positive conflicts*, in case the way Member States cooperate is contrary to European Union law; or in (ii) the *absence of conflicts*, in case they operate in compliance with European Union law;

(b) *Absence of conflicts*. Without necessarily voluntarily cooperating, the interactions among Member States may nonetheless not give rise to conflicts that would affect

[33] J. F. ZIMMERMAN, *Horizontal federalism. Interstate relations*, above, n. 5, 1.
[34] A. ERBSEN, "Horizontal federalism," above, n. 4, 498-584.

the European Union interest. This corresponds to situations where, for instance, the Court of Justice finds that the parallel exercise of Member States' jurisdictions does not infringe the free movement principle;

(c) *Positive conflicts*: the parallel exercise of Member States' respective spheres of jurisdiction frustrates the European Union interest. It may give such results through eight distinct but not mutually exclusive mechanisms that have been identified by A. ERBSEN: (i) *dominion*: "when one state attempts to assert sovereign power over another's territory or officers;"[35] (ii) *havens*: one state becomes "a haven for behavior that other states seek to restrain;"[36] (iii) *exclusions*: "when states decide to ban conduct that others allow;"[37] (iv) *favoritism*: states "favor local interests over out-of-state interests;"[38] (v) *externalities*: "one state pursues otherwise lawful objectives that have negative effects in other states. [...] The inverse of state action creating negative externalities is free-riding by states on the positive externalities of investments in infrastructure and human capital by other states;"[39] (vi) *rogues*: states refuse, for instance, to recognize other states' judgments; (vii) *competition*, which is probably the type of interstate interaction that is most often explored; (viii) *overreaching*: this corresponds to a state's efforts "to extend the effective reach of [its] authority beyond [its] borders."[40] In the US, this latter case is generally discussed from the perspective of the conflict of laws.

322. Instances of non-interaction or indifference. Besides these instances of interactions among Member States, mention must also be made of cases of non-interaction. The lack of interaction (a) may first give rise to '*interstate harmony*,' or, in other words, it may result in the absence of interstate conflicts. But (b) it may, in the same way as instances of interactions, equally affect the European Union interest, and, as such, contribute to shaping the status of Member States within the European Union constitutional order. Non-interaction may indeed bring about what I have described as '*negative conflicts*,' which are instances where no Member State regulates a situation. To mirror the previous category of overreaching, these cases may be

[35] Ibid., 514.
[36] Ibid., 516.
[37] Ibid., 520.
[38] Ibid., 521.
[39] Ibid., 523-524.
[40] Ibid., 527.

labeled as cases of 'underreaching.' In these cases, it is the very lack of interaction, and therefore of regulation of a given situation, that frustrates the European Union interest.

323. The types of interactions involved in the cases concerned by the power-based approach. Drawing on this general pattern, I have identified, in the cases involving powers retained by Member States, six combinations, corresponding to as many types of interactions among Member States. As shown by the following, two kinds are overrepresented: favoritism and underreaching:

1. *Favoritism-Externalities*: Rulings involving access to higher education and the financial assistance of nonresident students correspond to instances where host states favor their residents since nonresidents are subject to more burdensome conditions to get access to their public infrastructures[41]/to be granted social benefits.[42] In addition, host states' education policies bring about positive externalities, which (might) attract nonresidents.

2. *Favoritism-Overreaching*: Member States' interrelations are characterized, in several subfields of direct taxation, by favoritism coupled with overreaching. (i) This covers the case of the exit taxes imposed on outgoing taxpayers, whether individuals or companies:[43] they only concern movers, and, through their imposition, Member States seek to extend their taxing jurisdiction. (ii) The same holds true with respect to the imposition of inbound dividends[44] by the host state and the imposition of outbound dividends[45] by the home state.

3. *Favoritism-Exclusion*: The "favoritism-exclusion" combination occurred in cases involving the right to take collective action. In *Laval*,[46] the host state sought to favor its own workers, and to prevent a foreign provider of services from applying labor standards banned from domestic labor law. In *Viking*,[47] the home state sought to favor its own workers, and to prevent a provider of services from benefiting from less burdensome labor standards in a more permissive Member State.

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[41] See, *Supra*, §§ 181s.
[42] See, *Supra*, §§ 192; 199s.
[43] See, *Supra*, § 191.
[44] See, *Supra*, § 197.
[45] Ibid.
[46] Case C-341/05, *Laval*, [2007] *ECR* I-11767.
[47] Case C-438/05, *Viking*, [2007] *ECR* I-0779.

4. *Favoritism-Underreaching*: Instances of favoritism and underreaching comprise the remaining subfields of direct taxation: the taxation of individual[48]/corporate[49] nonresidents by the host state refusing to take into account cross-border elements; and the taxation of individual[50]/corporate[51] residents by the home state refusing to take into account financial interests occurring in another Member State. They also correspond to cases involving bilateral agreements concluded between a Member State and a non-EU country.[52] These agreements favor the nationals of the Member State party, with the latter refusing to extend its jurisdiction in such a way as to include non-nationals from other Member States of the European Union.

5. *Underreaching*: Many cases involving powers retained by Member States correspond to the underreaching mechanism. (i) Cross-border health care:[53] initially, there was no cooperation between home states and host states. Patients willing to seek health care abroad were no longer subject to the jurisdiction of their state of affiliation. The same holds true with respect to: (ii) the exportation of financial assistance in the field of education;[54] (iii) the compensation of civil war victims no longer resident in their home state;[55] (iv) the conditions to withdraw naturalization by the host state not taking into account the individual's cross-border circumstances;[56] (v) the conditions of loss of citizenship with the home state not taking into account the individual's cross-border circumstances;[57] and (vi) the taking into account of a debtor's ability to pay.[58] In all these instances, the lack of cooperation among Member States brings about negative conflicts, in the sense that it results in creating "stateless"[59] people, and, accordingly, in frustrating the European Union law of free movement. These people are no longer protected by their home states

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[48] See, *Supra*, §§ 192s.
[49] See, *Supra*, §§ 194s.
[50] See, *Supra*, §§ 192s.
[51] See, *Supra*, §§ 194s.
[52] See, *Supra*, §§ 219s.
[53] See, *Supra*, §§ 186s.
[54] See, *Supra*, § 185.
[55] See, *Supra*, § 205.
[56] See, *Supra*, § 207.
[57] Ibid.
[58] See, *Supra*, § 213.
[59] On the notion of "stateless" citizens in the context of horizontal federalism, see A. ERBSEN, "Horizontal federalism," above, n. 4, 547-549.

because they have left, but they are not yet protected by their host states because they are not considered as full-fledged members of their new respective communities.

6. *Rogues*: In *Micheletti*,[60] the Member State refusing to recognize the effectiveness of the nationality of another Member State can be described as "rogue," since its attitude amounts to a sign of distrust or suspicion towards the Member State having awarded its nationality. Similarly, cases relating to the rules governing surnames amount to instances where the host state refuses to recognize lawful practices of other Member States.

That having been established, I can now identify how the way the Court of Justice adjudicates the disputes involved in the cases concerned by the power-based approach contributes to turn the members of the European Union into interdependent members of the federation.

b. From monad to interdependent states

324. The linkage of Member States through solidarity. While the vertical dimension of the metamorphosis affecting Member States relies on the principle of loyalty, its horizontal dimension is induced by the obligation of mutual solidarity that binds the Member States. I have shown, in Chapter 2, that cases involving powers retained by Member States include indirect references to the joined Cases 6 & 11/69 *Commission v. France*.[61] These latter cases mention explicitly Article 5 EEC as the basis of the Court of Justice reasoning:

> 16. The solidarity which is at the basis of these obligations as of the whole of the Community system in accordance with the undertaking provided for in Article 5 of the Treaty, is continued for the benefit of the States in the procedure for mutual assistance provided for in Article 108 where a Member States is seriously threatened with difficulties as regards its balance of payments.
>
> 17. The exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty. [Emphasis added]

Accordingly, solidarity is the horizontal counterpart of loyalty. It embodies a "duty of cooperation *between* Member States,"[62] and consists in compelling them to take into account

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[60] See, *Supra*, § 215.
[61] (Cases 6&11/69) *Commission v. France*, [1969] *ECR* 523.
[62] J. T. LANG, "Community constitutional law: Article 5 EEC Treaty," 10 *Fordham International Law Journal* 503, 671 (1986).

their mutual interests when exercising their powers, even if the latter fall within their retained spheres of jurisdiction.[63] In the same way as loyalty, the principle of solidarity shows how necessary it is to have states cooperating with each other, especially in the fields analyzed herein. European integration would indeed be put in jeopardy if Member States could undo, through the exercise of their retained powers, what is done within the scope of European Union powers.

325. The (re)shaping of the relations of cooperation and interdependency among Member States. The cases concerned by the power-based approach reveal that the Court of Justice continuously enhances the codependency of Member States. It does so by making them increasingly interdependent on one another in each of the fields analyzed herein, even if these fields involve essential state functions. All in all, it develops three main strategies.

326. Inclusion of other EU nationals/companies. First of all, the most obvious strategy relates to the obligation placed upon Member States to include other European Union individuals/corporations into preexisting national arrangements. Thus, in most cases decided in the field of direct taxation, whether they pertain to individual income taxation, corporate income taxation, or dividend taxation, Member States have been compelled to include in the personal scope of their taxation powers individuals or companies, that were previously excluded. The same holds true with respect to national education systems. Provided that this does not jeopardize the sustainability of their systems, Member States must grant nonresidents access on the same basis as what they do with respect to residents. In the same vein, they must provide nonresident students with financial assistance.

327. 'Mutual consideration.' Second of all, the Court of Justice increasingly resorts to a strategy that can be described as a 'mutual consideration.' This strategy consists in compelling Member States to constantly take one another into account. For instance, it results from *Rottmann* that Member States must take the nationality policies of other Member States into consideration when the concurrent application of two (or more) Member States' jurisdictions results in statelessness – and, hence, the loss of European Union citizenship. Likewise, Member States must fully trust their fellow members with respect to the granting of nationality. They have no

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[63] M. BLANQUET, *L'article 5 du Traité C.E.E.. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, above, n. 14, 227.

other choice but to recognize and give full effect to any other Member State nationality.[64] In a similar vein, but provided that this does not infringe any fundamental (constitutional) principle of their legal orders, Member States must recognize other Member States' rules and practices with respect to the rules governing surnames. In addition, when implementing national public policies, they must take into consideration cross-border elements in order to treat European Union citizens involved in cross-border situations fairly. The taxation of nonresident workers illustrates this trend well,[65] as do the conditions of enforcement for the recovery of debts with respect to people no longer residing in the Member State where they have incurred debts.[66] This last component entails significant practical effects, since Member States are *de facto* and *de jure* encouraged to mutually cooperate and to assist each other in order to convey and to obtain relevant cross-border information.

328. *Mitigation of the territoriality principle.* Last but not least, the Court of Justice binds the Member States together by mitigating the principle of territoriality. To begin with, compelling Member States to recognize other legal institutions and practices has the effect of strengthening the extraterritorial effects of the application of Member States' laws and practices. Next, the logic of the Court of Justice rulings involving the exportation of social benefits – i.e. cross-border health care, financial assistance to study abroad, and the compensation of civil war victims – essentially consists in rebutting the presumption that a refusal by a Member State to export its social benefits complies with the territoriality principle.[67] In these three fields, home States are compelled to give an extra-territorial effect to – or they must, alternatively, increase the extra-territorial effect of – the exercise of their retained powers by granting benefits outside their territorial borders. To put it differently, "the Court has launched a conceptual

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[64] Case C-369/90, *Micheletti*, [1992] *ECR* I-4239.
[65] See, *Supra*, §§ 192s.
[66] Case C-224/02, *Pusa*, [2004] *ECR* I-5763.
[67] M. DOUGAN, "Expanding the frontiers of Union Citizenship by dismantling the territorial boundaries of the national welfare states?" in *The outer limits of European Union law*, (Eds.) C. BARNARD & O.ODUDU, (Oxford: Hart Publishing, 2009), 119, 128: "Community law takes at its starting point the idea that *any* refusal by the Member State to export its own social security benefits constitutes a prima facie breach of the Union citizen's free movement rights which must be scrutinized to ensure it is genuinely necessary in the public interest. (...) the exportation of benefits is no longer to be treated as some sort of privilege generously bestowed by the Community legislature upon its subjects; rather, the territoriality of the national social security systems is presumed to be a limitation on the full economic and social integration of Union citizens within the broader European Union."

transformation in the territorial identity of the national welfare state,"[68] which amounts to the "deterritorialization" of welfare powers.[69]

329. Conclusion of Section 1. To sum up, the Court of Justice power-based approach reveals that "thinking federal," to borrow K. LENAERT's words, means that Member States may no longer act unilaterally and/or selfishly, as if they were still monad state. Instead, they must accept that they evolve within the European Union constitutional space, and that they relate to both the European Union and the other co-equal members of the European Union federation. When faced with cross-border situations, they must behave loyally towards the European Union, and in a harmonious manner with their fellow members. All in all, the power-based approach furthers the transformation process of the Member States. They are gradually and increasingly turned into loyal and codependent states.

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[68] Ibid., 121.

[69] See, e.g. M. DOUGAN, "The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon," in *Integrating Welfare Functions into EU Law: From Rome to Lisbon*, (Eds.) R. NIELSEN *et al.*, (Copenhagen: DJØF Publishing, 2009), 148, 149-150 and, with respect to cross-border health care, L. AZOULAI, "En attendant la justice sociale, vive la justice procédurale! À propos de la libre circulation des patients dans l'Union (CJCE 16 mai 2006, *Watts*, Aff. C-372/04)," *Revue de droit sanitaire et social*, 843, 851 (2006).

SECTION 2. THE RESULTING POSITION OF MEMBER STATES WITHIN THE EUROPEAN UNION CONSTITUTIONAL ORDER

330. While Section 1 has focused on the implications of Member States' vertical and horizontal interactions for European Union's membership, in Section 2 I focus more specifically on Member States seen as unique independent polities. In a nutshell, I attempt to identify and describe the implications of the Court of Justice power-based approach for the position of Member States within the European Union constitutional order. To this end, I first assess to what extent the approach reshapes the contours of their national political communities. I then claim that, despite the undeniable adjustments that are required from them, Member States nevertheless conserve their state identity.

1. The reshaping of the contours of the national political community

331. The vertical instrumentalization of Member States. The vertical interactions between the European Union and its Member States in cases involving powers retained by Member States reveal that the latter are instrumentalized. All state functions are, as a matter of fact, allotted to the interests of the European Union. National policies and practices, i.e. any autonomous action, are turned into instruments of European Union integration for the benefit of the citizens of the European Union.[1] Interestingly, this instrumentalization process not only occurs within the framework of the Court of Justice's power-based approach. It is also part of a broader trend. It is sufficient to think, for instance, of the constraints placed on Member State's procedural and institutional autonomy.[2] Likewise, E. NEFRAMI has established that, as far as the field of external relations is concerned, Member States are instrumentalized in two main ranges of situations: while they enforce European Union law, and in the framework of their autonomous sphere of action.[3] This instrumentalization process, taken together with the effects of the horizontal interactions among Member States in cases concerned by the power-based approach, ultimately reshapes the conditions of national membership originally set out by the Member States free from external constraints.

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[1] L. AZOULAI, "Le rôle constitutionnel de la CJCE tel qu'il se dégage de sa jurisprudence," *Revue Trimestrielle de Droit Européen* 29, 41 (2008).
[2] See, *Supra*, § 34.
[3] E. NEFRAMI, "L'Etat Membre au service de l'Union européenne," *Annuaire de droit européen* 51, 53 (2004).

332. The reshaping of the conditions of national membership. The dynamic characterizing cases involving powers retained by Member States brings about two fundamental sets of implications for national membership. It may be described, first of all, as destructuring, to the extent that Member States are detracted from unilaterally and freely determining the personal and territorial scopes of their powers. Accordingly, they may no longer define, free of restraints, the personal and territorial frontiers of their national political community. But the Court's power-based approach also brings about a restructuring process, since it compels Member States to adopt and to enforce new national membership criteria. Personal criteria must be set out in such a way as to include other European Union citizens/companies. As for territorial criteria, they do not necessarily correspond to the geographical territory of the Member States. They must, under certain circumstances, extend as far as individuals/companies move within the European Union. As a result, the new criteria blur traditional distinctions between nationals and non-nationals, as well as between residents and nonresidents. They also tend to disregard traditional territorial boundaries.

333. The example of solidarity in the fields relating to welfare. The fields relating to the provision of welfare are a good illustration of the effects of the power-based approach on the contours of the national political community. In many of the cases involving welfare, Member States have tried to justify their restrictive measures by relying on the solidarity principle. Thus, in *Gravier*, which relates to access to the Belgian educational system, Belgium argued that maintaining the Minerval fee was necessary because:

> Otherwise students from other Member States could not only claim the benefit of services provided for its own nationals, paid for substantially out of taxes by its own nationals, but they might exclude from places in educational institutions the Member State's own nationals in cases where the number of students in the institutions was limited.[4]

Similarly, the United Kingdom claimed in *Bidar* that, with respect to the financial assistance of nonresident students, it was:

> [L]egitimate for a Member State to ensure that students' parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted.[5]

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[4] Opinion in Case 293/83, *Gravier*, [1985] *ECR* 593, 596. See also Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 27.
[5] Opinion in Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 65.

Member States have developed arguments of the same nature in cases relating to the compensation of civil war victims. As noted by Advocate General KOKOTT in *Tas-Hagen*:

> Article 3 of the WUBO provides that it is applicable only to civilian war victims who hold Netherlands nationality and are resident in the Netherlands on the date of the application for benefits (Article 3 of the WUBO). This *nationality and territorial criterion* stems from the idea that the special obligation of solidarity towards civilian war victims on the part of the Netherlands people has a scope which is restricted by nationality and country of residence.[6]

Therefore, Member States conceive of the idea of solidarity as being first and foremost national, and as reflecting the basic social contract that binds them to their respective communities. For to benefit from *national* redistributive policies, it is necessary to contribute financially through taxation[7] – in the case of education – or to hold the nationality of the Member State and reside on its territory – in the case of the compensation of civil war victims.

334. The Court has never denied the crucial role played by solidarity with respect to Member States' welfare arrangements. However, it has also obliged Member States to extend the benefit of their solidarity mechanisms at least to a certain extent. In the field of education, it held, for instance, that:

> Member States must, in the organization and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States.[8]

In cases relating to the compensation of civil war victims, the Court found that the residence criterion was not unlawful *per se*, but that the way it was implemented went beyond what was necessary, on the grounds that imposing a condition of a territorial nature, under which applicants must reside in their home state at the moment where the application is sought was:

> [N]ot a satisfactory indicator of the degree of attachment of the applicant to the society which is thereby demonstrating its solidarity with him.[9]

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[6] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 8. See also, Ibid., 57 and Case C-499/06, *Nerkowska*, [2008] ECR I-3993, 21.

[7] See M. DOUGAN, "The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon," in *Integrating Welfare Functions into EU Law: From Rome to Lisbon*, (Eds.) R. NIELSEN *et al.*, (Copenhagen: DJØF Publishing, 2009), 168 who underlines that welfare rights "are fundamentally about the redistribution of income between social groups, and imply a claim on resources and legitimization of the redistributive role of the state."

[8] Case C-209/03, *Bidar*, [2005] *ECR* I-2119, 56. See also the Opinion in Case C-158/07, *Förster*, [2008] *ECR* I-8507, 55: "Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market, and who thus made some contribution to its economy, such financial solidarity is now in principle to be extended to all Union citizens lawfully resident on its territory."

In this regard, Advocate General POIARES MADURO aptly summarized the rationale behind the Court's restructuring process of the personal and territorial scopes of welfare-retained powers:

> Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bounds of the national community, but also within the wider context of the society of peoples of the Union.[10]

335. The foregoing raises the question as to whether the Court of Justice approach has the effect of promoting an alternative model of solidarity, and hence to what extent it reshapes the conditions of national membership. The starting point of the inquiry necessarily requires pointing out that the Court's reasoning relies on *national solidarity mechanisms*. Some authors speak of a 'constitutional asymmetry' to describe the discrepancy between what is provided by the Member States and what can be provided by the European Union:

> [T]he pressures on national social choices exerted by the European economic integration are not matched by the availability at Union level of countervailing resources for the purposes of protecting and promoting social rights in general, or welfare provision in particular.[11]

Therefore, the basic component of the Court's model of solidarity lies in the fact that, whatever forms it may take, it is presently inexorably mediated by the Member States' solidarity mechanisms. Hence the endless difficulty faced by the Court: furthering European Union integration by extending it into social spheres, while safeguarding the ability of Member States to pursue welfare policies. Without them playing a key role, there simply cannot be welfare policies. As noted by G. DAVIES:

> As long as states exist and collect taxation it will not be possible to entirely prevent a certain degree of closure.[12]

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[9] Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451, 39.

[10] Opinion in Case C-499/06, *Nerkowska*, [2008] *ECR* I-3993, 23. (Emphasis added) See also the Opinion in Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969, 39 with respect to nonresident students' access to educational systems. C. RIEDER, 43 *CMLR* 1711-1726 (2006) has noted in this regard that "it is necessary for Member States to become aware of the fact that in a common market, where people move around, it will always be the case that a Member State pays for a person's education without necessarily harvesting the fruit i.e. in the form of taxes."

[11] M. DOUGAN, "The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon," above, n. 7, 152. See also M. DOUGAN & E. SPAVENTA, "'Wish you weren't here…' New models of social solidarity in the European Union," in *Social welfare and EU law*, (Eds) M. DOUGAN & E. SPAVENTA, (Hart publishing, Oxford and Portland, Oregon, 2005), 183, 189: "the lack of extensive harmonizing competences makes it difficult to identify a truly effective vehicle by which the Community might articulate any genuinely supranational framework of social solidarity."

[12] G. DAVIES, "The humiliation of the state as a constitutional tactic," in *The constitutional integrity of the European Union*, (Eds.) F. AMTENBRINK & P.A.J. VAN DEN BERG, (The Hague, Asser Press, 2010), 147.

As a result, the Court must necessarily be careful about mitigating the effects of its rulings.[13] Given the fundamental reliance of welfare policies on the Member States, several authors have attempted to identify the main features of the model of solidarity suggested by the Court in its case law. In this respect, a distinction must be drawn between situations involving host states and European Union migrants, and situations involving home states and their own outgoing nationals.

336. Solidarity and host state national community. With respect to the former, authors often refer to the creation of a 'transnational solidarity.'[14] As far as non-economically active European Union citizens are concerned, the distinction drawn by C. BARNARD is useful. She has indeed shown that the Court's case law leads to the creation of a "spectrum of situations."[15] First, long-term residents are placed on the same footing as nationals. They benefit fully from national solidarity, defined as solidarity between nationals. Second, medium-term residents are not fully assimilated into the host community but are nonetheless granted certain benefits and for certain periods. This time, they benefit from transnational solidarity, defined as solidarity between nationals and migrants. As for the individuals who have just arrived in the host State, "they enjoy only limited equal treatment with nationals due to the virtual absence of solidarity between the newly arrived migrant and the resident."[16] This threefold distinction shows that the Court's solidarity model concerns the 'medium-term residents,' including non-economically active European Union citizens. Under this understanding, transnational solidarity differs from the concept of national solidarity in a fundamental respect. It cannot be, by definition, conditional upon nationality/residence or financial contributions to the economy through taxation. Instead, as it is the result of the reshaping of the personal and territorial scopes of Member States' welfare powers, transnational solidarity is commensurate with the degree of integration of European Union citizens into the Community of the host State.[17] In other

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[13] G. DAVIES, "Welfare as a service," 29 *Legal Issues of Economic Integration* 27, 38 (2002).
[14] See A. SOMEK, "Solidarity decomposed: being and time in European citizenship," 32: 6 *Eur. L. Rev.* 787, 807s (2007); C. BARNARD, "European Union citizenship and the principle of solidarity," in *Social welfare and EU law*, (Eds) M. DOUGAN & E. SPAVENTA, (Hart publishing, Oxford and Portland, Oregon, 2005), 166; F. DE WITTE, "The role of transnational solidarity in mediating conflicts of justice in Europe," 18 *European Law Journal* 694, 704s (2012).
[15] C. BARNARD, "European Union citizenship and the principle of solidarity," in *Social welfare and EU law*, (Eds.) M. DOUGAN & E. SPAVENTA, (Hart publishing, Oxford and Portland, Oregon, 2005), 157, 166.
[16] Ibid.
[17] C. BARNARD, 42 C. M. *L. Rev.* 1465, 1476-1477 (2005); C. BARNARD, "Solidarity and new governance in social policy," in *Law and new governance in the EU and the US*, (Eds) G. DE BÚRCA & J. SCOTT, (Oxford; Portland, Or.;

words, as A. SOMEK notes it, "the connecting factor is, quite simply, being *and* time, that is, presence in a Member State."[18] The same author has described the Court's approach as amounting to extending the principle of solidarity "by interpenetration:"

> By leaving out the 'utilitarian' element it amends de facto solidarity's article of faith with the accumulation of presence over time.[19]

As for M. DOUGAN & E. SPAVENTA, they have qualified the Court's model as an 'assimilation model,' which consists in:

> [G]uaranteeing equal treatment between Community and own nationals, so that foreign migrants are fully integrated into the solidarity system of their host society, but without otherwise questioning the competence of each Member State to determine its own welfare choices [...] provided they apply without unjustified discrimination on grounds of nationality.[20]

337. Solidarity and home state national community. The effects of the Court's approach on the principle of solidarity when situations between a state and its own nationals are involved are different. Indeed, allowing nationals to export social benefits does not pertain to the integration of new individuals into national solidarity mechanisms, but rather to the preservation of the bonds between individuals and their home State despite cross-border movements. Here, the Court's stance may be described as entrenching a 'continuance model.' The crossing of borders may no longer justify a rupture of bonds of solidarity. This is what F. DE WITTE refers to as 'aspirational solidarity,' which "allows [...] citizens to retain access to the welfare entitlements [...] in their *home* state."[21] This model of solidarity concerns patients seeking cross-border health care, student financial assistance in the form of tax relief, and the compensation of civil war victims. As far as student financial support in the form of grants is concerned, students must demonstrate a sufficient degree of integration into the society of their home State. The effects of the 'continuance model' are specific:

Hart, 2006), 171-172 and 172: "*Bidar* emphasizes a 'quantitative' approach: the longer migrants reside in the Member State, the more integrated they are in that state and the greater the number of benefits they receive on equal terms with nationals. The corollary of this is that in respect of newly arrived migrants there is insufficient solidarity between them and the host state taxpayer to justify requiring full equal treatment in respect of social welfare benefits."

[18] A. SOMEK, "Solidarity decomposed: being and time in European citizenship," above, n. 14, 807.

[19] Ibid., 814.

[20] M. DOUGAN & E. SPAVENTA, "'Wish you weren't here...' New models of social solidarity in the European Union," above, n. 11, 189.

[21] F. DE WITTE, "The role of transnational solidarity in mediating conflicts of justice in Europe," above, n. 14, 708.

> Obliging the home state to provide welfare support in respect of its own migrant nationals helps such individuals to move closer to the point at which they can instead claim to be assimilated into the welfare systems of the host state; the gradual weakening of one 'real link' morphs into the gradual strengthening of another 'real link' so as to help ensure for the Union citizen a smoother transition between welfare states and better continuity of social support.[22]

All in all, Member States are precluded from assuming that crossing the border systematically breaks membership bonds between individuals and their solidarity mechanisms. Patients, students, and civil war victims exercising their free movement rights may continue to be part of the national community i.e. to benefit from social support provided by their home States. This is tantamount, as M. DOUGAN points out, to a "revolution in the conceptual foundations of the European welfare state" where, up to now:

> [C]itizens who chose to go abroad, and no longer share in the national community – or for that matter, pay taxes to the national exchequer, or submit themselves to supervision by the national authorities – [have been] presumed to forfeit the expectation of social support from their country of origin.[23]

338. *The Court's concern not to have EU citizens/companies left on their own.* The example derived from solidarity in the fields relating to the provision of welfare reveals the Court of Justice's core concern not to have 'stateless' European Union citizens. Member States are compelled to reshape the conditions of membership to their national community in such a way as to ensure that the lowest possible number of people be left on their own. To the extent that this does not jeopardize the sustainability and the viability of their welfare systems, they must alternatively either include new individuals, or keep their own nationals into their respective political communities. All of this holds true as far as the other fields analyzed herein are concerned. The very point of *Rottmann* was, for instance, not to have Member States "giving up" one of their (former) citizens.[24] In *Pusa*, the debtor had her personal circumstances taken into account neither in her home state nor in her host state.[25] As for direct taxation cases,

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[22] M. DOUGAN, "The spatial restructuring of national welfare States within the European Union: The contribution of Union citizenship and the relevance of the Treaty of Lisbon," above, n. 7, 160. See also M. DOUGAN, "Expanding the frontiers of Union Citizenship by dismantling the territorial boundaries of the national welfare states?," in *The outer limits of European Union law*, (Eds.) BARNARD C. & ODUDU O., (Oxford: Hart Publishing, 2009), 134-135.

[23] M. DOUGAN, "Cross-border educational mobility and the exportation of student financial assistance," 33: 5 *Eur. L. Rev.* 723, 724 (2008).

[24] Case C-135/08, *Rottmann*, [2010] *ECR* I-1449.

[25] Case C-224/02, *Pusa*, [2004] *ECR* I-5763.

nonresident/resident taxpayers did not benefit from tax advantages either in their home states, or in their host states.

339. The power-approach: between liberalism and communitarian assumptions. Thus, in which direction does the Court of Justice compel Member States to reshape their national political communities? L. BRILMAYER's distinction between traditional liberalism and communitarian assumptions might be useful to answer this question.[26] She has distinguished these two notions in the context of conflicts of laws in the United States, and has shown that they correspond to "two different approaches to the reach of state power in legal disputes that cross state borders."[27] She has defined them as follows:

> The notion that a state may regulate activities or consequences that occur within the state reflects traditional liberalism. The notion that state authority is most appropriately directed at domiciliaries and local corporations reflects communitarian assumptions.[28]

This distinction can be transposed within the framework of the power-based approach. It indeed seems that, when the European Court of Justice is faced with Member States refusing to open their political communities to other European Union citizens/corporations – corresponding to 'entry restrictions' – it imposes on them what L. BRILMAYER describes as the traditional liberalism model. The traditional state's membership is "downplayed,"[29] and the Court gives voice to the individuals' will to be subject to the jurisdiction of their host state on an equal basis. By contrast, when the Court faces Member States that are reluctant to keep intact the bonds that link them to outgoing citizens/residents, it endorses a 'communitarian approach,' and it justifies the conservation of these bonds despite cross-border movements by the very fact that these people belong to the national community.

340. Therefore, not only does the power-based approach deepen the bonds of loyalty that link the Member States and the European Union together, as well as the interdependency of Member States, but it also affects and reshape the contours of national political communities. However, notwithstanding these deep-seated effects, I am of the view that, overall, this approach allows Member States to conserve their state identities, and that it even ensures them

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[26] L. BRILMAYER, "Liberalism, community, and state borders," 41 *Duke Law Journal* 1-26 (1991).
[27] Ibid., 4.
[28] Ibid., 3.
[29] Ibid., 10.

that European Union law does not jeopardize the integrity of what defines them as independent polities.

2. The conservation of state identity

341. Besides the deepening of the metamorphosis affecting the members of the European Union, the Court of Justice power-based approach also simultaneously reasserts their state and political identity. In this respect, I have shown, in Chapter 4, that cases involving powers retained by Member States do not alter the latter's decision to assert jurisdiction. Furthermore, I have demonstrated that the Court mitigates the effects of the application of the free movement principle as soon as it is established that it might otherwise jeopoardize the integrity of national powers.[30] The United States Supreme Court follows a similar approach when faced with comparable jurisdictional conflicts.[31] As pointed out by J. D. VARAT:

> If sufficiently important to the fulfillment of *core state functions*, certain distinctions based on residence might also be justified despite their incompatibility with strict adherence to the unification objective of the commerce and privileges and immunities clauses.[32]

The European Court of Justice stance may be explained by two interrelated reasons. The first is of a practical nature, and is specific to the institutional settings of the European Union. The second, which is echoed in the US constitutional order, is deeper, and connected with the original federal model characterizing the European Union, and its understanding of the role to be played by Member States within the European Union constitutional order.

342. Practical reason for preserving Member States' essential functions. The obvious reason that comes to mind to explain the European Court of Justice endeavors to preserve Member States' essential functions throughout its case law lies in the fact that the European Union is fundamentally dependent on Member States to develop and implement the political and social public policies analyzed herein. In this respect, F. DE WITTE accurately notes that "the Union currently lacks the public sphere and a system of representative democracy strong enough to support a contractarian model of justice."[33] This statement holds all the more true in relation to

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[30] See, *Supra*, §§ 270s.
[31] See, *Supra*, §§ 23s.
[32] J. D. VARAT, "State "citizenship" and interstate equality," 48 *University of Chicago Law Review* 487, 522 (1981). (Emphasis added)
[33] F. DE WITTE, "The role of transnational solidarity in mediating conflicts of justice in Europe," above, n. 14, 697. See also M. DOUGAN, "The spatial restructuring of national welfare states within the European Union: The

policies embodying political powers such as nationality, taxation, or the rules governing surnames. In addition, the European Union lacks the necessary budget to pursue redistributive policies. Therefore, the social state capacities of Member States must not only be preserved at such, but also because the social goals of the European Union may only be carried out *through* them.[34] The European Union greatly differs from the United States on this point. The US Constitution, as a matter of fact, grants the national government a spending power,[35] which allows it to develop various ambitious programs. These programs curtail states' powers much more deeply[36] than European Union law with respect to its members. However, the preservation of the state and political identity of the members of the European Union is not entirely the result of practical considerations. The Court of Justice's stance towards safeguarding Member States' essential functions also relies on the European Union conception of the role to be played by the Member States.

343. The revealing character of the US Supreme Court stance. A few references to the United States Supreme Court jurisprudence may help better reveal the peculiar features of the European Union constitutional order. Supreme Court Justices are indeed often more explicit as to the role to be played by the states with respect to American federalism than the judgments of the European Court of Justice. For instance, Justice BLACKMUN asserted in *Baldwin v. Fish and Game Commission of Montana* that:

> Some distinction between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those *privileges* and *immunities* bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.[37]

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contribution of Union citizenship and the relevance of the Treaty of Lisbon," above, n. 7, 152-153, who refers to a 'constitutional asymmetry.'

[34] L. AZOULAI, "The European Court of Justice and the duty to respect sensitive national interests," in (Eds) M. DAWSON, B. DE WITTE & E. MUIR, *Judicial activism at the European Court of Justice: causes, responses and solutions*, (Cheltenham : Edward Elgar, 2013), 167, 184.

[35] Article I, Section 8, Clause 1 of the US Constitution: "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."

[36] For detailed analyses, see, among many: NOTE, "Federalism, political accountability, and the spending clause," 107 *Harv. L. Rev.* 1419, 1429 (1994) ; L. B. KADEN, "Politics, Money, and State sovereignty: The judicial role," 79 *Colum L. Rev.* 847, 867, 874 (1979) ; M. SHAPIRO, "American Federalism," in *Constitutional Government in America*, (Ed.) R. K. L. COLLINS (Durham, N. C. 1980), 359-371; M. S. KOLKER, "*National League of Cities*, the Tenth Amendment, and the conditional spending power," 21 *Urban Law Annual* 217, 221 (1981) .

[37] *Baldwin v. Fish and Game Commission of Montana* 436 U.S. 371 (1978) (Emphases added).

As in the context of the European Union, the US Supreme Court aims to preserve the independence of the states through safeguarding their political and welfare powers. To this end, it allows states to enact laws which, if they seem at first glance to impinge upon the principle of unity of the Nation, ultimately enable the states to protect their political integrity[38] as well as the special relationship that they bear with their citizens. It accepts, as a matter of principle, that "States may spend money on their own citizens."[39]

344. To take but a few examples, states may in theory validly impose durational residence requirements[40] in the field of education under US constitutional law. Durational residence requirements consist in subjecting the grant of benefits to the condition that one person must reside for a certain period of time in the state before being entitled to such benefits. They are to be distinguished from *bona fide* residence requirements, which simply require that a person must be resident of the state granting the benefits.[41] As the US Supreme Court itself once recognized:

> [W]ithout certain residency requirements the state 'would cease to be the separate political communit[y] that history and the constitutional text make plain w[as] contemplated.'[42]

The states may moreover limit the number of places available to nonresidents.[43] The justifications that states have put forward to justify these requirements are of a practical nature: "the state will not provide the benefits unless they can be restricted," and also more illustrative of the need to protect their political community when they expressed a "resentment of 'free rider.'"[44] Likewise, the US Supreme Court upheld a durational residence requirement of one year for obtaining a divorce.[45]

345. However, it struck down a law from Connecticut under which students could never qualify as residents so long as they remained students. This durational residence requirement

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[38] D. S. BOGEN, *Privileges and Immunities. A Reference Guide to the United States Constitution*, (Praeger, Westport, Connecticut, London, 2003), 68.
[39] Ibid., 74.
[40] See T. B. PARENT, "Tuition residence requirements: A second look in light of *Zobel* and *Martinez*," 61 *Indiana Law Journal* 287, 289 (1986).
[41] *Martinez v. Bynum* 461 U.S. 321 (1983), *Starns v. Malkerson* 401 U.S. 985 (1971), *Sturges v. Washington* 414 U.S. 1057 (1973).
[42] *Supreme Court of New Hampshire v. Piper* 470 U.S. 274, 282 (1985).
[43] G. J. SIMPSON, "Discrimination against nonresidents and the privileges and immunities clause of Article IV," 128 *U. Pa. L. Rev.* 379, 395 (1979).
[44] D. S. BOGEN, *Privileges and Immunities. A Reference Guide to the United States Constitution*, above, n. 38, 81.
[45] *Sosna v. Iowa* 419 U.S. 393 (1975).

was considered too absolute.[46] In the same way, it decided in the seminal *Shapiro v. Thompson*[47] case that a state could not subject welfare benefits to a one-year residence requirement. This decision concerned another law enacted by Connecticut. This time, the state submitted the following justifications: the preservation of the "fiscal integrity of state public assistance programs" which could be reached by deterring indigents from entering into its jurisdiction,[48] an "attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes,"[49] and administrative ease (particularly for planning purposes and avoiding fraud).[50] The Supreme Court, after applying the compelling state interest standard test, ruled them all out. With respect to the third justification, it held that less restrictive means than a one-year period requirement were available. It seems to have rejected the first two mainly because they primarily relied on a distinction between indigents and non-indigents:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.[51]

The Supreme Court confirmed its suspicious approach towards states' statutes limiting the grant of welfare benefits in *Saenz v. Roe*.[52] A California statute did not deny welfare benefits to newcomers, but limited their amount to what newcomers were entitled to in the state of their prior residence. Stressing that California relied on an "entirely fiscal justification," the majority of the Supreme Court struck down the statute. Justice STEVENS, writing for the majority of the Court, concluded that:

> Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." [...] The States, however, do not have any right to select their citizens. The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, "framed upon the theory that the peoples of the several states must sink or

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[46] *Vlandis v. Kline* 412 U.S. 441 (1973).
[47] *Shapiro v. Thompson* 394 U.S. 618 (1969).
[48] *Shapiro v. Thompson* 394 U.S. 618, 628-629 (1969).
[49] *Shapiro v. Thompson* 394 U.S. 618, 632 (1969).
[50] *Shapiro v. Thompson* 394 U.S. 618, 633 (1969).
[51] Ibid.
[52] *Saenz v. Roe*, 526 U.S. 489 (1999).

> swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 523 (1935).

346. In sum, durational residence requirements tend to be struck down when they are used by states for purely fiscal purposes – which is reminiscent of the approach of the European Court of Justice. However, if states manage to demonstrate that these requirements are necessary to preserve their political integrity, the latter are more likely to be upheld. Likewise, states can restrict the political power to residents by limiting "the making of policy to members of the community."[53] Therefore, states are considered, in the US constitutional order, as "separate political entities," and are protected as such. It is accepted that they play a key-role, and hence that their interests may sometimes prevail over the unity of the Nation.

347. The Member States, full-fledged actors of the European Union. Thus, just like the states are recognized as having a key-role to play in the US constitutional order, the European Court of Justice's power-based approach (and, for that matter, the acts of secondary legislation (un)successfully adopted in the fields analyzed herein) understands the Member States of the European Union as 'full-fledged actors' within the structure set up by the Treaties. European Union law may impose requirements on Member States in fields involving their retained powers, but only to the extent that this does not undermine the principle that they retain jurisdiction and that they are to remain the key-players. As a result, the Court of Justice power-based approach somehow unexpectedly, ultimately enhances the legal, political, and social weight borne by the Member States within the constitutional order of the European Union.[54] The justifications permitted in cases involving powers retained by Member States, if they reflect values commonly shared in the European Union, are a further means for Member States to protect their own jurisdiction. Ultimately, as L. AZOULAI underlines it:

> The impingement of EU law on core states competences is [...] compensated by the acknowledgment of the essential functions of states as autonomous political actors and guarantors of national collective goods and assets.[55]

In this sense, I concur with other scholars who have come to the conclusion that, far from destroying the States, the building of the European Union has had the effect of enhancing

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[53] D. S. BOGEN, *Privileges and Immunities. A Reference Guide to the United States Constitution*, above, n. 38, 75.
[54] L. AZOULAI, "Sur un sens de la distinction public/privé dans le droit de l'Union européenne," *Revue Trimestrielle de Droit Européen* 842-860 (2010); L. AZOULAI, "La formule des compétences retenues des Etats membres devant la Cour de Justice de l'Union européenne," in *Objectifs et compétences dans l'Union européenne*, (Ed.) E. NEFRAMI, (Brussels: Bruylant, 2013, Droit de l'Union Européenne), 359.
[55] L. AZOULAI, "Introduction," in *Deconstructing federalism through competences*, (EUI WP Law 2012/06), 4.

them, or at least of reasserting they full-fledged role. For instance, S. HOFFMANN noted already in 1982 that the then European Economic Community, "in exchange for curtailing the states' capacity for unilateral action, serve[s] to preserve the nation-state as the basic unit in world affairs,"[56] while A. MILWARD has claimed that the nation-state could reassert "itself as the fundamental unit of political organization"[57] through the building of the then European Community.

348. Conclusion of Section 2. Thus, this second section has established that the Court of Justice power-based approach contributes to reshaping the contours of the national political communities composing the European Union. The Member States are no longer absolute masters entitled to define, free from constraints, who is to belong to their political communities. Nor may they automatically break the bonds with the outgoing members of their respective communities. But, at the same time, cases involving powers retained by Member States reveal in a striking manner that the European Union fundamentally relies on independent polities that remain the key-players at the political, social, and economic levels.

CONCLUSION OF CHAPTER 5.

349. In conclusion, Chapter 5 has shown that the Court of Justice power-based approach brings to light very significant features of European Union membership. As a matter of fact, the case law of the European Court of Justice involving powers retained by Member States confirms O. BEAUD's assertion that the "federal operation" entails both a metamorphosis of the members of a federation and a conservation of their identity. Member States are gradually compelled to "think federal" while exercising their powers in fields where they retain jurisdiction. They must think federal vertically, and, in this sense, European Union law turns them into loyal federate states. In addition, they must do so horizontally, which has the effect of transforming them into states that are codependent on the other members of the European Union federation. However, at the same time, cases involving powers retained by Member States reflect that European Union membership does not call into question Member States' ability to act unilaterally, and to make basic choices that confirm their status as independent polities. In sum, European Union membership has the effect of turning the Member States into

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[56] S. HOFFMANN, "Reflections on the Nation-State in Western Europe today," 21: 1 *Journal of Common Market Studies*, 35 (1982).
[57] A. MILWARD, *The European rescue of the nation-state*, (2nd Ed., Routledge, London and New York, 2000), 2.

both full-fledged members of the European Union federation and key-vertical and horizontal actors of the European Union constitutional order.

CHAPTER 6. STRUCTURAL REASSESSMENT OF THE POWER-BASED APPROACH

INTRODUCTION OF CHAPTER 6.

350. Purpose. The preceding five chapters of this thesis have dealt expansively with the identification and the jurisdictional implications of the European Court of Justice's power-based approach. In this final chapter, I take a broader perspective, and provide an overall structural reassessment of my previous findings. As I have already stressed, my basic assumption is that the cases involving powers retained by Member States play a significant role in the development of the relationship between the European Union and its Member States on the one hand, and the relations among Member States on the other hand.[1] That being said, the purpose of the present chapter is to describe the fundamental features of these two sets of institutional relationships from a structural point of view.

351. Approach. To this end, I draw on the notion of federalism as defined in the General Introduction.[2] I moreover rely thoroughly on the US federal experience, in order to better identify the specific features of the Court of Justice's power-based approach. In particular, I rely on US constitutional history and the many developments that have affected the US Supreme Court's jurisprudence in relation to issues of federalism since its inception.

352. Outline. I have divided this chapter into two parts. First, I intend to demonstrate that the power-based approach is characterized by the striking silence of the Court of Justice on two main points: why certain fields, and not others (or at least not to the same extent) are subject to the original legal framework of the power-based approach, and the rationale behind this original form of integration. Second, I identify which structural model is reinforced by the Court of Justice's power-based approach.

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[1] See, *Supra*, §§ 311s.
[2] See, *Supra*, §§ 35s.

SECTION 1. THE PERSISTENT SILENCE OF THE COURT OF JUSTICE

353. In this first section, I focus specifically on the authority of the Court of Justice power-based approach, or, in other words, on how the Court justifies its reliance on this original line of reasoning in a specific range of free movement cases. In this respect, I show that, from a structural point of view, the Court of Justice displays a persistent silence on two defining issues. First of all, at no point of its reasoning does it explain why the various fields analyzed herein are subject to the original legal framework characterizing the power-based approach. As a matter of fact, it does not set out the criteria that lead it to single them out from the other fields involved in the law of free movement. Second of all, the Court is equally silent with respect to the rationale behind its approach. It has never provided an account of the reasons why the law of free movement should intrude into spheres of powers over which the European Union has no, or very limited, jurisdiction.

1. Silence regarding the fields subject to the power-based approach

354. The following shows, to begin with, that the Court of Justice, in contrast to the US Supreme Court, has never set out clear criteria for distinguishing between the fields concerned by the power-based approach and the fields subject to the general law of free movement. And yet, distinguishing between spheres of powers requires that the Courts, as 'umpires of the federal system,'[3] single out judicial criteria. The identification of such criteria is of the utmost importance because the characterization of 'police power' in the United States or 'retained power' in the European Union entails the application of specific legal frameworks. For instance, under the dual model of federalism in the United States,[4] states could exercise their police powers in absolute freedom, while the central government was strictly precluded from intruding into such spheres – and *vice versa*. As for the European Union legal order, the designation by the European Court of Justice of powers as being retained by the Member States results in the implementation of the power-based approach, which differs from the traditional legal framework usually implemented in free movement cases.

355. Autonomous distinctions. Both American states and European Member States have attempted to preserve their own spheres of powers in order to prevent too many encroachments

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[3] P. A. FREUND, "Umpiring the Federal System,"54 *Columbia Law Review* 561 (1954).
[4] See, *Infra*, §§ 427s.

from the central government. To this end, they have claimed that certain subject matters ought to fall *per se* within their sphere of jurisdiction, understood as strictly distinct from the jurisdiction of the central government. They have moreover asserted themselves as entitled to an absolute freedom while exercising such powers. In reply to these lines of arguments, the Supreme Court and the European Court of Justice have both rejected the idea that the states could themselves decide which subject matters are to fall within their reserved/retained powers. Even under the TANEY Court in the United States, which gave much weight to the states' claims based on the need to protect their police powers, it was solely for the Court to identify a police power. Admittedly, it defined the notion of police powers broadly, and construed its corresponding legal framework as giving significant leeway to the states in *New York v. Miln*:

> That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered nor restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.[5]

But, as E. S. CORWIN has noted in this regard:

> [I]t did not signify that the States, acting through either their legislatures or their courts, were the final judge of the scope of these 'sovereign' powers. This was the function of the Supreme Court of the United States, which for this purpose was regarded by the Constitution as standing outside and over both the National Government and the States, and vested with authority to apportion impartially to each center its proper powers in accordance with the Constitution's intention.[6]

Likewise, the European Court of Justice has also consistently defined the content and reach of the powers retained by Member States autonomously. Even though it has never set out a comprehensive and abstract definition of the concept itself, it has nonetheless identified, on a case-by-case basis, via its formulae, the subject matters that fall within the powers retained by Member States. The Courts' respective independent assessments have significant implications for the enforcement of American and European federalism. For if the states were permitted to themselves decide over which subject matters they have exclusive jurisdiction, the uniformity of federal law would be seriously undermined. As a result, each state could independently and unilaterally define the content of their reserved/retained powers, and consequently encroach on the own powers of the central government.

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[5] *New York v. Miln* 11 Peters 102 (1837).
[6] E. S. CORWIN, *The Commerce Power versus States' Rights*, (Princeton: Princeton University Press, 1936), 15.

356. US Constitutional law. From the 19th century through the early 20th century, the American Supreme Court developed significant doctrines in an attempt at drawing a line between national and states spheres of powers. The doctrines that better depict the debates raised by the dual model of federalism concern the dormant Commerce Clause. I am therefore going to focus on the latter in the following paragraphs. To begin with, the TANEY Court referred to the concept of 'police powers' of states to identify the matters over which the states had exclusive jurisdiction. In the same way as the MARSHALL Court, it initially drew a 'commerce/police' test[7] by looking at the purpose[8] of a state regulation. If it was found to regulate commerce, the state statute was overruled. However, it would be upheld where its purpose pertained to the police of the state, it was sustained. The TANEY Court never elaborated a comprehensive definition of the notion of police powers. Rather, it defined it as follows:

> [I]t is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation.[9]

It subsequently went on by adding up that they were "nothing more or less than that power of government inherent in every sovereignty to the extent of its dominion, the power to govern men and things."[10] The first years of the TANEY Court were characterized by "little clarity or agreement"[11] among the Justices. Some of them saw the regulation of interstate commerce as an exclusive power of Congress. As a result, only state 'police' statutes – to the exclusion of laws regulating 'commerce' – were considered constitutional. TANEY himself followed a more balanced approach, according to which states could regulate commerce so long as their measures did not conflict with the Constitution or a law of Congress.

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[7] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception," 69 *The George Washington Law Review* 139, 147 (2001).
[8] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception," above, n. 7, 148; K. M. SULLIVAN & G. GUNTHER, *Constitutional Law*, (Foundation Press, University Casebook Series, 2001), 242.
[9] *New York v. Miln* 11 Pet. 102, 139 (1837).
[10] *The License Cases* 5 How. 462, 504 (1847).
[11] K. M. SULLIVAN & G. GUNTHER, *Constitutional Law*, above, n. 8, 218.

357. The Court eventually tried to reach a compromise between the exclusive and concurrent doctrines in *Cooley v. The Board of Wardens of the Port of Philadelphia*.[12] A new subject-matter test[13] emerged, based on the distinction between national and local subjects:

> Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.[14]

The *Cooley* rule has sometimes been described as 'selective exclusiveness.' It allowed states to regulate commerce, but only to the extent that they regulated local aspects of interstate commerce, and as long as Congress had not exercised its power. Accordingly, *Cooley* recognized that the commerce power was in some way *concurrent*. However, this did not toll the death knell for the Supreme Court's dual understanding of federalism. As E. A. YOUNG has pointed out, under the Cooley doctrine, some subject matters were still described as "exclusively national" or "local in nature."[15]

358. The search for a borderline between the national and states spheres of powers led the Court to draw an ultimate test, this time based on the direct/indirect character of the effects of states' statutes.[16] Even though the latter were upheld if their effects on commerce happened to be merely indirect, this way of reasoning was also based on a dual interpretation of American federalism. Referring to the direct-indirect distinction, E. A. YOUNG has shown that the Court still insisted on "the viability of boundaries despite the interdependence of different markets and activities."[17] This is confirmed by the fact that, when interpreting the Commerce Clause, the Supreme Court continued to understand the police powers as forming a sphere of jurisdiction over which the states had almost absolute freedom.[18] Thus, throughout the 19th

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[12] Cooley v. The Board of Wardens of the Port of Philadelphia 12 Howard 299 (1851).
[13] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception," above, n. 7, 147.
[14] *Cooley v. The Board of Wardens of the Port of Philadelphia* 12 Howard 299 (1851).
[15] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception," above, n. 7, 147.
[16] See *Southern Railway Co. v. King* 217 U.S. 524 (1910), and *Seaboard Air Line Ry. v. Blackwell* 244 U.S. 310 (1917). See also E. S. CORWIN, *The Commerce Power versus States' Rights*, above, n. 6, 175-209.
[17] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception," above, n. 7, 148. See also E. S. CORWIN, *The Commerce Power versus States' Rights*, above, n. 6, 208: "The distinction is one of *kind*, not of *degree*; and this is so (...) because the purpose of this distinction is to maintain the States in *exclusive* possession of the power to regulate productive industry, and *especially the power to regulate the relationship of employer and employee in such industry*."
[18] See *Henderson v. New York* 92 U.S. 259 (1875): "[C]ertain powers necessary to the administration of their internal affairs are reserved to the States, (...) among these powers are those for the preservation of good order, of the

century and until the beginning of the 20th century, the Supreme Court to a large extent only sought to draw judicial tests aimed at distinguishing between national and state spheres of jurisdiction. If, admittedly, it set out tests that were increasingly flexible, the initial purpose remained. The Court was indeed still primarily interested in isolating exclusive spheres for the benefit of the states or, alternatively, Congress.

359. The ECJ power-based approach. In contrast to the Supreme Court, the European Court of Justice has never attempted to define the notion of powers retained by Member States, nor has it set out a test distinguishing between cases involving the power-based approach and traditional free movement cases. Instead, the Court simply asserts, through the statement of its formulae, that a certain range of fields falls within the powers retained by Member States. It does not make explicit the criteria used to describe a power as retained by Member States, which ought to be subject, as such, to the power-based approach. Even if the Court of Justice does not substantiate its approach, at least two hypotheses may be put forward with respect to the criteria it takes implicitly into account when implementing its power-based approach. On the one hand, while the conferral principle is not relevant for the identification of the powers retained by Member States, the fact that there is no, or very limited, harmonization in the fields subjected to the power-based approach at the European Union level may nonetheless be a pertinent factor. The institutional constraints weighing on the European legislator – such as the unanimity rule in the field of direct taxation, or the lack of consensus among Member States to adopt, for instance, the Patients' Rights Directive[19] – might also explain why the Court has developed an approach that gives more leeway to Member States. On the other hand, as I have already mentioned elsewhere,[20] the fields concerned by the Court's power-based approach pertain to Member States' 'essential functions.' Accordingly, it makes sense to single them out, and to subject them to a specific legal framework, which takes into account Member States' sensitive interests. In sum, the Court of Justice must be cautious, because deregulating fields

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health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character (...). This power, frequently referred to in the decisions of this Court, has been, in general terms, somewhat loosely called the police power;" *New Orleans Gas Co. v. Louisiana Light Co.* 115 U.S. 650 (1885): "[T]here is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases;" *Southern Railway Co. v. King* 217 U.S. 524, 531-532 (1910).

[19] See, *Supra*, §§ 288s.

[20] See, *Supra*, § 72.

such as those analyzed herein could seriously undermine the legitimate autonomy of Member States. Notwithstanding these two hypotheses, the fact remains that the criteria used to distinguish the powers retained by Member States are still, to say the least, vague. Their identification ultimately depends on the Court's discretionary power to subject certain domains to the power-based approach, resulting in a lack of transparency.

2. Silence regarding the rationale behind the power-based approach

360. If the Court of Justice is silent with respect to the basis on which it subjects certain fields to the power-based approach, it is equally tight-lipped about the sources of authority of its case law. The fact that the European Union is an organization of limited powers makes this issue all the more significant. In cases involving powers retained by Member States, the Court may not, as a matter of principle, rely on the conferral principle to justify and legitimize the limitations put on the exercise of powers that fall in spheres over which the European Union has no, or very limited, jurisdiction. In spite of that, when it comes to setting out the grounds of its approach, the Court of Justice is anything but expansive. As seen in Chapter 2, it does not go beyond the statement of formulae, which consist more in asserting a principle than in putting forward articulated legal foundations capable of legitimizing the limitations put on the exercise of the powers retained by Member States. In what follows, I review, in turn, the various grounds that are/could be put forward to justify the subjection of the fields analyzed herein to the Court of Justice scrutiny, which allows me to shed light on their shortcomings. I then defend the point that the power-based approach ultimately lacks structural foundations that would be powerful enough to enshrine both its authority and its legitimacy.

a. The shortcomings of the usual justifications

361. Overall, I have identified discrete sets of justifications that are usually/could be put forward to justify the power-based approach: (i) the principle of primacy of European Union law; (ii) functional justifications, which are explicitly put forward by the Court of Justice and/or its Advocates General, namely the principles of effectiveness and uniformity of European Union law; and (iii) underlying justifications, which, if they are not explicitly referred to by the Court of Justice seems nevertheless to play a significant role in its reasoning: the principle of sincere cooperation and the representation of out-of-state interests. With respect to the principle of primacy, I am of the view that it is an unconvincing legal ground, as it is more of an instrument to settle conflicts than an instrument establishing that there *is* a conflict. As for the

two other sets of justifications, they are of course relevant and useful to account for the applicability of European Union law. They contribute, as such, to legitimize the limitations put on the exercise of the powers retained by Member States. But my claim is that they are nonetheless unsatisfactory, mainly because they do not specifically give grounds for intrusions of European Union law into areas falling within Member States' jurisdiction.

1. The principle of primacy

362. Two understandings of the primacy principle. As is well known, primacy is, with direct effect, one of the cornerstones of European Union constitutional law. Not formerly included into the Treaties, it was recognized at an early stage in *Costa v. ENEL*.[21] To define it simply, "supremacy denotes the capacity of [the] norm of European Union law to overrule inconsistent norms of national law in domestic court proceedings."[22] It may be understood through two distinct perspectives, one static and the other one dynamic.[23] The first perspective consists in connecting, through their qualification, activities or sets of facts either to the municipal domain or to the European Union domain. And it is only if these activities or sets of facts can be connected to the European Union domain that European Union law trumps national laws. This understanding corresponds to J. H. H. WEILER's:

> The principle of supremacy can be expressed, not as an absolute rule whereby Community (or federal) law trumps Member State law, but instead as a principle whereby each law is supreme within its sphere of competence. This more accurate characterization of supremacy renders crucial the question of defining spheres of competence [...].[24]

This static conception differs from the dynamic perspective, based on the assumption that the European Union and national legal orders are fundamentally intertwined. Under this view, there is no need to distinguish between spheres of jurisdiction. Instead, it is accepted that European Union law trumps national laws each time a conflict of norms arises. B. DE WITTE supports this second understanding, when he argues that:

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[21] Case 6/64, *Costa v. ENEL*, [1964] *ECR* 585.

[22] B. DE WITTE, "Direct effect, supremacy, and the nature of the legal order," in *The Evolution of EU Law*, (Eds.) P. CRAIG & G. DE BÚRCA, (Oxford: Oxford University Press, 1999), 177. See also, by the same author, B. DE WITTE, "Retour à "Costa." La primauté du droit communautaire à la lumière du droit international," *Revue Trimestrielle de Droit Européen* 425-454 (1984).

[23] This distinction was drawn by R. GARRON, "Réflexions sur la primauté du droit communautaire," *Revue Trimestrielle de Droit Européen* 29-30 (1969).

[24] J. H. H. WEILER, "The transformation of Europe," *Yale Law Journal* 2410, 2414 (ft. 26) (1991).

> [T]he supremacy of primary [European Union] law cannot be explained in terms of division of competences; it is hierarchical in nature.[25]

Cases involving powers retained by Member States tends to support the second understanding. They indeed confirm that the Court of Justice does not hesitate to overturn any national law conflicting with the free movement principle, even if the national measure falls within fields where the European Union has no, or very limited, jurisdiction. As seen in Chapter 2,[26] the Court refuses to exclude the application of the principle of primacy on the basis that this would affect national spheres of jurisdiction.

363. The reliance on the dynamic understanding to justify the applicability of EU law in cases involving retained powers. Some authors, by (implicitly) relying on its dynamic understanding, infer that the applicability of European Union law in fields involving the powers retained by Member States is justified by the primacy principle. Under this view, the limitations put on the exercise of Member States' powers would stem entirely from this principle.[27] The Court of Justice case law would be nothing more than the logical development of the cases relating to the primacy principle.[28] The Advocate General in *Inizan*, for instance, shared this view. He indeed stated the formula, and emphasized the fact that "national authorities [...] have a duty to ensure the primacy of, and compliance with, the principles of the Treaty."[29]

364. Inherent limits. However, resorting to the primacy principle to give grounds for the applicability of European Union law in the fields analyzed herein turns out to be untenable for two main reasons. First of all, this view springs from a misconception of the primacy principle. As underlined by a few authors, the purpose of this legal tool is to dictate *how* to settle a conflict of norms occurring between a European Union rule and a national rule.[30] In other words, "[t]he problem of primacy concerns the manner in which [...] a conflict, if it is found to exist, will be resolved."[31] However, the primacy principle does not answer the question as to under

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[25] B. DE WITTE, "Direct effect, supremacy, and the nature of the legal order," above, n. 22, 191, n. 63.
[26] See, *Supra*, §§ 108s.
[27] This is what K. LENAERTS & L. BERNARDEAU, "L'encadrement communautaire de la fiscalité directe," 33 *Cahiers de Droit Européen* 19, 32-33 (2007) claim in relation to direct taxation.
[28] V. MICHEL, *Recherches sur les compétences de la Communauté*, (Paris: L'Harmattan, 2003), 459.
[29] Opinion in Case C-56/01, *Inizan*, [2003] *ECR* I-12403, 31-33.
[30] R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, (Oxford University Press, 2009), 190.
[31] M. WAELBROECK, "The emergent doctrine of Community pre-emption – Consent and re-delegation," in *Courts and Free Markets: Perspectives from the United States and Europe*, (Eds.) E. STEIN & T. SANDALOW, (Oxford: Clarendon Press, 1982, Vol. 2), 551. (Emphasis added)

which conditions a conflict of rules arises. For primacy to apply, a conflict must have been identified beforehand.[32] To put it differently, primacy is a tool for conflict resolution, but it is not a means of conflict identification. Second of all, and this closely relates to the reason just mentioned, using the primacy principle as the basis of the applicability of European Union law in cases involving powers retained by Member States ends up to putting the cart before the horse. As I have already indicated,[33] free movement cases are divided into four main steps: (1) applicability, (2) assessment of the restrictive character of the measure, (3) assessment of the acceptability of the justifications put forward by Member States, and (4) assessment of proportionality. Since the primacy principle is a tool for conflict resolution, it may only come into play if: (i) the national measure is found to restrict the free movement principle, and no valid ground may justify it; or (ii) the national measure is found to restrict the free movement principle, valid grounds of justification may be relied on, but it is nonetheless disproportionate. If, however, the measure either does not have a restrictive character, or is restrictive but justified, the primacy principle does not come into play since, by definition, there is no conflict between the free movement principle and the national measure subject to scrutiny by the Court of Justice. As a result, it must be accepted that the issue relating to the legal bases of the applicability of European Union law in fields where the European Union holds no, or very limited, jurisdiction, is distinct from the issue of primacy. Finding that European Union law is applicable does not in fact presuppose the existence of a conflict of norms, for the European Court of Justice happens to rule that European Union law is applicable, but that the national measure nevertheless does not conflict with the free movement principle. Accordingly, the primacy principle is not useful for justifying the applicability of European Union law in cases involving powers retained by Member States. The broadening of the scope of the free movement principle does not flow from an extension of the scope of the primacy principle. It is quite the reverse: the broadening of the scope of primacy is arises from the extension of the scope of the fundamental freedoms.

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[32] I. PERNICE, "*Costa v. ENEL* and *Simmenthal*: Primacy of European law," in *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, (Eds.) M. MADURO & L. AZOULAI, (Oxford: Hart Publishing, 2010), 58.

[33] See, *Supra*, § 20.

2. The principle of effectiveness

365. Advocate General KOKOTT's Opinion under Tas Hagen. A few years ago, Advocate General KOKOTT attempted to put flesh on the bones of the reasons justifying the applicability of European Union law in the fields analyzed herein. She expressed her views in *Tas-Hagen*,[34] which involved, as seen earlier,[35] the interpretation of European Union citizenship in a case where a nonresident was denied a benefit relating to the compensation of civil war victims, this type of benefit being expressly excluded from the scope of Regulations 1408/71 and 883/2004.[36] Her opinion deserves, in this respect, to be quoted at length:

> 33. [...] Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law.
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> 34. The nature of Union citizens' right to free movement as a *fundamental freedom* is expressed therein. As a fundamental freedom, Article 18(1) EC is directly applicable and to be interpreted broadly. In particular, this provision has, like the classic fundamental freedoms of the internal market, a scope which is not restricted to specific matters.
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> 35. Thus, the classic fundamental freedoms apply also to matters in respect of which the Treaty grants the Community no powers or otherwise contains rules. If such matters not governed by Community law were excluded from the scope of the fundamental freedoms, it would be impossible reasonably to implement one of the Community's core tasks, namely to establish an internal market without obstacles to the free movement of goods, persons, services and capital (Article 3(1)(c) EC). The internal market would not have the comprehensive aim of providing an area without internal frontiers (Article 14(2) EC), but would be merely fragmentary as it would be limited to individual products and activities governed by specific rules of Community law.
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> 36. A *fortiori* the scope of the fundamental freedoms cannot be restricted merely to matters in respect of which the Community has already exercised its powers, in particular by adopting harmonization measures. On the contrary, the fact that it can produce its effects primarily in fields which are not (yet) harmonized is consistent with the spirit and purpose of the fundamental freedoms and precisely an expression of their direct applicability. To make the application of a fundamental freedom subject to the existence of a harmonizing measure would ultimately be to deprive it of direct effect. [...]
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> 38. However, it would be equally inconsistent with the notion of Union citizenship as the fundamental status of all Union citizens, which they enjoy irrespective of any economic activity, if the Member States did not have to observe Union citizens' right to free movement in all areas but merely in individual matters in respect of which the Treaty grants the Community specific powers or other rules of Community law exist.

Thus, Advocate General KOKOTT provides a comprehensive reasoning, which may be divided into three parts. First, she relies on the basic features of European Union citizenship, which

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[34] Opinion in Case C-192/05, *Tas-Hagen*, [2006] *ECR* I-10451.
[35] See, *Supra*, §§ 130.
[36] See, *Supra*, § 57.

are, as she describes them, very similar to those of the four economic freedoms. Second, she justifies the applicability of European Union law in fields where the European Union holds no jurisdiction. Finally, she explains why European Union law is applicable in fields where the European Union holds jurisdiction, but has nonetheless not exercised its powers.

366. A common rationale. To begin with, Advocate General KOKOTT starts from the premise that the fundamental freedoms share three inherent features: they are directly applicable, they should be construed broadly and, last but not least, their scope is "not restricted to specific matters." A few words should be said, in this respect, about Advocate General KOKOTT's overall line of reasoning. There was no doubt that if one freedom was applicable to the facts of *Tas-Hagen*, it could only be European Union citizenship since no economic activity was involved. Nevertheless, in order to make her claim, the Advocate General makes references to both European Union citizenship and the four economic freedoms, and draws several parallels between them. This sheds light on three important aspects. First, this confirms that European Union citizenship and the four economic freedoms ought to be increasingly placed on the same footing. Second, this reveals that the Advocate General uses the four economic freedoms as a way to back up her claim, and to give it more weight. Her reasoning indeed consists in showing that what holds true for the economic freedoms also holds true for European Union citizenship. Last but not least, this upholds the assumption according to which cases involving powers retained by Member States form a coherent whole, whether based on European Union citizenship or on the economic freedoms.

367. Two justifications. Once the basic features of the fundamental freedoms have been recalled, the Advocate General goes on by focusing on the applicability of the four economic freedoms in fields where the European Union holds no jurisdiction. To this end, she develops an '*a contrario* reasoning,' and sheds light on the negative implications that would result if the Court of Justice were to find them inapplicable. She argues that this would give rise to two adverse outcomes. On the one hand, this would undermine the implementation of one of the "core tasks" assigned to the European Union, the establishment of the internal market, and on the other hand, this would entail a fragmenting effect.

368. The preservation of the integrity of EU jurisdiction. First, the applicability of European Union law is justified by the need to preserve the integrity of the jurisdiction of the European Union. M. P. MADURO has also alluded to this argument to provide grounds for the limitations

placed on nationality powers in *Rottmann*: "otherwise, the competence of the Union to determine the rights and duties of its citizens would be affected."[37] This justification is reminiscent of the reasoning developed by Chief Justice MARSHALL in the landmark *McCulloch v. Maryland* case decided in 1819.[38] This decision involved a statute enacted by the state of Maryland, which subjected the Bank of the United States to a tax. The Supreme Court was called upon to assess whether this amounted to a reasonable exercise of state power. It first established that Congress correctly exercised its power when it chattered the bank, by broadly construing the necessary and proper Clause of the US Constitution.[39] It then focused on whether Maryland could tax the bank. Chief Justice MARSHALL acknowledged that "the power of taxation is of vital importance; that it is retained by the States; [and] that it is not abridged by the grant of a similar power to the Government of the Union."[40] However, he tempered this principle, and for the first time put limitations on a state's retained power:

> [T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.[41]

In other words, as in cases involving powers retained by Member States, US states are at liberty to exercise their powers so long as this does not undermine the General Government's jurisdiction. Chief Justice MARSHALL added, in this regard, that the US Constitution is to be construed in such a way as to not "defeat the legitimate operations of a supreme Government."[42] However, emphasis should be put on a significant difference between the European and the American contexts. In *McCulloch v. Maryland*, the Supreme Court referred to the necessity to preserve the integrity of powers already exercised by the General Government. By contrast, in cases involving powers retained by Member States, the exercise of national powers does not affect specific acts of secondary legislation, but the free movement principle itself, a constitutional principle enshrined in the Treaty. Therefore, J. KOKOTT developed her

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[37] Opinion in Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 26.
[38] *McCulloch v. Maryland* 17 U.S. 318 (1819).
[39] US Constitution, Article 1, Section 8: "The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
[40] *McCulloch v. Maryland* 17 U.S. 318, 425 (1819).
[41] *McCulloch v. Maryland* 17 U.S. 318, 436 (1819). See O. BEAUD, "De quelques particularités de la justice constitutionnelle dans un système fédéral," in *La justice constitutionnelle*, (Eds.) C. GREWE, O. JOUANJAN & E. MAULIN, (Paris, Dalloz, 2005), 68-70.
[42] *McCulloch v. Maryland* 17 U.S. 318, 427 (1819).

reasoning in a more 'hypothetical' context than the US Supreme Court. Indeed, she ultimately relied on the need to preserve powers held by the European Union that have not (yet) been exercised.

369. The prevention of fragmentation. Second, J. KOKOTT also stressed that if European Union law were not applicable in the fields analyzed herein, this would produce fragmenting effects. Here, she referred to a cardinal principle of the constitutional law of the European Union, the principle of uniformity. This principle forms one of the bases of the European Union legal order, as already stated by the Court of Justice in *Costa v. ENEL*:

> The executive force of Community law cannot vary from one State to another [...] without jeopardizing the attainment of the objectives of the Treaty [...].[43]

The whole project of the European Union indeed relies on uniformity. Accepting that Member States may act unilaterally, without being subject to the Court's scrutiny would lead to a "territorial fragmentation," and, ultimately, to a "fragmentation of the European integration project."[44] This would open the door to the creation of multiple discriminations and/or obstacles hampering the free movement principle. This would then jeopardize the principle of unity of the internal market and, more generally, the European Union project itself.[45] This situation would lead to what N. POLITIS described, decades ago, in the context of public international law, as the creation of "anarchy" in international relations.[46] The preservation of unity is also at the core of US constitutional law. It is often used as a way to justify the limitations put on States' powers, which stem from the Privileges and Immunities Clause of Article IV and the Dormant Commerce Clause, the US equivalents of the TFEU provisions relating to European Union citizenship and the four economic freedoms.[47] J. D. VARAT notes, with respect to the former, that it is "primarily [...] an instrument of national unification,"[48]

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[43] Case 6/64, *Costa v. ENEL*, [1964] *ECR* 585.
[44] R. BARENTS, "The single market and national tax sovereignty," in *Fiscal sovereignty of the Member States in an internal market. Past and future*, (Ed.) S. JANSEN, (Alphen: Kluwer Law International, 2011), 61; L. AZOULAI, "La formule des compétences retenues des Etats membres devant la Cour de Justice de l'Union européenne," in *Objectifs et compétences dans l'Union européenne*, (Ed.) E. NEFRAMI, (Brussels: Bruylant, 2013, Droit de l'Union Européenne), 363.
[45] See with respect to direct taxation: F. C. DE HOSSON, "On the controversial role of the European Court in corporate tax cases," 34: 6/7 *Intertax* 294, 297 (2006).
[46] N. POLITIS, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux," 6 *Recueil des Cours* 1, 52 (1925).
[47] See, *Supra*, §§ 23s.
[48] J. D. VARAT, "State "citizenship" and interstate equality," 48 *U. Chi. L. Rev.* 487, 518 (1981).

while J. NZELIBE points out that the latter "embodies a concept of economic nationhood, of a 'common market.'"[49] In sum:

> Because state power to discriminate against nonresidents or recently arrived residents is in tension with the constitutional goals of a cohesive federal union and an open economy, it seems obvious that the objectives of interstate equality often may trump that of a state's particular interests.[50]

In other words, the applicability of European Union law flows from the necessity to prevent Member States from bypassing the free movement principle through the exercise of their retained powers. They may not indirectly place the unity of the European Union integration project at risk by acting unilaterally in fields where the European Union holds no jurisdiction.

370. The preservation of the fundamental freedoms' direct effect. The same holds true when the European Union holds jurisdiction, but has not exercised it. In J. KOKOTT's view, the applicability of European Union law in areas that are not (yet) harmonized is "precisely an expression of [the fundamental freedoms'] direct applicability." Her argument is built upon two fundamental components of the European Union legal order: the principle of direct effect and the principles stemming from the landmark decision *Cassis de Dijon*.[51] One of the main concerns underlying the principle of direct effect, recognized for the first time in *Van Gend en Loos*, is to "secure a uniform interpretation of the Treaty."[52] Therefore, a finding that the free movement principle is applicable once again turns out to be a means to ensure the uniformity of European Union law. The Advocate General also refers to *Cassis de Dijon* in paragraph 36 of her Opinion. She is thus of the view that the same logic as that developed in the 1979 decision justifies the applicability of European Union law in fields where the Court of Justice implements its power-based approach. It is in fact true that the Court of Justice case law involving powers retained by Member States is reminiscent of the issues raised in this case. Germany referred implicitly to the conferral principle in order to object to the applicability of European Union law. After relying on the "functional separation of powers between the national authorities and the Community authorities," it argued that:

> In relation to the interpretation of Article 30, that fundamental principle of the Treaty implies that the application of that provision reaches its limits at the point where the

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[49] J. NZELIBE, "Free movement: A federalist reinterpretation," 49 *Am. Univ. L. Rev.* 433, 465 (1999).
[50] Ibid., 465.
[51] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649.
[52] Case 26/62, *Van Gend en Loos* [1963] *ECR* 3, 12.

> functional exercise of the powers retained by the Member States would be jeopardized. The Member States must continue to be able effectively to exercise those powers, until the achievement of harmonization transfers their freedom of action to the Community.[53]

As is well known, the Court of Justice developed a different perspective. However, it did not specifically reply to the German argument based on the conferral principle. It instead stated that, as a matter of principle, Member States retain jurisdiction in the absence of harmonizing measures, but only to the extent that their measures satisfy mandatory requirements.[54] The starting point of its reasoning did not therefore lie in the need to preserve the functional exercise of Member States' retained powers, but in the concern to preserve the interests and the jurisdiction of the European Union. It implicitly ruled out the possibility, in a similar way as it consistently does today, that Member States enjoy a safe haven for enacting discriminatory or restrictive measures, regardless of the field involved.

371. A 'total' principle. It stems from the above that Advocate General KOKOTT justifies the applicability of European Union law in fields over which the European Union has no jurisdiction, or with respect to which it has not exercised its jurisdiction, on arguments of a functional nature, which all closely relate to the principle of effectiveness. The principle of effectiveness goes beyond the principles of primacy and direct effect; it also embodies the *effet utile* principle, as well as the principle of unity.[55] The full effectiveness of European Union law depends on uniformity and the consistent application of European Union law.[56] The Court itself, as well as several Advocate Generals, has referred to the need to safeguard this principle in cases involving powers retained by Member States.[57] In sum, it takes precedence over the formal division of powers between the European Union and its Member States, and its application does not depend on whether the European Union has exercised its jurisdiction or not. Member States have a general duty not to put the European Union project at risk, and

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[53] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649, 656-657.
[54] Case 120/78, *Rewe-Zentral (Cassis de Dijon)*, [1979] *ECR* 649, 8.
[55] M. BLANQUET, *L'article 5 du Traité C.E.E. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, (LGDJ, Bibliothèque de droit international, Paris, 1998), 337-339.
[56] Opinion 1/03, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2006] ECR I-1145, 128.
[57] See, e.g. Opinion in Case C-499/06, *Nerkowska*, [2008] ECR I-3993, 18; Case C-499/06, *Nerkowska*, [2008] ECR I-3993, 31; Opinion in Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 26; Opinion in Case C-56/01, *Inizan*, [2003] *ECR* I-12403, 44; Case C-372/04, *Watts*, [2006] *ECR* I-4325, 115; Opinion in Case 28/83, *Forcheri*, [1984] *ECR* 1425, 2341; Opinion in Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 3; Case C-175/88, *Biehl*, [1990] ECR I-1779; Opinion in Case C-279/93, *Schumacker*, [1995] *ECR* I-225, 30-31; Opinion in Case C-330/91, *Commerzbank*, [1993] *ECR* I-4017, 41.

must, notwithstanding the field at issue, "take 'the bitter with the sweet' of free movement law."[58] This line of reasoning leads to what L. AZOULAI describes as the 'totalization' of European Union law.[59] All the national spheres of powers must ultimately serve the principle of effectiveness. European integration not only affects on the "limited fields"[60] transferred by the Member States to the European Union, but has an effect on any field, which may be linked to it in one way or another. As a result, the applicability of the free movement principle is defined by the functional aim of the fundamental freedoms, and not by reference to the conferral principle.[61]

372. Critical assessment. To conclude, it may be pointed out that J. KOKOTT attempted to provide a comprehensive analysis to justify the applicability of European Union law in cases where the Court develops its power-based approach, and as a result went beyond the usual reasoning of the Court of Justice. However, one may question whether it is enough to explain the validity of the Court's case law in light of arguments that are of a purely functional nature. This inevitably leads to the question of whether the end can systematically justify the means. It is moreover doubtful that purpose-oriented principles can provide sufficient grounds for a phenomenon that contributes to turning the European integration project into a totalizing endeavor. Cases involving powers retained by Member States are at odds with the basic proposition that the European Union is an organization of limited powers, and that, as a result, European integration is a partial phenomenon. Last but not least, one must not lose sight that the Court of Justice's power-based approach puts limitations on powers that are constitutive of Member States' core political and social identities. From a democratic perspective, it is therefore necessary that it be based on solid grounds of authority and legitimacy. In other words, the functional arguments used by Advocate General KOKOTT do not comprise substantial democratic justifications as to how to explain that European Union law may intrude into spheres that Member States wish to retain within their own jurisdiction – be it through specific saving clauses inserted into the Treaty, through the unanimity rule, or through the

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[58] K. LENAERTS, "Federalism and the rule of law: Perspectives from the European Court of Justice," 33: 5 *Fordham International Law Journal* 1338, 1349 (2011).
[59] L. AZOULAI, "The 'retained powers' formula in the case law of the European Court of Justice: EU law as total law?," 4: 2 *European Journal of Legal Studies* 192-219 (2011).
[60] Case 26/62, *Van Gend en Loos* [1963] *ECR* 3, 12; Case 6/64, *Costa v. ENEL*, [1964] *ECR* 585, 593.
[61] A. MARZAL YETANO, *La dynamique du principe de proportionnalité. Essai dans le contexte des libertés de circulation du droit de l'Union européenne*, (Ph.D. Thesis, Université Paris 1 Panthéon-Sorbonne, 2013), 386.

mere silence of the Treaty. They account for the *necessity* of the Court of Justice power-based approach, but not for its deeper legitimizing roots.

3. The **principle** of sincere cooperation

373. Compelling Member States to comply with the free movement principle even in fields where the European Union has no, or very limited, jurisdiction, may also be seen as simply the result of Member States' obligations stemming from the Treaties. After all, it may be argued that when they entered into these international agreements, they tacitly accepted not to frustrate any interest of the European Union, even indirectly through the exercise of their retained powers. To be sure, they are bound by the principle of sincere cooperation.[62]

374. Identification. Article 4§3 TEU defines the principle of sincere cooperation as follows:

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

This principle is a genuine legal rule, and plays a significant role in the European Union legal order. It entails a series of obligations for both the Member States and the institutions of the European Union. Member States are subjected, in particular, to a number of duties that flow from the fact that they belong to the European Union.[63] In the manner of M. BLANQUET, they may be gathered into four discrete categories: the obligation of cooperation, the obligation of collaboration, the obligation of loyalty, and the obligation of solidarity.[64] The obligation of

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[62] To my knowledge, the Court of Justice has never explicitly relied on the principle of sincere cooperation in its rulings involving powers retained by Member States. However, Advocate Generals have referred to it on at least three occasions: see Opinion in Case C-135/08, *Rottmann*, [2010] *ECR* I-1449, 30; Opinion in Case C-372/04, *Watts*, [2006] *ECR* I-4325, 74; Opinion in Case C-73/08, *Bressol*, [2010] *ECR* I-2735, 154.

[63] See one of the earliest analyzes: J. T. LANG, "Community constitutional law: Article 5 EEC Treaty," 10: 3 *Fordham International Law Journal* 503-537 (1986). See also K. MORTELMANS, "The principle of loyalty to the Community (Article 5 EC) and the obligations of the Community institutions," 5: 1 *Maastricht Journal of European and Comparative Law* 67-88 (1998); P. HALLSTRÖM, "The European Union – From reciprocity to loyalty," 39 *Scandinavian Studies in Law* 79-88 (2000); V. CONSTANTINESCO, "L'article 5 CEE, de la bonne foi à la loyauté communautaire," in *Du droit international au droit d'intégration, Liber amicorum P. Pescatore*, (Baden-Baden, Nomos Verlagsgesellschaft, 1987), 97.

[64] M. BLANQUET, *L'article 5 du Traité C.E.E.. Recherche sur les obligations de fidélité des Etats membres de la Communauté*, above, n. 55.

cooperation consists of an obligation of enforcement and an obligation to supplement EU action. It is intrinsically linked to the question of the practical effectiveness of European Union law, and raises the issue of the institutional and procedural autonomy of Member States. The obligation of collaboration consists in enabling the action and the functioning of the organs of the European Union.[65] Under the obligation of loyalty, Member States must "refrain from any measure which could jeopardize the attainment of the Union's objectives." As M. BLANQUET shows, this obligation encompasses both a functional perspective, under which Member States must protect the full effect of European Union rules, and a structural perspective, under which they must protect the institutional structure of the European Union as well as its funding system. Finally, the obligation of solidarity compels Member States to assist each other, and to coordinate among themselves. In sum, M. BLANQUET points to the fact that Article 4§3 TEU allows the Court to settle conflicts where the European Union interest is at stake, but where the rules relating to the division of powers are not sufficient to provide a solution to the jurisdictional conflict.[66] In cases involving powers retained by Member States, the Court of Justice implicitly draws on the last two dimensions of the principle of sincere cooperation. This is revealed by the twofold transformation that affects the Member States described in Chapter 5.[67] This transforms the Member States both vertically, which is done in accordance with the obligation of loyalty, and horizontally, under the obligation of solidarity.

375. Shortcomings of the loyalty and solidarity principles. The fact that both public international law and federal law recognize that the principle of good faith or loyalty may place limitations upon the exercise of states' powers tends to indicate that the European Union principle of loyalty may be a valid factor to justify European Union law intrusions into Member States' jurisdiction. However, two main points must be pointed out. First, it is noteworthy that, in similar fashion to public international law, it is the functional dimension of the European Union principle of loyalty that primarily justifies the incursions of European Union law into the national spheres of powers. And, as I have just stressed, purpose-oriented grounds do not constitute an entirely satisfactory justification. Second, admittedly, the European Union principle of loyalty shares many features with the federal principle of loyalty. However, in a federal state, federal law intrusions into the legal orders of the federate entities are justified by

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[65] Ibid., 125.
[66] Ibid., 286.
[67] See, *Supra*, §§ 311s.

the principle of loyalty, which is itself supported by "the nature of the constitutional 'pact'" between the federation and the states.[68] In accordance with this constitutional 'pact,' the federation is legitimized by popular sovereignty. This is not the case in the European Union legal order, where popular sovereignty is first and foremost expressed at the Member State level. In sum, the principle of loyalty once again sheds light on the *functional necessity* of the limitations put on the exercise of the powers retained by Member States but not on the roots of their authority and legitimacy. Likewise, the principle of solidarity, which governs interstate relations,[69] lacks a dimension that would fully justify the existence of limitations placed on the exercise of the powers retained by Member States.

4. The representation of out-of-state interests

376. A close analysis of the cases involving powers retained by Member States sheds light on another underlying rationale of the Court of Justice power-based approach. Broadly speaking, this rationale consists in reinforcing the representation of out-of-state interests. When the Court of Justice subjects the Member States to the free movement principle in the fields analyzed herein, it is indeed driven by concerns relating to fairness. These concerns result in the Court's efforts to urge Member States to give voice to out-of-state interests, which are, by definition, underrepresented in the national political forum. To put it differently, the Court uses the free movement principle as a proxy to counterbalance deficiencies inherent to the national democratic process.

377. The doctrine. Several authors have developed an argument based on the representation-reinforcing theory to justify the Court of Justice's scrutiny of national measures in light of the free movement principle. The latter is given a role of "correction of national political processes,"[70] of "correction of 'nation-state failures.'"[71] M. P. MADURO and C. JOERGES, the two main advocates of this approach, both start from the same premise. National political processes are flawed to the extent that they lead to the underrepresentation of non-EU nationals and/or

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[68] BVerfGE 6, 309, 361.
[69] See, *Supra*, § 324s.
[70] M. P. MADURO, "Reforming the market or the state? Article 30 and the European economic constitution: Economic freedom and political rights," 3: 1 *European Law Journal* 55, 71 (1997).
[71] C. JOERGES, "European law as conflict of laws," in *'Deliberative Supranationalism' Revisited*, (Eds.) C. JOERGES & J. NEYERS, (EUI Working Paper Law 2006/20), 15, 22.

residents, which are nonetheless affected by national laws.[72] European Union law is seen, in similar fashion to US constitutional law, as a "democracy enhancer."[73] In this sense, these authors contend that not only does the free movement principle give rise to economic rights, through the four economic freedoms, but also to *political fundamental rights*.[74] The logic underpinning the argument developed by M. P. MADURO and C. JOERGES may, in addition, be used in relation to outgoing individuals. In case of exit restrictions, European Union law indeed plays a representation-reinforcing role of individuals in their own home countries. This category of European Union citizens or economically active individuals constitutes, as a matter of fact, a "minority," whose interests are usually underestimated by the national legislature.

378. US Constitutional theory. The roots of this doctrine can be found in US constitutional theory. J. H. ELY, in his seminal work *Democracy and Distrust*,[75] set out a theory of judicial review built upon a representation-reinforcing mode. To the question as to how to interpret the US Constitution, he ruled out, in turn, constitutional constructions based on clause-bound interpretivism, and the discovery of fundamental values. Instead, the starting point of its reasoning laid in *United States v. Carolene Products Co.*, a case decided by the US Supreme Court in 1938. In a footnote, Justice STONE, who wrote for the majority, stressed the following:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. [...]
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [...]
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious [...] or national [...] or racial minorities [...]; whether

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[72] M. P. MADURO, "Reforming the market or the state? Article 30 and the European economic constitution: Economic freedom and political rights," above, n. 70, 76-77; C. JOERGES, "European law as conflict of laws," above, n. 71, 22. See also G. DE BÚRCA & O. GERSTENBERG, "The denationalization of constitutional law," 47 *Harvard International Law Journal* 243, 259 (2006); L. AZOULAI, "La fabrication de la jurisprudence communautaire," in *Dans la fabrique du droit européen: scènes, acteurs et publics de la Cour de la justice des Communautés européennes*, (Eds.) P. MBONGO & A. VAUCHEZ, (Brussels: Bruylant, 2009), 169.

[73] C. JOERGES, "European law as conflict of laws," above, n. 71, 22: "Supranationalism is therefore to be understood as a fundamentally *democratic* concept."

[74] M. P. MADURO, "Reforming the market or the state? Article 30 and the European economic constitution: Economic freedom and political rights," above, n. 70, 72; C. JOERGES, "European law as conflict of laws," above, n. 71, 22.

[75] J. H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980).

> prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[76]

For J. H. ELY, while the first paragraph of this statement is "pure interpretivism,"[77] the second paragraph, coupled with the third, give an overview of what judicial review should consist in. On the one hand, the function of the Court is to guarantee the integrity of political processes (paragraph 2) or, in other words, the "machinery of majoritarian democracy."[78] However, on the other hand, paragraph 3 "suggests that the Court should also concern itself with what majorities do to minorities."[79] In a majoritarian democracy, so the argument goes, the majority tends to preserve its own interests, at the expense of minorities. As a result, it "does *not* ensure [...] the effective protection of minorities whose interests differ from the interests of most of the rest of us."[80] This ultimately runs counter to the fundamental principle of representation, according to which representatives must represent all the people, and not only majorities. As a way to offset the inherent deficiencies of the model of majoritarian democracy, the judiciary must develop a "representation-reinforcing mode of judicial review."[81] To this end, it must ensure "virtual representation" of minorities. J. H. ELY identifies two main minority groups. There are, in the first place, those who are members of a community, and who have therefore a voice in the political process, but who "find themselves functionally powerless."[82] There are also the "geographical outsiders, the literally voteless."[83] In this respect, J. H. ELY is of the view that the *raison d'être* of the Privileges and Immunities Clause of Article IV and of the Dormant Commerce Clause[84] is precisely to make sure that nonresidents are virtually represented. He notes, with respect to the Privileges and Immunities Clause, that:

> [T]he reason inequalities against nonresidents were singled out for prohibition in the original Constitution is obvious: nonresidents are a paradigmatically powerless class politically. How then were they to be protected? Not by a set of substantive entitlements

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[76] *United States v. Carolene Products Co.* 304 U.S. 144 (1938), n. 4, 152-53 (citations omitted).
[77] J. H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, above, n. 75, 1, defines interpretivism as "indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."
[78] Ibid., 76.
[79] Ibid.
[80] Ibid., 78.
[81] Ibid.
[82] Ibid., 84.
[83] Ibid.
[84] These two clauses are, as seen in the General Introduction the two main constitutional clauses used by the US Supreme Court to limit states' powers. See, *Supra*, §§ 23s.

> but rather by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those who did possess political power, the framers insured that their interests would be well looked after.[85]

In the end, J. H. ELY's approach to judicial review is a "remedy for the process defect of exclusion from democratic decisionmaking procedures."[86] Many US constitutionalists have relied on it. In the contexts of interstate equality and interstate commerce, which raise similar issues to those of the European Union free movement principle,[87] the limitations placed on the exercise of states' police powers have been justified, for instance, by the fact that "everyone who is affected ought to be represented."[88] Likewise, it has been suggested that since nonresidents are deprived from the right to vote, they should be able to rely on constitutional equality principles.[89]

379. *Widening of the scope of the doctrine.* J. H. ELY's doctrine pertains primarily to the policing of the process of representation or, in other words, to the "integrity of the mechanics that produce the legislation."[90] It claims to be, in this sense, what could be described as a "democracy enhancer."[91] Some authors have suggested going beyond the initial scope of the representation-reinforcing theory, and to extend it in such a way as to justify the judicial creation of welfare rights. F. I. MICHELMAN, in particular, contends that these rights are "a part of constitutionally guaranteed democratic representation."[92] In this sense, they are necessary to complement and ensure the rights of participation of both nonresidents and 'powerless' minorities. The author notably refers to *Goldberg v. Kelly*, where the US Supreme Court stated that:

> Welfare [...] can help bring within reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community [...]. Public

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[85] J. H. ELY, *Democracy and Distrust: A Theory of Judicial Review*, above, n. 75, 83.
[86] L. BRILMAYER, "Shaping and sharing in democratic theory: Towards a political philosophy of interstate equality," 15: 3 *Florida State University Law Review* 389, 394 (1987).
[87] See, *Supra*, §§ 23s.
[88] D. H. REGAN, "The Supreme Court and state protectionism: Making sense of the dormant Commerce Clause," 84 *Michigan Law Review* 1091, 1161 (1985-1986).
[89] J. D. VARAT, "State 'citizenship' and interstate equality," above, n. 48, 517.
[90] J. N. EULE, "Laying the dormant Commerce Clause to rest," 91 *Yale Law Journal* 425, 439 (1982).
[91] L. H. TRIBE, "The puzzling persistence of process-based constitutional theories," 89 *Yale Law Journal* 1063, 1063 (1980): "Such an account permits courts to perceive and portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments."
[92] F. I. MICHELMAN, "Welfare rights in a constitutional democracy," *Washington University Law Quarterly* 659, 678 (1979).

> assistance, then, is not mere charity, but a means to 'procure the Blessings of Liberty to ourselves and our Posterity.'[93]

380. Criticisms. All in all, J. H. ELY's theory is a process-based theory, which expressly excludes from its rationale the taking into account of substantive values and it is this very aspect that has attracted objections. Authors have put forward two main ranges of criticisms. On the one hand, they have drawn attention to the fact that the doctrine wrongly assumes that "majoritarian democracy is the predominant constitutional value in every situation."[94] L. H. TRIBE moreover pointed to the "inherently incomplete nature of channel-clearing as an aim."[95] On the other hand, some scholars have referred to the federal features of the US political order. For R. B. COLLINS, J. H. ELY's theory does not allow the basic question as to which level of government ought to act to be dealt with. Yet, if states are found to be entitled to legislate, their voters may legitimately advantage themselves.[96] This relates to D. H. REGAN's point, whereby "[n]onrepresentation of foreign interests follows from the simple fact that there are separate states."[97]

381. Shortcomings. The question is now whether the representation-reinforcing doctrine may equally justify the Court of Justice scrutiny when powers retained by Member States are involved. This theory undeniably goes beyond the functional justifications that I have reviewed so far. It indeed endeavors to build the legitimacy of European Union law upon substantive grounds based on democratic concerns. Nonetheless, it does not specifically address the issue as to why Member States should be compelled to give voice to out-of-state interests *even* in fields falling within their exclusive jurisdiction. M. P. M. MADURO concedes, admittedly, that:

> The existence of States, as identifiable political communities, only makes sense as long as those political communities express a greater degree of solidarity with their members than with non-members.[98]

However, the representation-reinforcing perspective, like its US counterpart, does not take into account the division of powers characterizing the federal order of the European Union. C.

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[93] *Goldberg v. Kelly* 397 U.S. 254, 265 (1970).
[94] R. B. COLLINS, "Economic union as a constitutional value," 63 *N. Y. U. L. Rev.* 43, 111 (1988).
[95] L. H. TRIBE, "The puzzling persistence of process-based constitutional theories," above, n. 91, 1077.
[96] R. B. COLLINS, "Economic union as a constitutional value," above, n. 94, 111.
[97] D. H. REGAN, "The Supreme Court and state protectionism: Making sense of the dormant Commerce Clause," above, n. 88, 1164-1165.
[98] M. P. MADURO, "Reforming the market or the state? Article 30 and the European economic constitution: Economic freedom and political rights," above, n. 70, 69.

JOERGES stresses that it "clarifies and sanctions the commitments arising from its independence with equally democratically legitimized states."[99] But what if Member States have decided not to commit in certain fields, such as the fields analyzed herein? The same type of objection could be raised in the US context. However, it can be more easily overcome, as seen in the following section. As far as the nature of the Union is concerned, the US Supreme Court develops a consistent approach, which sees the Union as an entity established by *the* people of the United States, thereby representing popular sovereignty. Such an approach, or an equivalent, does not exist in the jurisprudence of the European Court of Justice.

382. Conclusion of Section 1. Section 2 has shed light on two sets of factors, which explicitly or implicitly motivate the European Court of Justice when it rules on cases involving powers retained by Member States. However, they are not entirely satisfactory. The principles of effectiveness, uniformity, and sincere cooperation are of a functional nature. They reveal the practical and theoretical necessity of the Court's power-based approach. However, they are not sufficient to convincingly ground the authority and the legitimacy of European Union law when it limits the exercise of Member States' powers in fields over which they wish to retain jurisdiction. The necessity to represent out-of-state interests within national political processes is, in this respect, more compelling. Yet, all the grounds that I have reviewed so far are characterized by the same shortcomings: they do not *specifically* bring to light the authority of European Union law for applying in fields over which Member States have retained jurisdiction.

b. The lack of a compelling rationale

383. In this paragraph, I claim that, notwithstanding the fact that it is not deprived of relevant justifications, the Court of Justice's power-based approach ultimately lacks compelling grounds of justification. To this end, I resort to two complementary illustrations. These illustrations both shed light on how two other constitutional courts have relied on political philosophy in such a way as to substantiate their stance on the legal status to be imposed on states' reserved powers. I first take an example outside the context of the European Union. I refer to US constitutional theory, and, in particular, the debate over the nature of the Union. I establish that by endorsing the view that the Constitution is a fundamental law created by one

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[99] C. JOERGES, "European law as conflict of laws," above, n. 71, 22.

single people, the US Supreme Court has been able to provide a coherent set of justifications to legitimize the judicial limitations placed upon states' reserved powers. I then turn to an example relating specifically to the case of the European Union, namely the stance of the German Constitutional Court towards European integration. My point is not to assess whether the *Bundesverfassungsgericht* is right or wrong when it assumes the right to ultimately limit the reach of European integration. Instead, I show that its position is in line with the assumptions pertaining to the nature of the European Union that form the premises of its reasoning. These two examples allow me to ultimately demonstrate that, given that the European Court of Justice has never settled the issue of the nature of the European Union, its power-based approach is, as a result, deprived of solid foundations, thereby leaving its authority open to question.

384. The US debate over the nature of the Union. The American Revolution literally revolutionized political theory, by transforming the then established concept of sovereignty. Until the 1776 Declaration of Independence, the American colonies were subject to British law and its principle of parliamentary sovereignty.[100] Under this principle, sovereignty was vested in Parliament, which included the king, lords, and commons. As is well known, the American colonists called for actual representation within the British Parliament, notably after the Stamp Act was passed in 1765, which for the first time required them to pay a direct tax to England. They professed the principle of 'no taxation without representation.' The British replied that they were already virtually represented, since each Member of Parliament represented not only his district, but also the entire nation. The colonists rejected this view and claimed instead that sovereignty could only reside in the people themselves. Accordingly, they fundamentally altered the existing paradigm by shifting the locus of sovereignty from the Parliament to the people. This ultimately led to the Declaration of Independence, which proclaimed that "Governments are instituted among Men, deriving their just powers from the consent of the governed."

385. Unresolved issues. Following the Declaration of Independence, the former colonies adopted the Articles of Confederation. It quickly became apparent that the central government, as it was established, was too weak to respond to the many challenges of the time. To address this problem, representatives of the states met at the Convention of Philadelphia, which eventually led to the adoption of the US Constitution in 1787. Both the Articles of

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[100] See A. V. DICEY, *An Introduction to the Study of the Law of the Constitution*, 1885.

Confederation and the Constitution were based on the principle of popular sovereignty.[101] S. H. BEER has noted, in this respect, that this principle "made possible the distinctively American form of constitutionalism and so of federalism."[102] However, if the US Constitution conferred on the central government substantial powers, such as, to quote but a few, the power to collect taxes, to borrow money or to regulate interstate commerce,[103] it nonetheless left fundamental constitutional issues unsettled. One of the most significant related to the very concept of sovereignty: where was it to reside? Everyone at the time agreed that it resided in the people, but some claimed that it was vested in the people of the nation, while others maintained that it was vested in the separate peoples of the states.[104] This question reflected a fundamental disagreement over the issue relating to the nature of the Union. For the former, the Union was a sovereign nation, composed of one single people, whereas for the latter, it was nothing more than a compact between sovereign states. This debate, deeply intertwined with the slavery issue, as well as with issues of an economic and societal nature,[105] divided American society until the second half of the nineteenth century. The nineteenth century witnessed a series of crises between nationalists and states' rightists, which ultimately culminated with the Civil War that took place from 1861 through 1865. Each of these crises gave nationalists and states' rightists the opportunity to put forward the conceptions they made of the Union respectively. The Civil War, won by Northern States, symbolizes the victory of the nationalist doctrine over the states' rights doctrine.

386. Outline. In the following paragraphs, I set forth, in turn, these two doctrines, which allows me to shed light on their respective claims relating to the status and legal framework that ought to be imposed on states' reserved powers. I finally show that the US Supreme Court has

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[101] See, for instance, D. G. SMITH, "An analysis of Two Federal Structures: The Articles of Confederation and the Constitution," 34 *San Diego Law Review*, 249-342 (1997).

[102] S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, (Cambridge, Mass: Belknap Press of Harvard University Press, 1993), 137.

[103] US Constitution, Article 1, Section 8.

[104] See among many, S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, above, n. 102; A. R. AMAR, "Of sovereignty and federalism," 96 *Yale Law Journal* 1425-1520 (1987); J. GOLDSWORTHY, "The debate about sovereignty in the United States: A historical and comparative perspective," in *Sovereignty in transition*, (Ed.) N. WALKER, (Hart Publishing, Portland USA), 423-446; L. K. FORD, "Inventing concurrent majority: Madison, Calhoun, and the problem of majoritarianism in American political thought," 60 *The Journal of Southern History*, 34 (1994).

[105] See A. BESTOR, "The American Civil War as a Constitutional Crisis," 69 *The American Historical Review* 327-352 (1964), who gives a very good overview of the many interrelated issues involved in the Civil War.

from very early on endorsed the nationalists' claims, which has enabled it to give substantial grounds for the limitations it has placed over time upon states' reserved powers.

387. (i) Sovereignty resides in the people of each state. The theory of compact federalism, whereby the US Constitution amounts to a compact between sovereign states, is rooted in MONTESQUIEU's confederate republic model. This republic, so the argument goes, is a "convention agreed by the governing bodies of the member republics,"[106] composed of "small states related to one another by only a few external needs, such as defense."[107] The Anti-Federalists pleaded for compact federalism during the constitutional debates,[108] and were then taken over by the advocates of the states' rights doctrine throughout the nineteenth century.[109] A. R. AMAR sums up their stance as follows:

> To states' rightists [...], the Peoples of each state were sovereign. [...] The Constitution was a purely federal compact among thirteen sovereign principals to coordinate certain joint activities by employing a common agency. [...] At most the Constitution simply made clear that sovereignty did not reside in state legislatures, as the Articles could have been (mis)interpreted as implying, but in state Peoples.[110]

Defending the view that sovereignty resides in the people of each state has defining implications for the status of states' reserved powers.[111]

388. Implications for states' reserved powers. Two main occasions gave states' rightists the opportunity to expose their views: the 1798 Alien and Sedition Acts, and protective tariffs. Firstly, the adoption of the Alien and Sedition Acts in 1798 gave rise to the theory of interposition. The states of Kentucky and Virginia issued Resolutions, in which they argued that, since the US Constitution was nothing more than a compact, states had the right to interpret the Constitution themselves, and, if necessary, to declare Acts of Congress such as the Alien and Sedition Acts, unconstitutional.[112] J. MADISON, who secretly drafted the Virginia Resolution, stated that when Congress exceeded its delegated powers, state governments "have

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[106] S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, above, n. 102, 231.
[107] Ibid., 231.
[108] See *The Anti-Federalist Papers*.
[109] See, generally, F. MCDONALD, *States' rights and the Union. Imperium in imperio. 1776-1876*, (Lawrence: University Press of Kansas, 2000).
[110] A. R. AMAR, "Of sovereignty and federalism," above, n. 104, 1452.
[111] See, for instance, D. J. MANN, "Contested competences and the contested nature of the EU: ambiguity as defining characteristic of the EU and the (early) US," in *Deconstructing federalism through competences*, (EUI WP Law 2012/06), 97.
[112] K. E. WHITTINGTON, "The political Constitution of federalism in Antebellum America: the Nullification Debate as an illustration of informal mechanisms of constitutional change," 26: 2 *Publius* 1, 4 (1996).

the right and are in duty bound to interpose for arresting the progress of the evil." According to this standpoint, states have a constitutional right to protect their spheres of powers against any encroachment from the national government. Next, protective tariffs were also at the center of political debates between Northern and Southern states. While the former were in favor of high tariffs to protect their industries, the latter wanted to lower them in order to encourage their exports.

389. One of the most famous of these political debates involved R. Y. HAYNE, a states' rightist, and D. WEBSTER, a nationalist, in 1830. It gave them the occasion to elaborate on their respective understanding of the Union. R. Y. HAYNE based its speeches on the premise that the Constitution was a compact between preexisting independent sovereign states.[113] In line with the Kentucky and Virginia Resolutions, he reiterated that the states have a constitutional right to interpret and enforce the Constitution, because they are to be put on equal footing with the national government: "if there be no common superior, it results, from the very nature of things, that the parties *must be their own judges*."[114] From this he inferred interesting conclusions with respect to states' powers:

> [States] have, it is true, voluntarily retained themselves from doing certain acts, but, in all other respects, they are as omnipotent as any independent nation whatever.[115]

Thus, limitations on states' powers may only flow from the will of the states. They enjoy discretion with respect to any power that they have not surrendered. In other words, they remain the final judges of the "proprietary of [their] use,"[116] which ultimately implies that they are entitled to settle issues relating to the division of powers between themselves and the national government.

390. Another famous Southern proponent stepped into the debate involving protective tariffs. J. C. CALHOUN, who described the 1828 Tariff as a 'Tariff of Abominations,' elaborated a comprehensive theory on government in his *Exposition* and in *A Disquisition on Government*.[117] Like other states' rightists, he viewed the US Constitution as a compact between sovereign

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[113] Speech of R. Y. HAYNE, January 27, 1830, in (Ed.) H. BELZ, *The Webster-Hayne Debate on the Nature of the Union. Selected Documents*, (Indianapolis: Liberty Fund, 2000), 165, 167.
[114] Ibid., 166.
[115] Ibid., 166-167 (Emphasis added).
[116] S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, above, n. 102, 253.
[117] J. C. CALHOUN, *A Disquisition on Government*, 1853, available from: https://ia600408.us.archive.org/5/items/disquisitionongo00calh/disquisitionongo00calh.pdf.

states. If the national government exceeded its powers, the states had the right, and even the duty, to interpose, and to nullify unconstitutional laws.[118] J. C. CALHOUN is mostly remembered for his ideas on the concurrent majority. Under this theory, the majority of the majority and the majority of the minority must systematically find an agreement on all core issues before a law may be adopted. The national and states governments being equal, they have the right to determine the reach of their respective powers. The supremacy clause may only apply within the spheres of the powers delegated to the national government. In sum, J. C. CALHOUN maintained that:

> The concurrent majority [...] tends to unite the most opposite and conflicting interests, and to blend the whole in one common attachment to the country. By giving to each interest, or portion, the power of self-protection, all strife and struggle between them for ascendency, is prevented; and, thereby, not only every feeling calculated to weaken the attachment to the whole is suppressed, but the individual and the social feelings are made to unite in one common devotion to country.[119]

391. This brief overview of the states' rights doctrine reveals that defending the compact theory has significant implications for the nature of the Union, and therefore for the nature of the relationship between the national government and the states. Under this view, the national government, including federal courts, does not hold the authority or the legitimacy to encroach upon states' spheres of powers. Sovereignty is vested in the people of each state, which have a say on each law enacted by Congress that would affect them individually. In the long run, the Southern states went as far as to use this doctrine to assert the power to secede, which was, in particular, a way for them to preserve their slavery powers as well as their economic interests, and which ultimately led to the Civil War.

392. *(ii) Sovereignty resides in one single people.* Turning now to the nationalists' stand, they took a very different perspective. Instead of describing the Constitution as a compact, they depicted it as the fundamental law of one single people. While MONSTESQUIEU inspired compact federalism, the national theory finds its roots in J. HARRINGTON's work *The Commonwealth of Oceana*.[120] In Oceana, the people of the whole nation ratify the "order." For J. HARRINGTON, the local governments moreover "serve local needs and guard against the possible abuse of

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[118] See, generally, J.-P. FELDMAN, *La bataille américaine du fédéralisme. John C. Calhoun et l'annulation*, (Paris, PUF, Léviathan, 2004).
[119] J. C. CALHOUN, *A Disquisition on Government*, above, n. 117, 48.
[120] S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, above, n. 102, 231.

power by the center; yet even in this role, they act as subdivisions of one nation."[121] These ideas are reflected in the views of the nationalists:

> To nationalists [...], the people of the United States as a whole were sovereign. [...] The Constitution was not an inter-sovereign compact or treaty, but a supreme statute deriving from the supreme sovereign legislature – the People of the nation.[122]

Two variants may be identified among nationalists' stances. On the one hand, some argue that the creation of the American people dated from the Declaration of Independence. The two main nineteenth-century proponents of this view are J. STORY and A. LINCOLN. In this respect, the latter famously claimed in 1861 that:

> Originally some dependent colonies made the Union, and, in turn, the Union threw off their old dependence for them, and made them States [...]. The Union, and not themselves separately, produced their independence and liberty. By conquest or purchase the Union have to each of them whatever independence or liberty it has. The Union is older than any of the States, and, in fact, it created them as States.[123]

On the other hand, others make a case for a 'transformational view,' according to which prior to the ratification process of the Constitution, the states were in fact independent sovereigns. Their transformation was induced by the various ratifications, which "formed the basic social compact by which formerly distinct sovereign Peoples, each acting in convention, agreed to reconstitute themselves into one common sovereignty."[124] These two alternatives thus raise the question as to where sovereignty was vested before the adoption of the Constitution.[125] However, notwithstanding their differences, they have the same implications for states' reserved powers.

393. Implications for states' reserved powers. From the existence of one single people, nationalists infer fundamental principles. First, the interpretation of the Constitution may only be uniform. As J. STORY underlines it, "having been adopted by the majority of the people," the fundamental law "binds the whole community *proprio vigore*."[126] Very interestingly, he goes on to assert that states are precluded from imposing their individual views on the whole of the

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[121] Ibid.
[122] A. R. AMAR, "Of sovereignty and federalism," above, n. 104, 1452.
[123] A. LINCOLN, Message to Congress of 4 July 1861. See also a contemporary thinker, S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, above, n. 102, 321-322, who shares the same view.
[124] A. R. AMAR, "Of sovereignty and federalism," above, n. 104, 1460.
[125] D. J. MANN, *'We, the people' vs. 'We, the peoples' – the debate over the nature of the Union in the USA in Canada and its lessons for European integration*, (EUI Ph.D. Thesis, 2012), 52.
[126] J. STORY, *Commentaries on the Constitution of the United States*, (Melville Madison Bigelow 5th ed. photo. reprint 1994, 1891), 242.

people.[127] The point implied here is that this would be contrary to the majoritarian, and therefore to the democratic, principles. In the same vein, and in response to R. Y. HAYNE, D. WEBSTER asserted, for instance, that:

> It is, sir, the People's Constitution, the People's Government; made for the People, made by the People; and answerable to the People.[128]
>
> For myself, sir, I do not admit the jurisdiction of South Carolina, or any other State, to prescribe my constitutional duty, or to settle, between me and the People, the validity of laws of Congress, for which I have voted. I decline their umpirage.[129]

Logically, this first principle gives rise to a second one, which is intrinsically linked to it. The uniform interpretation of the Constitution may be guaranteed only if the Supremacy Clause is enforced.[130] This leads to a third basic principle: the existence of one single interpreter of the Constitution.[131] Therefore, nationalists firmly reject any states' right to interposition or nullification. States, far from being entitled to delineate and protect themselves their own spheres of powers, are subject to the decisions of the federal tribunals in case of jurisdictional conflicts. And, since the People directly established the national government, the latter may exercise its powers without being subject to any state veto, but only to the rulings of the US Supreme Court.[132]

394. (iii) The endorsement of the national theory by the Supreme Court. Sketching a comprehensive overview of the Supreme Court political philosophy would fill several volumes. For present purposes, I will therefore limit myself to refer to but a few of the Supreme Court early rulings, which nonetheless give a good sense of where it stands. It endorsed, very early in its case law, the national theory. Strikingly, the cases in which it laid the basis for the most fundamental principles of its jurisprudence all start from the premise according to which the Constitution is a fundamental law created by one single people forming one nation. Admittedly, the Supreme Court was never directly called upon to rule on interposition or nullifications issues. The latter

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[127] Ibid., 284.
[128] Speech of D. WEBSTER, January 26 and 27, 1830, in (Ed.) H. BELZ, *The Webster-Hayne Debate on the Nature of the Union. Selected Documents*, above, n. 113, 125.
[129] Ibid., 138.
[130] J. STORY, *Commentaries on the Constitution of the United States*, above, n. 126, 245; Speech of D. WEBSTER, January 26 and 27, 1830, in (Ed.) H. BELZ, *The Webster-Hayne Debate on the Nature of the Union. Selected Documents*, above, n. 113, 137.
[131] J. STORY, *Commentaries on the Constitution of the United States*, above, n. 126, 242; Speech of D. WEBSTER, January 26 and 27, 1830, in (Ed.) H. BELZ, *The Webster-Hayne Debate on the Nature of the Union. Selected Documents*, above, n. 113, 137.
[132] S. H. BEER, *To Make a Nation. The Rediscovery of American Federalism*, above, n. 102, 251.

were mostly discussed during public debates. However, just a few years after the Kentucky and Virginia Resolutions, the Supreme Court set forth its fundamentally differing conception of the Constitution in the seminal case *Marbury v. Madison*, decided in 1803.[133] As is well known, this decision opposed W. Marbury, who had been appointed Justice of the Peace by the former President J. Adams, but whose commission was not subsequently delivered. The Supreme Court was asked whether the new Secretary of State J. Madison was to be compelled to deliver the aforementioned commission. To this end, it argued that it had to establish whether the provision of the Judiciary Act of 1789 that had enabled W. Marbury to bring his claim before the Court, which turned out to be contrary to the Constitution, should as a result be overturned. On this point, it began by stating:

> That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.[134]

Therefore, the starting point of its reasoning lies in the supreme character of the authority, vested in the people, who establish the fundamental principles of their government. It is from this fact that the Supreme Court infers that the Constitution is "superior, paramount law, unchangeable by ordinary means,"[135] and then that "a legislative act contrary to the Constitution is not law."[136] In other words, it is the national theory that allowed the Supreme Court to give grounds for its doctrine of judicial review, and to indirectly rule out the theories of interposition and nullification.[137]

395. The Court followed the same approach in two subsequent rulings. In *Martin v. Hunter's Lessee*, decided in 1816, J. STORY, writing for the majority, specified that the scope of the power of judicial review extended to state courts decisions involving civil matters of federal law after reasserting that:

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[133] *Marbury v. Madison* 5 U.S. 137 (1803).
[134] *Marbury v. Madison* 5 U.S. 137, 176 (1803). (Emphases added)
[135] *Marbury v. Madison* 5 U.S. 137, 177 (1803).
[136] Ibid.
[137] E. ZOLLER, "Aspects internationaux du droit constitutionnel. Contribution à la théorie de la fédération entre Etats," 294 *Recueil des Cours* §§94-95 (2002).

> The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by 'the people of the United States.'[138]

Likewise, in *Cohen v. Virginia*, the Supreme Court asserted jurisdiction with respect to state courts rulings involving criminal matters when the defendant claimed that her constitutional rights had been violated after placing emphasis on the following:

> That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one, and the government, which is alone capable of controlling and managing their interests in all these respects, is the government of the Union.[139]

396. National theory and states' powers. The endorsement of the national theory by the Supreme Court also had significant implications for the relationship between the national government and the states. It allowed it, in particular, to justify the major developments of its jurisprudence with respect to states' powers. In *Martin v. Hunter's Lessee*, it already noted, incidentally, that the US Constitution "was to act not merely upon individuals, but upon States, and to deprive them altogether of the exercise of some powers of sovereignty and to restrain and regulate them in the exercise of others."[140] Accordingly, not only does it govern the division of powers between the national government and the states, but also the conditions under which states' powers are exercised. The decisive moment occurred a few years later, in 1819, when the Court decided *McCulloch v. Maryland*. As I have already mentioned,[141] the facts of this case involved a statute enacted by the state of Maryland, which subjected the Bank of the United States to a tax. The Supreme Court was called upon to rule on two distinct issues. First, it was to decide whether the national government could validly establish a bank. Second, it was to assess whether the exercise of Congress power could have the effect of restraining states' own taxing powers. In both cases, it appealed to the national theory. With respect to the former, it interpreted for the first time the 'Necessary and Proper Clause'[142] of the Constitution and claimed that:

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[138] *Martin v. Hunter's Lessee* 14 U.S. 304, 325 (1816).
[139] *Cohen v. Virginia* 19 U.S. 264, 413-414 (1821).
[140] *Martin v. Hunter's Lessee* 14 U.S. 304, 328 (1816).
[141] See, *Supra*, § 368.
[142] US Constitution, Article 1, Section 8.

> The Government of the Union then [...] is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.[143]

Relying on this premise, the Court then demonstrated that since the Constitution was not a compact concluded by the various peoples of the states, the Clause was to be interpreted broadly.[144] With respect to the latter, I have already noted that Chief Justice MARSHALL resorted to arguments of a functional nature.[145] Besides these arguments, he added that:

> [W]hen a State taxes the operations of the Government of the United States, it acts upon institutions created not by their own institutions, but by people over whom they claim no control. It acts upon the measures of a Government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole.[146]

In other words, a state may not impinge on the jurisdiction of the national government for the very reason that the latter has been created by the whole of the people, while the state only represents its own constituents. Chief Justice MARSHALL thus based the necessary limitations placed upon states' taxing powers on the superiority of the authority of the national government over the authority of each individual state.[147]

397. Therefore, the national theory has played a fundamental role for the consistency and legitimation of the Supreme Court jurisprudence, and, in particular, of the judicial limitations placed upon states' powers. It forms an integral part of the Court's reasoning, and is the cornerstone of its internal coherence, as well as its own authority and legitimacy. In this respect, it is striking that the US Supreme Court almost systematically refers to the unity of the nation, and the necessity to preserve it, in rulings that have the effect of restricting states' reserved powers. It often refers, for instance, to Justice CARDOZO's famous assertion that "the peoples of the several states must sink or swim together," and that "prosperity and salvation are in union and not division."[148] All in all, the case law of the US Supreme Court reveals its constant efforts to justify and to set forth the rationale behind its reasoning. It does so by relying on the

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[143] *McCulloch v. Maryland* 17 U.S. 318, 404-405 (1819).
[144] *McCulloch v. Maryland* 17 U.S. 318, 413-414 (1819). A. R. AMAR, "Of sovereignty and federalism," above, n. 104, 1453.
[145] See, *Supra*, § 368.
[146] *McCulloch v. Maryland* 17 U.S. 318, 435 (1819).
[147] K. T. LASH, "The original meaning of an omission: The Tenth Amendment, popular sovereignty, and "expressly" delegated power," 83 *Notre Dame Law Review* 1905, 1943-1944 (2008).
[148] *Baldwin v. G. A. F. Seelig, Inc.* 294 U.S. 511 (1935).

national theory, and does not limit itself to explain why it is necessary, from a practical point of view, to restrain the exercise of states' reserved powers. Instead, it goes beyond functional arguments, by setting out why these restrictions are justified. And it does so by relying on structural arguments[149] i.e. "on basic principles it believes immanent in the structure of the United States as a federal union:"[150]

> There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.[151]

398. The German Constitutional Court approach.[152] Similarly, the German Constitutional Court has based its judgments involving European integration issues on a comprehensive set of premises that rely on political philosophy, while using these assumptions in a very different way than the US Supreme Court.

399. Premises reminiscent of the US compact federalism theory. The very starting point of the German Constitutional Court reasoning is, as J. H. H. WEILER and J. P. TRACHTMAN put it, the "no demos thesis."[153] The *Bundesverfassungsgericht* has indeed described the then European Community and the current European Union as a 'federation of States' (*Staatenverbund*), which:

> [C]overs a close long-term association of states which remain sovereign, a treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States in which the peoples, i.e. the citizens, of the Member states, remain the subjects of democratic legitimation.[154]

In other words, the source of authority of the European Union lies in the individual peoples of the Member States.[155] This premise is intrinsically linked to another assumption made by the German Court, namely that the Member States "remain the masters of the treaties."[156] The

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[149] A. R. AMAR "Intratextualism," 112 *Harvard Law Review* 747, 752 (1999).
[150] V. C. JACKSON "*Cook v. Gralike*: Easy cases and structural reasoning," 2001 *Supreme Court Review* 299 (2001).
[151] *McCulloch v. Maryland* 17 U.S. 318, 426 (1819).
[152] In what follows I use two of the German Constitutional Court rulings to support my claim: the so-called Maastricht (BVerfGE, 89, 155 (1993) unofficial translation available from: http://www.proyectos.cchs.csic.es/euroconstitution/library/Brunner_Sentence.pdf) and Lisbon (BVerfG, 2 be 2/08 (2009)) cases.
[153] J. H. H. WEILER & J. P. TRACHTMAN, "European constitutionalism and its discontents," 17: 1 *Northwestern Journal of International Law and Business* 354, 377 (1997).
[154] Lisbon Case, BVerfG, 2 be 2/08 (2009), 229. See also the Maastricht Case, BVerfGE 89, 155 (1993), 51: "The Union Treaty [...] establishes a federation of States for the purpose of realizing an ever closer union of the peoples of Europe (organized as States) and not a state based on the people of one European nation."
[155] Maastricht Case, BVerfGE 89, 155 (1993), 39; Lisbon Case, BVerfG, 2 be 2/08 (2009), 231.
[156] Lisbon Case, BVerfG, 2 be 2/08 (2009), 231.

Court moreover never misses an opportunity to recall that each Member State is sovereign, and that its powers proceed from its own people.[157] As a result, the fundamental feature of the European Union legal order lies in its derived character:

> The exercise of sovereign power through a federation of States like the European Union is based on authorizations from States which remain sovereign and which in international matters generally act through their governments and control the integration process thereby. It is therefore primarily determined governmentally.[158]

400. Implications for Member States' powers. Thus, the doctrine developed by the *Bundesverfassungsgericht* is highly reminiscent of the US compact federalism theory. It moverover infers implications for Member States' powers that are similar to its US counterpart.[159] Since the German Constitutional Court is of the view that the European Union derives both its authority and legitimacy from the Member States, it concludes that the latter's spheres of powers must be preserved.[160] The line that must not be crossed is defined by the conferral principle. Under no circumstances may the European Union have *Kompetenz-Kompetenz*.[161] In this respect, the Court argues that "[t]he obligation under European law to respect the constituent power of the Member states as the masters of the Treaties corresponds to the non-transferrable identity of the constitution."[162] It goes on by stressing that fields such as criminal law, the use of force, taxation, social policy, and cultural aspects relating to family law, education, and religious freedom are essential for Member States' constitutional identity.[163] This leads the *Bundesverfassungsgericht* to assert a fundamental principle, which is inconsistent with the European Court of Justice basic doctrine. Just as the states' rightists in *Antebellum* America, it is of the view that national constitutional courts have jurisdiction to review European Union acts that would encroach upon Member States' assent to the transfer of certain powers to the European Union.[164] Accordingly, it considers the principles of uniformity of interpretation and of primacy of European Union law as only relative. The German Constitutional Court indeed openly claims that it will rule out the application of a European

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[157] Maastricht Case, BVerfGE 89, 155 (1993), 44.
[158] Maastricht Case, BVerfGE 89, 155 (1993), 46. See also Maastricht Case, BVerfGE 89, 155 (1993), 55; Lisbon Case, BVerfG, 2 be 2/08 (2009), 231.
[159] L. CATÁ BACKER, "The extra-national state: American confederate federalism and the European Union," 7 *Colum. J. Eur. Law* 173, 198-204 (2001).
[160] Maastricht Case, BVerfGE 89, 155 (1993), 44.
[161] Maastricht Case, BVerfGE 89, 155 (1993), 48; Lisbon Case, BVerfG, 2 be 2/08 (2009), 233.
[162] Lisbon Case, BVerfG, 2 be 2/08 (2009), 235.
[163] Ibid., 249s.
[164] Maastricht Case, BVerfGE 89, 155 (1993), 48, 49; Lisbon Case, BVerfG, 2 be 2/08 (2009), 235, 240, 334, 336.

Union act on the German territory if it turns out to breach the conferral principle.[165] It thus sees itself, together with the other national constitutional courts, as the final arbiter of jurisdictional disputes involving the European Union and its Member States.[166] The adoption of these premises has therefore allowed the *Bundesverfassungsgericht* to follow a state-centered perspective, and to locate the source of authority of the European Union in the peoples of the Member States. Under this view, the European Union is a compound of States, and primarily remains an instrument of international law. The conclusions that the German Constitutional Court draws from these assumptions openly conflict with the case law developed by the European Court of Justice.

401. Critical assessment. Regardless of whether or not we agree with the doctrines developed by the US Supreme Court and the German Constitutional Court respectively, my claim is that they have the merit of being based on explicit premises. These assumptions have allowed the two courts to put forward a coherent set of arguments with respect to the legal framework that ought to be given to states' reserved powers. By contrast, the European Court of Justice power-based approach, much like its entire case law, lacks convincing foundations, which would make explicit and give grounds for the authority and legitimacy of European Union law to place limits upon the exercise of the powers retained by Member States.

402. The striking silence of the European Court of Justice. As is well known, the European Court established, in the very early years of the then European Economic Community, that not only does European Union law trump any national law contrary to it, but also that the Court is itself the ultimate interpreter of European Union law, thereby binding the national courts.[167] The enshrinement of the principles of direct effect and primacy gave rise to the constitutionalization process of the European Union legal order. Under this view, the latter is autonomous and independent of national legal orders:

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[165] Lisbon Case, BVerfG, 2 be 2/08 (2009), 241.

[166] R. SCHÜTZE, "On 'federal' ground: the European Union as an (inter)national phenomenon," 46: 4 *C. M. L. Rev.* 1069, 1094-1095 (2009). See also M. HERDEGEN, "Maastricht and the German Constitutional Court: Constitutional restraints for an 'ever closer union'," 31: 1 *C. M. L. Rev.* 235 (1994); A. G. SOARES, "The principle of conferred powers and the division of powers between the European Community and the Member States," 23: 1 *Liverpool Law Review* 57, 74-75 (2001); P. KIIVER, "The Lisbon Judgment of the German Constitutional Court: A Court-ordered strengthening of the national legislature in the EU," 16 *European Law Journal* 578-588 (2010).

[167] Case 26/62, *Van Gend en Loos*, [1963] *ECR* 3; Case 6/64, *Costa v. ENEL*, [1964] *ECR* 585. In Case 294/83 *Parti Ecologiste les Verts v. European Parliament*, [1986] *ECR* I-1339, the European Court of Justice described the Treaties as the 'constitutional charter of the Community,' and dropped the reference to international law.

> [T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member states but also their nationals.[168]

> [T]he Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[169]

But where from does the European Union derive its legitimacy? Several authors have addressed this issue. For some of them, the European Union is deprived of a constituent power; it emanates from international treaties, the parties of which are the Member States.[170] Others maintain that Member States' peoples provide its authority indirectly, through their respective governments and national parliaments.[171] Finally, mention must be made of P. PESCATORE, former scholar who was also a very influential judge at the European Court of Justice from 1967 through 1985. He is one of the first scholars who emphasized the significance of the structure of the then European Communities. He notably described the system established by the European Communities as "supranational," and defined the notion of supranationality as the "creation of a whole system of relationships of authority and power."[172] More specifically, three factors characterize it: (i) the recognition of common values; (ii) the existence of effective powers; (iii) and the existence of autonomous powers.[173]P. PESCATORE also made the claim that the law of integration, distinct from international law, rested on the premise of the "divisibility of sovereignty."[174] Starting from this fundamental assumption, he inferred that:

> The creation of common institutions, organized in such a way that all the states participating can recognize their objectivity, makes acceptable the limitations on national sovereignty arising from accession to a system governed by the law of integration.[175]

Accordingly, P. PESCATORE based the limitations placed on national sovereignty or, in other words, on national powers, on substantive arguments that relied on the nature of sovereignty,

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[168] Case 26/62, *Van Gend en Loos*, [1963] *ECR* 3.
[169] Case 6/64, *Costa v. ENEL*, [1964] *ECR* 585.
[170] U. K. PREUß, "Is there a constituent power in the European Union?," in *Le Pouvoir constituant et l'Europe*, (Eds.) O. CAYLA & P. PASQUINO, (Dalloz, Paris, 2011), 82-83; G. Marti, *Le pouvoir constituent européen*, 129.
[171] On this argument and its critique, see J. H. H. WEILER & J. P. TRACHTMAN, "European constitutionalism and its discontents," above, n. 153, 376-377.
[172] P. PESCATORE, *The law of integration: emergence of a new phenomenon in international relations, based on the experience of the European Communities*, (Leiden: A. W. Sijthoff, 1974), 49.
[173] Ibid., 50-51.
[174] Ibid., 30.
[175] Ibid., 33. See also, in the same vein: P. PESCATORE, *La répartition des compétences et des pouvoirs entre les Etats membres et les Communautés européennes: Etude des rapports entre les Communautés et les Etats membres*, (1967), 7.

the latter being seen as divided between two levels of government, and not exclusively on the practical necessity to impose constraints upon the Member States.

403. By contrast, the European Court of Justice has, up to now, always been conspicuously silent as to the source(s) of authority of the European Union. Unlike the US Supreme Court and the German Constitutional Court, it has never developed a comprehensive reasoning explaining the basis of the European Union's legitimacy. It has never, in other words, set out its own conception of the nature of the European Union. That being said, my claim is that the lack of such a premise in its reasoning has a detrimental effect on the coherence and consistency of its overall case law. Indeed, it ultimately prevents the Court from developing a thorough doctrine based on compelling grounds of authority and legitimacy, and also from countering the reluctance of national courts, starting with the *Bundesverfassungsgericht*. This is particularly true of its power-based approach. The power-based approach indeed pertains to fields where the European Union has either no, or very limited, jurisdiction. As a result, the conferral principle may not be used as a legitimate basis to give it solid grounds of justification. However, while the US Supreme Court has endorsed the national theory to justify the limitations put on states' reserved powers, and while the German Constitutional Court has developed the 'no demos' thesis to arrogate itself the right to rule out European Union acts impeding the conferral principle or Germany's constitutional identity, the European Court of Justice has simply stated the principle according to which Member States must comply with European Union law when exercising their retained powers, without going beyond the aforementioned functional justifications. In other words, as B. DE WITTE accurately points out:

> [The] Court has remained remarkably silent on the subject of sovereignty and has not made any attempt at formulating a comprehensive theory about the place of (State) sovereignty within the framework of European integration.[176]

My overall conclusion is, as a result, that the European Court of Justice power-based approach does not comprise comprehensive grounds of authority and legitimacy. However, I do not argue that the European Court of Justice should specifically follow either the perspective of the US Supreme Court or that of the *Bundesverfassungsgericht*. Instead, my point is that it should in turn develop its own coherent and explicit set of justifications. As a result, its power-based

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[176] B. DE WITTE, "Sovereignty and European integration: The weight of legal tradition," 2 *Maastricht J. Eur. & Comp. L.* 145, 154 (1995).

approach would be more coherent, legitimate and transparent, and thus less questionable from the perspective of legitimacy. It would also strengthen the Court's own authority as the ultimate arbiter of jurisdictional conflicts between the European Union and its Member States.

404. Conclusion of Section 1. In this first section, I have claimed that the Court of Justice's power-based approach is not grounded on a solid rationale. I have first established that the principle of primacy of European Union law is an unconvincing ground of justification as it is an instrument that does not aim to determine when there is a conflict but rather how to solve such a conflict. I have then reviewed, in turn, several justifications that actually play a part in the identification of the rationale behind the Court of Justice's case law involving powers retained by Member States. Justifications of a functional nature, such as effectiveness and the principle of sincere cooperation, are, admittedly, relevant grounds, but they nonetheless do not give sufficient authority and legitimacy to the power-based approach. As for the representation of out-of-state interests, it constitutes a deeper ground, based on democratic and fairness concerns, nonetheless it does not aim to specifically explain why the applicability of European Union law should extend to fields over which the European Union has no, or very limited, jurisdiction. These findings have led me to look into the reasoning of the US Supreme Court and the German Constitutional Court. Both courts have developed doctrines based on explicit foundations, which have allowed them to infer coherent implications for the legal status to be given to American states' and European Member States' powers respectively. This very element is lacking in the European Court of Justice's own power-based approach, which has the effect of weakening the legitimacy and authority grounds of the case law and of the Court itself. Cases involving powers retained by Member States – and, to a certain extent, all free movement cases – therefore reveal a striking discrepancy between the comprehensive assessment of proportionality made by the Court, as seen in Chapter 3,[177] and, to say the least, its evasive attitude towards the justification of the applicability of European Union law in fields over which Member States seek to retain jurisdiction.

[177] See, *Supra*, §§ 139s.

SECTION 2. THE STRUCTURAL MODEL ENTRENCHED BY THE POWER-BASED APPROACH

405. The purpose of the present section is to shed light on the structural model that is entrenched by the power-based approach in cases involving powers retained by Member States. In order to do so, I focus specifically on three components of the concept of federalism:[1] (i) the federal principle, which can be described as the general agreement that binds the members of a federation and which corresponds, therefore, to the foundation on which is built a federation; (ii) the federal balance, which refers to the manner the two levels of government interact; and (iii) the safeguards of federalism, i.e. the means used to safeguard the integrity of the various entities composing the federation. Taken together, these elements will help me shed light on the defining features of the nature of European federalism characterizing cases involving powers retained by Member States. Once again, I will rely in particular on the US federal experience.

1. Free movement, the cornerstone principle governing European federalism

406. In cases involving powers retained by Member States, the European Court of Justice primarily resorts to the principle of free movement as a yardstick against which the interplay between the European Union and its Member States, as well as among Member States themselves, is defined. As a result, the free movement principle should be described as a cornerstone principle governing European federalism. My argument is twofold. First, the central value underlying the free movement principle is the promotion of federalism, and not, contrary to what is commonly accepted, the protection of individual rights. Second, consistent with this assumption, I show that the primary function of the free movement principle, in cases involving powers retained by Member States, is the enforcement of federalism or, in other words, the regulation of the relations between the European Union and its Member States, and amongst Member States.

a. The underlying value: the promotion of federalism

407. In what follows, I provide a 'federal/structural-based' analysis of the free movement principle, which better reflects, in my view, the way it is used in cases involving powers retained by Member States. This approach draws on an understanding of the four traditional freedoms and European Union citizenship that is more holistic than the way they are traditionally

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[1] See, *Supra*, §§ 35s.

understood. This reveals that, notwithstanding their respective legal frameworks, the five freedoms ultimately protect the same value, the promotion of federalism. In order to substantiate my claim I first examine the US constitutional debate.

408. The US constitutional debate. As far as US constitutional provisions relating to what would be depicted in the context of the European Union as 'free movement issues' are concerned, several authors have challenged the traditional rights-based analysis. They have offered a reading of these provisions based on a structural perspective, which reveals that they primarily seek to promote federalism. As seen in the General Introduction, the US legal order includes several constitutional principles relating to free movement issues, namely: the Privileges and Immunities Clause of Article IV – also commonly called the 'Comity Clause,' the dormant Commerce Clause, and the right to travel.[2] In the same way as in the context of the European Union, many commentators, and, to a greater or lesser extent, the US Supreme Court itself, usually see these provisions as aiming primarily to protect individual rights.[3] However, several authors have challenged this traditional view, and have developed powerful arguments bringing to light its limits, and putting forward alternative, and more compelling, interpretations.

409. The Privileges and Immunities Clause of Article IV. The Privileges and Immunities Clause of Article IV of the US Constitution is, to begin with, very instructive, given that the US Supreme Court itself used to cast it as a constitutional provision protecting individual fundamental rights. Justice WASHINGTON, writing for the majority of the Court in *Corfield v. Coryell*, initially defined the privileges and immunities as those "which are, in their nature, fundamental; which belong, of right, to the citizens of all free Government."[4] Under this construction, the Privileges and Immunities was used to protect fundamental rights *per se*, regardless of the implications for the state statute subject to the Supreme Court's scrutiny for federalism. Following this initial phase, the Court began to move away from natural rights theories.[5] In *Paul v. Virginia*, it

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[2] See, *Supra*, §§ 23s.

[3] J. NZELIBE, "Free movement: A federalist reinterpretation," 49 *Am. Univ. L. Rev.* 433, 441 (1999): "It seems that every anti-discriminatory, union-promoting principle embedded in the Constitution has been cast at one time as a personal or individual right."

[4] *Corfield v. Coryell* 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

[5] L. H. TRIBE, *American Constitutional Law*, (New York: N.Y.: Foundation Press, 2000), 1251; D. S. BOGEN, *Privileges and Immunities. A Reference Guide to the United States Constitution*, (Praeger, Westport, Connecticut, London, 2003), 69.

described the privileges and immunities as "those privileges and immunities that each state affords to its own citizens under their constitution and laws."[6] It instituted a new test, under which it had to be asserted whether a state discriminated against nonresidents and, if so, whether the rights affected were fundamental. The decisive move occurred in *Toomer v. Witsel*, where the Supreme Court abandoned the 'fundamentality' criterion to focus instead on the justifications given by the states with respect to the challenged discrimination. The majority of the Court ruled that:

> The primary purpose of this clause [...] was to help fuse into one nation a collection of independent, sovereign states. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.[7]

Even if the Supreme Court again referred to fundamental rights in several subsequent cases,[8] a number of authors have developed compelling arguments showing that the primary purpose of the Privileges and Immunities Clause is "to facilitate federalism by preventing parochialism in the treatment by a state of citizens of other states."[9] At the core of the Comity Clause is ensuring harmonious interstate relations, not protecting individuals from state interference. J. M. GONZALES shows, in this respect, that it must be read in the context of other constitutional provisions, all of which aim to "promote peaceful relations among the states by eliminating many of the obstacles to the realization of an effective union among them."[10] These provisions are the Full Faith and Credit Clause of Article IV, the Interstate Rendition Clause of Article IV, the Interstate Compact provision of Article A, the Commerce Clause, and Article III, §2, Clause 1 relating to the federal judicial power. The Comity Clause moreover has its roots, as does the Commerce Clause, in Article IV of the Articles of Confederation, the purpose of which was to regulate interstate relations.[11]

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[6] *Paul v. Virginia* 75 U.S. (8 Wall.) 168 (1869).
[7] *Toomer v. Witsell* 334 U.S. 385, 395 (1948).
[8] E.g. *Hicklin v. Orbeck* 437 U.S. 518 (1978); *New Hampshire v. Piper* 105 S. Ct. 1272 (1985).
[9] J. M. GONZALES, "Comment: The interstate Privileges and Immunities: Fundamental rights or federalism?," 15 *Capital University Law Review* 493, 494 (1986).
[10] Ibid., 495-496.
[11] Article IV, §1 of the Articles of Confederation reads as follows: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner

410. The dormant Commerce Clause. Many authors point to the common features shared by the Privileges and Immunities Clause and the dormant Commerce Clause.[12] The latter is intrinsically linked to the building of a common market, which was one of the main reasons why the US Constitution was ratified in the first place. Here again, some scholars have shown that the dormant Commerce Clause should be read from a federal-based perspective instead of an individual-rights perspective. Consistent with this approach, R. B. COLLINS has described the rights recognized under this provision as "intergovernmental," and not as "personal." He has maintained that the dormant Commerce Clause is fundamentally concerned with interstate jurisdictional conflicts on the following grounds:

> Personal theories are wrong. The framers' concern with economic union arose from conflicts among the states and problems of foreign trade, not from disputes between the states and individual merchants.[13]

411. The right to travel. Turning now to the right to travel, as one author has put it, its "sources and dimensions [...] as a constitutional entitlement remain mysterious and indeterminate."[14] The Supreme Court nonetheless seems to have rooted it in the Equal Protection Clause of the Fourteenth Amendment. As a result, constitutional issues involving interstate travel are analyzed through the lens of a rights-based perspective, which consists in focusing on "classifications based on how recently an individual has traveled into a state."[15] In *Crandall v. Nevada*, which concerned a tax imposed by the state of Nevada on people leaving this state by vehicles which were in the business of transporting passengers, the Court held for the first time that the right to travel was a fundamental right.[16] In *Saenz v. Roe*, a contemporary ruling involving a California statute limiting the amount of welfare benefits available to newcomers to what they were entitled to in their state of prior residence,[17] it confirmed this 'rights-based reading' of issues relating to interstate travel:

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is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them."

[12] See, for instance, L. H. TRIBE, *American Constitutional Law*, above, n. 5, 1260.

[13] R. B. COLLINS, "Economic union as a constitutional value," 63 *N. Y. U. L. Rev.* 43, 46 (1988).

[14] B. H. WILDENTHAL, "State parochialism, the right to travel, and the privileges and immunities Clause of Article IV," 41: 6 *Stanford Law Review* 1557, 1575 (1989).

[15] B. H. WILDENTHAL, "State parochialism, the right to travel, and the privileges and immunities Clause of Article IV," above, n. 14, 1574. See also J. NZELIBE, "Free movement: A federalist reinterpretation," above, n. 3, 435.

[16] *Crandall v. Nevada* 73 U.S. 35 (1868).

[17] See, *Supra*, § 345.

> The states have not now, if they ever had, a power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any state he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.[18]

However, convincing arguments have been developed to challenge this understanding. To begin with, S. O'CONNOR, a Supreme Court Justice, offered a convincing alternative in a concurring opinion in *Zobel v. Williams*. This case related to a law enacted by Alaska in order to distribute income derived from its natural resources to its residents, the amounts of which varied depending on the length of each citizen's residence. It thus had the effect of favoring long-term residents to the detriment of newcomers. S. O'CONNOR argued that the right to travel should no longer be grounded in the Equal Protection Clause of the Fourteenth Amendment, but instead in the Privileges and Immunities Clause of Article IV. She argued that:

> [A]pplication of the Privileges and Immunities Clause to controversies involving the "right to travel" would at least begin the task of reuniting this elusive right with the constitutional principles it embodies.[19]

The constitutional principles S. O'CONNOR alluded to relate to federalism principles. As L. TRIBE has persuasively pointed it out, the right to travel primarily embodies a "concern for interstate comity"[20] instead of an individual right relating to interstate movement. It is indeed a "structural principle,"[21] which reflects "the Court's vision of governmental design in a federal union of equal states."[22] Other authors have similarly shown that the underlying values of the right to travel are in fact the "explicit condemnation of state parochialism,"[23] and the promotion of the federal union.[24]

412. The common rationale behind the US 'free movement provisions.' Therefore, taken together, the Privileges and Immunities Clause of Article IV, the dormant Commerce Clause, and the right to travel embody the same rationale despite the different constitutional contexts in which

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[18] *Saenz v. Roe*, 526 U.S. 489 (1999).
[19] *Saenz v. Roe* 526 U.S. 489 (1999). (S. O'Connor, concurring).
[20] L. H. TRIBE, "Comment: *Saenz* sans prophecy: does the privileges or immunities clause revival portend the future – or reveal the structure of the present?," 113 *Harvard Law Review*, 110, 141 (1999).
[21] Ibid., 146.
[22] Ibid., 154.
[23] B. H. WILDENTHAL, "State parochialism, the right to travel, and the privileges and immunities Clause of Article IV," above, n. 14, 1575.
[24] J. NZELIBE, "Free movement: A federalist reinterpretation," above, n. 3, 435.

they apply. They are all meant to protect two sets of intertwined interests: the preservation of the nation's political, social, and economic unity,[25] and the prevention of state parochialism.[26] These two sets of concerns are ultimately two sides of the same coin, the promotion of federalism. As J. NZELIBE convincingly puts it, "the freedom-to-move principle, the Commerce Clause, and the Comity Clause constitute a 'trio' of union-conserving norms."[27]

413. The lessons for the ECJ power-based approach. In what follows, I demonstrate that the traditional reading of the free movement principle, stemming, in a similar way to what occurs in the US context, from a rights-based approach, does not allow for an entirely comprehensive account of the role and function played by that principle in the cases concerned by the power-based approach. Its shortcomings, to be overcome, call for what I have described a "federalist" or "structural" reinterpretation inspired by what I have just depicted in relation to US constitutional theory.

414. Traditional reading: the conferring of individual rights. The principle of free movement is of crucial importance for European integration. It forms the pillar of the establishment and the functioning of the internal market, which was, historically, the primary goal of the then European Economic Community. As is well known, it encompasses the four traditional economic freedoms. In this respect, Article 26§2 TFEU provides that:

> The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

Mention must also be made of a non-economic freedom, the free movement enjoyed by citizens of the European Union, introduced by the Maastricht Treaty. The European Court of Justice gradually recognized that each of the freedoms have direct effect, which has enabled natural and/or legal persons to resort to the free movement provisions before national courts when their claims involve free movement issues. Scholars typically note that, as F. G. JACOBS puts it, "[w]ith the assistance of direct effect, the freedoms set out in the Treaty [...] are transformed

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[25] D. S. BOGEN, *Privileges and Immunities. A Reference Guide to the United States Constitution*, above, n. 5, 27; R. B. COLLINS, "Economic union as a constitutional value," above, n. 13, 60; J. NZELIBE, "Free movement: A federalist reinterpretation," above, n. 3, 436, 445; W. A. KNOX, "Prospective applications of the Article IV Privileges and Immunities Clause of the United States Constitution," 43 *Missouri Law Review* 1, 18 (1978).

[26] R. A. SEDLER, "The negative commerce clause as a restriction on state regulation and taxation: an analysis in terms of constitutional structure," 31 *Wayne Law Review* 885, 1011 (1985); B. H. WILDENTHAL, "State parochialism, the right to travel, and the Privileges and Immunities Clause of Article IV," above, n. 14, 1563.

[27] J. NZELIBE, "Free movement: A federalist reinterpretation," above, n. 3, 441.

into individual rights."[28] The Court of Justice has inferred from each freedom, described as "fundamental," a specific set of individual rights. On that account, free movement cases are usually analyzed from a right- and an individual-centered perspective. E. SPAVENTA's claim according to which "the effect of the free movement provisions is to impose a duty to refrain from disproportionate interference with fundamental economic and non-economic rights,"[29] is emblematic of this approach. This author also characterizes the Court of Justice as "a guarantor of individual rights *vis-à-vis* national regulators."[30] In other words, the free movement principle is seen as a tool creating a direct bond between the European Union and individuals. Under this view, it is considered as a means to prevent national authorities from hampering individual free movement rights.

415. Traditional reading: the focus on the nature of individual rights. In line with this view, many authors have looked into the content and the nature of free movement rights. Many of them have focused on the significant shift that has occurred. Initially, so the argument goes, the rights embodied in the four traditional freedoms were first and foremost of an economic nature.[31] They were designed to protect economic interests, in accordance with the economic agenda of the European Economic Community. However, the broadening of the scope of free movement rights followed the expansion of the objectives pursued by European integration. The European Court of Justice soon attached a social dimension to the rights derived from the four economic freedoms, principally the free movement of workers and the freedom of establishment. For instance, workers and self-employed, as well as their families, were recognized as having free movement rights pertaining to the fields of social security and education.[32] In some notable cases, such as *Carpenter*[33] in particular, the Court of Justice moved

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[28] F. G. JACOBS, "The evolution of the European legal order," in *A Review of Forty Years of Community Law. Legal Developments in the European Communities and the European Union* (Ed.) A. MCDONNELL, (Kluwer Law International, The Hague, 2005), 26. (Emphasis added)

[29] E. SPAVENTA, "From *Gebhard* to *Carpenter*. Towards a (non-)economic European constitution," 41 *C. M. L. Rev.* 743 (2004).

[30] Ibid., 772-773.

[31] See, for instance, P. PESCATORE, "Fundamental rights and freedoms in the system of European Communities," 18 *Am. J. Comp. L.* 343, 349 (1970); C. A. BALL, "The making of a transnational capitalist society: The Court of Justice, social policy and individual rights under the European Community's legal order," 37 *Harv. Int'l. L. R.* 307, 339 (1996). For a critique of the traditional Court's approach see, for instance, J. COPPEL & A. O'NEILL, "The European Court of Justice: Taking rights seriously?," 29 *C. M. L. Rev.* 669-692, (1992).

[32] See, generally, C. A. BALL, "The making of a transnational capitalist society: The Court of Justice, social policy and individual rights under the European Community's legal order," above, n. 31, esp. 333s; F. DE WITTE, "The role of transnational solidarity in mediating conflicts of justice in Europe," 18 *European Law Journal*, 694, 699 (2012); N. NIC SHUIBHNE, "The Outer Limits of European Union citizenship: Displacing Economic Free

further away from a pure economic rationale.[34] Against this backdrop, European Union citizenship was introduced, and the Court soon described it as the "fundamental status" of European Union citizens.[35] It decided cases of great significance, which have the effect of integrating non-economically active individuals into the law of free movement, and of allowing them to benefit from a brand new range of rights. Taken together, these various trends laid down the foundations for a decisive shift from 'market citizenship' towards the building of 'Union citizenship.'[36] The four economic freedoms and European Union citizenship are increasingly seen as forming a whole, and as mutually complementing and influencing each other. Next, some scholars, instead of focusing on the social dimension of the economic freedoms, have put emphasis on their political dimension. M. P. MADURO and C. JOERGES inferred, as I have already pointed it out in Section 1,[37] that rather than giving rise to economic or social rights, the four freedoms must be seen as bringing about fundamental *political* rights. Under this view, the primary function of the free movement principle is to reinforce the rights of individuals who are not represented in the national political process. All in all, most authors agree that the law of free movement has produced a set of fundamental individual rights, which forms one of the defining features of the European Union legal order. G. DE BÚRCA has shown, in this respect, that the "language of rights," as introduced by the European Court of Justice – notably but not exclusively in free movement law – has both "a legitimating and an integrating force."[38]

416. Cases involving powers retained by Member States. Cases involving powers retained by Member States are admittedly another illustration of the Court of Justice increasingly placing economic, social, and political concerns on the same footing. Thus, for instance, one of the main outcomes of the cases relating to social security is the creation of cross-border patients'

Movement Rights?," in *The Outer Limits of European Union Law*, (Eds.) C. BARNARD & O. ODUDU, (Hart Publishing, 2009), 167-195.

[33] Case C-60/00, *Carpenter*, [2002] *ECR* I-6279.

[34] E. SPAVENTA, "From *Gebhard* to *Carpenter*. Towards a (non-)economic European constitution," above, n. 29, 744.

[35] Case C-184/99, *Grzelczyk*, [2001] *ECR* I-6193, 31.

[36] A. TRYFONIDOU, "Further steps on the road to convergence among the market freedoms," 35: 1 *Eur. Law Rev.* 39-41 (2010); F. WOLLENSCHLÄGER, "A new fundamental freedom beyond market integration: Union Citizenship and its dynamic for shifting the economic paradigm of European integration," 37: 1 *European Law Journal* 1-34 (2011).

[37] See, *Supra*, §§ 376s.

[38] G. DE BÚRCA, "The language of rights and European integration," available from http://aei.pitt.edu/6920/1/de_búrca_gráinne.pdf.

rights, which are first and foremost social in nature. They apply to any patient seeking cross-border health care, regardless of whether they are economically active. The same holds true, to a certain extent, for direct taxation. Recognizing new tax rights certainly provides nonresident taxpayers with economic benefits. But these rights also entail a social dimension, as they allow nonresident individuals to benefit from the solidarity of their employment state, and from a certain degree of integration in their host society. Cases involving powers retained by Member States also confirm that there is an increasingly converging rationale behind the traditional four freedoms and European Union citizenship. *Schwarz*[39] concerned, for instance, a German tax rule according to which payments of school fees to certain schools located in the German territory, but not payments to schools located in other Member States, could be treated as special expenditure leading to a reduction of income tax. The Court assessed, in turn, whether the national measure was compatible with the freedom to provide services and European Union citizenship. It notably construed the two provisions in a quasi-identical way. In particular, it looked at the German rule in light of the same ranges of justifications,[40] and reached identical conclusions. Accordingly, this case corroborates the idea that an originally purely economic freedom and European Union citizenship may now both protect rights of a similar nature, in this case the right to seek education abroad. Cases involving powers retained by Member States moreover confirm that the European Court of Justice uses the free movement principle as a way to give voice to individuals not represented in the national political process in any field, regardless of whether it involves Member States' core economic, social, and political autonomy. As a result, cases involving powers retained by Member States are another sign of the gradual *objectification* of the fundamental freedom provisions. They are not economic-centered, but affect equally national interests of an economic, social, and political nature.

417. Shortcomings. However, this usual reading of the free movement principle offers an explanatory framework that does not provide an entirely satisfactory scheme to analyze the cases involving powers retained by Member States. My claim is that it suffers from at least two main shortcomings. First of all, this approach overshadows, to a great extent, a fundamental range of actors, which nonetheless play a defining role in the framework of the power-based approach,

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[39] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849.
[40] Ibid., 95-96.

namely, the Member States. In this respect, I have previously shown that if individual rights play a significant role in the Court of Justice's reasoning, it nevertheless primarily assesses these cases through an approach that puts great emphasis on the Member States.[41] Second of all, this approach does not provide a full understanding of the nature of individual free movement rights, as it ignores the their implications and significance for European integration. The fact must be stressed that free movement rights do not have the same nature as traditional individual rights. They reflect, to borrow R. LECOURT's words, that free movement rights holders are "auxiliary agents" of the European Union.[42] To put it differently, as far as cases involving powers retained by Member States are concerned, the traditional reading of the free movement principle suffers from the same shortcomings as the traditional US literature relating to the abovementioned constitutional provisions and principles. It does not pay enough attention to the structural dimension of the four economic freedoms and European Union citizenship.

418. A federalist reinterpretation of the free movement principle. That being said, I suggest revisiting the free movement principle through a federal/structural perspective. Cases involving powers retained by Member States reveal that the free movement principle is not primarily about conferring individual rights, but rather regulating the relations between the European Union and its Member States on the one hand, and interstate relations on the other hand. It is about striking a balance between European and national interests i.e. between free movement requirements and national autonomy. This is particularly reflected at the applicability stage, which includes the formulae, and at the justification stage. As seen earlier,[43] the justifications admitted in cases involving powers retained by Member States are a means for Member States to reassert their jurisdiction, and/or to protect their financial interests. Taken together, the four economic freedoms and European Union citizenship are, like their US counterparts, characterized by the same underlying value, the promotion of federalism. They are used by the Court to both preserve the unity of the European integration process and prevent Member States' parochialism. Such a perspective allows the aforementioned shortcomings of the rights-based reading of the free movement principle to be overcome. First, it is more in line with the wording of the free movement provisions, which are, it is to be recalled, directed at Member

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[41] See, *Supra*, § 91.
[42] R. LECOURT, *L'Europe des juges*, (Brussels, Bruylant, 1976).
[43] See, *Supra*, §§ 154s.

States.[44] Second, a federal-based perspective places Member States' interests on the same footing as individual and European interests, thereby better reflecting their role for the European integration process. Last but not least, it provides a better assessment of the nature of the free movement principle and of the rights attached to it. It depicts the free movement principle as a *neutral* principle, which, for the needs of the preservation of European federalism, may equally give rise to economic, social, and political individual rights. Like the Privileges and Immunities Clause of Article IV, the dormant Commerce Clause, and the right to travel, it is first and foremost a *structural* principle governing the relations between the European Union and its Member States and interstate relations.

b. The primary function: the enforcement of federalism

419. Understood as embodying a value promoting federalism, the free movement principle must be seen as having as its primary function the enforcement of federalism in cases involving powers retained by Member States. This function consists in striking the right federal balance, which ultimately has the effect of bestowing a peculiar nature on individual free movement rights.

420. Striking the European federal balance. As far as the US constitutional order is concerned, J. M. GONZALES points out that:

> [T]o prevent states from ignoring constitutional proscriptions of parochialism, several express provisions of the federal Constitution limit the extent to which the several states are permitted to exercise powers reserved to them under the Constitution.[45]

Therefore, one of the main functions assigned to these constitutional provisions is to place limitations upon states' powers, to the extent that this jeopardizes the US federal principle. The same holds true with respect to the four economic freedoms and European Union citizenship in cases involving powers retained by Member States. As I have demonstrated it in Chapter 3,[46] one of the main effects of the European Court of Justice power-based approach is to limit the discretionary character of the way Member States exercise their powers. Thus, the Court primarily uses the free movement principle as a means to regulate the exercise of the powers retained by Member States. Such an exercise must comply with two sets of interests: the

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[44] See, *Supra*, § 2.
[45] J. M. GONZALES, "The interstate Privileges and Immunities: Fundamental rights or federalism?," above, n. 9, 495.
[46] See, *Supra*, §§ 177s.

interests of the European Union and the interests of the other Member States involved in the jurisdictional dispute at stake. In addition, the four economic freedoms and European Union citizenship also allow Member States to rely on a set of justifications aimed at protecting and preserving their autonomy and their existence as separate individual states. All in all, the Court of Justice uses the free movement principle to ensure harmonious relations among the different actors of European integration: the European Union, the Member States and the individuals.

421. The resulting nature of free movement rights. The primary function of the free movement principle being the enforcement of federalism, this is reflected in the nature of free movement rights. The reference to the US legal order is once again helpful. First of all, J. NZELIBE characterizes the rights conferred on individuals by the Supreme Court in rulings involving free movement issues as "surrogate rights," that ought to be distinguished from fundamental rights:

> [S]urrogate rights can be considered those interests asserted by the individual against the state to protect values that are essential to the existence of one union, as opposed to values that presume there are certain liberties inherent to the individual upon which the state may not infringe.[47]

Likewise, I contend that, in the European Union legal order, free movement rights embody the same federalist values. In free movement cases, and in cases involving powers retained by Member States in particular, individuals are, so to speak, agents of the European Union, or, as the same author would put it, "private enforcer[s] of a norm designed to promote federalism."[48] In other words, much like in the US legal order, in the European Union, individual free movement rights "depend pervasively on judicial assessment of the appropriate scope of government powers."[49] They are not counterbalanced to other individual rights, but, instead, to national interests. In free movement cases, the Court seeks to assess whether the recognition of individual rights at the European Union level has a deterrent effect on Member State autonomy. As a result, this original understanding of free movement rights explains why the Court of Justice may equally recognize economic, social, and political rights. Second of all, A. ERBSEN has emphasized the horizontal dimension of the US free movement rights. Describing them as "horizontal rights," he has shown that one of the defining features of these rights is to "shield individuals from adverse effects of the friction-inducing behavior [...] that are an

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[47] J. NZELIBE, "Free movement: A federalist reinterpretation," above, n. 3, 451-452.
[48] Ibid., 451.
[49] R. H. FALLON, "Individual rights and the powers of government," 27 *Georgia Law Review* 343, 363 (1992).

inevitable consequence of divided sovereignty, coequality and aggregate state power."[50] The same holds true with respect to the rights recognized in cases involving powers retained by Member States. They indeed allow individuals to appeal to a federal arbitrator, the European Court of Justice, when they face two Member States unwilling to cooperate to allow them to move freely throughout the European Union. All in all, seeing these free movement rights as being simultaneously individual, surrogate, and horizontal rights better reveals the interactions between rights and structure that occur in the cases involving powers retained by Member States. To put it differently, this reveals a cross-fertilization process, defined by G. P. MILLER in the US context as follows:

> Principles derived under the system of rights ought to have some impact on questions that arise under the system of structure; conversely, principles derived from the system of structure ought to inform our understanding of rights.[51]

In other words, this reflects the role played by these rights for the gradual building of the European federal balance that must now be identified.

2. The nature of the European federal balance

422. A few years ago, R. SCHÜTZE published a book entitled *From Dual to Cooperative Federalism. The Changing Structure of European Law*[52] in which he contends that European federalism is nowadays moving on from dual to cooperative federalism. In his view, Europe's exclusive powers, as well as those of the Member States, are gradually declining while a form of European cooperative federalism is emerging and is even in the process of being constitutionalized.[53] He supports his claim by taking many concrete examples.[54] And yet, he does not refer to the European Court of Justice's power-based approach. The aim of the present section is therefore to put specific emphasis on this issue, and to assess whether the Court's approach is closer to a dual or a cooperative model of federalism by comparing it with the relevant case law of the American Supreme Court. My claim is basically that in cases involving

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[50] A. ERBSEN, "Horizontal federalism," 93 *Minn. L. Rev.* 493, 547-548 (2008).
[51] G. P. MILLER, "Liberty and constitutional architecture: The rights-structure paradigm," 16 *Harvard Journal of Law and Public Policy* 87, 88 (1993).
[52] R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, (Oxford University Press, 2009).
[53] Through the principle of subsidiarity (See R. SCHÜTZE, *From Dual to Cooperative Federalism. The changing structure of European law*, above, n. 52, 241-265) and complementary competences (Ibid., 265-286).
[54] Among them Article 352 TFEU (the so-called 'flexibility clause') and Articles 114 and 115 TFEU (former Articles 94 and 95 relating to the power to harmonize national legislations in the internal market field).

powers retained by Member States, the Court of Justice implements a hybrid approach which borrows, to a greater or lesser degree, from the two US models of dual and cooperative federalism. After defining the concepts of dual and cooperative federalism, I show that the power-based approach is both characterized by the recognition of discrete spheres of powers, and by the intrusions of European Union law into fields where the European Union has no, or very limited, jurisdiction.

a. Defining terms: dual federalism v. cooperative federalism

423. Dual federalism. Dual federalism has been defined in the American context as "a concept of separate state and federal governments operating in distinct spheres with little significant overlap or significant 'sharing' of authority,"[55] where "each of the two sovereignties has its own exclusive area of authority and jurisdiction, with few powers held concurrently."[56] E. S. CORWIN has famously described its four axioms as follows:

> 1. The national government is one of enumerated powers only. 2. Also, the purposes which it may constitutionally promote are few. 3. Within their respective spheres the two centers of government are 'sovereign' and hence 'equal'. 4. The relation of the two centers with each other is one of tension rather than collaboration.[57]

Thus, the main feature of dual federalism resides in the idea that it is possible to identify two discrete spheres of powers in a constitutional order: one that belongs exclusively to the States and another that belongs exclusively to the general government. In each of these spheres, the centers of government may exercise their powers in their own way, without taking into account the interests of the other center.

424. Cooperative federalism. Cooperative federalism is generally distinguished from dual federalism. Unlike the latter, the cooperative model does not assume that the spheres of federate and federal powers are mutually exclusive. On the contrary, the powers of states and of the central government are viewed as being deeply intertwined: "the National government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their

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[55] H. N. SCHEIBER, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," 9 *University of Toledo Law Review* 619, 626 (1977-1978).
[56] D. J. ELAZAR, *The American Partnership*, (Chicago: Rand-McNally, 1966), 22.
[57] E. S. CORWIN, "The Passing of Dual Federalism," 36 *Virginia Law Review* 1, 4 (1950).

applicability to the problem in hand."[58] Accordingly, the cooperative model constitutes an alternative to the "rigid 'parallel function' theory of dual federalism."[59] In this regard, M. H. REDISH has suggested labeling it as "interactive federalism:"

> [A] term more neutral than 'cooperative' and one that recognizes the inevitable intertwining of the state and federal systems as they both go about the business of governing. At times, this interaction will be combative in nature, where the governing decisions of one sovereign differ from the other's and threaten the social and economic policies sought to be advanced by the other's decisions. Yet, at other times the actions of the respective sovereigns will be supplementary or complementary to each other, combining to meet the same problem in different but not conflicting ways. At still other times the problems facing government will call for some form of cooperative action – either through direct joint action, or more indirectly, through the exchange of information, ideas and experience. There is no reason to believe that combative and cooperative federalism are mutually exclusive; both are manifestations of the dynamic interaction of the state and federal systems.[60]

425. Thus, dual and cooperative federalism models substantially differ from one another. The former is based on the assumption that the federal balance can only be preserved if powers are strictly and rigidly divided. Conversely, the latter is based on the idea that powers are intertwined, which implies that each level of government may regulate the same subject matters, and that the two levels of government are coordinated in such a way as to act alongside harmoniously. Accordingly, the fundamental issue is no longer '*Who* has the power to exercise a powers?' but instead '*How* are powers to be exercised?'

b. The recognition of discrete spheres of powers

426. In what follows, I focus on the 'dual dimension' of the European Court of Justice case law involving powers retained by Member States. In doing so, I assess to what extent the European Court of Justice approach can be compared to the US Supreme Court cases that were decided when American federalism corresponded to a dual model of federalism. To this end, I inquire how the European and American Courts have recognized the existence of separate spheres of powers within their respective legal orders.

427. US Constitutional law. The American Supreme Court was called upon, from its earliest decisions, to settle disputes between the national and state governments regarding the division and the exercise of powers. This gave it the opportunity to set out the main features of

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[58] Ibid., 19.
[59] M. H. REDISH, *The Constitution as Political Structure*, (New York: Oxford University Press, 1995), 29.
[60] Ibid. (Emphases added).

American federalism. Views differ as to the basis on which the Court developed its first judicial theories regarding federalism. Some scholars contend that the Court genuinely respected the intentions of the Framers.[61] Others are of the view that "it does not appear that the Constitution on its face dictates the dual federalism model."[62] The fact remains, however, that the Supreme Court initially opted for a dual interpretation of American federalism.[63] The US Supreme Court was asked for the first time,[64] in *McCulloch v. Maryland*, to settle a jurisdictional dispute between a state and the central government. Chief Justice MARSHALL ruled, in this regard, that:

> In America, the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.[65]

In Chief Justice MARSHALL's mind, divided sovereignty implies dual federalism. Powers are strictly divided, and belong to two mutually exclusive spheres. Each center of government exercises its powers freely and independently from the other center. Accordingly, the idea of "peaceful" or "fruitful" interaction between the two spheres is excluded; this corresponds to E. S. CORWIN's fourth axiom that described the relation between such spheres as "one of tension." Chief Justice MARSHALL confirmed his initial position in *Gibbons v. Ogden*, the first case involving the power to regulate interstate commerce.[66] He defined it as an *exclusive* congressional power:

> It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. (...) If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government.[67]

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[61] H. N. SCHEIBER, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," above, n. 55, 624-628.
[62] M. H. REDISH, *The Constitution as Political Structure*, above, n. 59, 30.
[63] Political scientist D. J. ELAZAR was of a different view. He contended that the American model of federalism has always been cooperative. See D. J. ELAZAR, *The American Partnership*, above, n. 56, esp. 305s.
[64] R. K. NEWMYER, *The Supreme Court under Marshall and Taney*, (American History Series. Wheeling: Harlan Davidson, 2006), 41.
[65] *McCulloch v. Maryland*, 17 U.S. 316 (1819).
[66] R. K. NEWMYER, *The Supreme Court under Marshall and Taney*, above, n. 64, 49.
[67] *Gibbons v. Ogden* 22 U.S. 196, 197 (1824).

Once again, he made a dual interpretation of American federalism, by excluding any idea of concurrent power to regulate interstate commerce that could be shared between the national government and the states. He clearly distinguished it from "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens."[68] The notion of "police powers" gradually became a "linguistic means of drawing the line between state and federal activities."[69] In *Willson v. The Blackbird Creek Marsh Company*,[70] for instance, Chief Justice MARSHALL decided that health, safety and the protection of public order were part of the 'reserved powers' of states, which meant that they were fully sovereign while exercising them – provided that this exercise did not interfere with congressional powers.[71]

428. The Supreme Court followed a similar path with respect to the enforcement of the Fourteenth Amendment.[72] In the *Slaughter House Cases*, it refused to apply the Bill of Rights to state actions on the following grounds:

> [W]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.[73]

It thus rejected the incorporation doctrine, whereby the Bill of Rights does not only apply to acts of the federal government, but also to state actions through the Due Process Clause of the Fourteenth Amendment. Accordingly, initially, for the Supreme Court, the Fourteenth Amendment, adopted during the Reconstruction era, was solely aimed at barring racial discrimination, not at subjecting the states to the individual rights and freedoms protected by the Bill of Rights. The Court took the same stance with respect to the Equal Protection Clause of the Fourteenth Amendment. In *Barbier v. Connolly*, the defendant sought to challenge an ordinance enacted by San Francisco regulating the establishment of public laundries. Justice FIELD ruled that the constitutional provision was not relevant:

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[68] *Gibbons v. Ogden* 22 U.S. 196, 208 (1824).
[69] P. KENS, "The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937," 35 *Am. J. Legal Hist.* 70, 74 (1991).
[70] *Willson v. The Blackbird Creek Marsh Company* 2 Peters 245 (1829). See also *Brown v. Maryland* 12 Wheaton 419, 443 (1827) with respect to the power to direct the removal of gunpowder.
[71] Willson v. The Blackbird Creek Marsh Company 2 Peters 245 (1829).
[72] On the Fourteenth Amendment, see CORWIN, E. S. *Liberty against government*, (Baton Rouge: Louisiana State University Press, 1948). On the Equal Protection Clause, see C. W. COLLINS, *The Fourteenth Amendment and the States. A study of the operation of the restraint clauses of section one of the Fourteenth Amendment to the Constitution of the United States*, (Boston, Little Brown & Company, 1912).
[73] *Slaughter-House Cases* 83 U.S. 36 (1873). See also, in the same vein, *Barron v. Mayor & City Council of Baltimore* 32 U.S. 243, 247 (1833) and *United States v. Cruikshank* 92 U.S. 542, 549-550 (1875).

> Neither the Amendment – broad and comprehensive as it is – nor any Amendment, was designed to interfere with the power of the State – sometimes termed its police power – to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.[74]

429. Thus, this first series of rulings marked the initial steps towards the enshrinement of dual federalism. As K. LENAERTS has put it, "[t]he State was regarded as being sovereign, with full powers within *its* sphere, *i.e.*, possessing to their full extent all the powers *not* transferred to the Union by explicit grant or by necessary implication."[75] Accordingly, this line of reasoning compelled the Supreme Court to identify, on a case-by-case basis, which matters fell within the national government or, alternatively, within the states. This approach prevailed until the 1930s. It should be noted, however, that the Privileges and Immunities Clause of Article IV did not have the same fate. Indeed, the Supreme Court has not limited its scope of application. However, as seen earlier, it construed the Clause, during the dual federalism era, through the lens of fundamental rights. Moreover, it did not have many occasions to interpret it, unlike the other aforementioned clauses.

430. The ECJ power-based approach. The European Court of Justice recognizes that Member States may operate within a discrete sphere of powers in cases involving their retained powers. This is supported by the fact that it systematically uses the formulae.[76] The various justifications used in this specific range of cases moreover reveal that for the Court of Justice certain fields are the primary responsibility of the Member States. The latter must be recognized as having a great deal of leeway to preserve their autonomy, and to prevent too burdensome encroachments from European Union law. In sum, the power-based approach reveals that the idea of separate spheres of powers is not absent from the Court's reasoning when it deals with powers retained by Member States. As a result, in the eyes of the Court, there exist, at least formally, distinct spheres of powers over which Member States – at least temporarily – have exclusive jurisdiction. This line of reasoning is reminiscent of the cases where the US Supreme Court implemented a dual model of federalism. However, as will be seen in the following paragraph, the European Court of Justice does not attach the same consequences to the separation of spheres of powers as the US Supreme Court.

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[74] *Barbier v. Connolly* 113 U.S. 27, 31 (1885).
[75] K. LENAERTS, "Distribution of Powers in American Federalism. The Negative Implications of the Commerce Clause," 30 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 569, 576 (1981).
[76] See, *Supra*, §§ 117s.

431. Only a few cases involving powers retained by Member States may be characterized as enshrining a strict model of dual federalism. As I have mentioned in Chapter 2,[77] the Court of Justice used to exclude students' assistance from the scope of application of European Union law. It justified its stance in *Lair* and *Brown* by making the following argument:

> [A]t the present stage of development of Community law assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7. It is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty.[78]

Even if the Court has since reversed its position in *Bidar*,[79] these two cases nonetheless reveal that it happened to follow a line of reasoning very close to that of the US Supreme Court. Not only did the Court recognize two discrete spheres of powers, but it also found that a national measure falling within a power retained by the Member States was to fall outside the purview of European Union law. Similarly, in *Kaur*, it accepted that the United Kingdom could define, further to the 1972 Declaration annexed to the Treaty of accession, the category of UK nationals falling within the scope of the EU Treaties, without being subject to any free movement requirement.[80]

432. The power-based approach thus shares similarities with the US Supreme Court dual model of federalism during the first era of American federalism. But two main divergences differentiate the two approaches. The first is of a methodological nature. As seen in Section 1,[81] while the US Supreme Court has attempted to explain how it distinguished states' police powers from other powers, the European Court of Justice has remained silent with respect to the powers retained by Member States. The second is more fundamental. The two Courts have inferred different effects from the recognition of two discrete spheres of powers. Under the US dual model of federalism, states were totally prevented from regulating a field if the latter pertained to interstate commerce. Conversely, they enjoyed absolute freedom to exercise their police powers. However, under the power-based approach, if the Court of Justice recognizes

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[77] See, *Supra*, §§ 110s.
[78] Case 39/86, *Lair*, [1988] *ECR* 3161, 15; Case 197/86, *Brown*, [1988] *ECR* 3205, 18.
[79] Case C-209/03, *Bidar*, [2005] *ECR* I-2119.
[80] Case C-192/99, *Kaur*, [2001] *ECR* I-1237.
[81] See, *Supra*, §§ 354s.

that Member States have exclusive jurisdiction over fields falling within their retained powers, it nonetheless places them under the obligation to comply with European Union law.

c. The intrusions of European Union law into the powers retained by Member States

433. The development of American federalism experienced a tipping point during the first half of the twentieth century, when the Supreme Court reversed its previous interpretation of dual federalism. This led to the replacement of its initial formal approach by an approach centered on balancing national and state interests. The new approach recognized that national and state spheres of powers were deeply intertwined. The central government was no longer precluded from regulating fields pertaining to states' police powers, while the states could enact statutes affecting Congress' own powers. This marked the enshrinement of a cooperative model of federalism within the US constitutional order. The ECJ power-based approach also reveals, to a certain extent, the Court's inclination to understand the interplay between the European Union and its Member States as being cooperative. Even if the jurisdiction and the primary responsibilities retained by Member States are acknowledged, the latter must nonetheless comply with the obligations flowing from the free movement principle.

434. US Constitutional law. In the US legal order, as far as the dormant Commerce Clause is concerned, the US Supreme Court's highly formal interpretation deriving from the *Cooley* rule began to be increasingly criticized from the 1920s. In a famous dissenting opinion, Justice STONE considered that "the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value." Referring to the distinction arising from *Cooley* between direct and indirect interferences, he added that:

> [I]t is clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines."[82]

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[82] *Di Santo v. Pennsylvania* 273 U.S. 34, 44 (1927).

STONE therefore proposed to introduce a new approach, based on the balancing of state and national interests, that would replace what R. A. SEDLER has called the "allocation of powers" approach.[83] The Supreme Court eventually ruled out the *Cooley* doctrine. Its modern decisions "have generally abandoned any attempt to apply categorical distinctions between exercises of 'police' and 'commerce' powers, between 'local' and 'national' subject matters, or between 'indirect' and 'direct' effects."[84] In other words, the Court moved away from its dual vision of federalism, and instead gradually leaned toward a cooperative interpretation of the dormant Commerce Clause.

435. Today, it strikes down state regulations in three cases: 1) where they overtly discriminate against interstate commerce; 2) where they are on their face neutral but they have in fact protectionist effects; 3) where they unduly burden interstate commerce, notwithstanding their facially neutral character.[85] In the third case, the Supreme Court follows a balancing of interests approach, as defined in *Southern Pacific Co. v. Arizona*:

> [M]atters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.[86]

Accordingly, the Court no longer prevents the states from regulating interstate commerce. Instead, it places limitations upon the exercise of their powers in such a way as to compel the states to comply with the Commerce Clause, and not to jeopardize Congress' interests. As a result, the Supreme Court no longer seeks to draw the line between separate spheres of powers in the way it used to under the dual model of federalism. It "requires state governments to regulate in an even-handed way, without limiting the subject matter upon which their

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[83] R. A. SEDLER, "The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure," above, n. 26, 921.
[84] K. M. SULLIVAN & G. GUNTHER, *Constitutional Law*, above, n. 8, 245.
[85] Ibid.
[86] *Southern Pacific Co. v. Arizona* 325 U.S. 761, 770-71 (1945). The *Southern Pacific* reversal only concerns state regulation. See *Complete Auto Transit, Inc v. Brady* 430 U.S. 274 (1977) with respect to taxation. See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970): "[where] the statute regulated even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [If] a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

regulation can operate."[87] In addition, it follows the same uniform approach, regardless of the nature of the state power involved. E. A. YOUNG has noted that "[t]he abandonment of dual federalism has been most obvious – and probably least controversial – in the context of the dormant Commerce Clause."[88] But interesting parallel developments have occurred with respect to the Fourteenth Amendment.[89] Regarding first the Due Process Clause, the US Supreme Court reversed its initial approach in the 1920s, and has since applied the incorporation doctrine.[90] As a result, the federal government is not only subjected to the Bill of Rights, but the states are also accountable, regardless of the field involved.[91] As for the Equal Protection Clause from which seems to spring the right to travel, the Supreme Court intensified its scrutiny in such a way as to control an ever wider range of states' regulations. This is evidenced by the fact that most cases relating to the right to travel were decided during the second half of the twentieth century.[92] It results from these various evolutions that the states are nowadays required to comply with federal law and to take into account the interests of the national government in any field, regardless of whether these fields fall within their 'police' or 'reserved' powers. The US Supreme Court thus enforces a cooperative interpretation of federalism.

436. The ECJ power-based approach. The power-based approach, in the same way as the contemporary case law of the US Supreme Court or traditional free movement cases, also relies on a test revolving around the balancing of the respective interests of the two levels of government. Therefore, the recognition, by the European Court of Justice, that Member States have exclusive jurisdiction to exercise their retained powers does not imply that they enjoy absolute freedom when doing so. This is in line with its previous approach. The Court of Justice has indeed consistently rejected Chief Justice MARSHALL's absolute dual vision of federalism put forward in *McCulloch v. Maryland* or *Gibbons v. Ogden*. Even if the Court has

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[87] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception," above, n. 7, 150.
[88] Ibid.
[89] The scope of the Privileges and Immunities Clause of Article IV has never been limited. But it is nonetheless noticeable that the US Supreme Court started to move away from its fundamental-rights approach, and to lean more toward a federal-based approach during the second half of the 20th century.
[90] Gitlow v. People of New York 268 U.S. 652 (1925).
[91] R. E. BARNETT, "The proper scope of the police power," 79 *Notre Dame Law Review* 429-495 (2004); E. ORBAN, "Droits de la personne et processus de centralization: rôle de la Cour Suprême des Etats-Unis," 20 *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 718s (1987).
[92] See, for an overview of the US Supreme Court case law with respect to the Fourteenth Amendment: http://law.justia.com/constitution/us/amendment-14/

never formally denied the existence of separate spheres of powers in which the European Union and the Member States respectively operate, it has repeatedly taken the view that interferences and mutual influences between these spheres are conceivable. As seen earlier,[93] it recognized in *De Gezamenlijke Steenkolnmijnen in Limburg* that the jurisdiction of the Community could "impinge on national sovereignty" to preserve the effectiveness of European Union law. The reference to "the jurisdiction of the Community" and to "national sovereignty" indicates that the Court recognizes the existence of two separate spheres. However, as P. PESCATORE has noted, "here the Court shows that the sovereignty of the Member States is affected beyond the scope of the exclusive powers that have been transferred to the Community."[94] In a subsequent case decided in 1969 and involving Member States' powers in the monetary field, the Court expressly asserted that "the exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty."[95] In cases involving powers retained by Member States, the Court acknowledges that certain fields ought to be singled out, and ought to be more protected from intrusions of European Union law. However, notwithstanding this dual dimension, the European Court of Justice does not attach the same effects as the US Supreme Court does under the US dual federalism model. Admittedly, its power-based approach does not challenge the existence of national powers. As seen earlier,[96] it does not have a preemptive effect: the Court of Justice has never denied Member States their ability to exercise their retained powers. Instead, it focuses almost exclusively on '*how* Member States exercise their retained powers.' This means that when Member States are found to infringe European Union law, it is not on the grounds that they have occupied the European field, but rather because they have not properly exercised their powers. This is precisely in this respect that the respective approaches of the US Supreme Court and the European Court of Justice differ. Under the dual federalism model, the former used to infer that once it was recognized that states held jurisdiction over a subject matter, they were to enjoy absolute liberty to exercise their powers. By contrast, one of the defining features of the European Court of Justice power-

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[93] See, *Supra*, § 124.
[94] P. PESCATORE, "Fédéralisme et intégration: Remarques liminaires," in *Federalism and Supreme Courts and the Integration of Legal Systems*, (Eds.) E. MCWHINNEY & P. PESCATORE, (Heule-Bruxelles-Namur, Belgium, Ed. UGA, 1973), 10: "La Cour montre ici que la souveraineté des États membres est affectée au-delà du domaine des matières transferees de manière exclusive à la Communauté."
[95] Case 11/69, *Commission v. France*, [1969] *ECR* 523.
[96] See, *Supra*, §§ 262s.

based approach is to subject the exercise of Member States' retained powers to European Union law requirements even though they do hold jurisdiction.

437. The hybrid character of the ECJ power-based approach. The European Court of Justice approach borrows from both the dual and cooperative models of federalism. It may therefore be described as 'hybrid.' The Court's scrutiny over Member States' measures primarily consists in setting limits on the exercise of their retained powers, which is consistent with the cooperative model of federalism. And yet, it also shares a range of similarities with the dual model of federalism since it seeks to draw the line between discrete spheres of powers in order to subject the powers retained by Member States to a specific legal framework. The example derived from *Watts* is revealing:

> [A]lthough Community law does not detract from the power of the Member States to organize their social security systems and decide the level of resources to be allocated to their operation, the achievement of the fundamental freedoms guaranteed by the Treaty nevertheless inevitably requires Member States to make adjustments to those systems. It does not follow that this undermines their sovereign powers in the field.[97]

This statement synthesizes the twofold dimension of the power-based approach. On the one hand, Member States have 'sovereign powers' in the sense that they have sole jurisdiction to exercise the power to organize their social security systems. They are moreover recognized as having more leeway than usual to preserve their autonomy. On the other hand, the power-based approach borrows to an even greater extent from the cooperative model of federalism. Member States are required to cooperate, i.e. to comply with European Union law, even if the obligations placed upon the exercise of their powers at least partially reflect that they are primarily responsible for regulating the fields analyzed herein.

438. Now that I have identified the nature of the federal balance characterizing the European Court of Justice power-based approach, I can deal with a final point, which raises the issue of the safeguards of federalism the Court uses in cases involving powers retained by Member States.

3. The safeguards of European federalism

439. The role and function of safeguards of federalism. To be sustainable, a federal system must contain safeguards guaranteeing the preservation of the integrity of each of its component parts.

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[97] Case C-372/04, *Watts*, [2006] *ECR* I-4325, 121 (Emphases added).

The permanence of both the federation and its Member States must be ensured in some way. Otherwise, this could lead to the disappearance of the states due to an excessive centralization in favor of the federation or alternatively, to the dilution, and even the dismantling, of the federation if the latter is not sufficiently protected from unauthorized state encroachments. In other words, as C. SCHMITT pointed out, a federation aims to preserve the political existence of all its members.[98] Contemporary federations are generally characterized by centripetal trends. The European Union is no exception and the literature has therefore increasingly focused on the issue of how to properly safeguard the autonomy of the Member States. Two main sets of safeguards may be distinguished: ex-ante and ex-post methods. The former aim to set "clear-cut frontiers to the EU enumerated powers,"[99] while the latter refer to safeguards of a judicial nature. In this regard, the previous chapters of this thesis have shown that the Court's power-based approach is a way of ensuring that, even within their spheres of retained powers, Member States do not unduly undermine the interests of the European Union. But how does it safeguard the legitimate autonomy of Member States? In the following paragraphs I answer this question by addressing, in turn, two points. First, the power-based approach confirms that, in the European Union legal order, Member States are not entitled to a "nucleus of sovereignty." Second, I draw a typology of the safeguards of federalism that are gradually being drawn by the Court of Justice. However, before undertaking this exercise, I draw a brief picture of the US constitutional debate, which sheds light on the various issues raised by the need to protect state autonomy.

440. The various safeguards used in the US legal order. The issue relating to the safeguards of federalism is at the core of the US constitutional debate. Three main judicial trends and/or doctrinal propositions, which reflect the significant developments that have occurred since the origins of US federalism, may be identified. There is, first, what has been described as Tenth Amendment federalism,[100] or power federalism.[101] This doctrine consists in drawing lines

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[98] C. SCHMITT, *Théorie de la Constitution*, (Trad. From German to French by L. Deroche), (Paris: Presses Universitaires de France, 1993), 515.
[99] L. AZOULAI, "Introduction," in *Deconstructing federalism through competences*, (EUI WP Law 2012/06), 1.
[100] V. L. FARHAT, "Term limits and the Tenth Amendment: the popular sovereignty model of reserved powers," 29 *Loyala of Los Angeles Law Review* 1163, 1166 (1996).
[101] E. A. YOUNG, "Protecting Member State autonomy in the European Union: some cautionary tales from American federalism," 77 *N. Y. U. Law Review* 1612, 1645 (2002).

between national and state spheres of powers, and views the Tenth Amendment[102] as granting the states a constitutional right to have their reserved powers protected from encroachments by the national government. The US Supreme Court endorsed it during the dual federalism era,[103] and used the Tenth Amendment to reserve the regulation of certain subject matters to the states, over which the latter were deemed to have a "complete, unqualified, and exclusive"[104] authority.[105] This approach has been criticized in two main respects. First, it turns out to rely too heavily on Justices' policy preferences.[106] The tests drawn by the US Supreme Court have been said to reflect too heavily the Justices' own conceptions of the organization of society. Second, in the end, the US Supreme Court never succeeded in setting out satisfactory and workable criteria for distinguishing between national and state spheres of power.[107] These two shortcomings partly explain that the Court moved away from its initial dual model of federalism, and instead turned towards a cooperative model. As seen earlier, it no longer primarily focuses on drawing the line between two discrete spheres of powers. As an alternative, it considers that the national government and the states may concurrently regulate the same subject matters, thereby seeking to coordinate their respective spheres of action.[108] As a result, it has significantly reduced the role played by the Tenth Amendment, and it even happened to describe it as a mere "truism."[109] The Supreme Court has since nonetheless resorted again to its initial dual logic in a few instances. To begin with, it held in *National League of Cities v. Usery*,

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[102] The Tenth Amendment of the US Constitution provides that: "The 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."
[103] See, *Supra*, §§ 427s.
[104] *New York City v. Miln* 36 U.S. (11 Pet.) 102, 139 (1837).
[105] S. L. SMITH, "State autonomy after *Garcia*: Will the political process protect states' interests?," 71 *Iowa Law Review* 1527, 1531-1534 (1986); V. L. FARHAT, "Term limits and the Tenth Amendment: the popular sovereignty model of reserved powers," above, n. 100, 1171; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *A framework for studying the controversy concerning the federal courts and federalism*, 18 (1986), Available from: http://www.library.unt.edu/gpo/acir/Reports/information/m-149.pdf. On the Tenth Amendment, see generally: K. T. LASH, "James Madison's celebrated Report of 1800: The transformation of the Tenth Amendment," 74 *George Washington Law Review* 165-200 (2006); K. T. LASH, "The original meaning of an omission: The Tenth Amendment, popular sovereignty, and "expressly" delegated power," 83 *Notre Dame Law Review* 1905 (2008); C. A. LOFGREN, "The origins of the Tenth Amendment: History, sovereignty, and the problem of constitutional intention," in COLLINS, *Constitutional Government in America*, (Ed.) R. K. L. (Durham, N.C. 1980), 331-357.
[106] E. A. YOUNG, "Protecting Member State autonomy in the European Union: some cautionary tales from American federalism," above, n. 101, 1666.
[107] See also A. RAPACZYNSKI, "From sovereignty to process: The jurisprudence of federalism after Garcia," *Supreme Court Review* 341, 355 (1985); E. A. YOUNG, "Protecting Member State autonomy in the European Union: some cautionary tales from American federalism," above, n. 101, 1670.
[108] E. ORBAN, "La Cour Suprême des Etats-Unis et le processus de nationalisation," in *Fédéralisme et Cours Suprêmes, Federalism and Supreme Courts*, (Ed.) E. ORBAN, (Brussels, Bruylant, Les Presses de l'Université de Montréal, 1991), 65.
[109] *United States v. Darby* 213 U.S. 100 (1941).

decided in 1976 and involving Congress' conditional spending power, that the Tenth Amendment constrained congressional commerce power on the grounds that:

> [T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress lacks an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[110]

The Supreme Court found that the Fair Labor Standards Act ('FLSA'), through which Congress sought to regulate wages, hours, and benefits of state employees – including those in hospitals and schools –, displaced "the States' freedom to structure integral operations in areas of traditional governmental functions."[111] Faced with the difficulty of identifying the traditional state governmental functions, it soon abandoned this logic again, before somehow... resurrecting it. On the one hand, in the 1990s, it entrenched the anti-commandeering doctrine, under which the national government is prohibited from commandeering state governments. *New York v. United States*[112] barred Congress from commandeering the state legislative branch, *Printz v. United States*[113] barred the commandeering of the state executive branch, and, finally, *Alden v. Maine*[114] barred the commandeering of the state judicial branch.[115] On the other hand, the Supreme Court held fairly recently that Congress unduly encroached on states' reserved powers while exercising its commerce power in *United States v. Lopez*,[116] which concerned a federal statute regulating the carrying of handguns in schools, and *United States v. Morrison*,[117] which involved the Violence Against Women Act.

441. Despite these notable rulings, the US Supreme Court today tends to refrain from drawing lines between national and state spheres of powers. This leads to another doctrine aiming at enforcing US federalism, namely process federalism. In *Garcia v. San Antonio Metropolitan Transit Authority*,[118] decided in 1985, the Supreme Court ruled, in line with H.

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[110] *National League of Cities v. Usery* 426 U.S. 833, 845 (1976). See M. S. KOLKER, "*National League of Cities*, the Tenth Amendment, and the conditional spending power," 21 *Urban Law Annual* 217-237 (1981).
[111] *National League of Cities v. Usery* 426 U.S. 833, 852 (1976).
[112] *New York v. United States* 488 U.S. 1041 (1992).
[113] *Printz v. United States* 521 U.S. 898 (1997).
[114] *Alden v. Maine* 527 U.S. 706 (1999).
[115] E. A. YOUNG, "Protecting Member State autonomy in the European Union: Some cautionary tales from American federalism," above, n. 101, 1654 argues that "the doctrine limits the *means* that Congress may employ rather than the regulatory objectives that it may pursue."
[116] *United States v. Lopez* 514 U.S. 549 (1995).
[117] *United States v. Morrison* 529 U.S. 598 (2000).
[118] *Garcia v. San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985).

WECHSLER's seminal 1954 article,[119] that there was no need to set out judicial safeguards of federalism. Instead, it should be acknowledged that the national political process protects states' interests effectively, since the states themselves participate in the composition and selection of the national government.

442. Last but not least, mention should be made of Guarantee Clause federalism. The Supreme Court has never officially enforced this doctrine, but it is nonetheless an interesting doctrinal proposition made by D. J. MERRITT.[120] This author basically suggests to use the Guarantee Clause of the US Constitution, which provides that "[t]he United States should guarantee to every State in this Union a republican form of government," to protect state autonomy:

> The language of the Guarantee Clause [...] has two aspects. On the one hand, the clause prohibits the states from adopting nonrepublican forms of government. On the other hand, as long as the states adhere to republican principles, the clause forbids the federal government from interfering with state governments in a way that would destroy their republican character.[121]

She further argues that this judicial safeguard of federalism should have been at the basis of numerous cases involving six ranges of federalism issues: the franchise,[122] the structure and mechanics of state government, qualifications for state office,[123] wages of state employees, regulation of private activity, and employing the states as agents of the nation (i.e. commandeering issue). With respect to the second, she argues that:

> [T]he guarantee clause promises the states federal support for the continued existence of some form of government. [...] The guarantee clause, moreover, restricts the federal

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[119] H. WECHSLER, "The political safeguards of federalism: The role of the states in the composition and selection of the national government," 54 *Columbia L. Rev.* 543-560 (1954). See also J. H. CHOPER, *Judicial review and the national political process: A functional reconsideration of the role of the Supreme Court*, (Chicago: University of Chicago Press, 1980), esp. 175, according to whom the judiciary has no role whatsoever to play in the settlement of jurisdictional disputes between the states and the national government; and L. D. KRAMER, "Putting the politics back into the political safeguards of federalism," 100 *Columbia L. Rev.* 215, esp. 292-293 (2000) who proposes to refine H. WECHSLER's argument.

[120] D. J. MERRITT, "The Guarantee Clause and state autonomy: Federalism for the third century," 88 *Columbia L. Rev.* 1-78 (1988).

[121] Ibid., 25.

[122] See, for instance, *Lassiter v. Northampton County Board of Elections* 360 U.S. 45 (1959), *Oregon v. Mitchell* 400 U.S. 112 (1970), and *South Carolina v. Katzenbach* 383 U.S. 301 (1966), which involve state laws imposing specific conditions on voters.

[123] *Taylor v. Beckham* 178 U.S. 548, 570-71 (1900): "It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers [...] should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

> government's power to interfere with the organizational structure and governmental processes chosen by a state's residents.[124]

443. All in all, the US Supreme Court jurisprudence reveals the difficulty the Court faces to erect and/or recognize workable safeguards of federalism. It fluctuates between establishing safeguards of a judicial nature, which are often tinged with the Justices' subjectivity, and in any case hard to enforce in practice, and trusting the political process to protect state autonomy. In particular, the question as to whether the states are to enjoy a "nucleus of sovereignty" has still not been entirely settled. The Supreme Court has largely abandoned the recourse to the Tenth Amendment, but still happens to resort to it in order to protect states' reserved powers that it seems to consider in some way "impenetrable."

444. European Union law: No nucleus of sovereignty. In contrast to its US counterpart, the European Court of Justice has never, aside from a few exceptions, recognized the existence of a nucleus of sovereignty in favor of the Member States.[125] Looking more closely at free movement cases, Member States contended, in the early years of the Community, that the express derogations to the free movement of goods set out in the Treaty reserved to them certain matters, over which they had sole jurisdiction. The Court firmly rejected this view on the following grounds:

> [T]he purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the Article.[126]

As a result, as K. LENAERTS puts it, "[t]he residual powers of the Member States have no reserved status."[127] The same holds true with respect to cases involving powers retained by

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[124] D. J. MERRITT, "The Guarantee Clause and state autonomy: Federalism for the third century," above, n. 120, 40.

[125] Case 30/59, *De Gezamenlijke Steenkolenmijnen*, [1961] *ECR* 1 and Cases 6 & 11/69, *Commission v. France*, [1969] *ECR* 523. Interestingly, a similar debate can be found in public international law as to whether Article 2§7 of the Charter of the United Nations creates a reserved domain for states. See, on this issue: L. LE FUR, "Reconnaissance, détermination et signification en droit international du domaine laissé par ce dernier à la compétence exclusive de l'Etat," 8 *R. D. I.* 94-127 (1931); G. SCELLE, "Critique du soit-disant domaine de compétence exclusive," *RDILC*, 365-394 (1933); C. ROUSSEAU, "La détermination des affaires qui relèvent essentiellement de la compétence nationale des Etats," *Ann. I. D. I.* 5-41 (1950).

[126] Case 153/78, *Ratti* [1979] *ECR* 2555, 5. See also Case 35/76, *Simmenthal*, [1976] *ECR* 1871, 14; Case 72/83 *Campus Oil* [1984] *ECR* 2727, 32.

[127] K. LENAERTS, "Constitutionalism and the many faces of federalism," 38 *The American Journal of Comparative Law* 205, 220 (1990).

Member States.[128] As I have shown in Chapter 2, the European Court of Justice has not accepted to recognize limits to the applicability of the free movement principle, and therefore to the intrusions of European Union law into national spheres of jurisdiction.[129] *Schwarz*, a decision involving a German tax advantage allowing school fees to be deducted but that was inapplicable if the schools were not established on German territory, is telling. The Court ruled out an argument developed by Germany, which drew on "the allocation of competences envisaged by the EC Treaty,"[130] by stating its formulae.[131] In the same vein, it dismissed arguments aiming at excluding the applicability of European Union law, which were based on one of the Treaty provisions excluding EU-level harmonization. In particular, it held in *Watts* that:

> That provision [Article 152§5 TFEU] does not, however, exclude the possibility that the Member States may be required under other Treaty provisions, such as Article 49 EC, or Community measures adopted on the basis of other Treaty provisions [...] to make adjustments to their national systems of social security.[132]

Accordingly, except in a few early cases decided in the field of education[133] – and which have since been reversed – and in *Kaur*,[134] where the Court of Justice has construed European federalism from a strict dualist perspective, cases involving powers retained by Member States confirm that the European Union legal order does not safeguard the autonomy of Member States through the recognition of a "nucleus of sovereignty." Provisions relating to the allocation of powers between the European Union and its Member States, including the conferral principle, are of no further help in tilting the balance in the Member States favor.[135] As a result, safeguards of federalism are to be found elsewhere.

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[128] K. LENAERTS, "Federalism and the rule of law: Perspectives from the European Court of Justice," 33 *Fordham International Law Journal* 1338, 1340 (2011).
[129] See, *Supra*, §§ 108s.
[130] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 50.
[131] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849, 69-70.
[132] Case C-372/04, *Watts*, [2006] *ECR* I-4325, 147.
[133] Case 39/86, *Lair*, [1988] *ECR* 3161 and Case 197/86, *Brown*, [1988] *ECR* 3205.
[134] Case C-192/99, *Kaur*, [2001] *ECR* I-1237.
[135] A. MARZAL YETANO, *La dynamique du principe de proportionnalité. Essai dans le contexte des libertés de circulation du droit de l'Union européenne*, (Ph.D. Thesis, Université Paris 1 Panthéon-Sorbonne, 2013), 393. See also F. AMTENBRINK, "The European Court of Justice's approach to primacy and European constitutionalism – Preserving the European constitutional order?," *The European Court of Justice and the Autonomy of the Member States*, in (Eds.) H.-W. MICKLITZ & B. DE WITTE, (Intersentia, 2012), 35, 56 who already said that the inclusion of a catalogue of competences into the Treaties would not fundamentally change the preexisting situation.

445. Typology of the safeguards of federalism used in the power-based approach. Cases involving powers retained by Member States reveal that the Court of Justice resorts to two types of safeguards of federalism for the protection of Member State autonomy. On the one hand, it results from the findings set out in Chapter 3 that the European Court of Justice has fashioned safeguards of a judicial nature. First of all, it has accepted specific grounds of justification, which allow Member States to preserve the core of their essential political and social functions, as well as their economic interests.[136] Second of all, when implementing the power-based approach, the Court moreover makes a flexible appraisal of the proportionality test, in order to give more leeway than in its traditional free movement cases to Member States. It has shaped the requirements imposed upon the latter in such a way as to not jeopardize the sustainability and the internal coherence of their retained powers.

446. On the other hand, mention should also be made of the Court's recent tendency to increasingly rely on textual safeguards of federalism. In *Wittgenstein*, it acknowledged that:

> [I]n accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.[137]

It subsequently ruled in *Vardyn & Wardyn* that:

> According to the fourth subparagraph of Article 3(3) EU and Article 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. Article 4(2) provides that the Union must also respect the national identity of its Member States, which includes protection of a State's official national language.[138]

Therefore, in these two cases, the Court took into account safeguards that Member States have expressly included into the European Union Treaty. They are in line with other decisions, such as *Omega*[139] and *Schmidberger*,[140] where it received favorably Member States' claims based on the need to respect their constitutional identity.[141]

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[136] See, *Supra*, §§ 154s.
[137] Case C-208/09, *Wittgenstein*, [2010] *ECR* I-13693, 92.
[138] Case C-391/09, *Vardyn & Wardyn*, [2011] *ECR* I-3787, 86.
[139] Case C-36/02, *Omega*, [2004] ECR I-9609.
[140] Case C-112/00, *Schmidberger*, [2003] *ECR* I-5659.
[141] D. RITLENG, "Le droit au respect de l'identité constitutionnelle nationale," in *Vers la reconnaissance de droits fondamentaux aux Etats Membres de l'Union européenne?* (Eds.) J.-D. MOUTON & J.-C. BARBATO, (Bruylant, Coll. Droit de l'Union européenne, 2010) 22, 29; F.-X. MILLET, "The respect for national constitutional identity in the European legal space: An approach to federalism as constitutionalism," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press, 2014), 253,

447. A right to political existence. In sum, taken together, the judicially-created and the textual safeguards of federalism used in cases involving powers retained by Member States are reminiscent of what is embodied in, and protected by, in D. J. MERRITT's opinion, the US Guarantee Clause.[142] They indeed prevent European Union law from interfering in a too burdensome way into Member States' organizational structures and governmental processes. They also echo the fundamental rights of states doctrine developed in public international law. Under this doctrine, states are entitled to a certain number of rights, for the simple reason that they are states. These rights include the right to existence, independence or sovereignty, equality, mutual respect, and free trade.[143] A few authors have claimed that the European Union legal order has incorporated this doctrine through the adoption of Article 4§2 TFEU, which provides that:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.[144]

The European Court of Justice power-based approach reveals that the idea of protecting Member States "fundamental rights" is not only present in Article 4§2, but also in most of the judicially created safeguards used in cases involving powers retained by Member States. All in all, both the judicially created and the textual safeguards of federalism may be described as "arrangements designed to preserve the position of Member States,"[145] or, in other words, as ensuring that Member States remain full-fledged states within the European Union legal order.

260, 263. See, more generally, F.-X. MILLET, *L'Union européenne et l'identité constitutionnelle des Etats membres*, (L.G.D.J. Coll. Thèses, 2013).

[142] See, *Supra*, § 442.

[143] F. POIRAT, "Les droits fondamentaux de l'Etat en droit international public," in *Vers la reconnaissance de droits fondamentaux aux Etats Membres de l'Union européenne?* (Eds.) J.-D. MOUTON & J.-C. BARBATO, (Bruylant, Coll. Droit de l'Union européenne, 2010) 237, 244, 249-250.

[144] J.-D. MOUTON, "Vers la reconnaissance de droits fondamentaux aux Etats dans le système communautaire?," in *Les dynamiques du droit européen en début de siècle. Etudes en l'honneur de J-C Gautron*, (Paris, Pedone, 2004), 470, 473, 476; J.-D. MOUTON, "Présentation d'une proposition doctrinale," in *Vers la reconnaissance de droits fondamentaux aux Etats Membres de l'Union européenne?* (Eds.) J.-D. MOUTON & J.-C. BARBATO, (Bruylant, Coll. Droit de l'Union européenne, 2010); G. MARTI, "Droits fondamentaux des Etats et fédération," in *Vers la reconnaissance de droits fondamentaux aux Etats Membres de l'Union européenne?*, (Eds.) J.-D. MOUTON & J.-C. BARBATO, (Bruylant, Coll. Droit de l'Union européenne, 2010), 269, 276. For an another perspective, which considers Article 4§2 TFEU as protecting "the hard core of sovereignty which the Union may not affect," see C. TIMMERMANS, "ECJ doctrines on competences," in *The Question of competence in the European Union*, (Ed.) L. AZOULAI, (Oxford, United Kingdom; New York: Oxford University Press, 2014), 155, 160.

[145] A. DASHWOOD, "States in the European Union," *Eur. Law Rev.*, 201 (1998).

As a result, they amount to providing Member States with a "right to political existence," which reflects that the federation, i.e. the European Union, is constitutionally forbidden to call into question Member States' political existence.[146]

448. That being said, I am of the view that the preservation of Member State autonomy may rely too heavily on the discretion of the European Court of Justice. Admittedly, unlike the US Supreme Court, it never fell into the trap of dual federalism, which gives the illusion that state jurisdiction is better protected if completely isolated. The power-based approach nonetheless does lead the Court to unilaterally draw the contours of spheres that, in its own view, deserve specific protection. This explains why the Court ultimately faces the same range of difficulties as the US Supreme Court. In similar fashion to its US counterpart, it is confronted with the challenge of singling out subject matters that ought to be specifically safeguarded. The Court of Justice has moreover often seemed hesitant with respect to the intensity of the requirements to be imposed upon Member States. In this regard, it is striking that it mitigated, on several occasions, the initial effects of its case law,[147] considered by many Member States and commentators as undermining Member State autonomy too heavily. Suffice to think, for instance, of cases relating to access to higher education[148] and students' financial assistance.[149] The same holds true with cross-border losses in the field of direct taxation. Cases relating to social security also illustrate this trend.[150] In sum, cases involving powers retained by Member States reveal that, like its US counterpart, the European Court of Justice is in a continuing search of workable safeguards of federalism, which tends to create some legal uncertainty.

CONCLUSION OF CHAPTER 6.

449. In this final chapter, I have provided an overall structural reassessment of the Court of Justice power-based approach. I have first shed light on the persistent silence of the Court regarding the fields subject to the original form of integration, and the rationale behind it,

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[146] O. BEAUD, *Théorie de la Fédération*, (Paris: Presses universitaires de France, 2007), 324.
[147] This has notably been noticed by V. HATZOPOULOS, "Actively talking to each other: the Court and the political institutions," in *Judicial activism at the European Court of Justice: causes, responses and solutions*, (Eds.) M. DAWSON, DE WITTE B. & MUIR E., (Cheltenham: Edward Elgar, 2013), 102, 139.
[148] See the discrepancy between Case C-147/03, *Commission v. Austria*, [2005] *ECR* I-5969 and Case C-73/08, *Bressol*, [2010] *ECR* I-2735.
[149] See the discrepancy between Case C-209/03, *Bidar*, [2005] *ECR* I-2119 and Case C-158/07, *Förster*, [2008] *ECR* I-8507.
[150] See the discrepancy between Case C-372/04, *Watts*, [2006] *ECR* I-4325 and Case C-512/08, *Commission v. France*, [2010] *ECR* I-8833 or Case C-211/08, *Commission v. Spain*, [2010] *ECR* I-5267.

which ultimately has the effect of weakening both its authority and legitimacy. Second, I have focused on the structural model that is entrenched by the power-based approach, and I have reviewed, in turn, its three fundamental components. I have argued that the free movement principle ought to be considered as a genuine federal/structural principle regulating the relations between the European Union and its Member States, and interstate relations. I have then highlighted the hybrid character of the federalism model implemented in the power-based approach. Even if the Court rejects a strict dual model of federalism, it nonetheless identifies, on the basis of rather vague criteria, fields characterized by limited intrusions of European Union law. Last but not least, I have shown that the power-based approach is characterized by the use of safeguards of federalism that encompass a genuine right to political existence for Member States. All in all, cases involving powers retained by Member States confirm that free movement is the cornerstone principle of European Union law. They also reassert that Member States are fundamental actors of the European Union legal order. Indeed, European integration cannot proceed without them, which explains why the Court of Justice erects safeguards aiming to preserve their political existence, without nonetheless ruling out the applicability of European Union law where it is necessary to protect the European Union's own interests

CONCLUSION

450. A legal framework composed of three fundamental features. This thesis has shown that, as far as free movement cases are concerned, the characterization by the European Court of Justice of a power as being "retained" by the Member States results in the implementation of a power-based approach. In Chapter 1, I claimed that the Court's reasoning revolves around the notion of power. Hence, the cases concerned by the original form of integration display a more structural-oriented dimension than traditional free movement cases. In Chapter 2, I highlighted the subtle distinction that the Court draws between the existence and the exercise of a power in order to infer that the law of free movement is applicable even in fields where the European Union holds no, or very limited, jurisdiction. This ultimately results in a divergence between the scope of application of European Union law and the powers held by the European Union. Last but not least, Chapter 3 shed light on the original way the Court of Justice settles the vertical and horizontal jurisdictional conflicts it is called upon to adjudicate. It does so through a 'mutual adjustment resolution.' On the one hand, the Court imposes constraining adjustment requirements upon the conditions of exercise of the powers retained by Member States. On the other hand, it self-adjusts its approach by giving more weight to national interests than in traditional free movement cases.

451. A unique legal framework. Everything considered, the power-based approach may be described as a combination of three fundamental features. Taken together, these features amount to a whole that is more than the sum of its parts. As a result, it may not be inferred from the simple fact that the Court of Justice grants Member States wide margins of appreciation that it is necessarily implementing the power-based approach. Its case law relating to games of chance, betting or gambling[1] clearly illustrates this point. Admittedly, in these cases,

[1] Case C-275/92, *Schindler*, [1993] *ECR* I-1039; Case C-6/01, *Anormar*, [2003] *ECR* I-8621; Case C-338/04, *Placanica*, [2007] *ECR* I-1891; Case C-42/07, *Liga Portuguesa de Futebol*, [2009] *ECR* I-7633; Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 & C-410/07, *Stoβ and others*, [2010] *ECR* I-8069; Joined Cases C-

the Court recognizes that, as far as the aforementioned activities are concerned, Member States should enjoy a great deal of discretion in the pursuance of objectives of social policy and public health. It has held, for instance, that they are "free to set the objectives of their policy on gambling and, where appropriate, to define in detail the level of protection sought."[2] Thus, when it faces national restrictive schemes setting up, among others, exclusive rights to manage off-course betting on horseracing,[3] public monopolies at state level,[4] or national legislation restricting the operation and playing of games of chance or gambling to specific areas,[5] it is inclined to develop a rather deferential proportionality test, and to give more weight to Member States' specific interests than it usually does.[6] Therefore, this trend seems at first glance reminiscent of the Court of Justice's power-based approach. However, it nevertheless remains distinct since at least two of its fundamental components are missing. The Court does not allude to the notion of power in these cases. Moreover, it neither states formulae nor resorts to the distinction between the existence and the exercise of a power in some other way at the applicability stage. To put it differently, the power-based approach should not be simply viewed as encompassing all the cases where the Court carries out a flexible assessment of proportionality.

452. A unique constitutional arrangement part of a more general trend. All in all, the power-based approach is constitutive of a unique constitutional arrangement within the jurisprudence of the European Court of Justice. But it also forms part of a more general trend that concerns an increasing number of facets of the European Union legal order. As a result, this trend is becoming ever more significant. It consists in subjecting any national domain that might affect in some way the interests of the European Union to the "common framework of action"[7] set up by the Treaties. Thus, as I have already mentioned,[8] Member States may not, through the exercise of their powers, adversely affect the positive action undertaken by the European

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447/08 & C-448/08, *Sjöberg & Gerdin*, [2010] *ECR* I-6921; Case C-46/08, *Carmen Media Group*, [2010] *ECR* I-8149; Case C-212/08, *Zeturf Ltd.*, [2011] *ECR* I-5633.

[2] Joined Cases C-447/08 & C-448/08, *Sjöberg & Gerdin*, [2010] *ECR* I-6921, 39.

[3] Case C-212/08, *Zeturf Ltd.*, [2011] *ECR* I-5633.

[4] Joined Cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 & C-410/07, *Stoß and others*, [2010] *ECR* I-8069.

[5] Case C-6/01, *Anormar*, [2003] *ECR* I-8621.

[6] D. RITLENG, "Les États membres face aux entraves," in *L'entrave dans le droit du marché intérieur*, (Ed.) L. AZOULAI, (Brussels: Bruylant, 2011), 315-316.

[7] "Editorial comments. Union membership in times of crisis," 51 C. M. *Law Rev.* 1 (2014).

[8] See, *Supra*, § 31.

Union. Even if their powers involve fields over which the latter has no, or very limited, jurisdiction, the exercise of their powers may not jeopardize the effectiveness of acts of secondary legislation.[9] Likewise, Member States may not, through the exercise of their external retained powers, undermine the external action of the European Union, even when the latter has no jurisdiction in the field, or has not (yet) exercised its jurisdiction.[10] They are bound by the principle of cooperation and the duty of loyalty. As a result, and to echo the General Introduction of this thesis, the Court of Justice power-based approach consists in "bringing together" previously independent "parts into a whole,"[11] the parts being the national spheres of jurisdiction concerned by the power-based approach and the whole being the "common framework of action" of European integration. Therefore, the power-based approach amounts to a process of *absorption* of national powers in the sense given by J. H. H. WEILER.[12]

453. Breadth v. depth.[13] The various findings of this thesis invite us to draw a distinction between breadth and depth and to keep in mind its significance for properly understanding the meaning of, and the implications induced by, the power-based approach. This thesis has revealed the striking discrepancy that exists between the breadth of the applicability of European Union law in the fields concerned by the power-based approach, and the depth of its application. The former turns out to be potentially unlimited. It relies on the distinction between the existence and the exercise of a power, which may be virtually used in any area. Its breadth is therefore tremendous, and the Court of Justice will most probably keep expanding it over the years. But the depth of the application of European Union law is more restricted. As I have shown in Chapters 3 and 4 in particular, the Court is increasingly inclined to mitigate the effects of the application of the free movement principle. It applies the later in such a way as not to deprive the Member States of their powers and only to the extent that this does not undermine the basic components of their autonomy. As a result, a corresponding contrast exists between the theoretical ramifications of the Court of Justice power-based approach and

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[9] Case 9/74, *Casagrande*, [1974] *ECR* 773.
[10] See, for instance, Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98, "*Open Skies Judgments*," [2002] *ECR* I-9427.
[11] B. BALASSA, "Towards a theory of economic integration," 14: 1 *Kyklos*, 1 (1961).
[12] J. H. H. WEILER, "The Transformation of Europe," in *The Constitution of Europe: Do the new Clothes have an Emperor? And other Essays on European Integration*, (Cambridge: Cambridge University Press, 1999), 49. See, *Supra*, § 31.
[13] I have borrowed this distinction from S. GARDBAUM, "The breadth v. the depth of Congress's Commerce power: the curious history of preemption during the *Lochner* era," in *Federal Preemption: States' powers, national interests*, (Eds.) R. A. EPSTEIN & M. S. GREVE, (Washington, The AEI Press, 2007), 48-78.

their practical implications. The latter are limited in scope. In this respect, Chapters 3 and 4 have established that Member States do retain primary responsibility in the fields analyzed herein, in spite of the various adjustments they are required to accept. By way of contrast, the former are deep-seated. Indeed, the power-based approach seems to be but another illustration of the turning point at which European integration stands at the moment. Initially conceived of as a partial phenomenon, it is increasingly turning into a "total" one. All the spheres of national activity are gradually subjected to the European Union's principle of legality, and are thereby being absorbed into the legal order of the European Union. The states composing the European Union are compelled to give up their initial status of monad states and must instead behave like genuine members of the European Union federation, regardless of the field involved. They must do so loyally, as shown in Chapter 5, in the framework of the vertical relationship with the European Union, but also in compliance with the principle of solidarity, when they interact horizontally with the other Member States. Viewed from this angle, the European Union's interest must be understood as encompassing both the interests of the federation, and the interests of its members. European Union law is therefore a means of protecting both the federation and its members from the encroachments of other institutional actors.

454. The main weaknesses of the Court of Justice power-based approach. The power-based approach, which consists in requiring Member States to cooperate, and to take into account the respective interests of the European Union and of the other members of the European Union federation in all of their fields of activity, can be accounted for rather easily from a utilitarian perspective. It is, as a matter of principle, necessary to prevent the Member States from undoing what the European Union institutions – and hence themselves – are gradually building through the exercise of powers that fall within their spheres of autonomy. However, I have argued throughout this thesis and in Chapter 6 in particular, that the power-based approach lacks deeper grounds of authority and legitimacy. As a comparison with the respective case laws of the US Supreme Court and the German Constitutional Court strikingly reveals, the Court of Justice remains silent as to where the foundations of its approach are to be found. This holds true, in my view, with respect to all the cases[14] having the effect of curtailing the exercise of national powers over which the European Union has no, or very limited, jurisdiction. In view

[14] See, *Supra*, §§ 88s.

of this, this thesis should be seen as an incentive for the Court to deepen its reasoning and to expand in its various cases on the different reasons why subjecting the Member States to the free movement principle even in areas where they have *de facto* or *de jure* exclusive jurisdiction is justified from the point of view of democracy and legitimacy. In sum, this thesis calls for making explicit the source(s) of authority of the power-based approach.

455. In a similar vein, one may legitimately wonder which criteria are at the basis of the Court of Justice's decision to subject only certain fields to the power-based approach. Chapter 1 has shown, in this respect, that the fields analyzed herein correspond in all likelihood to what are commonly considered in Western Europe as "essential state functions." But how is this concept to be defined? Through which criteria? As the reference to the US constitutional experience has made it clear,[15] it is extremely difficult to find compelling criteria for distinguishing between different state functions. Most of the time such criteria turn out to be unworkable. The current stand of the European Court of Justice is nonetheless unsatisfactory, since the subjection of the fields concerned by the power-based approach relies entirely on its discretion. Once again, I call for a clarification of the judicial tools used to identify the fields that ought to be subject to a specific legal framework.

456. Implications for the analysis of European Union constitutional law (i). I have used, throughout my thesis, an original framework to analyze the cases involving powers retained by Member States. First, I have provided a crosscutting analysis of the cases involving powers retained by Member States. In this respect, my various findings confirm that from a structural perspective the four economic freedoms and European Union citizenship form a coherent whole. They should, in this respect, be seen as an incentive to increasingly understand the free movement principle as a unitary principle. I am indeed of the view that the law of free movement should be increasingly subdivided depending on the substantive field involved – i.e. social security, direct taxation, company law, gambling, etc. – instead of relying on each freedom individually. In any case, as the Court increasingly bases its rulings on more than one freedom, the use of separate freedoms would appear to be increasingly less relevant. It is sufficient to think, for instance, of the cases of *Schwarz* and *Commission v. Germany*,[16] cases in which the simultaneous

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[15] See, *Supra*, §§ 356s.
[16] Case C-76/05, *Schwarz*, [2007] *ECR* I-6849; Case C-318/05, *Commission v. Germany*, [2007] *ECR* I-6957.

application of the freedom to provide services and European Union citizenship led the Court to reach the exact same conclusions.

457. Implications for the analysis of European Union constitutional law (ii). Second, I have taken as the starting point of my inquiry the institutional and constitutional bonds that tie the European Union and its Member States on the one hand, and the Member States together on the other hand. I have seen how the entrenchment of the power-based approach has the effect of reshaping and refashioning these bonds. I have attempted to renew the perspective that is traditionally endorsed to analyze the contours of the constitutional law of the European Union. Instead of focusing on rights, I have almost exclusively looked at the structure that characterizes the European Union. At times, I might have too overlooked the "right dimension" of the cases concerned by the power-based approach. However, my structural approach has the merit of bringing to light findings, such as the issue relating to Union's membership, that would not have been arrived at had I followed the traditional approach.

458. From a broader perspective, my approach in fact sheds light on the necessity to bridge the gap, as far as the constitutional law of the European Union is concerned, between structure and rights. Even if constitutional theory in the United States is, in many respects, very different than that of the European Union, the following statement made by G. P. MILLER with respect to the US constitutional order does not lose its relevance with respect to EU constitutional law:

> A basic challenge of modern constitutional law [...] is to develop a Grand Unified Theory that would explain both the system of rights and that of structure as manifestations of deeper underlying principle.[17]

This is what I have somehow attempted to do, however modestly, when I have drawn the attention, for example, to the peculiar nature of the individual rights recognized in the cases involving powers retained by Member States.[18] They differ from what is traditionally referred to as "fundamental rights." Indeed, they include a vertical or "surrogate" dimension, in the sense that they reflect the need to promote and to further the unity of the European integration project. They also display a horizontal facet, revealing of the interactions among Member States. Put differently, an accurate understanding of the peculiar nature of the rights that stem from the cases involving powers retained by Member States requires the structure characterizing the

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[17] G. P. MILLER, "Rights and structure in constitutional theory," 8 *Social Philosophy & Policy* 196, 198 (1991).
[18] See, *Supra*, § 421.

European Union to be taken into account. This approach moreover better reflects the reasoning of the Court of Justice itself. Similarly, the structural architecture of the European Union can only be assessed if the role played by individuals rights – and, in particular, the way they are used by the Court to legitimate its overall authority –[19] is adequately taken into consideration.

[19] G. DE BÚRCA, "The language of rights and European integration," available from http://aei.pitt.edu/6920/1/de_búrca_gráinne.pdf.

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