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Some Thoughts About the Interaction Between Judges and Politicians

Professor Dr. Koen Lenaerts, LL.M.†

The drafters of the Treaties establishing the European Communities entrusted to the European Court of Justice ("ECJ") the task of "ensur[ing] that in the interpretation and application of [these treaties] the law is observed."1 They could not foresee how the ECJ would fulfill that task, nor did they define the concept of "the law" anywhere in the Treaties. Nevertheless, the drafters agreed that the concept was vital to the operation of the newly created European Community ("EC" or "Community"). Indeed, a Community based on the rule of law would undoubtedly help lay "the foundations of an ever closer union among the peoples of Europe."2

Apart from this basic conception about the proper function of the law in the European Community, representatives from the Member States filled the Treaties with concepts and provisions drawn from public international law, which governs the relations among independent States. For example, Treaty sections, relating to political decisionmaking in the Community3 and to judicial enforcement of Community law against recalcitrant Member States,4 respected the Member States' status as sovereign nations. In its original state, the European Community's "constitution" was seen as, at most, a compact among States.5

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2 EEC preamble.

3 See, in particular, EEC, Art 146, which gives the Council (consisting of governmental representatives from the Member States) the final say on all legislation and which, until the entry into force of the Single European Act in mid-1987, granted the European Parliament a very limited role, namely, the right to give an opinion on a number of matters.


5 Compare the Preamble to the U.S. Constitution, containing the solemn proclamation by the "People of the United States" of their intent "to form a more perfect Union" (of States), with the EEC Treaty, which opens with an equally solemn declaration by six Heads
Since that time, the Treaties establishing the European Community are considered a true constitution, leading the ECJ to rule in 1986 (after three decades of Community existence) that “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the [EEC] Treaty.”

This ruling, of course, was preceded by a number of developments in ECJ jurisprudence, which contributed to the gradual constitutionalization of the Treaties. The ECJ had paved the way for turning the European Community, which was still perceived by its Member States to be a unique international organization, into a true composite legal order. The political decisionmaking and law enforcement at the central level would then coexist with fully sovereign component entities—the Member States.

This Article argues that the ECJ reached this aggregate outcome by focusing on the pressing institutional and legal needs of the European Community for successive periods of time. Each judicial response boosted the political processes of the individual Member States and of the Community as a whole, enabling them to continue to develop the Community through amendments to the Treaties and lawmaking in numerous policy fields, both at the Community and national levels. Moreover, each response to a particular need remains present throughout the further course of the ECJ’s decisions. The result is another layer of the *acquis communautaire*, on which new strands, reflecting innovative judicial concerns, can be grafted.

For the sake of analysis, I will distinguish three strands in the ECJ’s jurisprudence. The *first strand* relates to the series of ECJ rulings that helped turn a public-international-law construction into a truly novel legal order (hereafter the “Community legal order”), containing the essence of a federal system. A *second strand*
reflects judicial moves to safeguard the core of the European integration agenda set out in the Treaties, when the political actions that should have been taken were not pursued, and the legislation that should have been adopted was, in fact, not passed.

In contrast to this visible and direct interaction between the political and the judicial processes, the third strand came to the forefront when the political process regained the strength to make policy decisions and pass necessary legislation. In these later cases, the Court of Justice has acted as a constitutional court, upholding the “checks and balances” built into the Community decision-making process and, if need be, protecting the fundamental rights of the people against any excessive action resulting from that process.

This constitutional role of the ECJ has grown rapidly, especially after the 1986 Single European Act (“SEA”). The SEA greatly enhanced the efficiency of the Community’s process of political decisionmaking, most notably through an increased acceptance of qualified majority voting within the Council. The Treaty on European Union, signed in Maastricht, which federalized even more strongly the procedures of political decisionmaking within the Community, should give this role further momentum. Regarding in particular the protection of private party interests affected by illegal administrative actions (or inaction) by Community institutions—a subject of concern for the ECJ to some extent from the beginning—the ECJ expanded its role by proposing the establishment of the Court of First Instance of the European Communities.9

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9 After presenting the ECJ’s working ideas on the establishment of a Court of First Instance in a document dated November 26, 1986, the Court of Justice submitted a formal request for a Court of First Instance of the European Communities to be established pursuant to ECSC, Art 32D, EEC, Art 168A and EAEC, Art 140A (Articles which were themselves inserted into the Treaties at the request of the Court of Justice, made on October 16, 1985). None of these texts have been published. For an insider’s account, see Yves Galmo, Le
I. SHAPING THE "COMMUNITY LEGAL ORDER"

To ensure that "the law is observed," the Court of Justice first had to construct tools enabling it to guarantee the effectiveness, supremacy, and uniform judicial enforcement of Community law throughout the Member States. An American reader might be astonished to learn that these tools had to be constructed. Weren't the Treaties automatically considered a constitution for the Community? Wasn't it obvious that Community law would operate directly within the legal order of the Member States? Surely, the Treaties must have stated the supremacy of Community law over national law, with the ensuing obligation for all judges in the Member States to make Community law prevail over inconsistent national law? In fact, none of these basic questions received an express and unequivocal answer in the Treaties. Yet, the ability of the EC to become a functional, composite legal order depended on the answers to these very questions.

While the provisions of the Treaties were not wholly unhelpful in answering those questions, their public-international-law origin had a decisive impact on the precise wording of the Treaty sections, an effect which the ECJ had to discount considerably before it could rely on them in the global context of the Treaties. Among the provisions that proved to be significant in this respect, special mention must be made of Article 5, the so-called "fidelity clause." This clause obliges the authorities of the Member

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10 See Case 26/62, Van Gend & Loos v Netherlands Inland Revenue Administration, 1963 ECR 1, 1963 CMLR 105; Case 6/64, Costa v ENEL, 1964 ECR 585, 593, 1964 CMLR 425:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the 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.


States (including their judges, as the ECJ would later hold)\textsuperscript{13} to be loyal to the Community and "abstain from any measure which could jeopardize the attainment of the objectives of [the EEC] Treaty." Even an imaginative reader would have trouble finding in this clause a judicially enforceable rule, like the Supremacy Clause of the U.S. Constitution, for resolving conflicts between federal and State law.\textsuperscript{14} Nonetheless, the ECJ was able to fashion such a rule out of Article 5 and other provisions such as Article 177 (organizing the procedure for requests from Member State judges to the Court of Justice for preliminary rulings on the interpretation of Community law or on the validity of acts of Community institutions) and Article 189\textsuperscript{15} (providing for the different kinds of binding legislative instruments under Community law).

To establish the supremacy of Community law, the ECJ first recruited national courts and private parties as allies. In recruiting the former, the ECJ accepted an extensive role\textsuperscript{16} for national judges in the scheme of judicial oversight of Member State compliance with Community law.\textsuperscript{17} To interest private parties in the correct application of Community law, the ECJ developed the doctrine of "direct effect" of provisions of Community law\textsuperscript{18} and the principle of supremacy of Community law over inconsistent national law.\textsuperscript{19} All three aspects of the ECJ's jurisprudence now be-


\textsuperscript{14} US Const, Art VI, § 2.

\textsuperscript{15} Compare ECSC, Art 14 and EAEC, Art 161.


\textsuperscript{17} This role might even go beyond the jurisdictional powers possessed by the national judges under national law. See Case C-213/89, \textit{The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others} ("Factortame"), 1990 ECR 2433, 1990:3 CMLR 867.

\textsuperscript{18} Advocate General G.F. Mancini articulated the underlying philosophy of the system when he observed that an individual may now rely on principles of Community law "before the national court which, as is well known, is also a Community court." Case 237/82, \textit{Jongeneel Kaas v Netherlands}, 1984 ECR 483, 520, 1985:2 CMLR 53.


\textsuperscript{20} The principle was first stated in Case 6/64, \textit{Costa v ENEL}, 1964 ECR 585, and received a basic application as to the relationship between Community law and national law on competition in Case 14/68, \textit{Walt Wilhelm v Bundeskartellamt}, 1969 ECR 1, 1969 CMLR 100. Since then, the principle has been restated on numerous occasions as an axiom of Community law and has been applied in relation to all rules of national law, including national constitutional provisions. See Case 11/70, \textit{Internationale Handelsgesellschaft v Einfuhr-
long to the base-level layer of the *acquis communautaire*, but during the early 1960s they had to be established over the fierce opposition of a majority of the then six Member States.\(^1\)

The main thrust of the ECJ’s opinions during this constructionist stage was the effectiveness (“effet utile”) of Community law and its uniform application in favor of private parties. Thus, the ECJ ruled in its 1963 landmark judgment, *Van Gend & Loos v Netherlands Inland Revenue Administration*:\(^2\) “The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.”\(^2\)

The Dutch and Belgian Governments argued that the ECJ could not use its jurisdiction to hand down a preliminary ruling on the interpretation of a provision of Community law if the consequence of such a ruling would be to reveal an inconsistency between national and Community law. Such inconsistency could only be declared, they maintained, following the special procedure laid down in Articles 169 and 170, traditional public-international-law-type provisions offering a kind of declaratory relief for the Community or a Member State. The Treaty drafters had come no further than this sole mechanism of judicial supervision, but the ECJ found that “a restriction of the guarantees against an infringement of [Community law] by Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals.”\(^2\)

The ECJ pointed out “the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.”\(^2\)

Accordingly, the ECJ accepted its jurisdiction to interpret, by way of a preliminary ruling pursuant to Article 177, any provision of

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\(^1\) See the observations submitted to the Court of Justice by the Belgian, Dutch, and German Governments in Case 26/62, *Van Gend & Loos*, 1963 ECR 1, and of the Italian Government in Case 6/64, *Costa v. ENEL*, 1964 ECR 585.

\(^2\) One might refer to *Van Gend & Loos* as the “Marbury v Madison” of European Community constitutional law, in the sense that without it, not much of Community law would exist.


\(^4\) Id.

\(^5\) Id.
Community law, even if its interpretation revealed that a rule of national law ran afoul of Community law.

The Member State judge who requests a preliminary ruling is bound to enforce the rights held by the interested private party under the Community law provision ("direct effect"), notwithstanding the existence of the inconsistent rule of national law ("supremacy" of Community law). In practice, the preliminary ruling will be binding upon all national judges throughout the Community (given their duty of loyalty under Article 5), except when they prefer to resubmit the problem to the ECJ in order to have the latter reconsider its interpretation in the light of new developments in fact or law.26

Thus, the ECJ supplemented the scheme of judicial supervision of Member State compliance with Community law, based on a conception of public-international-law litigation between the institutions and component entities of the Community legal order, with one that essentially relies on the initiative of private parties and the authority of national judicial systems. As a consequence, the Community must trust these systems, particularly the efficiency of their rules of procedure in cases involving the enforcement of rights of private parties under Community law. Under the ECJ's rulings, the Community and national legal orders are distinct from one another, so national rules of procedure apply.27 This principle, however, threatens the uniform judicial enforcement of Community law throughout the several Member States, as national rules of procedure tend to differ rather strongly from one Member State to another.28 In order to remedy this situation, the ECJ openly appealed to the political process of the Community. The ECJ indicated the legal basis in the Treaties that would enable the political

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26 The Court of Justice has stated this rule in express terms for any "court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law" (EEC, Art 177, last 1). See Case 283/81, CILFIT v Ministry of Health, 1982 ECR 3415, 3429-30, 1983:1 CMLR 472. For an argument in favor of an extension of this rule to all courts and tribunals of the Member States, see René Joliet, L'article 177 du traité CEE et le renvoi préjudiciel, Rivista di diritto europeo 1991, 591, 606-07.

27 See, for example, Case 45/76, Comet, 1976 ECR at 2053; and Case 33/76, Rewe, 1976 ECR at 1997. National rules will apply unless Community legislation provides for uniform rules of procedure to be observed by the national courts when deciding on claims arising under Community law.

28 See, as examples, the divergent national statutes of limitation or procedural conditions for recovery of sums unduly paid to public authorities (for example, a tax which later appeared to be inconsistent with Community law). See also the cases cited in note 13.
organs to enact a Community-wide procedural code to be applied by all national courts when enforcing Community law rights.29

Not willing to wait for the political process to respond to that appeal, the ECJ crossed the line of separation between the Community and national legal orders. The ECJ imposed on the national courts an obligation to produce an effective outcome in cases involving Community law (so as to guarantee what is known as the "useful effect" of the "direct effect" of provisions of Community law). At first, the ECJ moved cautiously and simply required that the same rules of procedure apply in actions to enforce rights arising under national law and in actions to enforce similar rights under Community law.30 This requirement follows from the no-discrimination principle—one of the fundamental principles of the Community legal order.31 The ECJ later added that, even when the no-discrimination requirement is satisfied, national rules of procedure "may not be so framed as to render virtually impossible the exercise of rights conferred by Community law."32 This latter condition became known as the requirement of effectiveness.33 The ECJ has subsequently framed this requirement into a fundamental right of private parties—that national courts provide an effective remedy for protecting individuals' rights under Community law.34

Accordingly, the Member States must either create, under national law, an effective remedy whenever one does not exist or clear away obstacles that might prevent an existing remedy from being fully effective. Since the ECJ sees this as an obligation of the Member States under Community law (essentially Article 5), the ECJ will answer requests for a preliminary ruling under Article 177. Thus, the ECJ will fill in the precise contours of that obligation in the concrete setting of a Member State's pre-existing legal tradition. The ECJ's decisions in this respect are bound to be ex-

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29 Case 33/76, Rewe, 1976 ECR at 1998; Case 45/76, Comet, 1976 ECR at 2053 (referring to Articles 100 through 102 and 235).
33 This requirement was first enunciated in Case 45/76, Comet, 1976 ECR at 2053. See also, Case 811/79, Amministrazione delle Finanze dello Stato v Ariete, 1980 ECR 2545, 2554-55.
tremely sensitive, as they go right to the heart of the Member States’ surrender of sovereignty, as agreed upon in far less explicit terms in the Treaties.

One leading case in this area is SpA Granital v Amministrazione delle Finanze dello Stato. In Granital, the Italian Constitutional Court abandoned its procedural requirement that, when a provision of Community law conflicts with subsequent national legislation, the courts first refer the matter to the constitutional court in order to have it quash the legislation on the ground of its inconsistency with Article 11 of the Italian Constitution. The Court of Justice had indeed ruled that a national court, when called upon, within the limits of its jurisdiction, to apply provisions of Community law, must (i) give full effect to those provisions; (ii) refuse to apply any conflicting provision of national legislation, even if adopted subsequently; and (iii) need not request or await the prior setting aside of such provisions by legislative or other constitutional means. In the grounds of the ECJ’s judgment, the requirement of effectiveness is called “of the very essence of Community law,” so that any “impediment to the full effectiveness of Community law” had to be rejected, even if it were only temporary. This consideration indicates that the ECJ is not ready to engage in a balancing test, weighing the effectiveness of Community law against the possible cost in terms of national resentment toward the ECJ’s ruling. Indeed, since “the very essence of Community law” is at stake, only “full effectiveness” (in time and space) is sufficient.

The same impression surfaces in the Factortame case. In Factortame, the petitioner sought interim relief from a U.K. government decision which likely conflicted with Community law. However, an age-old English rule of procedure precluded interim relief against Government decisions. Nevertheless, in reply to a request for a preliminary ruling from the House of Lords, the ECJ held that where the sole obstacle to interim relief is a rule of na-

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57 This is the legal basis in the Italian legal order for the supremacy of Community law. Id.
59 1978 ECR at 644.
60 Id.
61 Factortame, 1 All England Law Reports 70 (House of Lords 1991).
tional law, the national court must set aside that rule. Thus, once again, the ECJ required a dramatic change in national procedural law where that law provides the framework for the judicial enforcement of Community law. Outside the field of application of Community law, of course, the law of the Member State remains unaffected. However, inside the field of EC law, the national courts have become the decentralized judicial enforcers of Community law. The Member States must protect the full effectiveness of that law, even at the expense of part of their own procedural autonomy. Here, too, the ECJ justified this ancillary loss of Member State judicial sovereignty as part of the obligations of national judges under Article 5 and as part of the system of Community law set up under Article 177.

The visibility of this first strand in the ECJ’s case law peaked in the Francovich judgment of November 19, 1991. In that judgment, the ECJ stated that a Member State must create an action for damages from the State when the Member State does not fulfill its obligations to implement a directive correctly and, thereby, harms the interests of private parties, who would have drawn rights from the directive if it had been correctly implemented. In some Member States, such a right of action is foreign to their national legal traditions, especially when the action for damages aims in effect at obtaining compensation for the harm caused by the “fault”—action or inaction—of the Member State’s national legislature.

Clearly, the ECJ believed that such a right of action was the only way to provide an effective remedy in the national courts for an infringement of Community law on the part of the national political process. As before, the ECJ based this ancillary loss of Mem-

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41 Case C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and Others ("Factortame"), 1990:1 ECR at 2474-75.
42 Id (as to the reference to Article 5).
43 Joined Cases C-6/90 and C-9/90, Francovich v Italy, (Judgment of November 19, 1991) (not yet reported).
44 The Community directive at issue in Francovich obliged the Member States to establish a national guarantee fund to take over the financial obligations of insolvent employers vis-à-vis their workers. Italy had not established any such fund and faced claims brought against it by workers who could not obtain payment of what was still due to them by their (insolvent) employer. Another situation in which the Member State’s failure to implement a directive into national law might cause harm to a private party is when the directive’s content is clear, precise, and unconditional and, therefore, capable of producing “direct effect,” and one private party wishes to invoke it against another private party. Such an action currently is not possible when the directive has not been first implemented in a provision of national law. See Case 152/84, Marshall v Southampton and South-West Hampshire Area Health Authority, 1986 ECR 723, 749, 1986:1 CMLR 688.
ber State judicial sovereignty principally on Article 5, this time read in combination with the definition in Article 189 of the “directive” as a legislative instrument of Community law.46

At the time of this decision, the Member States were considering a number of amendments to the EEC Treaty. One of these proposed amendments would have required Member States to create national non-contractual liability regimes. Under these regimes, private parties could recover whenever they could prove actual harm as a consequence of any infringement of Community law committed by the public authorities. Relief would first be granted for the failure to implement a directive, as was the case in Francovich.47 Thus, the judicial process had, in essence, preempted the choice for the political process and for the makers of the constitution themselves. As it turned out, this proposed Article was not adopted at the Maastricht meeting of the European Council,47 even though, according to the judges, the constitution already contained the seeds of the “new” obligation.48

This recent development is yet another explicit example of “normative” supranationalism overtaking “decisional” supranationalism.49 Once again, the ECJ gave interested private parties an effective tool to enforce their Community legal rights before national courts. Once again, the ECJ acted on the basic premise that the judicial enforcement mechanism of Community law must be dispersed between the courts of the Member States and proceed at the initiative of private parties, with the Court of Justice ensuring

46 EEC, Art 189, ¶ 3: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” On the obligation of Member States to adopt the necessary implementing measures, see Case 102/79, Commission v Belgium, 1980 ECR 1473, 1487, 1981:1 CMLR 282.


48 The “European Council” comprises the Heads of State or of Government of the Member States and the President of the Commission of the European Communities, assisted by the Ministers for Foreign Affairs and by a Member of the Commission, and meets at least twice a year. Single European Act, Art 2. At its Maastricht meeting in December 1991, the European Council sat at the same time as a “conference of representatives of the Governments of the Member States” within the meaning of Article 236, which provides the procedure for amending the EEC Treaty.

49 See especially ¶ 36 of joined cases C-6/90 and C-9/90, Francovich, (Judgment of November 19, 1991) (not yet reported) in which the court explicitly refers to Article 5 as an additional legal basis—besides the general system of the Treaty—for the obligation of Member States to compensate the harm caused to private parties by the infringements of Community law which they commit.

uniformity of application of that law through its preliminary rulings.

Meanwhile, the political process came no further than amending the more traditional, public-international-law route of judicial enforcement, that is, the “Commission v Member State” or “Member State v Member State” actions based on Articles 169 and 170. At Maastricht, the Community adopted a new provision authorizing the Court of Justice to impose, at the request of the Commission, “a lump sum or penalty payment,” when a State fails to comply with a previous ECJ judgment that the Member State has infringed Community law. Although this provision undeniably constitutes an improvement to the Treaty, inasmuch as it will allow the ECJ to do something about persistent infringements of Community law by Member States, the proposed text remains a rather lengthy and burdensome route to effective compliance with Community law. In addition, it does little to protect the interests of private parties who fall victim to a Member State infringement of Community law.

II. SAFEGUARDING THE CORE OF THE AGENDA OF EUROPEAN INTEGRATION

A second strand in the ECJ’s case law concerns the substantive interaction between the Community’s judicial and political processes. In this respect, special mention must be made of the principle of “direct effect”. According to ECJ case law, provisions of Community law have direct effect when they are clear, precise, and unconditional, so as to create judicially enforceable rights without requiring any further political decisionmaking on the part of the Community or the Member States. Thus, the decision of the ECJ to recognize the direct effect of a provision reflects the judgment that the provision contains the judicially manageable

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60 Under the case law as it stood before Francovich, an ECJ finding, in Article 169 or Article 170 proceedings, that a Member State had infringed Community law could serve as the starting point for a claim for damages against the Member State before the latter’s courts only if national law provided such a remedy. See Case 39/72, Commission v Italy, 1973 ECR 101, 112, 1973 CMLR 439. Now, the Member States have an obligation to provide such a remedy. Of course, a Member State’s infringement of Community law can also become apparent on the basis of a preliminary ruling, so that the national judge will be able to go from there in deciding on damages claims brought against the Member State by an affected private party. In such cases, an ECJ judgment based on Articles 169 or 170 is definitely no prerequisite.

standards needed to give it an effective interpretation.\textsuperscript{52} Such a decision does not mean, however, that the directly effective provision of Community law may need no interpretation because the interpretation would be so utterly clear; it only means that, whenever such an interpretation proves to be necessary, the judicial office can functionally provide it. Thus, a decision that a provision produces direct effect makes the ECJ responsible for fine tuning the application of the provision in concrete cases, which in turn leads to a judge-made gloss on the provision, determining its real content and relevance.

This line of reasoning struck observers of the ECJ’s work as an unequivocal expression of judicial activism, especially when the provision that was declared directly effective seemed to need implementation rules in order to reach its “effet utile.”\textsuperscript{53} The ECJ, however, argued that those implementation rules were not a prerequisite, but were only proposed to make the fulfillment of the obligation easier.\textsuperscript{54} The only prerequisite, according to the ECJ, is that the provision impose “an obligation to attain a precise result.”\textsuperscript{55}

The ECJ’s interpretation of the “obligation to attain a precise result” might contain the answer to some issues which should have been addressed in Community legislation before the end of the transitional period but were not because the political consensus needed for sensitive decisions in the Council (before the Single European Act)\textsuperscript{56} was lacking. The ECJ made clear that where the

\textsuperscript{52} Compare the rhetoric used by Justice Brennan in his opinion for the Court in \textit{Baker v. Carr}, 369 US 186, 226 (1962): “Judicial standards under the Equal Protection Clause are well developed and familiar.”

\textsuperscript{53} In \textit{Van Gend & Loos}, the ECJ started out with the easier case of a “negative obligation” for the Member States which triggered directly enforceable rights for interested private parties, but the later case law indicated that a clear and unconditional “positive obligation” flowing from Community law could also lead to directly enforceable rights in favor of interested private parties. A famous illustration is Case 43/75, \textit{Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena}, 1976 ECR 455, 1976:1 CMLR 98. In that case, Belgium had failed to fulfill its positive obligation under Article 119 to ensure and maintain the principle that men and women should receive equal pay for equal work; the ECJ granted the provision “direct effect.” For an assessment of the innovation brought about by that reasoning of the court, see Walter Van Gerven, \textit{Contribution de l’arrêt Defrenne au développement du droit communautaire}, 13 Cahiers de droit européen 131 (1977).


\textsuperscript{55} Id.

\textsuperscript{56} Until July 1, 1987 (date of the entry into force of the Single European Act), the principal legal basis enabling the Community to tear down obstacles to free trade in the common market that result from disparities of national laws was Article 100, which required unanimity in the Council. The Single European Act supplemented this legal basis with Article 100A, which allows the Council to act by a qualified majority.
court could make judicial sense of a provision, the ECJ would not allow the Community's failure to timely adopt some measures announced in the EEC Treaty to imperil the effectiveness of the Treaty provision those measures were to implement. Thus, after determining that Article 52 should receive direct effect, as far as it states the principle of non-discrimination on the grounds of nationality (in the field of establishment of self-employed persons) the ECJ ruled that, with the expiration of the transitional period, the directives provided for in the Treaty to implement this principle have become "superfluous."\(^{15}\)

Despite its initial appearance, the "activism" of the ECJ did not consist of finding that political action had become superfluous. Rather, the activism became the inevitable consequence of recognizing the "direct effect" of those provisions, thereby inviting interested private parties everywhere in the Community to claim rights arising under them. This, in turn, led to a concomitant number of requests for preliminary rulings. In answering those requests, the ECJ was bound to come up with a judicially workable interpretation of the directly effective Community law provision.

A balancing of conflicting policy values, then, often is at the center of the ECJ's decisionmaking. This is especially the case with regard to the Treaty provisions securing the free movement of goods, workers, self-employed persons (freedom of establishment), and services—the cornerstones of the common (internal) market.\(^{18}\) The ECJ evidently endeavors to safeguard the full effectiveness of the free movement principle, the centerpiece of market integration. Yet, at the same time, the ECJ tries to be sensitive to the need for some exceptions, as stated in the Treaty\(^{68}\) or worked out in the ECJ's jurisprudence,\(^{68}\) to this principle. However, the art of "draw-

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\(^{15}\) Case 2/74, Reyners, 1974 ECR 631, 652.

\(^{18}\) See EEC, Art 30 (goods), Art 48 (workers), Art 52 (self-employed persons/freedom of establishment) and Arts 59 and 60 (services), all of which were granted "direct effect" throughout the ECJ's case law. See Case 74/76, Iannelli & Volpi SpA v Meroni, 1977 ECR 557, 575, 1977:2 CMLR 59 (regarding Art 30); Case 41/74, Van Duyn v Home Office, 1974 ECR 1337, 1346-47, 1975:1 CMLR 1 (regarding Art 48); Case 2/74, Reyners, 1974 ECR 631 (regarding Art 52); Case 33/74, Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 ECR 1299, at 1312, ¶ 27, 1975:1 CMLR 298 (regarding Arts 59 and Art 60).

\(^{68}\) See EEC, Arts 36, 48 (3), 56, and 66, which provide for exceptions to the free movement principle on grounds of public policy, public security, or public health which have been interpreted restrictively by the ECJ. See, for example, Case 36/75, Rutili v Minister for the Interior, 1975 ECR 1219, 1976:1 CMLR 140 (regarding Art 48 (3)); and Case 104/75, Officier van Justitie v De Peijper, 1976 ECR 613, 1976:2 CMLR 271.

\(^{68}\) In the field of the free movement of goods, see Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung für Branntwein, 1979 ECR 649, 1979:3 CMLR 494, establishing
ing lines" between the operational reach of the free movement principle, on the one hand, and the permissible scope of national exceptions to that principle, on the other hand, inevitably produces unpredictable outcomes. Even the judge questions, at times, the legitimacy and the feasibility of making policy choices, weighing the Community interest in having an internal market and the Member States' interest in protecting what they see as fundamental local values.

Nonetheless, disparities between national legislation, arising out of the divergent ways in which the several Member States define their fundamental local values, entail the risk that goods or services, lawfully marketed in the Member State in which they originate, cannot be introduced into the market of other Member States that subject those goods and services (both domestic and imported) to protective conditions unknown in the Member State of origin. The ECJ simply could not accept that obstacles to the principle that national legislation which is indistinctly applicable to domestic and imported goods, yet hinders inter-Member State trade, may escape from the prohibition laid down in Article 30 if it is "necessary" to satisfy a "mandatory requirement" of general interest to the Member State in question. In the field of the free movement of services, the ECJ allows for "specific requirements" being imposed on service providers even if the requirements somewhat hinder the cross-border provision of services (for example, "where [the requirements] have as their purpose the application of professional rules, justified by the general good or by the need to ensure the protection of the [consumer].") Case 110/78, Ministère Public v Van Wesemael, 1979 ECR 35, 52, ¶ 28, 1979:3 CMLR 87. But, at least in the case of goods, the court construes this exception narrowly, looking closely to see whether the measures adopted to meet the mandatory requirements are really necessary and whether less restrictive alternatives are available.


Internal market is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." EEC, Art 8A.

Fundamental local values include the protection of health, environment, consumers, fairness of commercial transactions, and avoidance of fraud in taxation. In the field of the free movement of services, the application of professional rules could be added to the list, Joined Cases 110/78 and 111/78, Ministère Public and Chambre Syndicale des Agents Artistiques et Impressarii de Belgique, A.S.B.L. v Van Wesemael, 1979 ECR 35, as well as the elimination of possible abuse in the provision of manpower, Case 279/80, Criminal Proceedings Against Alfred John Webb ("Webb"), 1981 ECR 3305, 3325, 1982:1 CMLR 719. As to the Court's awareness of the limits to its practicing the art of drawing lines, see Case 205/84, Commission v Germany,1986 ECR 3755, 3809, 1987:2 CMLR 69: "the Court is not in a position to make such a general distinction [between the several kinds of insurance services] and to lay down the limits of that distinction with sufficient precision to determine the individual cases in which the needs of protection, which are characteristic of insurance business in general, do not justify the requirement of an authorization." As a consequence, Germany could maintain its requirement of authorization for out-of-state insurance brokers selling insurance contracts on its market and it would be for the Council to legislate comprehensively on the matter at the level of the Community as a whole (which has largely been done since then on the basis of EEC, Art 100A).
free movement principle arising from the disparities in national legislation had to be tolerated as exceptions to the free-movement principle.

The ECJ, therefore, introduced into its jurisprudence the concept of mutual recognition due by the Member States to each other's laws, even where their actual content differs. Under this concept, the free movement principle requires Member States to authorize, in their territory, the marketing of goods and services lawfully introduced into the market of another Member State. An exception is granted where a Member State's own national provisions, containing specific marketing conditions for such goods and services (conditions which apply equally to domestic and out-of-state goods and services), "may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer." This list of "mandatory requirements" is by no means exhaustive. The list will be lengthened whenever the ECJ finds that the policy goal pursued by a Member State in its legislation, forming an obstacle to the free movement principle, serves an aspect of the general interest worthy of public protection by the Member State's police powers. This obviously is the first moment of judicial policy choice that is unavoidable in the ECJ's scheme for the legal relationship between the principle and its possible excep-

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44 Mutual recognition in the field of services means that the Member State in which the services are provided "must take into account the evidence and guarantees already furnished by the provider of the services for the pursuit of his activities in the Member State of his establishment." See Case 279/80, Webb, 1981 ECR at 3326. For a more recent application of the same line of reasoning relating to the issue of the mutual recognition of diplomas and professional qualifications, see Case C-340/89, Vlassopoulou v Ministerium für Justiz, 1991 ECR I-2357 (Rather than being allowed to refuse recognition of the Greek diploma in law and the subsequent legal experience of Ms. Vlassopoulou in Germany, this Member State was put under an obligation to analyze with great care the precise extent of professional knowledge acquired by Ms. Vlassopoulou, who wanted to become an attorney in Germany. Therefore, the German authorities could only impose the additional training requirements which would still seem to be necessary after having duly taken into account the legal training received in the Member State of origin).

45 Case 120/78, Rewe-Zentrale ("Cassis de Dijon"), 1979 ECR 649, 662.
Using that prerogative of judicial policy choice, the ECJ later added the protection of the environment to the list. A second and far more intangible judicial policy choice relates to the question of whether national legislation that burdens the operation of the free movement principle was actually "necessary" to satisfy the mandatory requirement at hand. If there were less restrictive alternatives, less burdensome for the operation of the free movement principle yet equally (or only marginally less) effective in satisfying the mandatory requirement, the national legislation would be considered incompatible with Community law.

This "means-goals" test draws the ECJ into the hardest part of balancing conflicting policy values. The outcome of this judicial review of Member State legislation will depend entirely upon the degree of scrutiny applied. The scrutiny tends to be severe, following the general rule that a principle (here, free movement) should be interpreted expansively, and an exception (here, the mandatory requirement) narrowly. In practice, the Member State defending its legislation must argue convincingly that its national situation is so specific, and hence different from that prevailing in the other Member States, that the laws of those states must be regarded as insufficient to satisfy the

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Note the wording of the ECJ's assessment that the elimination of possible abuse in the provision of manpower "amounts for [Member States] to a legitimate choice of policy pursued in the public interest." Case 279/80, Webb, 1981 ECR at 3325. "[T]he provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned." Id. It is hard to imagine a more open discussion of policy as the basis for a judicial decision.


For an application of the "less restrictive alternatives" test, see the so-called German beer case, in which a centuries-old law, which mandated that beer brought onto the German market be made only with natural ingredients, was considered to be inconsistent with the free movement principle, because the objectives stated for the law (health and consumer protection) could have been reached, according to the ECJ, through alternative means which would have been less burdensome for cross-border trade, such as, for example, an appropriate warning on the label of the bottle. Case 178/84, Commission v Germany, 1987 ECR 1227, 1988:1 CMLR 780.

See, for example, the ECJ's approach in the German beer case, explaining why a ban on additives is not really necessary to protect public health: "Mere reference to the potential risks of the ingestion of additives in general and to the fact that beer is a foodstuff consumed in large quantities does not suffice to justify the imposition of stricter rules in the case of beer." 1987 ECR at 1275. The ECJ also cited "the findings of international scientific research and in particular the work of the Community's Scientific Committee for Food, the Codex Alimentarius Committee of the FAO and the World Health Organization," for support for its conclusion. Id at 1276.
The ECJ's jurisprudence, which as early as 1979 elaborated the obligation of mutual recognition, corrected by the mandatory requirements exception, constituted an important lever to move the Community political process forward. Until then, politicians sought to work out uniform legislation on the basis of the Community's legislative competence to harmonize national laws, but the negotiators exhausted themselves by considering the smallest details of the subject matter at issue. The output of that process was wholly unsatisfactory, both in quantitative and in qualitative terms: few national laws were harmonized and, worse, the staunchest obstacles remained because not all Member States were pleased by the necessary compromises.

The judicial approach to the disparities between national laws and the difficulties they cause for the functioning of the common market showed the way to more realism in the political process. The Commission's 1985 White Paper on the internal market advocated a new approach to harmonization through Community legislation: actual harmonization should only concern the base-level requirements for goods and services to be marketable everywhere in the Community; beyond that level, Member States would be obliged to accept the differences among their national laws and to consider them as being equivalent, if not in their actual substance, at the very least in their actual outcome.

The policy scope of harmonization of national laws changed dramatically as a consequence of this new approach. Member States now see the political process of the Community as an opportunity to eliminate the most disturbing aspects of other Member States' laws, rather than to integrate the complete fine print of their own law into the new Community-wide legislation. The change in the Member States' attitude itself assured more successful political decisionmaking within the Council.

In addition, the new approach helped the Member States realize that having the political process in the Community really do its work, on the basis of qualified majority voting in the Council, was better than the alternative of letting the judicial process continue to make the necessary policy choices incrementally, by determining

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70 For a case in which the defending Member State made this argument successfully, see Case 188/84, Commission v French Republic, 1986 ECR 419 (relating to technical and safety standards for woodworking machines).
how much mutual recognition the Member States owed each other’s laws and creating additional exceptions under the rubric of mandatory requirements. In other words, Member States were led to prefer political legislation, even at the risk of being pushed into the minority on a vote concluding Council deliberations among the Member States, to a kind of “creeping legislation” through the judicial process, to which they were completely external. The impetus given to the political process by the judicial process has, in this respect, been a decisive factor which finally produced the Single European Act and especially the new Article 100A introduced into the EEC Treaty.

To say that the political process feared creeping judicial legislation is not to say that the political process had lost confidence in the operation of the judicial process. Quite the contrary, as Article 100A demonstrates. This provision sets out the Community’s legislative competence to harmonize national laws in view of the establishment of the internal market. To exercise that competence, the Council acts by a qualified majority on a proposal from the Commission in cooperation with the European Parliament. Thus, Member States can be outvoted in the Council and yet be equally bound by the Community legislation. As a softener for that “risk,” Article 100A(4) provides a mechanism for a Member State to continue to apply its conflicting national legislation “on grounds of major needs” (listed narrowly in the Treaty), unless the Commission or another Member State objects.

However, if the Member State in question is merely protecting its own market by keeping out competing goods or services originating in other Member States, then the matter will be referred, in a kind of summary proceeding, to the Court of Justice, which will have the final say.71 Thus, although the political process is definitely resolved to take matters in its own hands after the coming into force of the Single European Act, the process accepts the legitimacy of judicial umpiring as the last-resort solution to a political deadlock. One should note, however, that after almost five years of operation, not a single case has been brought to the ECJ under Article 100A(4), which proves that the ECJ’s lever to move the political process forward on its own merits and be based on its own constitutional legitimacy, must have been quite effective.

There are other, even more visible instances of interaction between the Community’s judicial and political processes. The ECJ’s

decisions concerning the status of the European Parliament as a
defendant or applicant in annulment actions brought under Article
173 provides an outstanding illustration. A literal interpretation of
that Article, which only mentions the Council and the Commis-
sion, should have led to a decision that the ECJ lacked jurisdic-
tion to hear annulment actions either brought against acts of the
European Parliament or brought by the European Parliament
against acts of the Council or the Commission. The participants at
the Intergovernmental Conference, which finally resulted in the
signing of the 1986 Single European Act, considered amending Ar-
ticle 173 to give the European Parliament standing. However, the
"founding fathers," the Member States that must agree unani-
mosously on any amendments to the Treaty, could not reach con-
sensus. Although the Community's political process had thus failed
to fill what was widely perceived as a problematic gap in the Com-

First, the ECJ recognized that a political party could bring an
action for annulment against the European Parliament—despite
the wording of Article 173—when that action was directed at
"measures adopted by the European Parliament intended to have
legal effects vis-à-vis third parties." Such was the case, according
to the ECJ, with regard to appropriations to cover the prepara-
ions for the election of members to the European Parliament by direct
universal suffrage, because those measures have legal effects vis-à-
vis both the political groups already represented in the Parliament
and those not so represented but able to take part in the elections.
The applicant was the French ecology party "Les Verts" which be-
longed to the latter category and, thus, was a third party vis-à-vis
the European Parliament. The ECJ reasoned that the Community
is based on the rule of law and that "the general scheme of the
Treaty is to make a direct action available against 'all measures

72 EEC, Art 173(1) reads as follows: "The Court of Justice shall review the legality of
acts of the Council and the Commission other than recommendations or opinions [that is,
only the binding acts]. It shall for this purpose have jurisdiction in actions brought by a
Member State, the Council or the Commission on grounds of lack of competence, infringe-
ment of an essential procedural requirement, infringement of this Treaty or of any rule of
law relating to its application, or misuse of powers."

73 See EEC, Art 236.

74 See Pierre Pescatore, Reconnaissance et contrôle judiciaire des actes du Parlement
européen, 14 Revue trimestrielle de droit européen 581 (1978).

75 See Case 294/83, Parti écologiste "Les Verts" v European Parliament, 1986 ECR
adopted by the institutions . . . which are intended to have legal effects.’”

It is particularly interesting that the judges believed they could still appeal to the “general scheme of the Treaty” immediately after a failure of the political process to solve the problem by a specific provision in that same Treaty. The truth of the matter is, of course, that it would have been unimaginable for the ECJ to deny legal protection to this political party. A fundamental principle was at stake: political parties must have an equal chance to present themselves to the voters. Without judicial enforcement of that principle, even against the acts of the European Parliament itself, the Community simply could not survive as a credible model of representative democracy.

Second, in 1990, after an initial refusal based on a literal reading of Article 173, the ECJ recognized the possibility for the European Parliament to bring an action for annulment against an act of the Council or the Commission “provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement.” The ECJ went on to specify that “in accordance with the Treaties, the Parliament’s prerogatives include participation in the drafting of legislative measures, in particular participation in the cooperation procedure laid down in the EEC Treaty.” The ECJ filled this gap in the Treaty text because it saw a pressing need for judicial enforcement of the constitutional system of “checks and balances.” Without such enforcement, that system could be constantly pressured by unchecked exercises of power emanating from the other Community institutions. The ECJ explained as follows:

76 Id at 1365.


79 1990 ECR at 2073, ¶ 28.

80 Compare the purpose served by this concept in American constitutional law, as described by Justice Frankfurter in his concurring opinion in Youngstown Sheet & Tube Company v Sawyer, 343 US 579, 593-94 (1952): “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”

81 The mirror image of this situation was already among the considerations which had led the ECJ to accept the capacity of the European Parliament to stand as a defendant in annulment proceedings brought against it under Article 173. See Case 294/83, Les Verts, 1986 ECR at 1366 (“Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or the other institutions, or exceed the limits which have been set to the Parliament’s power, without it being possible to refer them for review by the Court.”).
[The European Parliament's] prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community. Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur. The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve.\footnote{Case C-70/88, European Parliament v Council, 1990 ECR 2041, 2072-73.}

The delicate issue was the ECJ's legitimacy in filling an intentional gap in the Treaty text, which was left there after a failed attempt by the competent political body (the Intergovernmental Conference) to resolve the issue. The ECJ approached the problem in these terms:

The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.\footnote{Id at 2073.}

Having received a coherent answer to the question of the standing of the European Parliament in actions for annulment, the political process found no difficulty amending Article 173 at its next round of constitution-making, the Intergovernmental Conference culminating in the Maastricht meeting of the European Council. The negotiators included in Article 173 the precise terms of the ECJ's 1986 and 1990 rulings concerning the position of the European Parliament as a defendant and as an applicant in annulment.
actions. The divisions caused by the issue in 1985-86 had disappeared completely in 1990-91 and had been replaced by a widespread feeling that this solution was obviously the correct solution in a Community based on the rule of law. This sequence of interaction between the judicial and political processes of the Community could become even more relevant in the future, as it appears that Intergovernmental Conferences amending the Community constitution will be an ongoing process, culminating in a series of amendments every five years or so. The Maastricht Treaty on European Union provides for the next Intergovernmental Conference to be held in 1996.84

Another instance of judicial decisionmaking having an impact on the further operation of the Community's political process is contained in a 1981 case involving fishing stocks.85 In that case, the ECJ considered the question of what a Member State may do on its own regarding a subject-matter (conservation of the resources of the sea) over which the Community has exclusive powers under the Treaty. In principle, Member States may not act in such areas, even when the Community does not exercise its powers.86 Thus, the answer should have been easy: nothing. The factual and political problems, however, overshadowed the theoretical one. The factual problem was that, without any action from a public authority, the "resources of the sea" (that is, fishing stocks) might have been severely damaged. The political problem was—in the words of the Commission—that "the Council would have been in a position to adopt [conservation measures] in the form intended by the Treaty if the United Kingdom had not itself blocked the decisionmaking process in the Council . . . ."87 Consequently, the Community had the sole power to act but was politically incapable of using that power, whereas the Member State was politically capable of adopting its own conservation measures for its territory but lacked the power to do so.

The ECJ could have simply lifted the ban on the Member State's power on the ground that, in a case of force majeure, the Member State should be able to act. Doing so, however, would have entailed the risk that the Member State would view such a ruling as an incentive not to make any concessions in Council de-

84 Treaty on European Union, Art N(2).
87 Case 804/79, Commission v United Kingdom, 1981 ECR at 1070.
liberations. If the Member State could prevent the Community’s political process from producing an effective outcome, it could easily recover the powers that had been transferred to the exclusive domain of the Community. The ECJ thus faced the unique challenge to preserve with a single stroke the exclusivity of the Community’s legislative competence and the soundness of the fishing stocks.

As the starting point of its reasoning, the ECJ emphasized that the Community powers remained exclusive, regardless of whether the Council had been able to enact legislation. Accordingly, Member States were to abstain from enacting their own legislation, even to fill a gap left by Council inaction. The ECJ then referred to Article 5, according to which “Member States are required to take all appropriate measures to facilitate the achievement of the Community’s task and to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty.”88 In the ECJ’s view,

This provision imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.89

The proposal from the Commission, which under the Treaty constitutes the necessary point of departure of the Council’s decision-making in any field of legislative competence of the Community, was now to become, in the absence of a Council decision, the reference for the Member States acting “as trustees of the common interest . . . .”90 Indeed, the ECJ held that, given the exclusivity of the powers of the Community, a Member State could adopt interim conservation measures only “as part of a process of collaboration with the Commission.”91 Member States, the ECJ continued, have “not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation

88 Id at 1075.
89 Id.
90 Id.
measures in spite of objections, reservations or conditions which might be formulated by the Commission."

The effect of this ruling was to give the Commission a veto power over any proposed national interim conservation measures, a power to be exercised with reference to the full content of the legislative proposal which it had submitted to the Council as the basis for that institution's deliberations and voting. In the case at hand, of course, the United Kingdom was unhappy with the Commission's proposal itself. The U.K. could prevent the Council from adopting the Commission's proposal, but, after the ECJ's ruling, it would then have to face the Commission on the merits of this very same proposal.

The ECJ's ruling thus gave all Member States an incentive to make a new effort at reaching a compromise within the Council, even if that meant amending the Commission's proposal through a unanimous vote. The Member States, especially the dissenting Member State, most likely would prefer to deliberate in the Council rather than be forced to meet the objections raised by the Commission without having any forum to discuss these objections. As a result, the exclusivity of Community powers was preserved, as no unilateral action on the part of the Member States was to be tolerated. Nonetheless, interim conservation measures could be taken to the extent that they did not meet with objections of the Commission, the institutional guardian of the interests of the Community. All in all, the true winner was the Community's political process (along with, of course, the "resources of the sea"), which came out stronger, better able to make effective decisions. Indeed, a compromise was reached in a reasonable time following the ECJ's ruling.

Finally, in a number of policy areas, the political process has been able to move on after the ECJ laid down the groundwork for the further development of Community law on the basis of a teleological interpretation of the existing Treaty text. The interaction between the ECJ's jurisprudence and the political process of con-

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92 Id.
93 EEC, Art 149(1).
94 EEC, Art 155.
stitution-making deserves special attention in this respect. A first example concerns the Community’s legislative competence in the field of education. Under the EEC Treaty, such competence does not exist—a fact which is unquestioned in the ECJ’s decisions. Despite this absence of legislative competence, however, the ECJ developed elaborate rules relating to educational matters by reference to other Treaty provisions, especially those stating the principle of non-discrimination on grounds of nationality and the Community’s power to “lay down the general principles for implementing a common vocational training policy.”

In its 1985 judgment in *Gravier v City of Liège*, the ECJ held that “the imposition on students who are nationals of other Member States, of a charge, a registration fee or the so-called ‘minerval’ [additional tuition for foreigners] as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the Treaty.” The ECJ defined “vocational training” as any course of study that prepares students for a profession, trade, or employment.

This definition was later applied to almost all disciplines of higher education. The right to equal access was also expanded to encompass not only the amount of tuition, but also fellowships covering necessary expenses to obtain access to education (excluding general living costs and even costs of study). The equal access right also applied to the public funding systems of universities and institutions of higher learning in general, to the extent that such universities or institutions had incentives to take domestic students rather than students who are nationals of other Member States. Furthermore, the ECJ recognized Article 128 as being a sufficient legal basis for Community legislation relating to university students’ and teachers’ mobility, despite the undeniable impact that such legislation has on the structure and programs of the courses of study involved.

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97 EEC, Art 7.
98 EEC, Art 128.
100 1985 ECR at 615.
During the recent Intergovernmental Conference (1990-1991), in particular during the deliberations about a possible Treaty amendment which would grant to the Community some express powers in the area of education, Member States felt the influence of these decisions in two ways. On the one hand, the distance to be bridged between the total absence of Community powers in the area of education (the Treaty text of 1957) and the idea of granting such powers at present had become much smaller. The ECJ had largely paved the way to seemingly reasonable terms for the Community powers, thought to be necessary and appropriate. On the other hand, Member States were wary of any further extension of the Community's powers into a field that they had strongly believed to be their own. They saw express provisions about these powers in the revised Treaty text as the best way to restore legal certainty about the future reach of the development of the Community powers in question. Indeed, granting express powers also means stating express limits to such powers, and that was at least as much a concern for the Member States as the powers themselves. At the Maastricht meeting of the European Council, consensus was reached about the precise terms of a new title to be inserted into the Treaty on Community powers relating to education.105

The road towards "European citizenship" was similarly cleared to a considerable extent by the ECJ's jurisprudence before the Intergovernmental Conference agreed to devote a new title to it in the Treaty. The idea is that, as a citizen of the European Community, a national of a Member State is entitled to some basic rights in all the Member States—a kind of EC "Privileges and Immunities Clause." Those rights are essentially as follows: Community citizens shall have the right to move freely and to choose their residence within Community territory, and when they do so, they should be treated by the Member States concerned as these States' own nationals. At a later stage, the right of all Community citizens to vote and be candidates for elective office in the elections for the European Parliament and in municipal elections at their place of residence (irrespective of their nationality) will be added. This de-

105 The compromise reached can be summarized as follows: the Community will promote the European dimension of education (learning of languages, academic mobility, and transnational cooperation among institutions of learning) but it must at the same time respect fully the identity of the educational systems (which differ from one Member State to another and sometimes even within a single Member State), including their cultural and linguistic diversity.
development is novel and spectacular, because it indicates that the European Community no longer operates as a primarily economic device but aims, instead, at the integration among peoples wanting to live together in a new form of supranational polity.\textsuperscript{106}

In this important area, too, the ECJ had first signalled the way in which, even under the original EEC Treaty, the free movement principle could be of benefit to the “citizen” rather than only to the participant in the marketplace. The ECJ ruled, in \textit{Cowan v Trésor Public},\textsuperscript{107} that a national of a Member State who is a tourist in another Member State, and thus a potential recipient of services, must be able to enjoy the same rights granted by that State to its own nationals.\textsuperscript{108} In \textit{Cowan}, a British tourist was mugged while leaving a French subway station. French law provided for compensation for the harm suffered in such circumstances when the victim is French, holds a residence permit, or is a national of a country which has entered into a reciprocal agreement on the matter with France. Britain and France had no reciprocal agreement. Nevertheless, the ECJ held that Community law offered a solution to the British tourist’s case. Specifically, the ECJ referred to Article 7, which prohibits discrimination on the basis of nationality against, among others, recipients of services.\textsuperscript{109}

In fact, the ECJ relaxed the economic nexus which until then was generally believed to be a prerequisite for applying the free movement principle to a national of a Member State wanting to take part in economic activities in another Member State. The nexus no longer needs to be an “active” one (as worker, self-employed person, or provider of services) but can also be a “passive” one (as a potential recipient of services). Thus, because everyone is a potential recipient of services, every citizen crossing Member State borders inside the Community is protected by the free movement principle and the right to equal protection in the Member States he or she visits. After all, just taking the bus is a service within the meaning of the EEC Treaty.\textsuperscript{110}

\textsuperscript{108} Id.
\textsuperscript{109} 1989 ECR at 223.
\textsuperscript{110} See EEC, Art 60, ¶ 1: “Services shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration.” See also G. Federico
Even more striking than this extension of the free movement principle was the fact that the ECJ did not hesitate to state, in favor of the "new" category of persons, an obligation for the Member States to disburse public funds by way of social or medical assistance under the same substantive conditions as they would to their own nationals. As can be suspected, this was precisely the type of obligation which politicians saw as preventing a generally recognized right for nationals of one Member State to move freely into the territory of the other Member States and to reside there if they wished. What should happen if they lack sufficient resources, and nationals of the host Member State in similar circumstances receive some sort of "social and medical assistance"?1

After the Cowan ruling, the political authorities in the Member States worried about the possible reach of this right to equal protection. The ECJ had construed this right technically only in favor of actual or potential recipients of services in another Member State, but in reality in favor of all nationals of Member States. Thus, here again, the political process, at the level of the making of the constitution itself (through the Intergovernmental Conference), received a serious incentive through the ECJ's decisions to place the initiative for further consideration of this matter in the hands of the Community's legislature. Accordingly, in the Treaty on European Union, the Intergovernmental Conference agreed on a legislative competence for the Community to take all measures that will facilitate the exercise of the rights held as a "citizen of the Union."12 This competence must be exercised by the Council acting unanimously on a proposal from the Commission and with the assent of the European Parliament. Thus, in the field of "European citizenship," the judicial statement of the right to equal protection has operated as an impetus for the political process, without which the drive for consensus within that process would not have been the same.13


1 Compare the European Parliament's Declaration, cited above, Art 15(3), providing that "anyone lacking sufficient resources shall have the right to social and medical assistance." 1989 OJ C120:51-52 at D.

12 EEC, Art 8, as amended by the Treaty on European Union (February 7, 1992).

13 The judiciary, of course, was not the principal actor that made the difference. The Spanish Government made an important contribution to the shaping of "European citizenship," evidenced by the law review article, cited above authored by the Spanish Secretary of State for European Affairs during the Intergovernmental Conference. See Mira, Revue du marché commun et de l'union européenne at 168 (cited in note 106).
III. A Constitutional and Administrative Court

The third strand in the ECJ's case law, involving the constitutional and the administrative functions performed by the Court of Justice, relates to the judicial review exercised by the ECJ over the action or inaction of the Community institutions and of the Member States within the field of application of Community law.

As already indicated, political decisionmaking in the Community gained new momentum in recent years. This is a consequence of the extension by the Single European Act of qualified majority voting in the Council to a number of often quite sensitive policy areas. In a concomitant move, the ECJ started using more aggressively the rhetoric of a constitutional court, enforcing in litigation the system of "checks and balances" and the fundamental rights of the people. As mentioned, in its illustrious Les Verts judgment, the ECJ designated the Treaty as a "basic constitutional charter," echoing Chief Justice Marshall's exclamation in McCulloch v Maryland: "[We] must never forget that it is a constitution we are expounding." Accordingly, the ECJ would now more explicitly be concerned about its posture as the constitutional umpire of the Community legal order. Moreover, this posture was precisely announced in the Les Verts judgment itself, as well as in the 1990 ruling that recognized the right of the European Parliament to take action to protect its own prerogatives.

The task of the ECJ to enforce the Treaty text against all possible infringements committed by Community institutions or Member States, of course, has existed since the beginning, so that, in this sense, the constitutional role of the ECJ is not new. What appears as a novelty, however, is the increased frequency of ECJ rulings "umpiring the federal system." The decisions relating to the so-called "legal basis" of legislative acts of the Community, discussed below, are the most striking example.

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114 See, for example, EEC, Art 57 and Art 100A. In the Treaty on European Union, the list of legislative powers of the Community exercised by the Council acting by qualified majority in cooperation with the European Parliament is further lengthened.
117 See text at note 75.
The Community government is one of enumerated powers. Each legislative act must indicate in its preamble the Treaty provision that serves as its "legal basis." The ECJ requires that an explicit reference to a specific Treaty provision be made in this respect "where, in its absence, the parties concerned and the ECJ are left uncertain as to the precise legal basis." Such requirement is merely an application of the more general requirement under the Treaty to give reasons for all acts.

The Treaty provision serving as the legal basis determines the balance of power between the Community and the Member States in at least three ways. There is first the substantive aspect, whether the content of the legislative enactment is within the material scope of powers conferred on the Community in the Treaty provision at hand. If it is not, the Community may have trespassed upon the residual powers of the Member States, unless another Treaty provision could have supplied the necessary powers enabling the Community to act.

The choice of one Treaty provision as the legal basis rather than another, where either would cover the substantive content of the legislative act, makes an important difference as to the two other aspects of the legal basis concept, namely the institutional and the instrumental aspects. The institutional aspect relates to the precise terms of the decisionmaking process, which differ from one Treaty provision (and thus, Community substantive power) to another. Specifically, a provision may require that the Council pass the legislation by a simple majority, by a qualified majority, or by unanimity, either with no role for the European Parlia-

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121 This principle of enumerated powers was strengthened in the new Article 3b inserted into the EEC Treaty by the Treaty on European Union: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."


123 EEC, Art 190.

124 See the so-called ERTA judgment, Case 22/70, Commission v Council, 1971 ECR 283, 1971 CMLR 335. The issue in that case was whether Articles 75 and 228 provided the Community a sufficient legal basis to negotiate and conclude agreements with third States, under the auspices of the United Nations Economic Commission for Europe. If they did not, the Community would have lacked substantive competence altogether, unless the Council decided by unanimous vote on a proposal from the Commission and after obtaining the opinion of the European Parliament, to resort to the "elastic clause" of the EEC Treaty, namely Article 235. According to the ECJ, Article 235 gives the Council the option "to take [as Community action] 'any appropriate measures' equally in the sphere of external relations." 1971 ECR at 283.

125 For examples of qualified majority voting in the Council, see EEC, Art 43 (agriculture), Art 57 (mutual recognition of diplomas and professional qualifications), Art 75 (trans-
The cooperation of the Parliament guarantees the Parliament an input of a co-legislative decisionmaking nature. Clearly, when the Council is to act unanimously in a given field without any role for the European Parliament or only the right for the latter to state its opinion, "federalism" in the Community's decisionmaking is at its lowest ebb. Conversely, when the Council decides on the basis of simple or qualified majority voting with the European Parliament cooperating in the decisionmaking, "federalism" becomes a somewhat more credible label for the Community's legislative process insofar as the process then reaches a high degree of decisional autonomy from the Member States.

Finally, there is the instrumental aspect in each Treaty provision serving as the legal basis for a Community legislative act. As one more expression of the compromise of divided sovereignty between the Community and the Member States, the Community's political process has several types of instruments through which it can express the rules it enacts. This is different from the U.S. Congress, which has but one instrument—the "Act of Congress." Article 189 provides for regulations, which have general application, are binding in their entirety, and are directly applicable in all
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Member States. Further, Article 189 provides for directives, which are binding only as to the result to be achieved, but which leave the choice of form and methods to the national authorities of each Member State. Thus, a regulation resembles a federal-type "law" of the central government's legislature, whereas a directive is an act which, at least in theory, if not in actual practice, should obtrude less on Member State sensitivities, in that the Member States individually decide how it becomes operational within their national legal orders.

Therefore, those who favor greater integration will search through the several Treaty provisions which might be relied upon as the legal basis of a given legislative act to find one (if there is one, of course) that defines the substance of the Community's powers extensively, allows for majority voting in the Council in cooperation with the European Parliament, and allows for a regulation as the instrument in which the legislative act to be adopted could be cloaked. Those who are primarily concerned with protecting the remaining sovereignty of the Member States will look for the exact opposite on all three scores. In most cases arising after the entry into force of the Single European Act, the Commission, the European Parliament, or both were on the pro-integration side, while the Council, a body composed of representatives of the Governments of the Member States, was on the other side.

The first hurdle the ECJ had to overcome in cases of this nature was to remove the choice of the correct legal basis from the sphere of political discretion. The ECJ had to characterize the choice as a justiciable issue that must be solved in conformity with the Community constitution and therefore in front of the ECJ. The Council had argued on a number of occasions that the choice

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130 For an illustration of how this is to operate, see again the facts underlying joined cases C-6/90 and C-9/90, Francovich, (Judgment of November 19, 1991) (not yet reported).

131 As mentioned above in Part II, some directives leave the Member State no margin to make further policy choices, and so can have direct effect. In such cases, Member State authorities cannot rely on their own infringement of Community law, their own failure to implement the directive, to deny private parties their rights under Community law. See, for example, Case 148/78, Pubblico Ministero v Ratti, 1979 ECR 1629, 1980:1 CMLR 96; Case 8/81, Becker v Finanzamt Münster-Innenstadt, 1982 ECR 53, 1982 CMLR 499; Case C-188/89, Foster v British Gas plc, 1990 ECR I-3313, 1990:2 CMLR 833.

132 For cases in which this was not so, see Case 68/86, United Kingdom v Council, 1988 ECR 855, 1988:2 CMLR 543; Case 131/86, United Kingdom v Council, 1988 ECR 905, 1988:2 CMLR 364. In these cases, the Council agreed with the Commission that the proper legal basis was an Article which allowed for qualified majority voting in the Council (EEC, Art 43). One of the Member States, however, wanted to retain a veto power, and so argued for an Article that required unanimity in the Council (EEC, Art 100). The ECJ came out on the side of the Council.
of a legal basis belonged entirely to the bargaining package presented by the Commission when it proposes an act for the Council to adopt.\textsuperscript{133} Therefore, the Council argued, by acting unanimously in accordance with Article 149(1), it could alter the Commission's proposal if for reasons of political judgment it preferred a different Treaty provision.

The ECJ rejected that argument and denied that the political process had any right to exercise its own subjective preferences.\textsuperscript{134} Rather, the political process must search for the sole legal basis that is correct under the constitution. The choice, the ECJ said, "must be based on objective factors which are amenable to judicial review."\textsuperscript{135}

Even if based on objective factors, however, this task of judicial review is a sensitive and, at times, unpredictable exercise.\textsuperscript{136} Because of its institutional aspects, the choice of legal basis is the pivot on which the balance of federalism within the European Community turns. By reserving for itself the ultimate decision on the correct legal basis, the ECJ places itself in a position to control that balance. Although the legitimacy of judicial review is certainly least questioned within the context of the enforcement of the constitutional balance of powers inherent in federalism (as seems to be the case in the United States),\textsuperscript{137} the fact remains that the search for "objective factors"—a search to make judicial review more credible as a reliable exercise of the art of judging\textsuperscript{138}—remains at times open-ended and value-laden.

In a recent judgment,\textsuperscript{139} the ECJ openly discussed the values that should guide its choice between two Treaty provisions, Article 100A and Article 130S, relied upon respectively by the Commission.

\textsuperscript{133} See the opinion of the Court of Justice, given pursuant to the second subparagraph of Article 228(1), Opinion 1/78, International Agreement on Natural Rubber, 1979 ECR 2871, 2881, second full ¶, and 2906-07, 1979:3 CMLR 639.
\textsuperscript{134} 1979 ECR at 2907-08.
\textsuperscript{135} Case 45/86, Commission v Council, 1987 ECR at 1520. For the application of this rule, see Case 68/86, United Kingdom v Council, 1988 ECR at 898; Case 131/86, United Kingdom v Council, 1988 ECR at 933.
\textsuperscript{136} See, in this respect, the opposite outcome reached by Advocate General J. Mischo and the ECJ itself as to the correct legal basis of the student mobility aspect of the case known as Erasmus, Case 242/87, Commission v Council, 1989 ECR 1425, 1991:1 CMLR 478.
\textsuperscript{139} Case C-300/89, Commission v Council, 1991 ECR I-2867.
and the Council to serve as the legal basis for the Community directive on titanium dioxide waste.\textsuperscript{140} The Commission had based its proposal for the directive on Article 100A, arguing that the act was to harmonize national laws on manufacturing conditions for a whole range of goods. This would eliminate a factor of distortion of competition in the internal market, even if the actual substance of the rule related to environmental concerns. Since Article 100A grants the power to the Community to enact measures necessary "for the achievement of the objectives set out in Article 8A [that is, the 'internal market']," this argument ran, it should be the correct legal basis for the proposed directive. The Council disputed this line of argument and changed, through a unanimous vote, the proposed legal basis to Article 130S, which confers on the Community the power to take actions in the field of the environment.

The institutional aspect of these two Articles differs greatly. Article 100A allows the Council to act by a qualified majority and requires the cooperation of the European Parliament. Article 130S requires the Council to act unanimously and allows the European Parliament only the right to be consulted. Thus, the substantive characterization of the proposed directive as a matter relating to the "internal market" or to the "environment" determined the process of decisionmaking to be followed.

The Commission, supported by the European Parliament, asked the ECJ to annul the directive, on the ground that the Council had based it incorrectly on Article 130S, rendering the directive unconstitutional. The Council defended its act as being consistent with the Treaty. The ECJ ruled in favor of the Commission, but before doing so admitted that the content of the directive revealed aspects of both environmental and internal market legislation and therefore should, in principle, have been based simultaneously on both Articles. This solution, however, could not work in practice, the ECJ observed, because the procedures of decisionmaking introduced by these two Articles contradicted each other.\textsuperscript{141}

The ECJ then explained that in such a case preference had to be given to the legal basis that provides the European Parliament the right to cooperate in the decisionmaking. The object of the cooperation procedure, according to the ECJ, was to strengthen the

\textsuperscript{140} Council Dir 89/428/EEC (on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry), 1989 OJ L201:56.

\textsuperscript{141} See Case C-300/89, Commission v Council, 1991 ECR at I-2900.
part played by the European Parliament in the legislative process of the Community. This "reflects at Community level the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly." In the very last paragraphs of its judgment, the ECJ went on to explain that, from a substantive perspective, Article 100A by itself could be a sufficient legal basis for the directive. The ECJ referred in this respect to the third paragraph of Article 100A, obliging the Commission, in its proposals for legislative acts concerning health, safety, environmental protection, and consumer protection, to take as a base a high level of protection. The ECJ concluded from this provision that the drafters of Article 100A had clearly envisaged the situation in which "internal market" legislation would require harmonizing the laws of the Member States on some aspects of environmental policy.

The ECJ's imaginative approach to the substantive aspect of the legal basis litigation had been triggered by its frank commitment to "the fundamental democratic principle" of parliamentary representation in the legislative process. This approach could not really be controversial in "a Community based on the rule of law." Still, some Member States might have been surprised by the declaration that they had surrendered sovereignty over the necessary degree of environmental protection, a sensitive policy issue, without having reserved the right to express a veto during the Community's decisionmaking. Article 130S would have appeared to have left the Member States the right to veto.

The posture of the ECJ as a constitutional court has equally been pushed to the forefront through its jurisprudence regarding the fundamental rights of the people. The Treaties do not contain a catalogue of fundamental rights, although some discrete expressions of such rights can be found in a number of Treaty provisions. In that sense, the present text of the Treaties could be compared to the United States Constitution that came out of the Philadelphia Convention, before the addition of the first ten

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[142] Id.
[145] See, for example, EEC, Art 7 (non-discrimination on grounds of nationality) or EEC, Art 119 (equal pay for equal work performed by women and men).
amendments.\footnote{148}{Compare Laurence Tribe, American Constitutional Law 4 n 7, (Foundation Press, 1988): “The Constitutional Convention decided against including a Bill of Rights largely in the belief that Congress was in any event delegated none of the powers such a bill would seek to deny.” Likewise, in the European Community, it was unthinkable that in a supranational structure of economic powers the fundamental rights of the people, thought of during the 1950’s as being solely civil and political rights, could be at risk. See Pierre Pescatore, Referat, Der Schutz der Grundrechte in den Europäischen Gemeinschaften und seine Lücken, in Hermann Mosler, Rudolf Bernhardt, and Meinhard Hilf, Grundrechts-schutz in Europa: Europäische Menschenrechts-Konvention und Europäische Gemeinschaften 64 (Springer-Verlag, 1977).} This lack of a bill of rights, however, did not stop the ECJ from declaring that “fundamental rights form an integral part of the general principles of law, the observance of which [the ECJ] ensures.”\footnote{147}{To ascertain these rights, the ECJ looks to the “constitutional traditions common to the Member States” and “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”\footnote{148}{The most important treaty in this regard is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.\footnote{149}{To the ECJ, these rights are a part of the Community’s basic constitution. Thus, the ECJ will censure as unconstitutional any acts of Community institutions\footnote{150}{or Member States implementing Community rules\footnote{151}{that infringe these fundamental rights. The constitutionalization of fundamental rights protection in the Community legal order did not, however, lead to an EC version of the fourteenth amendment to the U.S. Constitution. That is, the ECJ cannot selectively incorporate the several fundamental rights recognized at the level of the Community into a Community fundamental rights standard which the ECJ could enforce in all circumstances against the Member States (proceeding on the basis of the principle of supremacy of Community law).\footnote{152}{The ECJ has consistently held that, “although it is the duty of the ECJ to en-

146 Compare Laurence Tribe, American Constitutional Law 4 n 7, (Foundation Press, 1988): “The Constitutional Convention decided against including a Bill of Rights largely in the belief that Congress was in any event delegated none of the powers such a bill would seek to deny.” Likewise, in the European Community, it was unthinkable that in a supranational structure of economic powers the fundamental rights of the people, thought of during the 1950's as being solely civil and political rights, could be at risk. See Pierre Pescatore, Referat, Der Schutz der Grundrechte in den Europäischen Gemeinschaften und seine Lücken, in Hermann Mosler, Rudolf Bernhardt, and Meinhard Hilf, Grundrechts-schutz in Europa: Europäische Menschenrechts-Konvention und Europäische Gemeinschaften 64 (Springer-Verlag, 1977).


148 Id.


152 For an argument in favor of applying a Community fundamental rights standard to the Member States, see Michel Waelbroeck, La protection des droits fondamentaux à l'égard des États membres dans le cadre communautaire, in 2 Mélanges Fernand Dehousse 333 (Fernand Nathan-Editions Labor, 1979), but see the opinion of Advocate General F. Capotorti in Case 149/77, Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena, 1978 ECR 1365, 1385-86, 1978:3 CMLR 312.}
sure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law.\textsuperscript{153}

The issue then becomes, of course, whether a national act said to be incompatible with the European Convention on Human Rights lies "outside the scope of Community law."\textsuperscript{154} Apparently, the solution of that issue depends in part on the compatibility of national legislation with the Community fundamental rights standard upheld by the ECJ, which makes the reasoning look rather circular. Indeed, in its recent \textit{Elliniki Radiophonia Tileorasi v Pliroforissi}\textsuperscript{155} judgment of June 18, 1991, the ECJ ruled that, when Member States defend their legislation in the face of the free movement principle by reference to one of the exceptions provided for in the Treaty or allowed under the ECJ's case law, the legislation must be compatible with the Community fundamental rights standard. If it is not, then it cannot fit within the exception, and thus comes within the scope of Community law and can be prohibited as an infringement of the free movement principle. On the other hand, if the legislation is compatible with the Community standard, then it can fit within the exception and fall outside the scope of Community law.\textsuperscript{156} Thus, the ECJ avoids hurting Member States' feelings by pronouncing on the compatibility of their laws or acts with the Community fundamental rights standard only when a nexus can be established between the States' laws and Community law. However, in practice the nexus need only be slight.

The ECJ demonstrated its increased concern for protecting the rights of private parties through the support it gave to the creation of a Court of First Instance. This Court, established by an act of the Council in 1988, is entrusted with the task of hearing certain categories of cases brought by natural or legal persons, subject to a right of appeal to the Court of Justice only on points of law. The idea was that, "in respect of actions requiring close exam-


\textsuperscript{156} Id at 2964.
ination of complex facts, the establishment of a second court will improve the judicial protection of individual interests," thereby freeing the Court of Justice "to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law" (which is to be done essentially by handing down an increasing number of preliminary rulings) and "to maintain the quality and effectiveness of judicial review in the Community legal order." 167

At present, the adjudicatory jurisdiction of the Court of First Instance is limited to three categories of cases: (1) disputes between the Communities and their servants; (2) cases brought by coal and steel companies, or associations of coal and steel companies, against the Commission; and (3) cases brought by companies against the Commission relating to the application to them of the EEC Treaty competition rules. 158 However, the ECJ has made a further request to the Council to have the adjudicatory jurisdiction of the Court of First Instance extended to essentially all categories of cases brought by private parties against a Community institution. 159 If accepted by the Council, this proposal will make the Court of First Instance into the administrative court of the Community (still subject, of course, to a right of appeal to the Court of Justice on points of law). Thus, the Court of Justice will be in a position to guarantee the uniformity of Community law not only vis-à-vis the national courts (through its preliminary rulings), but also vis-à-vis the other Community court which, according to the relevant Treaty provisions, is "attached" to the Court of Justice. 160

The Court of First Instance is developing as a court specializing in the judicial protection of the interests of private parties against illegal administrative acts by Community institutions. Such protection mostly raises, in addition to questions of law, complex questions of fact requiring a detailed examination of the evidence. Others will judge whether the Court of First Instance over the past two years has met the expectations produced by its establishment, but, at this point, the Court of First Instance can only be pleased that the Court of Justice has asked the Council to enlarge substantially the scope of the former's adjudicatory jurisdiction. This de-


158 Id, art 3.

159 By letter of October 17, 1991 from the President of the Court of Justice to the President of the Council (unpublished).

160 ECSC, Art 32D; EEC, Art 168A; and Euratom, Art 140A.
velopment will further shape the impact of the Community’s judicial process on its political process when the Court of First Instance subjects the Community’s administrative action or inaction to increased judicial scrutiny and ensures that such action or inaction is consistent with the requirements flowing from the superior rules of law.¹⁰¹

CONCLUSION

The several strands in the ECJ’s jurisprudence outlined above all reflect judicial responses to vital questions which arose as the ECJ performed its basic task—to ensure that the law is observed in the operation of the Community legal order. The resulting statements about the requirement of effectiveness of Community law, as well as the rigorous enforcement of the integrity of the powers granted to the Community under the Treaties, all proceed from the fundamental awareness that the Treaties serve as the constitution of a Community based on the rule of law. The political processes of the Community and the Member States are as committed to the rule of law as the ECJ itself. This mutual commitment explains why, in so many instances, the Court of Justice was able to have a decisive impact on the political process. Rather than provoking rebellion with what might have appeared at times the excesses of judge-made law, the ECJ kept the confidence of the other Community institutions and saw them often move forward from where it had itself left an issue, at the outer boundary of what was still solvable on the basis of the existing texts. Thus the ECJ’s decisions have repeatedly served as a catalyst for the further development of Community law, not because they laid down so many rules, but because they succeeded in making the political process fulfill its responsibilities under the Treaties.

The entry into force of the Single European Act in mid-1987 remains, in this respect, the turning point in Community history. The ECJ now gains the stature of a constitutional court, and a structure is evolving towards a genuine administrative court. The present era is “merely” one of judicial review of the legislative and administrative acts of the Community institutions and the Member States acting within the field of application of Community law. Despite the unpredictability inherent in any system of judicial re-

¹⁰¹ For more details, see Koen Lenaerts, The Development of the Judicial Process in the European Community after the Establishment of the Court of First Instance, in I Collected Courses of the Academy of European Law, I, 53-113 (1990).
view, the ECJ’s focus on the judicial review of acts of the political process is seen as a retreat from judicial activism, from the outright substitution of the judicial for the political process.

Although the interaction between the judicial and the political processes may have seemed a one-way street in which the former pushed the latter, two remarks should nevertheless be borne in mind. First, the ECJ based its whole jurisprudence, in the final analysis, on the object and purpose of the Treaty itself, the constitutional charter of the Community as the political process had originally produced it. Second, the ECJ responded to the expectations of the political process that it decide some issues in order to free the political process from them and enable it to move on. A clear example of this phenomenon is Article 100A(4), which called on the ECJ as the ultimate outlet in order to make the compromise of qualified majority voting in the Council acceptable to all Member States. This example shows that the ECJ is still seen as the guardian of the rule of law and of democratic values when the actors in the political process seem to need protection against each other’s majoritarian rule.

A similar example can be found in the Maastricht Treaty on European Union, stating the “principle of subsidiarity,” according to which:

[T]he Community shall take action . . . only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.\textsuperscript{162}

This principle is to become a justiciable provision of the Community constitution. Yet, obviously a judge will not be able to enforce the principle without getting somehow involved in the political calculus that underpins the litigious Community action. However, in this case, the actors in the political process prefer some “politics” on the part of the ECJ than to be left exposed to the excessive interpretation which the members of a majority in the Council might make of one or another Community power.

In that sense the political process seems to agree with Chief Justice Marshall that it is a constitution which the ECJ is expounding, with all that this entails in terms of legal certainty and uncertainty.

\textsuperscript{162} Article 3b inserted into the Treaty on European Union (see second paragraph).