

# Doctrine of Implied Powers as a Judicial Tool to Build Federal Polities

Comparative Study on the Doctrine of Implied Powers in the European Union  
and the United States of America

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# I. INTRODUCTION

'Federation' has been one of the most controversial words in the history of the European integration. It has always been in the air but most of the time it has remained silent and hidden so as not to disturb and wake up the demons that could stop or slow down the process of bringing the nations of Europe closer together. Federal thinking has been present in the European project since its beginning, and it has been more or less visible in different periods of the integration - sometimes almost mute, sometimes loudly apparent, but always present in the process of development of the European Union. Nevertheless, the system of government of the European Union is still very difficult to describe. Diverse classifications are used. The theory that it is a mere international organization is hard to defend these days, but disparate authors compete in delivering arguments to support their suggestion of how to name the dynamic outcome of the post-war integration. Is it a confederation? Or maybe it has the nature of a federal state. Some scholars see it as a pre-federal state, others as a quasi-federal or a *sui generis* federal state. The fact that the European Union is a dynamic construct makes this categorization even more difficult. The whole Union is changing: it is a matrix of inextricably interwoven political, economic, social and cultural processes. The problem with analyzing the Union in its width is that these processes are too numerous and they cover too wide a spectrum of functional aspects of the polity, in addition to happening at a fast pace. Each of these pieces can be analyzed as an object of studies of federalism. Moreover, each of such studies would be vast and complex. A real contribution in today's discussion on the federalism in Europe may only be made by addressing small sections of this huge picture.

In this dissertation I would like to contribute to a study of the doctrine of implied powers, primarily in the European Union (EU) but also in the United States (USA). The research will be a comparative legal study, focused on federalism in both polities. Yet, even though the primary focus will be on the European Union, the processes observed there will be consistently compared with what happened across the Atlantic. Two immediate questions that could be asked here are: Why the United States? Why the implied powers?

The first question is very easy to answer. The United States is the paragon of a modern federation. The longest existing federal state and the world superpower. It has been inspiring federalists all over the world, and it was definitely a role model for the European integration.<sup>1</sup> Even though the United States of Europe were never the official goal of the founding fathers of the Community and were not set up formally on the integration agenda,

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<sup>1</sup> See e.g. Andrew Glaneclose, Alexander Trechsel (eds), *EU Federalism and Constitutionalism: The Legacy of Altiero Spinelli* (Lexington Books 2011); Anand Menon, Martin Schein, *Comparative Federalism. The European Union and the United States in Comparative Perspective* (Oxford University Press 2006); Claus Gulmann, 'Methods of Interpretation of the European Court of Justice' (1980) 24 *Scandinavian Studies in Law* 197.

the United States are an example of a successful story of integration that the European politicians have been looking at when trying to reform legal-institutional arrangements. The American model of federation is seen as a precondition of a successful creation and long-lasting existence of a compound polity in the globalized world.

There have been many comparative works on European and American law in general, and federalism in particular<sup>2</sup>. This research will focus on the judicial integration and the role of the highest courts as actors in the process of federalization of a compound polity. Also, the idea of comparing those two courts is not new. When the Court of Justice (ECJ<sup>3</sup>) was mentioned during the negotiations concerning the Coal and Steel Community, the idea that the interpretation of the Treaty by that Court should be modeled on the interpretation of the US Constitution by the Supreme Court was already prevalent.<sup>4</sup> Many researchers still see parallels. Klaus Gulmann claims that the Court of Justice has been given tasks of such complexity and importance that its functions might well be compared to those of the US Supreme Court.<sup>5</sup> He adds:

The great importance the jurisprudence of that tribunal has had, not only for the development of law in a narrow sense but also for the development of society in general, is well known. The same is true with regard to the criticism — sometimes violent — that is leveled against the Supreme Court for its alleged lack of respect for the principle of judicial self-restraint. This criticism is not unlike that leveled against the Court of Justice.<sup>6</sup>

What is especially interesting for this research is the comparison of the courts as actors in processes of integration and federalization. The United States are a model of federalism for the European Union because of the problems caused by the divided powers and competences, i.e.. The role of the ECJ as an interpreter of a developing legal system seems similar to the one that the United States Supreme Court played in the formative years of the United States.<sup>7</sup> Both courts were engaged in the process of determining the text of the founding documents of their respective polities (the US Constitution and the European Treaties). They interpreted them to create more coherent unions and to establish their own position as supreme adjudicators. One of the most significant steps in this process in the EU was the *Van Gend en Loos* decision<sup>8</sup> when the ECJ held that, under certain conditions, the

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<sup>2</sup> Mauro Cappelletti, Monica Secombe, Joseph Weiler (eds), *Integration Through Law: Europe and the American Federal Experience* (De Gruyter 1985); Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge 2006); Sergio Fabbrini, *Democracy and Federalism in the European Union and the United States* (Routledge 2005)

<sup>3</sup> Court of Justice of the European Communities. The ECJ originated in the individual courts of justice established in the 1950s for the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community. In 1958 a single, unified ECJ was created to serve all three of the European Communities. In this dissertation the name European Court of Justice (ECJ) will be used to describe all the above-mentioned courts, depending on the time.

<sup>4</sup> Ditlev Tamm, 'The History of the Court of Justice of the European Union Since its Origin', in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Asser Press 2013)

<sup>5</sup> Claus Gulmann, 'Methods of Interpretation of the European Court of Justice' (1980) 24 *Scandinavian Studies in Law* 187

<sup>6</sup> *ibid*

<sup>7</sup> *ibid*

<sup>8</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] Case 26/62

provisions of the treaty could have a direct effect on the Member States (MS). This gave the Treaty the character of a constitution, as opposed to an international convention. Thus, in both polities those with the most incentive to enforce a particular law are given access to a forum in which to do so.

I decided to compare how both courts were shaping federalism using the example of the doctrine of implied powers. This is a comparative work in the field of judicial integration, illustrating the role of the two High Courts in the process of integration. It reconstructs judicial activities, mostly through detailed studies of fundamental cases, and points out a common pattern of integration where such a pattern exists. Differences in the process of integration across the Atlantic are analyzed in the light of concrete political situation at precise moments of integration.

The starting premise is that both Courts have been involved in the development of the theory of implied powers in their polities. Through this process they helped to transform and build a new polity. The judicial decisions by which the Courts implied powers are analyzed against a broader background. The political circumstances are incorporated as an important factor that cannot be separated from the process of judicial decision-making. Every change in the doctrine of implied powers is studied as an implication of the multilateral relations between the most powerful players.

The textual justification for the doctrine of implied powers in US law is Article I, section 8, paragraph 18, which secures Congress with the authority to “make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers.” This is the only justification for implied powers in the US legal system. The literature concerning the implied powers in the US is extensive and starts with the debate on constitutionality of the First Bank of the United States. It included George Washington and Alexander Hamilton on one side and Thomas Jefferson, James Madison and Edmund Randolph on the other side. Hamilton’s *Opinion for the Bank* delivered what came to be known as a classic statement for implied powers:

That every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society.<sup>9</sup>

In Chapter II I analyze the development of the doctrine of implied powers in the United States. I start with the Framing era that was the most interesting period when it comes to forming theoretical foundations for the doctrine. Arguments delivered at that point will outline the entire history of American federalism, from the drafting of the US Constitution, through the debate on the Bank Bill in 1791, to *McCulloch v. Maryland*<sup>10</sup> - the point when the most important lawyers and statesmen defended a restrictive or expansive interpretation of the Necessary and Proper Clause. This Supreme Court opinion became one of the most influential decisions in the history of the US Supreme Court. It still plays a

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<sup>9</sup> Alexander Hamilton, *For the Bank* (23 February 1791)

<[http://avalon.law.yale.edu/18th\\_century/bank-ah.asp](http://avalon.law.yale.edu/18th_century/bank-ah.asp)> accessed 24 March 2014

<sup>10</sup> 17 US 316 (1819)

primary role in comprehending the doctrine of implied powers. Scholars and practitioners still use the legal arguments of Chief Justice Marshall and the means-end test to justify broad implied powers, or to deny the support of the narrow construction thereof<sup>11</sup>.

Those arguments were of course elaborated in the later periods of development of US federalism, but the basis remained the same. The first significant alteration to the doctrine happened in the post-New Deal era when the Necessary and Proper Clause was coupled with the Commerce Clause. Because the meaning of the word “commerce” is a source of much controversy, the tandem of both clauses became powerful. The Commerce Clause addresses the ends available to Congress, but, when paired with the Necessary and Proper Clause, it addresses the means Congress may employ in pursuit of any of its enumerated ends or powers. Consequently, the Necessary and Proper Clause started to be a main judicial tool to change balance between the states and federal government inside the USA. The Court expanded the powers of the federal government to the extent never known before. *Darby*<sup>12</sup>, *United States v. South-Eastern Underwriters*<sup>13</sup>, *Wrightwood*<sup>14</sup>, and *Wickard v. Filburn*<sup>15</sup> are some examples of how the Necessary and Proper Clause served the Supreme Court’s goals of that time. In the 1980s, commerce power was almost unlimited because of the Necessary and Proper Clause.<sup>16</sup>

The implied powers were also used as a tool in the counter-revolution against the strong central government in the 1980s.<sup>17</sup> The new conservative wave in the USA changed the majority and started striking down federal legislation as going beyond the powers enumerated in the Constitution. The Rehnquist Court broke new ground in setting limits on congressional power and insulating state governments from federal intervention. *Lopez*<sup>18</sup> is known as the milestone case because it marked the first time in more than fifty years that the Court limited Congress's ever-growing commerce power. *Printz*<sup>19</sup>, *Morrison*<sup>20</sup>, *Raich*<sup>21</sup> and *Comstock*<sup>22</sup> also confirm the tendency for banning the federal government from regulating the continued noneconomic interstate activity.

The study of the development of the doctrine of implied powers in the USA is a study of the development of US federalism. The implied powers became a main tool for shaping a new form of federal relations. American federalism evolved over the centuries with the doctrine of implied powers. When the external, political, social or economic circumstances pushed for a change in the relations between the federal structures and the states, the Necessary

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<sup>11</sup> See eg *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 (1985); *United States v Lopez* 514 US 549 (1995)

<sup>12</sup> 312 US 100 (1941)

<sup>13</sup> 322 US 533 (1944)

<sup>14</sup> 315 US 110 (1942)

<sup>15</sup> 317 US 111 (1942)

<sup>16</sup> See II.2

<sup>17</sup> See II.5

<sup>18</sup> *United States v Lopez* 514 US 549 (1995)

<sup>19</sup> *Printz v United States* 521 US 898 (1997)

<sup>20</sup> *United States v Morrison* 529 US 598 (2000)

<sup>21</sup> *Gonzales v Raich* 545 US 1 (2005)

<sup>22</sup> *United States v Comstock* 560 US 126 (2010)



and Proper Clause served them perfectly. Thus, the justices played a primary role in the process of recreating the form of federalism.

After having understood the details of how the doctrine works in its homeland, we proceed with an analysis of implied powers in the European context in Chapter III. The history of implied powers started in the European Community with the *ERTA* case<sup>23</sup> where the European Court of Justice declared that the Community has external powers not mentioned in the Treaties.<sup>24</sup> When a measure is taken internally to regulate a given subject matter, the Community acquires the competence to adopt measures on the same subject matter externally. This was a groundbreaking decision that was criticized by the Member States' governments, but was eventually accepted. Later we will observe how the doctrine evolved between the 1960s and 2010s.

It will be shown that the ECJ has used the doctrine in its never-ending task of building a stronger union of peoples of Europe. The analysis of the implied powers in the EU shows that the ECJ was an important actor that worked hand in hand with other actors. We can see whether the Court has followed its integrationist agenda and how it adjusted its behavior to the current situation in the Community. The ECJ consequently pushed the integration forward by gradually extending the case law on implied powers. When other actors, especially those that officially were not friendly towards fast-track integration (the Member States and the Council), were weak and unable to reform the common institutions and mechanisms, the ECJ showed its determination and force in creating new powers. Conversely, when the Member States and the Commission were able to show their initiative and commitment in recreating the model of the Union, the ECJ stepped back and announced its opinions in a much more moderate way. The present study shows that we can see clear periods in the development of the doctrine of implied powers: from creation, through reaffirmation, through constraint, to re-invention and codification thereof. These were connected with the political atmosphere of the times; they reflected (inversely) the stage of the integration wheeled by politicians.

This chapter will show also that the notion of "implied powers" in the European context should not be limited to external power, as it is often presented in the literature on the subject, because of the exceptionally important position of the *ERTA* case in the legal history of the doctrine and also because other areas of European law were influenced by implied powers. Some of them were of special significance for the sovereignty of the Member States, e.g. criminal law.<sup>25</sup>

Additionally, I also suggest a different division of implied powers in the European Union. We can divide all implied powers in the EU into those based on the Treaty article - those that are an application of Article 352 LT and can always be used where the "Treaty has not provided the necessary powers" - and those that are based on a specific Treaty provision. The latter are a sole consequence of the style of interpretation employed by the ECJ - these are termed *supportive implied powers*. We can further divide them into *proper functioning implied*

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<sup>23</sup> Case 22/70 Commission v Council [1971] ECR 263

<sup>24</sup> See III.1.1

<sup>25</sup> See III.3.4

*powers and effectiveness reinforcing implied powers.* Only the latter powers have a federal character, since they are oriented toward optimization, i.e. reaching goals on the most efficient level possible.<sup>26</sup>

This conclusion is also presented in Chapter IV, which brings us to a comparative study. The study of case law in a historical context shows us that the European Union developed the doctrine of implied powers typical for a federation. Among the powers implied by the ECJ are those that would not be implied in a non-federal polity, since they interfere too deeply with sovereignty of the Member States. The ECJ behaves like a federal court, just like the US Supreme Court, in implying powers that are a result of a teleological reading of the Treaty. The ECJ creates new Community powers that are oriented toward optimization of the integration, even when the original Treaty-makers are of a different opinion. It will be shown that the central institutions of the EU, along with the implied powers, became a federal government which is able to shape the policy of the entire Community without the consent of the constitutive units that now take part in defining the competences of the Union. This conclusion allows us to claim that the EU has one additional characteristic of a federation and therefore it is closer to a perfect federal model of a state, and thus closer to the American model.

In the conclusion it will be shown that the development of the doctrine in both polities was a consequence of an internal conflict between powerful actors.<sup>27</sup> This conclusion is a consequence of the comparative study of both Courts' work on implied powers over time. The object of the conflict was the balance of powers between the central government and the constitutive units. The final result was a binding version of federalism. But the sides of this conflict were different on both sides of the Atlantic. As we saw earlier, in the USA it was a dispute between federalists and anti-federalists. But in the EU it was a pro-integrationist camp of the Commission, with the support of the European Parliament and the more conservative camp of the Council and the Member States. What is important in this case is the fact that the ECJ clearly formed a part of the first camp, playing the role of a guardian of the Treaties and a guardian of the progress of integration within the Union. The situation is different in the United States, where the Supreme Court as a body is not supporting stronger integration or a stronger central government. Its preference depends on the views of the majority of justices. The conflicting sides are less vertical and more political. In the American context the support for federalism is connected with political views, and consequently with political affiliation. What matters in America is identification with one of the two mainstream political groups. Generally speaking, the republicans associate themselves with antifederalism and strong state powers, and the democrats with federalism and strong federal government. The Supreme Court as such has no long-term strategy; the ECJ has its federal agenda. This conclusion is an auxiliary one and helps us to understand the development of the doctrine of implied powers. The fact that the conflict had very different groups of supporters and enemies in each polity is probably the biggest difference in the development of the doctrine in the EU and the USA.

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<sup>26</sup> See III.4.1

<sup>27</sup> See IV.2

I finish the dissertation by placing the doctrine of implied powers within the scholarships (the academic) studies of judicially transformed polities. Sometimes the highest courts in the community shape (create or reconstruct) polities. Their decisions influence the transformation of existing polities into new forms. They therefore assume a role usually associated with the political branches of government. When the ECJ started its long process in arranging the doctrine of implied powers, the Community was totally different in terms of its compound polity than it is now. The Court consequently transformed the European polity into a more federal entity. The judicial decisions formed a forceful agenda of change. The ECJ beat the sporadic defiance of the Member States and made them accept the new status quo. They agreed on functioning in a more federal polity with a supranational mechanism of governance not provided by the treaties. This process was finalized with codification of the content of the key judicial decisions on implied powers in the treaties. The new legal situation produced a new distribution of legal powers.

But before getting to the most essential parts of the thesis, Chapter I offers an introduction. It is two folded. It starts with a theoretical-philosophical and historical input on federalism as such.<sup>28</sup> It contains the history of the relations between statehood and sovereignty that will lead us to understand what a federation is. It also shows a diverse spectrum of views of the most important legal thinkers on federalism and points at those who were most important in the United States and Europe respectively. The political and philosophical underpinnings were different in both cases and they influenced the models of compound polities. Finally, diverse forms of coexistence of states will be analyzed.<sup>29</sup> Knowing the differences between them allows us to examine the constitutional system in the European Union. The second part of this chapter presents the development of the doctrine of implied powers in international organizations as a very different form of polity, i.e. where implied powers are present.<sup>30</sup>

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<sup>28</sup> See I.2-5

<sup>29</sup> See I.6

<sup>30</sup> See I.7

## 1. Methodology

As mentioned in the previous section, this research will produce a comparative work in the field of judicial integration, illustrating the role of the two High Courts in the process of integration. It will reconstruct judicial activities, mostly through detailed studies of fundamental cases. Differences in the process of integration across the Atlantic will be analyzed in the light of concrete political situations at precise moments of integration.

The main research question is: How has the European Court of Justice contributed to building federal polity through the doctrine of implied powers?

Answering this question will deliver new arguments that will help to address a more general problem, one that has been studied by other legal scholars but has not yet been finally answered because of its overwhelming latitude and complexity: Does the EU have characteristics of a federation? How can we classify its form of government? Finally, answering the main research question will contribute to a discussion about the European Court of Justice's relations with other actors. Did they build any alliances? Were there any forces permanently against this process?

The main novelty of the research will be its contribution to the knowledge of how the doctrine of implied powers was used by the Courts to build new polities. Although the process of judicial integration in the United States and the European Union is known, detailed comparative research on this point is rare. This project will provide additional, original, legal analysis that will explain how these Courts helped build new polities using their powers. It will be a study of the formation of a more federal polity through the doctrine of implied powers. As such, it will contribute to this domain of legal studies.

This project is a comparative study which looks at the development of the doctrine of implied powers in the European Union and the United States. It will show whether the judicial construction of the doctrine in both polities has been similar, and whether there are any parallels in its legal history. Such a comparative study will be an additional voice in the academic discussion about the status of government in the European Union. A comparison between the developments of the doctrine of implied powers in Europe with the one in the encyclopedic example of a federation will bring us closer to answering the question of whether the European Union has the characteristics of a federation.<sup>31</sup>

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<sup>31</sup> And whether the ECJ is a federal Court. See e.g. H Rasmussen, *The European Court of Justice* (GdaJura 1998), JHH Weiler, 'Journey to an unknown destination: a retrospective and prospective of the European Court of Justice in the arena of political integration' 31 (4) *Journal of Common Market Studies* (1993); M Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the US Supreme Court' 4 (4) *Int'l Jnl. of Constitutional Law* (2006); K Alter, 'Who Are the "Masters of the Treaty"? European Governments and the European Court of Justice' 52 *International Organization* (1998)

This explains why the comparative method is so important for the present research. The development of the doctrine over time in the European Union - which constitutes the main focus of the research - will be compared with the same development in the USA. The implied powers in the USA will play a supportive role. Conclusions from the US Supreme Court decisions will allow us to state important points regarding the parallel process in the European Union. Comparing the development over time, we will demonstrate that there are similar stages in both polities.

Of course, the comparative study will be done only when separate case studies have been completed on both polities. Those case studies will mostly use the legal dogmatic method, but also the legal realist method.

The part of the research regarding the doctrine of implied powers in the United States will be built on both an original case study and on secondary sources. Academic writings on Necessity and Proper Clause are numerous and particular decisions of the Supreme Court have been analyzed in depth. In the case of the European Union, implied powers have not been analyzed in detail. Academic articles on particular ECJ decisions exist, but there are not many of them.<sup>32</sup> They also focus mainly on one legal sector influenced by the doctrine of implied powers in Europe, namely external affairs.<sup>33</sup> Since in most cases the ECJ implied powers on other central organs are connected with EU foreign policy, the whole doctrine is considered merely as part of the structure of European external affairs. The research will show that there is more than one dimension of implied powers in the European context. Therefore, the focal point of the research will be a case study of the ECJ's decisions, with an aim to explaining how particular decisions have changed the polity.

Because of the position of the doctrine in the constitutional system and the long history thereof, there are a large number of Supreme Court cases connected with implied powers. The collection and study of them all would go far beyond the scope of this dissertation. This large number requires making some selections. I focus only on the most important decisions that helped build the doctrine and, later, where these are crucial for altering the version of the doctrine and, consequently, the version of federalism. Only those cases that are commonly recognized by scholars as milestones of American judicial history will be analyzed in this dissertation. In the American academic tradition, there is a set of canonic cases that are of special importance for the system of government. Some of them deal with interpretation of the Necessary and Proper Clause, some directly and others indirectly, for

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<sup>32</sup> Additionally, the research will collect all academic opinions regarding the doctrine of implied powers in Europe. The doctrine has been widely commented on in the USA, but its European correspondent lacks detailed professional commentaries. A compilation of all available sources will be important as it will allow one to see the entire spectrum of theoretical proposals that have supported it and might support the doctrine in the future. Thus, it will be a theoretic base for the case study. European judicial tradition of the doctrine of implied powers will be seen alongside the academic tradition. Eventually, a comparison with the academic discussion in the USA will be possible. It will show whether the comparatively less stormy and exposed European debate varied in terms of proposals and arguments from the one observed in the United States.

<sup>33</sup> E.g. A Ott, R Wessel, 'The EU's External Relations Regime: Multilevel Complexity in an Expanding Union', in S Blockmans, A Łazowski (ed) *The European Union and Its Neighbors* (TMC Asser Institute 2006)

instance through the Commerce Clause;<sup>34</sup> it was these decisions that were chosen for study of the development of implied powers and federalism in the United States. On the other hand, the part of the research regarding the European Court of Justice will be an original case study. This is because comments on the development of the doctrine are very vague. All the ECJ implied powers judgments since the beginning of the Integration until now - practically starting with the *ERTA* case - will be examined. The caseload as regards the doctrine of implied powers is not very voluminous, and therefore it is easy to track all the cases and deliver a complete analysis of the development of the judicial doctrine.

Legal dogmatic methodology will be used in the analysis of the ECJ cases. The research will provide a systematic exposition of the rules governing the doctrine of implied powers. The relation of implied powers with the principle of effectiveness will be the starting point of analysis of each case. The implied powers will be shown as an embodiment of this principle. In a more general picture, other principles will also have to be taken into consideration in the study, mostly the principle of subsidiarity. The relationship between the rules will be exposed, and areas of difficulty will be explained. In the development of the doctrine of implied powers, the question of exclusivity of implied powers plays a primary role, since the existence thereof equates an important reduction of powers of the Member States and consequently interferes with their sovereignty. The latter aspect also changes the balance of powers, modifying the legal system of the Union and the Member States. The way the cases modified the entire legal system will be shown, especially in the context of altering relations between the central authorities and the subunits in the European Union and the United States. In other words, the creation of new implied powers (especially the exclusive ones) will be presented as a mechanism that altered sovereignty and ownership relations within the Community. With implied powers, the Member States cannot claim full ownership of the Union anymore; with implied powers the Community institutions become co-responsible for the functioning of the polity. The doctrine of implied powers will be presented as a tool of transforming polities, from less to more federal ones. , and the courts will be identified as key actors in this process. The research will foster a more complete understanding of the conceptual bases of the structure of government of both compound polities.

In order to ensure that my analysis goes beyond pointing out only the legal consequences of each EJC case, I will adopt a legal realist approach. Legal realism seeks to describe what law is. Law is concerned with and is tied to the real world outcomes of particular cases.<sup>35</sup> This methodology claims that legal reasoning is not separated and autonomous from political (or moral) discourse.<sup>36</sup> Nevertheless, the ECJ will be treated as a branch of government that shapes the Union together with other so-called political branches and other subnational, national and supranational partners.<sup>37</sup> Every decision that has further developed the

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<sup>34</sup> See II.2

<sup>35</sup> MS Green, 'Legal Realism as Theory of Law' (2005) 46 *William & Mary Law Review* 1915; B Leiter, 'American Legal Realism', in W Edmundson, M Golding (eds) *The Blackwell Guide to Philosophy of Law and Legal Theory* (Blackwell 2003)

<sup>36</sup> M Horwitz, *Transformation of American Law 1870-1960* (Oxford University Press 1972) 69-70

<sup>37</sup> See eg Federico Mancini, 'The Making of a Constitution' (1989) 26 *Common Market Law Review* 595; Geoffrey Garrett, Barry Weingast, 'Ideas, Interests and Institutions: Constructing the EC's Internal Market', in Judith Goldstein, Robert Keohane (eds) *Ideas for Foreign Policy*, (Cornell University Press

doctrine of implied powers will be examined as a consequence of the political situation in a precise moment, an interplay between all the actors. In the conclusions I will show that every decision of the courts regarding the powers was a consequence of political circumstances – not only of the current power of the court itself, but also of all other political actors. The actors that the courts had to work with while developing the doctrine will be divided into two camps: pro and anti-implied powers. This division will allow us to understand the dynamics of the process and see why certain decisions were taken by the court at certain times. It will show patterns in the development parallel in both polities. Furthermore, I will point out the political consequences of the judgments to further illustrate the influence of politics on the judgment, and more specifically to show who benefits the most from the ECJ decisions, who loses, and what impact this has on the ultimate decision.

When we combine the points-of-view of legal and political actors, the court's image will be more complete. Normative and positive enterprises are complementary and do not exclude one another. The conclusions about the courts drawn by the social scientists and researchers working at the borderline between law and social science will be used to support the legal research. The political circumstances will be incorporated as an important factor that cannot be separated from the process of judicial decision-making. I will show that those circumstances were important in the process of taking particular decisions that granted (or not) the new implied powers. Each court's decision on the scope of implied powers was a result of diverse factors that those circumstances composed together.

The legal historical method will be employed, especially while analyzing the development of the doctrine of implied powers in the United States. The debate about the meaning of the Necessity and Proper Clause is as old as the Constitution itself. It is impossible to outline the development of the doctrine without diving into historical sources, including *The Federalist Papers* and other writings from the Framing Era. These materials, and even more importantly some cases from the eighteenth century, are still the foundations of the debate of implied powers in the modern USA. I claim that *McCulloch* has been and will be a datum point for any discussion of implied powers because of the amount and significance of arguments it delivers for both sides of the debates. Only in a historical perspective is it feasible to explore the question of whether or not a clear pattern existed each time the courts imposed powers on other institutions. The case analysis will have to be supplemented by legal history that describes the political and social background of each judgment and provides guidance with respect to theories of federalism and integration.

When the case study of the development of the doctrine of implied powers in each of the polities is finished, I will complete a comparative study between the ECJ and the US Supreme Court. Much of the study of comparative constitutional law involves the examination of judicial review,<sup>38</sup> which will illuminate general features of some aspects of the constitutional

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1993); Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press, 2001)

<sup>38</sup> M Tushnet, 'Comparative Constitutional Law', in M Reihmann, R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006)

structure. In this case, some general conclusions about the court's role in the process of integration will be made. The comparison of the doctrine's development in the EU with the parallel process in the oldest modern federation of the world will allow us to reflect on whether the European Union has the characteristics of a federation.



## 2. Judicial integration

Before we proceed to the section on diverse aspects of federalism, we should stop for a moment to understand why and how the research will approach the question of the role of the very special actors in the process of federalization of the states. The Courts will be studied as very active actors that are co-responsible for the state of federalism and integration in their respective polities. This conclusion can be reached only if we accept a realistic picture of the judiciary, and consequently a realistic methodology of the research (as mentioned above).

How did the ECJ and the Supreme Court of the United States manage to complete this task? While working on this question, it is impossible to omit the debate on judicial integration. The academic circles describe both Courts as going far beyond the traditionally recognized role of mere adjudicators. Both Courts have been studied from the perspective of their role in building closer unions. An excellent departure point for this study is a famous article 'The Making of a Constitution for Europe' by the ex-ECJ-judge, G. Federico Mancini,<sup>39</sup> who evaluates the Luxembourg justices' role in the whole process, describing their unique tactics of persuading the national authorities in the Member States to follow their vision of the legal integration.

This touches upon the topic of judicial activism, widely discussed in the USA but quite virginal in European scholarship. One of the first people in the European law to focus on that topic was Hjalte Rasmussen.<sup>40</sup> In 1986 Hjalte Rasmussen published *On Law and Policy in the European Court of Justice*, which became a landmark in the history of EC legal studies. He advanced the thesis that the ECJ was engaged in activist, pro-federalist policymaking, which exceeded not only the textual limits and political mandate but also public acceptance. His theses deeply shocked the majority of European scholars and the book met strong opposition.<sup>41</sup> Rasmussen's principal criticism of the Court is that in its definition of the Member States' relationship with the Communities, the ECJ accepted "deep involvement in making choices between competing public policies for which the available sources of law did not offer (...) judicially applicable guidelines."<sup>42</sup> He adds that the Court is perpetuating a "pernicious myth" that its teleological reasoning is a legal inevitability and not the outcome of a continuous policy process. Rasmussen broke the European tradition of looking at the Court from a merely judicial, non-political perspective and implemented the method (very well known in the United States) of realist analysis of the judiciary. His conclusions were

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<sup>39</sup> Mancini (n 37)

<sup>40</sup> Domestic constitutional law had already been discussed in the Nordic countries in the 1930s. See Ragnhildur Helgadóttir, *The Influence of American Theories on Judicial Review in Nordic Constitutional Law* (Martinus Nijhoff 2006)

<sup>41</sup> E.g. Mauro Cappelletti, 'Is the European Court of Justice "Running Wild"?', (1987) 12 *European Law Review*. 4; JHH Weiler, 'The Court of Justice On Trial' (1987) 24 *C.M.Law Review* 555; AG Toth, 'On Law and Policy in the European Court of Justice', (1987) *Yearbook of European Law* 411

<sup>42</sup> Hjalte Rasmussen, *On Law and Policy in the European Union* (Nijhoff, Dordrecht 1986) 508

groundbreaking in the 1980s, but now are commonly accepted.<sup>43</sup>

Peering into journals of political science, a lawyer can discover a brand new world of European integration where the ECJ is a very important actor, sometimes called a motor, sometimes a catalyst of the integration. It can be understood from these sources that the ECJ played a political role in shaping the Union together with other actors. Opinions on its actual function differ, but they all acknowledge that the ECJ was not a mere interpreter of the Treaty, but actively participated in the process of integration. They analyze the Court's position amongst other institutions, their links and mutual influences. So it is not only that in this version of the story the ECJ looks more powerful, as it also has a strategy and its decisions are an aggregate of many factors, most of all those derived from the fact that it is not an isolated entity.<sup>44</sup>

In the public opinion, the integration was designed and construed by a handful of statesmen backed by governments of the most powerful states. I believe this is not a full picture, although it looks like this realistic approach has been accepted by some lawyers, including the most meritorious ones. In his famous "The Making of a Constitution", Judge Mancini described ECJ's strategy of influencing the integration: "The national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play." He praises the ECJ judges' cleverness in choosing a fortunate plan of fashioning its decisions in such a way that its logic and autonomous power would be embraced by unaware national judges. Therefore, Mancini exposes his colleagues and forces us to reflect more deeply on the role of the judiciary in the integration. I believe that it is essential to look at the ECJ from different angles, casting aside the theory of absolute truth of legal orthodoxy. To understand the real role of the Court during the integration, another point of view may be helpful. Remaining firm in a position that claims the Court's neutrality and the lack of purposive engagement with established goals is easy and comfortable, but not helpful. By identifying the Court's inspirations and motives, as well as its friends and enemies, it will become possible to truly comprehend its decisions. This process can be facilitated by legal science that has already delivered rich literature concerning the issue of relations between diverse actors within the European Union. Conclusions drawn there can be implied in due form into legal thinking.

The two Courts display very different styles of dispute resolution. The European Court of Justice acts in a way that makes it hard to criticize it. It uses techniques that minimize the possibility of attacks by its opponents. The ECJ follows a deductive and syllogistic style, which can be called Cartesian and is a style that is inspired by the French judiciary. A crucial part of it is that the court "speaks" the law or the Constitution in the name of the republic as an indivisible whole. Similarly to French courts, the Luxembourg court announces the law with a

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<sup>43</sup> See eg Geoffrey Garrett, Barry Weingast, 'Ideas, Interests, and Institutions: Constructing the EU's Internal Market', in Judith Goldstein and Robert Keohane (eds), *Ideas and Foreign Policy* (Cornell University Press 1993) 173; Renaud Dehousse, *The European Court of Justice. The politics of Judicial Integration* (Macmillan Press 1998); Karen Alter, *Establishing the Supremacy of European* (Oxford University Press 2001); Mark Pollack, *The Engines of European Integration* (Oxford University Press 2003)

<sup>44</sup> See III.4.3

single voice, without dissents and competitive opinions. The general public never knows if and how tempestuous the debate was and if the judgment was really supported by all the judges. Of course, the ECJ is not an exact copy of the French model. Some variations and modifications must be observed because of peculiarities of the European Union as a hybrid model, a form of federal polity rather than a single state. Obviously the ECJ does not speak in the name of the republic, but relies on the authoritativeness of the Union, the Treaties and their objectives. The Court “speaks” as well to support its own authoritativeness - to build its own position and constitutional identity. The Court “speaks” with a unanimous voice that is supposed to strengthen the message and build the Court’s position as a neutral final arbiter. It uses the deductive and syllogistic style known from post-revolutionary France. Other differences with the classical French approach are the roles played by Advocate Generals (AG). They modify the character of the absolutely firm and unequivocal style and rhetoric of the Court’s judgments. They are personal and include the use of locutions like “in my opinion”.<sup>45</sup> They analyze advantages and disadvantages of different solutions and, in doing so, open the door for major changes in the jurisprudence. Michel Rosenfeld writes that AG opinions are, on the one hand, plurivocal, and open to a broad panoply of plausible arguments that often expose the complexity, contradiction and fragility of their reasoning, yet on the other hand are personal and seemingly subjective.<sup>46</sup> In other words, in the AG’s opinion, it is not the institution that speaks but rather, after due deliberation and consideration of all institutional factors, an individual who sees it all from his/her uniquely situated position and who advocates, accordingly, what s/he thinks the ECJ decision should be.

The American system contrasts drastically with the European system. The US Supreme Court exercises a totally different kind of judicial style and rhetoric. US judges, as common law judges, do not “speak” law, they “make” law in a process of interpretation, by trial-and-error procedures. The Supreme Court does not only rely on authoritativeness of the state but also employs persuasiveness. In the complex system of checks and balances, the justices use the power of the pen against the power of the sword associated with the so-called political branches. The style of its judgments can be described as argumentative, dialogical, analogical or controversial. It communicates with its counterparts polyphonically, including dissenting and competitive opinions. The most fundamental decision might be taken by a majority of one voice, 5:4. Therefore, this is seen as *à la française* in style and as a weakness. The common law is considered as an emboldening element that helps to keep the integrity of the losing minority, which is an obvious strength of the system.<sup>47</sup>

The ECJ judges follow their specific style to do the exact same - to convince the losing part about the irreplaceable role of the court and to safeguard the conviction that the Court is still the best resolver of future cases. Martin Shapiro introduces here the notion of “triadic dispute resolution” to explain why courts still have to rely on their “neutrality”.<sup>48</sup> In short,

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<sup>45</sup> Michel Rosenfeld, ‘Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court’ (2006) 4 Int’l J. of Const.L. 618

<sup>46</sup> *ibid*

<sup>47</sup> *ibid*

<sup>48</sup> Martin Shapiro, *Courts* (Chicago University Press 1981) chap 1

his idea states that when two parties in dispute ask a third party to help them, they build, through a consensual act of delegation, a note of social authority or mode of governance. This simple and universal scheme of organization of courts is based on a tension between the triad. The mediator knows that his/her social legitimacy depends on the consent of the parties, which is also done in the name of neutrality. But there are always two parties, and after every judgment one is satisfied and one is not. Therefore, the dispute resolver must develop some techniques to preserve the perception of neutrality. Where one or more parties perceive that the third party is not neutral, they have little incentive to comply with its decisions. It is worth noticing that the term “neutrality” is used here with the meaning of having no personal interest in the outcome of the case (i.e. it is not institutional neutrality).<sup>49</sup>

The ECJ and the US Supreme Court use different methods in order to be a reliable “third party”. The European way of doing so is to consequently convince the two other parties about the courts’ independence. The word neutrality could be used in the last sentence too, but the meaning would be different: it would not be political, i.e. it would not refer to creating any new norms or situations but rather to being purely legal, simply applying law to the situation at stake. In this vision, judges play a very special role of professional arbiters, deprived of personal choices and isolating their own opinions and political/ideological views from their judicial activities. Because of this disinterest, they can act in the name of whole polity and the authority of the polity stands by them. Judges here are only agents of the state or of the law.

We can accept this theory and keep on treating courts as extraordinary neutral bodies, or we can try to look at the judiciary from different perspectives, critically analyzing the orthodox vision of the Court popularized by the judges themselves and some other actors. Shapiro’s triadic dispute resolution was not created to root the story of a court’s neutrality, as he calls the judicial neutrality a noble lie, a fiction employed by the judges to conserve their position in triadic dispute resolution. He claims that this disguise is used by the elite in power to convince the loser in the case that they had an equal chance of winning and that the final decision was not political.<sup>50</sup> The theory of the rule of law is usually employed to support the idea of judicial neutrality. Alec Stone Sweet argues that legal norms derive much of their force from the perception that they represent an expression of social interest, one that is fundamentally superior to the expression of interests of one person or just a few people. Thus the rule of law is associated with the protection of larger social interests.<sup>51</sup>

Democratic societies grant some people and institutions special legitimacy by acknowledging their special political position and accept their role because of subordination to the voters. The judiciary claims that its legitimacy relies on something else. Judges name themselves non-political warrants of the rule of law. Shapiro and Stone Sweet argue that alone among democratic organs of government, courts achieve legitimacy by claiming they are something they are not.<sup>52</sup> The point of mentioning this here is not to ridicule the court’s neutrality as

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<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

<sup>51</sup> Alec Stone Sweet, ‘The European Court of Justice and the Judicialization of EU Governance’ (2010) 5 *Living Review of European Government* 2

<sup>52</sup> Martin Shapiro, Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press 2002)

such - it is to understand this notion better. In the twentieth century, the picture of totally neutral courts and judges began to be questioned, starting with the sociological jurisprudence movement and legal realism. Sociological jurisprudence sought to utilize common law as an engine of social reform. Legal realists maintained that common-law adjudication is an inherently subjective system that produces inconsistent and sometimes incoherent results that are largely based on the social, moral and political predilections of judges. These schools of thoughts challenged the classical view of US jurisprudence under which law was characterized as an autonomous system of rules and principles that courts can logically apply in an objective fashion to reach a determinate and apolitical judicial decision.<sup>53</sup> Courts started to be recognized as a part of the government and analyzed as such. This quickly became obvious for many scholars in the United States, where the Supreme Court is treated as one of the branches of government. The primary point with the so-called political jurisprudence was not the acknowledgment thereof - judicial politics had been accepted slowly before - but its treatment as normal, natural, matter-of-fact, and central rather than an exception to be attacked, specially justified, explained away or fudged.<sup>54</sup> The concept of judicial neutrality has been defended, especially by lawyers for whom this affirmation was part of their specific narration and the source of a special professional position. This tendency - the support for a court's neutrality - has been and continues to be especially strong in Europe. The important thing is that this neutrality should be understood in a realistic way, not as "a noble lie". The notion of neutrality is needed in the European legal narrative; it has been part of European understanding of the judiciary for centuries. The acknowledgment that courts are not neutral organs does not undermine their work and importance of having the judiciary as a separate and fundamental part of organization of state and society. Saying that courts are political does not imply that they are party-dependent. Courts do their work in a very different way from the legislative or executive branches. A court is political in the way that it employs some extra-textual sources in its decision-making; it uses values that are not locked in the text to develop new principles, sometimes of fundamental meaning for the system. It must, however, be careful not to go overboard. The Court cannot forget that it derives its power from being apolitical, and its too obvious behavior as a political actor, because its too aggressive intervention in the sphere traditionally reserved for the political branches of government would provoke a fully devised reaction from political institutions that derive their authority from democratic support. Again, courts will always occupy their unique position, and the democratic state of law as we know it requires a whole spectrum of a special educational process, along with the terminology and methodology of being a judge (and a lawyer). They warrant, in the best way possible, the socially expected and efficacious role of a defender of justice, sentry of law and freestanding arbiter.

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<sup>53</sup> See eg Richard Posner, *Frontiers of Legal Theory*. Cambridge (Harvard University Press 2001); Dennis Patterson, *Philosophy of Law and Legal Theory*. Malden (Blackwell 2002)

<sup>54</sup> See Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001)

### 3. Federalism

In this section I will try to compare the federal tradition in both the United States and the European Union. If one wants to take a deeper look at the process of creating federations on both sides of the Atlantic, one should start with checking if there actually is anything to compare. At first glance we can say that the forms of organization of governance in the United States and in the European Union are very different. For most observers these two polities vary a lot. One has a clear form of government, while the other one is commonly known as hybrid without a precedent. In this section I will analyze federalism as a form of governance. To decode this term I will give a brief overview of the history of federalism. We will see how the biggest political philosophers of the modern era have shaped the way of thinking about compound states.

Bodin will be the starting point for this outline. His notion of sovereignty is crucial for any discussion of a modern state. Even though he did not focus his research on federalism itself, his concept of the highest power in a state and its distribution influenced modern thinking about a state and has been present in political writings ever since. We will analyze how this idea developed through centuries and will try to spot its aftermath in treatises of the most influential European thinkers: Hobbes, Locke, Montesquieu and Rousseau. Eventually, we will try to describe the role of Protestant theologians in determining patterns of creating compound states. They played an important role in transferring a Biblical notion of covenant into societal realities. This stream of federal philosophy is rather ignored in Europe where fully secular theories deriving from Bodinian writings were vanquished. Furthermore, we will see how these two strands, secular and religious, formed the thinking of federations in America and, from the other side, how the two completely different philosophies, anarcho-syndicalist and social catholic, influenced European integration. Later on, the system of government of both polities will be studied in the context of possible forms of coexistence between states, intra-state and infrastate ones. At that stage we will try to focus on the evolution of understanding of the terms federalism and federation to determine if there is any sense in comparing the USA and the EU.

#### **3.1. What is federalism?**

The Oxford Dictionary of Politics provides us with the following definition:

The term federalism (Latin: foedus, compact, covenant, agreement) is most commonly employed to denote an organizational principle of a political system, emphasizing both vertical power-sharing across different levels of governance (centre-region) and, at the same time, the integration of different territorial and socio-economic units, cultural and ethnic groups in one single polity. Federal political systems are hence often viewed as

combining 'unity with diversity' (as in the motto of the United States, e pluribus unum).  
(...)

Federalism suggests that everybody can be satisfied (or nobody permanently disadvantaged) by nicely combining national and regional/territorial interests within a complex web of checks and balances between a general, or national, or federal government, on the one hand, and a multiplicity of regional governments, on the other. This concept purports to describe a method of arranging territorial government, and accommodating differing territorial interests that, at one and the same time, avoids both the perceived overcentralization of unitary systems and the extreme decentralization of confederations.<sup>55</sup>

The first part of the definition suggests that federalism denotes a system where the power is both shared between central government and the sub-units and vertical organization of the national government. For the purpose of the present dissertation, the first part of this definition will be important. Talking about federalism, I accept the definition that it is a system where power is divided between national and various regional governments. Thus, federalism represents here a concept of government where sovereignty is divided between the central governing authority and the sub-units. It neither provides us with one particular concept of relations between those two levels of a government nor goes as far as describing relations between particular branches of the government - it only claims that the power should be split. The main goal of federalism according to this definition is to bind a group of states into a larger, superior and noncentralized state while simultaneously allowing them to keep their own political identity. It can be concluded that in a general understanding, a *sine qua non* condition of federalism is a written basic law (a constitution) that warrants the division of powers and ensures neutrality and equality in representation.

The scope of federalism is a federation. A federation is a type of sovereign polity characterized by self-sovereign states united by a central government. In a typical federation this form of union is entrenched in an act of constitutional value and it cannot be altered by a unilateral decision. In other words, federalism is the form of government in a federation. The term federalism will be used in the present work in the meaning just identified above. By federalism I do not mean what is generally, in common speech, understood as federalism. This is of special importance when one has to bear in mind that the current analysis concerns the United States and the European Union because in both of these polities the word federalism has some additional meanings. In the USA, federalism is often understood as a proper balance between the national and state governments. This definition goes one step further than the one accepted here. It is not focused merely on the existence of a two-layer organization of the government, but deals with a particular arrangement - the links and interactions between branches at the same and different levels. In this context, it is more about the relationship between state governments and the federal government. I would call it "organization of federation", a form of federalism. Different forms of federalism will be discussed in the process of analyzing the development of the doctrine of implied powers, namely dual federalism, cooperative federalism and New

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<sup>55</sup> Berthold Rittberger, Jim Bulpitt, 'Federalism', in Iain McLean, Alistair McMillan, *The Concise Oxford Dictionary of Politics*, edited by Iain McLean and Alistair McMillan (Oxford University Press 2009)

Federalism. In *The Federalist* No. 45, James Madison presented his vision of how federalism would work:

The powers delegated by the Constitution to the federal government are few and defined. Those which are to remain in state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. ... The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the states.

Since the Madisonian era, the arrangement of the government has changed many times, the balance between the branches and the states being modified by constitutional amendments, Supreme Court decisions, federal statutes, and executive actions, although the United States kept being a federation.

Going further, we can point at federalism as a political philosophy. This meaning is very often used in the American context. The meaning of *federalism* as a political movement, together with what it denotes, varies with country and historical context. In the United States, federalism is associated with the group of drafters of the Constitutions that supported the creation of a stronger central government, a closer union between the states.<sup>56</sup> It is the opposition of anti-federalism, a political philosophy that fought against the strong central government envisioned in the Constitution of the United States of 1787. Anti-Federalists believed that the central governing authority of a nation should be equal or inferior to, but not having more power than its sub-national units.<sup>57</sup> Any conflict between the federalists and the anti-federalists is in fact a debate about how tight the union should be. The former would support a rather close and strong government, and the latter a looser agreement, more similar to a confederation. What can be even more confusing is the relation between these historical terms, going back to the Framing era, with the newest ones used to describe the American government. Hence, the term “new federalism” connotes the restoration to the states of some of the autonomy and power which they lost to the federal government after 1937. It is called a political philosophy of devolution, or the transfer of certain powers from the United States federal government to the states, and is associated with Reagan's administration of returning administrative powers to the state governments.<sup>58</sup>

On the other side of the Atlantic, federalism is sometimes used to describe the support for European integration as such, or the advocacy for European government.<sup>59</sup> European federalists stand in favor of building tighter links between the European states and of the transformation of the EU into a real federation. Often they connect the postulate of

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<sup>56</sup> Stephen Krason, *The Transformation of the American Democratic Republic* (Transaction Publishers 2012); John Chester Miller, *Alexander Hamilton and the Growth of the New Nation* (Transaction Publishers 2004)

<sup>57</sup> Hebert J. Storing (ed) *The Complete Anti-Federalist* (University of Chicago Press 1981)

<sup>58</sup> See p 97

<sup>59</sup> See Michael Burgess, *Federalism and the European Union: The Building of Europe, 1950-2000* (Routledge 2005)



accelerating the process of integration with the one of strengthening democracy in Europe, particularly by giving new powers to the European Parliament or the peoples of Europe.

These ways of understanding the word federalism could be easily confused with the one used in the present dissertation. It is essential to note the differences and to be able to distinguish when each meaning is being used. The meanings could be easily mixed up since they are all strictly connected with the federation as a system of government. It is important, however, to understand that when talking about federalism I will use the definition described above. It is especially important to accept that this term will be used in a descriptive way, i.e. federalism as a specific form of the organization of government, not in a postulate way, i.e. federalism as a wish of creating a federation or a wish of creating it in a specific form. Federalism as a political philosophy is not the scope of this work. All the definitions of federalism will be mentioned in following chapters, but if this is done in a different sense to the one indicated as the general one, the term will be clearly explained (e.g. European federalism when understood as a political philosophy).

### **3.2. State and sovereignty**

Sovereignty is a notion of primary importance for any discussion about federalism and federations. The definitions of federalism proposed above use affirmations of shared sovereignty. But what does it really mean today? Does this term have the same meaning as it had a century ago? The modern definition of sovereignty was born in the eighteenth century. Before that period we could refer to diverse definitions. Romans, for instance, understood sovereignty through the maxim stating that *the will of the Prince has the force of law*. Then the definition of sovereignty evolved. Modern national sovereign states were born and the term became divided into internal and external sovereignty.

The seventeenth and eighteenth centuries witnessed the gradual development and consolidation of the modern territorial state as a sole legitimate source of public order and political authority. And the state was "sovereign" in this sense that it admitted no rival or competing authority within its own territorially demarked boundaries. The modern territorial sovereign national state was predicted upon the assumption that there was a final and absolute political authority in the political community. In Weber's terms, it possessed the legitimate monopoly of the means of physical coercion in a given territory. And it had two faces. The internal face of sovereignty was understood to be the source of the legal sanction governing the use of physical coercion while the external face of sovereignty - international relations - confronted a world of similarly sovereign states where elite actors recognized no authority higher than their own except for treaty commitments which they could always revoke. In the absence of any overarching international authority which might attempt to

monitor the behavior of states and arbitrate between them in incidences of conflict, there was, an implicit “anarchy” of international relations.<sup>60</sup>

This is a description of the Westphalian interpretation of sovereignty, that was dominant in the post-1700 era. According to Stephen Krasner, it was characterized by 1) the holding of public authority within a territorial state that exercises effective control there; 2) the ability of the public authority to control transborder movements of good, persons and services, 3) mutual recognition within the international system of sovereign states as the sole entity authorized to act on behalf of the people within the territory of the state; and 4) the legitimate power to exclude external actors from interfering with domestic sovereign authority. Krasner claims that common acceptance of this definition is a myth, an “organized hypocrisy”, giving examples of forcible coercion of weaker states by stronger states or colonial and quasi-colonial formation all around the globe.<sup>61</sup>

This practice of limiting the full, Westphalian, sovereignty of weaker countries by larger and stronger ones has since been treated as a normal part of the universal status quo - a part of arranging complicated relations between the subjects of international politics where not everyone is equal and some players need to qualify their domain not to be fully dominated. But a tendency of sovereign states resigning from their absolute sovereignty voluntarily, ceding it to new transstate powers that are able to enforce effectively their own decisions on the creators, is a relatively new trend that requires more precise explanation. Many of the multilateral conventions or organizations could serve as examples here. Krasner’s analysis uses an example of the European human rights regime. He recognizes that “the existence of a transnational judicial body whose decisions are directly applicable in more than twenty states cannot be comprehended in terms of the Westphalian model.”<sup>62</sup> What is more, he notices that minority rights in general, and human rights regimes in particular, are part of a late twentieth-century trend that should be looked at together with the

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<sup>60</sup> ibid chap 1

<sup>61</sup> In other words, Krasner defines four ways in which people refer to sovereignty in international relations: (1) Legal sovereignty, which Krasner defines as states recognizing one another as independent territories. (2) Interdependence sovereignty, which is an eroding mechanism of sovereignty. Krasner sees globalization (capital flows, migration, and ideas) as a way in which the power of sovereignty in states is being increasingly lessened. (3) Domestic sovereignty is seen as the standard: this definition refers to state authority structures and their effectiveness of control within the state. (4) Westphalian sovereignty, which Krasner declares is the concept that states have the right to separately determine their own domestic authority structures.

He also describes the four situations in which the international community deems the rules of sovereignty invalid, and subject to outside intervention: (1) Religious toleration; (2) Minority rights; (3) Human rights; (4) International stability.

The concept of Westphalian sovereignty has been seen by states as a guiding principle rather than as a law to abide to. Violations to the principle of Westphalian sovereignty have occurred many times along the course of history, and have been legitimized either on the basis of domestic sovereignty or on the principle that states are unequal sovereigns and thus some are allowed to act exceptionally. Only a few states have “succeeded” in owning all of the components of being sovereign (as identified by Krasner), and these are the most powerful states of the world. They have to guarantee sovereignty of other states that cannot guarantee it themselves (see Steven D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press). Krasner borrowed the term ‘organized hypocrisy’ from Nils Brunsson, *Organization of Hypocrisy* (Wiley 1989))

<sup>62</sup> Krasner (n 61) 235

phenomenon of multilateral voluntary conventions. In both cases, powerful European decision-makers agreed to let outsiders regulate their own exercise of power.<sup>63</sup> Leslie Goldstein claims, though, that Krasner does not acknowledge that his own fundamental organizing premise - his *grundnorm*, as it were, according to which “rulers want to stay in power” - simply cannot account for voluntary cessions of power from rulers of already strong states into the hands of transstate authorities.<sup>64</sup> Of course this *grundnorm* could be employed to justify the creation of some federations in the past. The Dutch, Swiss or American federations developed from a need to survive; they were fruits of the necessity to protect weak states from being destroyed by foreign powers.<sup>65</sup> However, Goldstein’s premise does not explain why strong states like Germany or France decided to cede part of their sovereignty to suprastate or transstate authorities. Krasner answers that they do so to promote security, prosperity and values of their constituents; to retain their own power.<sup>66</sup> As Elazar observed, “even where the principle is not challenged, the practical exercise of absolute sovereignty is no longer possible.”<sup>67</sup> Sovereignty is no longer absolute or unconditional. The modern world’s deviances buried the Bodinian<sup>68</sup> and Westphalian theories. Sovereignty can be understood as a sum of powers: the one of a state and the one of a federation. The most vivid interests of the states can be protected by creating a union, by sharing the sovereignty voluntarily. Governments discovered that covenants with their counterparts/peers help them to exercise their authority in the best way possible, transcending quality of government of a simple state capability. Today an effective state needs to be global, it needs tight links with other states. Yet peoples and governments do not want to resign from their political and national identity. A federation can consequently be seen as a mode of saving national states, which prolongs their existence. The voluntary cession of a portion of power is a price for keeping the lion’s share of former dominion.

### **3.3. Historical overview**

To understand modern federalism fully we should start with a historical overview. The idea of federalism is tightly connected with sovereignty. Therefore, we will start our trip to the past with Bodin, who dedicated lots of writings to the concept of sovereignty, and consequently to the question of whether it can be divided. Bodin provided an intellectual basis for modern state theories and his philosophical platform was considered important for the discussion of federations by many political and legal thinkers. It was Hobbes and Locke who reflected on Bodin’s philosophy and developed it critically. Their concepts formed the

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<sup>63</sup> Krasner (n 61)

<sup>64</sup> Leslie Friedman Goldstein, *Constituting Federal Sovereignty* (The John Hopkins University Press 2001) 8

<sup>65</sup> See William Riker, *Federalism: Origin, Operation, Significance* (Brown 1964)

<sup>66</sup> Krasner (n 61) 235-237.

<sup>67</sup> Daniel J Elazar, *Federal-type Solutions and European Integration* (Md. University Press of America, 1995) 449

<sup>68</sup> See p 26-27

foundations for the modern theories of federalism. Their great accomplishment is the secularization of the notion of covenant, which has Biblical roots and influenced American federalism more than European federalism. The latter employed instead the ideas of Montesquieu and Rousseau, who were two secular philosophers interested in the theory of federalism. Additionally, European federalism was influenced by Catholic social theory and anarcho-syndicalism that did not play any role in the formation of American federalism. Of course, there were many more thinkers and ideas who influenced the modern idea of federalism, but the length of the dissertation allows to present only the most important ones.

Francis H. Hinsley claimed that the origins and history of the state and sovereignty are indissolubly connected.<sup>69</sup> Sixteenth-century Europe was an unquiet and uneasy land where wars between and within nations intertwined with the crisis of power in the two biggest masters - the Pope and the Emperor of the Holy Roman Empire. The peoples of Europe were victims of the instability of the political system. In these circumstances, Jean Bodin published *Les Six Livres de la République* (*The Six Books of the Commonwealth*; 1576). His antidote against the turbulence of the France of the time was very simple: the absolute, centralized and indivisible authority of a monarch. The French scholar advocated a strict hierarchical structure with a clear pattern of dependencies. Bodin's classical definition of sovereignty is: "la puissance absolue et perpetuelle d'une République" (the absolute and perpetual power of a Republic). Only this will guarantee stability and order for his country. "The sovereign Prince is only accountable to God", we read in Chapter VII of Book 1 in *La République*, i.e. a sovereign should be responsible only before God and natural law, "not bound" (*absolutus*) by the civil or positive laws which he or his predecessors had promulgated. But the most remarkable was the shift from the divine rule of God to the notion of human will. Bodin implemented a very modern requirement: that authority must be founded on ideas like consent and legitimacy to an established concept of the natural order of things. Bodin's work is considered as a link between the old feudal era and the modern epoch in terms of describing the political organization of a state.<sup>70</sup>

How can Bodin, an author (unfairly) accused by many historians of being the father of absolutism with a very rigid vision of government, be useful for further analysis of federalism? S. Rufus Davis claimed that this idea, albeit paradoxical at first glance, makes perfect sense.

Whether by force of repulsion or resistance, his catalytic influence on federal theory cannot be ignored (...) other jurists could no more evade Bodin than successive generations of political jurists could free themselves from the questions – who commands, and how many masters can there be in a stable, one, two, three, or more?<sup>71</sup>

The final question is crucial for any historical analysis of federalism.

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<sup>69</sup> See Francis Hinsley, *Sovereignty* (Basic Books 1966)

<sup>70</sup> SR Davis, *The Federal Principle: a Journey through Time in Quest of a Meaning* (University of California Press 1978) 46-47

<sup>71</sup> *ibid*

Some forty years before Bodin's masterpiece was published, a Swiss theologian-philosopher Heinrich Bullinger finished his treatise *The One and Eternal Testament or Covenant of God*.<sup>72</sup> The central point for Bullinger's concept is the notion of covenant. A covenant is a morally-informed agreement or pact between people or parties having an independent and sufficiently equal status, based upon voluntary consent and established by mutual oaths or promises witnessed by the relevant higher authority.<sup>73</sup> He derives his philosophical ideas directly from the Bible.<sup>74</sup> The divine covenant between God and his people was a perfect example whereby human beings on Earth could organize their political life. This covenant was not intended simply to create a dependent structure where one of the parts is an absolute ruler and the other a mere serf. Rather, a covenant is a partnership between parties involved. As Elazar notes, of course the God-human covenant is not an agreement of peers but it was one of equal partnership in a common task, in which both parties preserve their respective integrities even while committing themselves to a union of mutual responsibilities.<sup>75</sup> This thesis gave rise to the Biblical (or ethical, Reformed, Puritan) strand of federalism, which was described in 1991 by Charles McCoy and J. Wayne Baker. In *Foundation of Federalism: Heinrich Bullinger and the Covenantal Tradition*, they claimed that Bullinger's treatise was fundamental because it clearly shows the connection between covenant and federalism (Latin *foedus* means covenant) and it examines primary social entities and their relationship in terms of federalism,<sup>76</sup> starting with families and church congregations and ending with all kinds of organizations.

The author himself was a leader of the Reformed Church in Zurich between 1531 and 1575 so the *Testament* constituted a very influential theological and political inspiration for the Reformation's architects. His influence was remarkable and direct in the century following the publication of the *Testament*, and indirect long after that time. As Michael Burgess claims in the sixteenth century, it was difficult, if not impossible, to distinguish the theological form of federalism from the political one. In the seventeenth century, when the separation of those branches had already taken place,, the theological one was clearly identified with the philosophy of Johannes Althusius.<sup>77</sup>

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<sup>72</sup> An English translation by Charles S McCoy and J Wayne Baker is found in Charles S McCoy and J Wayne Baker, *Fountainhead of Federalism: Heinrich Bullinger and the Covenant Tradition* (Westminster/John Knox Press 1991)

<sup>73</sup> Daniel J Elazar, 'The Political Theory of Covenant: Biblical Origins and Modern Development' (1980) 10 *Publius* 6

<sup>74</sup> Elazar claims that all the examples of developed covenantal traditions are derived from the Bible (ibid 13). He explains that the grand biblical design for humankind is federal in three ways: (1) It is based upon a network of covenants beginning with those between God and man, which weave the web of human relationships, especially those that are political, in a federal way, i.e. through compact, association and consent. (2) The biblical commonwealth was a fully articulated federation of tribes created and reaffirmed through a covenant to operate under a common law. (3) The biblical vision of the 'end of days' contains a promise of instituting a world confederation or a league of nations, each preserving its own integrity while accepting a common divine covenant and constitutional order (ibid 14)

<sup>75</sup> ibid 15

<sup>76</sup> McCoy & Baker (n 72) 12-14

<sup>77</sup> Burgess (n 29) 7

Althusius was a German Calvinist intellectual and political magistrate who emerged out of the Reformist tradition and constructed a political philosophy based upon the covenant theology.<sup>78</sup> He wrote:

... no realm or commonwealth has been ever founded or instituted except by contract entered into one with the other, by covenants agreed upon between subjects and their future prince, and by an established mutual obligation that both should religiously observe. Whence it follows that the people can exist without magistrate, but a magistrate cannot exist without a people, and that the people creates the magistrate rather than the contrary. Therefore, kings are constituted by the people for the sake of people, and are its ministers to whom the safety of the community has been entrusted.<sup>79</sup>

His idea of federalism was closely connected with the notion of association. For Althusius, federalism meant an arrangement, the modern corporation. Civil society was organized from the bottom up, based on interlocking voluntary (private) associations, and almost every other element that reflects social organization based upon what has loosely been called "contract" rather than "status".<sup>80</sup> S. Mogi observed that:

The result was a purely natural structure of society, in which the family, the vocational associations, the commune and the province are the necessary and organic members intermediate between the individual and the state, and the wide union is always consolidated in the first place from the corporative unities of the narrower unions and obtains its members by this means. In this structure of society every narrow union as a real and original community creates for itself a distinct common life and a legal sphere of its own, and gives up to the higher union only so much thereof as the higher union absolutely needs for the attainment of its specific purpose.<sup>81</sup>

So, state was a final consequence of a gradual process; it was preceded by the creation of local units, like provinces, that were preceded by the creation of families and other small groups.

Althusius is known as the father of federalism. His treatise *Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata* (Latin for "Politics Methodically Digested, Illustrated with Sacred and Profane Examples", 1603) provides a concept of federalism based upon relationships rather than structure, agreement rather than order. His conception of society and its structures is fundamentally organic, delineated by the principles of corporatism and subsidiary. It is a recognition of both the functional and territorial bases of representation, the belief in "foedus" as a normative and ethical principle of human organization rather than a mere empirical and/or instrumental meaning, and the acknowledgement of the complex interaction between individuals, groups and societies which characterized the fundamental interdependence of human life.<sup>82</sup>

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<sup>78</sup> Frederick Carney, *The Politics of Johannes Althusius* (Eyre & Spottiswoode 1964)

<sup>79</sup> Frederick Carney (trans), *Johannes Althusius Politics* (Beacon Press 1964) 117

<sup>80</sup> *ibid* 5

<sup>81</sup> S Mogi, *The Problem of Federalism: A Study of the History of Political Theory*, vol II (Allen & Unwin 1931), 1073-74.

<sup>82</sup> Burgess (n 29) 8

Althusius' federalism was pluralist and communitarian. It indicates a universal way of forming compound organizations, when autonomous unities were linked in a federal union. This form could be (and was) extended to different nongovernmental areas. According to this theory, unites could build new lasting but limited linkages designed to make possible cooperative activity in ever larger spheres without reducing the members of each union to mere cogs within it.<sup>83</sup> Theological federalism of Protestantism spread from Switzerland to other parts of Europe, starting with the flow of the river Rhine, then across the North Sea to Scotland and the western coast of Scandinavia, and successively reaching "new worlds" like Iceland, North America, South Africa and Australia. Unfortunately for the German intellectual, covenant as a political theory was then - in the seventeenth century - underestimated and was not very influential because scholars at that time were already fascinated by the statism of Bodin.<sup>84</sup>

Bodin's philosophy was developed by the brightest minds of the times. Thomas Hobbes and John Locke are mostly presented as the intellectuals that continued Bodin's line of secular Enlightenment philosophy. They developed Bodin's theory in two different directions. Hobbes's theory of sovereignty is in perfect accordance with the Bodinian one. The sovereign in a society is a person or a body of persons who has been given the right of governing through the social contract,<sup>85</sup> and has the three "marks" of sovereignty - control of the military, the ability to raise money, and control of religious doctrines.<sup>86</sup> Hobbes is an absolutist in the sense that there is no right to revolution on ideological grounds. On the other hand, a sovereign cannot treat his subjects unjustly. This is connected with the theory of the social contract. Through social contract, the future subjects unconditionally give the sovereign the power as a gift that authorizes all their future actions. The sovereign is not party to the actual contract. Even though Hobbes personally preferred monarchy as a form of government, he did not point at any particular form of organization of the sovereign power on the basis of the number of people who rule. This was supposed to be decided by the social contract. He rejects the classical distinction between true and corrupt regimes; the only test a government must pass is the one of keeping the peace. In *Leviathan* he explains a theory of articles of peace, or of the civil covenant.

The opinion that any Monarch receiveth his Power by Covenant, that is to say on Condition, proceedeth from want of understanding this easy truth, that covenants being but words, and breath, have no force to oblige (...) but what it has from the public Sword; that is, from the untied hands of that Man, or Assembly of men that hath the Sovereignty, and whose actions are avouched of them all...<sup>87</sup>

Therefore, even if Hobbes stands in line with the other most significant political thinkers drawing on Bodinian writings, he incorporated a covenantal element into his philosophy. The general theory of Biblical federalism, which says that a covenant can bind any number of

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<sup>83</sup> Elazar *Theory of Covenant* (n 73) 24

<sup>84</sup> Burgess (n 29) 444

<sup>85</sup> Thomas Hobbes, *Leviathan* (first published 1651; Yale University Press 2010) chap 17, para 13

<sup>86</sup> *ibid* chap 18, para 16

<sup>87</sup> *ibid* chap 8

partners for a variety of purposes but primarily creates a relationship in political terms, can be observed in *Leviathan* very easily.<sup>88</sup>

With Locke, the idea of social contract was planted out from a ground of absolutism to a field of limited government. His version of social contract is a two-way agreement, where subjects do not give up their rights and abilities to judge their sovereign when forming a government.

Hence it is evident, that absolute monarchy, which by some men is counted the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil-government at all: for the end of civil society, being to avoid, and remedy those inconveniencies of the state of nature, which necessarily follow from every man's being judge in his own case, by setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may arise, and which every one of the society ought to obey; where-ever any persons are, who have not such an authority to appeal to, for the decision of any difference between them, there those persons are still in the state of nature; and so is every absolute prince, in respect of those who are under his dominion.<sup>89</sup>

The goal of the contract is a crucial notion for his theory. Ultimately the sovereignty always belongs to the people. People established a civil society to resolve conflicts in a civil way with help from the government in a state of society. This led Locke to support a system of representative parliamentary government. The supreme power<sup>90</sup> of the legislative branch comes from the will of the people: although everyone is bound by its laws (including the government itself) regardless of their personal opinion, this supreme power can therefore be revoked at any time.<sup>91</sup> Locke cannot see the necessity of binding all the powers needed to govern in one body. Furthermore, he proposed a division of powers of the commonwealth including the legislative, the executive and the federative one. For our further deliberations, the most important one will be the latter, the federative power. "This therefore contains the power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the common-wealth, and may be called federative, if any one pleases."<sup>92</sup>

Both Hobbes and Locke secularized the theory of covenant, entrenching it in the modern political philosophy. In the eighteenth century, this idea was incorporated and developed by the most significant thinkers, notably Montesquieu and Rousseau (in a somewhat altered way by the latter).

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<sup>88</sup> *ibid*

<sup>89</sup> John Locke, *Two Treatises of Government* (first published 1689, Cambridge University 1988) chap 2, sec 90

<sup>90</sup> Locke never uses the word "sovereignty" in *Of Civil Government*. Instead, he refers to "absolute" and "supream" power.

<sup>91</sup> Locke (n 89) 406-2

<sup>92</sup> *ibid* 365



Elazar claims that Montesquieu built a post-Hobbesian bridge between covenant and federalism.<sup>93</sup> Montesquieu offers the possibility of survival for small republics through federation. Republics were rare phenomenon in early eighteenth-century Europe. In *Esprit des Lois* (French for *The Spirit of the Laws*; 1748) we read: "If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by an internal imperfection".<sup>94</sup> Montesquieu believed that past and present examples demonstrated that a republic must necessarily be small in order to be free; if it expands it is no longer a republic.<sup>95</sup> He proposed a solution for a small republic to last by uniting in bigger political organizations. His model of a federative polity did not call for creating any kind of super-state. He proposed sharing their sovereignty and pooling their federative power.

In Montesquieu's federation, there is a basic right of interference for each part in the affairs of the other parts.

Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty.<sup>96</sup>

Thus not only do the small republics exercise their federative power jointly, they also have to sacrifice part of their internal sovereignty and - in the case of corruption or despotism - other republics forming the federation can intervene in their home affairs. In this way, Montesquieu developed Locke's federative power theory. His alteration about dividing the government into three branches was essential. The great innovation of disuniting legislative, executive and judiciary, and separating them from a dependence upon each other so that the influence of any one power would not be able to exceed that of the other two, either singly or in combination, entered to the canons of political science, both in theory and in practice.

Rousseau's *Contrat social* (*Social Contract*; 1762) also became one of the most influential works of political philosophy in the Western world. He claims that by joining together into civil society through the social contract and abandoning their claims to natural rights, individuals can both preserve themselves and remain free, because submission to the authority of the general will of the people guarantees individuals the freedom from being subordinated to the wills of others. Furthermore, it ensures that they obey the rules

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<sup>93</sup> See Daniel Elazar, *Covenant and Civil Society: The Constitutional Matrix of Modern Democracy* (Transaction Publishers 1998)

<sup>94</sup> Montesquieu, *Spirit of Laws* (first published 1748, < <http://www.constitution.org/cm/sol.htm> > accessed 25 March 2014) book 9, para 1

<sup>95</sup> David Hume disagreed on the argument of the size of the state. *In a large democracy ... there is compass and room enough to refine the democracy*. He held that a numerous and geographically large federation would do better than small polities in preventing decisions based on "intrigue, prejudice or passion" against the public interest. In "Idea of a Perfect Commonwealth" (David Hume, *Political Discourses* (R.Flaming 1752, <<http://www.davidhume.org/texts/pd.html>> accessed 25 March 2014) Hume recommended a federal arrangement for deliberation of laws involving both member unit and central legislatures. Member units enjoy several powers and partake in central decisions, but their laws and court judgments can always be overruled by the central bodies. (See: Stanford Encyclopedia of Philosophy < <http://plato.stanford.edu/entries/hume/> > accessed 25 March 2014)

<sup>96</sup> Montesquieu (n 94)

themselves because they are the authors of the law. Elazar called Rousseau a son of the Genevan Republic, itself a major manifestation of covenantal tradition of Reformed Protestantism, which in many respects could be seen as carrying on aspects of the tradition of Calvin by providing a covenantal basis for absolute secular rule in the name of the higher principle of the will of the people instead of the Calvinian will of gracious God.<sup>97</sup> He claims that the people became Rousseau's secularized divinity. This stress on the anthropogenic and anthropocentric characteristics - not divine or religious - of a contract made Rousseau very popular.

Rousseau's opinion on federalism was ambivalent. On one hand, he was a nationalist and an admirer of small republics. On the other, he understood the advantages of creating unions for protection of wealth and identities of small polities. He could not really promote anything like the modern federal state in which the central power would be as much a state as the localities, because in such a federal state the "sovereign" - for Rousseau the people acting in their legislative capacity - would not be the author of all fundamental law, but only of the part left to the localities by the territorial division of power.<sup>98</sup> His concept of sovereignty as a power to make the law that should be in the hands of the people, combined with a fondness for isolated small republics, explains why he insisted on each state being left to govern itself on its own. The reason that Rousseau never wrote his promised treatise on federalism is that an effective federalism would have "entrenched" on sovereignty, it would not have allowed the small republic to master in its own house.<sup>99</sup> Therefore, he leaned toward confederation, which would be like an improved version of a defensive league, rather than toward federation.<sup>100</sup> In *A Lasting Peace*, Rousseau recounted the advantages of such a confederation as follows:

Absolute certainty that all their disputes, present and future, will always be settled without war: a certainty incomparably more useful to princes than total immunity from lawsuits to the individual.

The abolition, either total or nearly so, of matters of dispute, thanks to the extinction of all existing claims - a boon which, in itself, will make up for all the prince renounces and secure what he possesses.

An absolute and indefeasible guarantee not only for the persons of the prince and his family, but also for his dominions and the law of succession recognised by the custom of each province: and this, not only against the ambition of unjust and grasping claimants, but also against the rebellion of his subjects.

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<sup>97</sup> Elazar *Covenant and Civil Society* (n 93) 50

<sup>98</sup> See Patrick Riley, 'Rousseau as a Theorist of National and International Federalism' (1973) 3 *Publius* 5

<sup>99</sup> *ibid*

<sup>100</sup> Rousseau believed that a strong international federation is a dangerous scenario, especially in Europe, because he believed that the division of the world into states - a necessity and a consequence of turning man from a 'stupid and limited' animal into an 'intelligent being and a man' (*Social contract*) - transmitted natural hostility between the states. In the case of Europe, the situation was even harder because of numerous links and permanent action-reaction emergency between the states; partial unity was even worse for Rousseau than perfect isolation (Jean Jacques Rousseau, *A Lasting Peace through the Federation of Europe and The State of War* (Constable 1917) 208-210)

Absolute security for the execution of all engagements between princes, under the guarantee of the Commonwealth of Europe.

Perfect freedom of trade for all time whether between State and State, or between any of them and the more distant regions of the earth.

The total suppression for all time of the extraordinary military expenses incurred by land and sea in time of war, and a considerable reduction of the corresponding ordinary expenses in time of peace.

A notable increase of population and agriculture, of the public wealth and the revenues of the prince.

An open door for all useful foundations, calculated to increase the power and glory of the Sovereign, the public wealth and the happiness of the subject.<sup>101</sup>

He claimed it should be organized in a form where the bonds connecting nations are similar to those which already unite their individual members and place the one no less than the other under the authority of law.<sup>102</sup> “We must put all the members of it in a state of such mutual dependence that no one of them is singly in a position to overbear all the others, and that separate league (...) shall meet with obstacles formidable enough to hinder their formation”.<sup>103</sup> Work of such a federation/confederation should be based upon the power of settling controversies, ceded to a federal diet, rotation of presidency and a mutual guarantee of inviolability of all the dominions that a member-state government possesses at the moment of the treaty, and finally - the power for the central government to frame measures requisite for great development of the alliance and to “ban” from the federation those members that break the treaty.

No federation could ever be established except by a revolution, Rousseau concludes sadly, asking if we should therefore rather desire it or fear it. Elazar proves<sup>104</sup> that Rousseau’s worries were right - Rousseauian theories were not used in small republics, especially not in his native Geneva, but were first tried out in revolutionary France.<sup>105</sup>

Therefore, Rousseauian theories on federation were met by public unease and were torn apart.<sup>106</sup> Nevertheless, his intellectual heritage includes diverse arguments supporting federal projects, along with a multiplicity of proposals on how it should be constructed. Rousseau has a reputation as a proponent of national and international federalism. His theories were innovative and started a discussion that still inspires not only historians but also political scientist and lawyers. Riley says that Rousseau’s federalism at both levels (national and international) is fascinating not because of its success, but because it tried to

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<sup>101</sup> *ibid*

<sup>102</sup> Elisabeth York, *Leagues of Nations: Ancient, Medieval and Modern* (The Swarthmore Press 1919) 197

<sup>103</sup> *ibid* 210

<sup>104</sup> Elazar *Covenant and Civil Society* (n 93) 50.

<sup>105</sup> In the early days of the revolutions, a Day of Covenant was established in which Parisians were invited to assemble in the Champs de Mars, first to affirm and then to renew the new social contract which was viewed as binding for the French.

<sup>106</sup> Elazar *Covenant and Civil Society* (n 93) 50

fuse so many disparate elements. However, he adds that its failure must be admitted.<sup>107</sup> Nevertheless, his and Montesquieu's writings are important for further deliberations about federalism, as they were the first secular thinkers who contributed directly to the philosophy of federalism<sup>108</sup>. Their works constitute a cornerstone for the history of federalism in the Western Thought and influenced the formation of the most significant federations, including those that are the subject of the present dissertation. On the other hand, Hobbes and Locke, mentioned before, did not donate anything directly to the modern federal idea, but they were crucial in forming an intellectual background that allowed modern federalism to sprout. Their contribution was largely in asking fundamental questions about sovereignty and central power, including problems of social contract, natural rights or justification of popular resistance. However, Burgess claims that to get to know the main intellectual inspiration for the Continental European tradition of federalism, Roman Catholic social theory, and the much later and very different secular anarchist-socialist strand associated with Pierre-Joseph Proudhon, it cannot be omitted.

Catholic social theory is normally identified with papal encyclicals announced between the 1880s and the 1930s, especially with *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931). The principle of subsidiarity is pointed out as a salient one that inspired federal thinking. "A community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good" (Catechism of Catholic Church, 1883). It holds that government should undertake only those initiatives which exceed the capacity of individuals or private groups acting independently. All the secular activities should be carried at the local level, as close to the people as possible. It recognized that a human individual is a social being and that all forms of social organization should have his/her benefits as a primary goal. The subsidiary underlines advantages of small communities and voluntary associations. Consequently, Catholic social theory blossomed out from principles like solidarism, personalism and pluralism. All these values influenced the federalization of Europe indirectly. The Church never formally addressed itself to federalism per se. It proposed a vision of society and the human individual role therein which could form an ethical compass for politicians involved in the process. The Vatican's voice was especially well heard by the Christian Democratic parties that were extremely influential at the time of the creation of the European project.<sup>109</sup>

On the other hand, European federalism was influenced by a father of anarcho-syndicalism. Proudhon denounced the idea of authority and his idea of federation was nothing other

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<sup>107</sup> Riley (n 98) 16

<sup>108</sup> Ludolph Hugo (ca 1630–1704) was the first to distinguish confederations based on alliances, decentralized unitary states such as the Roman Empire, and federations characterized by 'double governments' with territorial divisions of powers, in *De Statu Regionum Germanie* (1661).

<sup>109</sup> Michael Burgess, 'The European Tradition of Federalism: Christian Democracy and Federalism', in Michael Burgess, AG Gagnon (eds) *Comparative Federalism and Federation: competing traditions and Future Directions* (Harvester Wheatsheaf 1993)

than a contractual equilibrium between the opposing forces of authority and liberty.<sup>110</sup> He strongly believed in a social contract as the only legitimacy for authority.

The political problem reduced to its simplest expression, consists of finding the equilibrium between two contrary elements, authority and liberty... To balance two opposing forces means subjecting them to a law which balance by making them respect each other, brings them into accordance. But there can we get this new element, superior to both Authority and Liberty, and mutually acceptable to both as the arbiter of their relationship? We get it from the contract, which not only confers rights to its parties but applies equally to both of them.<sup>111</sup>

Only this kind of contract keeps the parties equal forever. The new society is equal and not hierarchical. In this society, principles of anarchism are transformed to federalism and the relations between the state and its units resolve themselves into relations of equal exchange (commutative justice). His fear of a state, combined with the recognition of sovereignty, had to come to fruition in the form of the principle of subsidiarity. Proudhon believes in autonomy of units. Every function that can be taken care of at the lower level must be exercised at this level, lest the whole system degenerate. He supported a decentralized federal state.

As we could see, the reflections on federalism started with state and sovereignty. This idea was mixed with the Biblical idea of covenant that was developed by the Protestant thinkers. This directly influenced American federalism, whereas in Europe this influence was indirect. It came through the filter of secularization of the doctrine posed by the most influential thinkers of the Enlightenment. In the twentieth century, European federalism was additionally influenced by two streams that underlined solidarity, subsidiarity and equality. These differences in philosophical underpinnings in both polities will be easy to spot in the upcoming chapters.

### ***3.4. Political and philosophical underpinnings of American and European federalism***

In this section we will observe how the above-mentioned grand theories have influenced the process of forming federations. It will become obvious that the pure intellectual concepts presented by thinkers from the eighteenth, seventeenth and even sixteenth centuries were reflected in real life. Political and legal practice benefited prominently from philosophical ingenuity. Some ideas were used directly, others were taken from books and implemented in a creative and complicated process of designing compound states, and some were applied

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<sup>110</sup> Yves Simon, 'A Note on Proudhon's Federalism,' in Daniel Elazar, *Federalism as Grand Design: Political Philosophers and the Federal Principle* (University Press of America 1987) 223-34.

<sup>111</sup> Jean-Pierre Prudhon, *The Federal Principle*; from the original *Du Principe federatif* (Ernest Flammarion 1863) 75

because of the habit and tradition deeply entrenched in the groups practicing them, combined with a strong conviction about their correctness.

In this section we will see that American and European federalism had different theoretical-philosophical sources. These could have been easily observed in the formative eras of both compound polities. The statesmen who were the primary authors of the founding documents of the polities were inspired by disparate theories. We will see how the theory of covenant influenced American thinking from the time of British colonization to Madison. On the other hand, we will see that the inspiration for the European Union was secular, based also on the national experiences of the European countries. Finally, it is important to mention that in post-war Europe there were two main proposals for European federalism, two main visions of European integration. The triumph of Schuman over Spinelli was the triumph of functionalism, i.e. the triumph of institutions and market integration over the deeper integration of peoples.

The American tradition of federalism clearly melds the two strands of federal thoughts, theological and secular, which were mentioned previously. At the beginning, let me cover briefly the former aspect. The Protestant Reformation of the sixteenth century broke up the unity of Western Christendom and led to the formation of numerous new religious churches and sects, which often faced persecution by governmental authorities allied with Catholic Church. Many groups of the first settlers came to American colonies with the aim of escaping from those prosecutions and living according to their faith, with the right to practice their religion. As we know, Reformation constituted the main channel of spreading the idea of covenant. This form of organization was brought to the New World by European congregations: by the Anglicans to Virginia, by the Puritans to New England, by the Presbyterians to the Middle Colonies, and so on.<sup>112</sup> The best-known example of a covenant of this kind was written by the colonists known as the Pilgrims, who came to America on board the *Mayflower* on November 11, 1620:

In the name of God, Amen. We whose names are underwritten, the loyal subjects of our dread Sovereign Lord King James, by the Grace of God of Great Britain, France and Ireland, King, Defender of the Faith, etc.

Having undertaken, for the Glory of God and advancement of the Christian Faith and Honour of our King and Country, a Voyage to plant the First Colony in the Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.

In witness whereof we have hereunder subscribed our names at Cape Cod, the 11th of November, in the year of the reign of our Sovereign Lord King James, of England, France and Ireland the eighteenth, and of Scotland the fifty-fourth. Anno Domini 1620.

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<sup>112</sup> McCoy & Baker (n 72) 89

It not only became the first governing document of Plymouth Colony, but it also remains the first hallowed document of US constitutional history. Many other examples of compacts from the era can be pointed out here. They follow several distinguishable kinds, e.g. the Salem Agreement (1634) created the people (society); the Agreement of the Settlers of Exeter (1639) created a government; and the Massachusetts Body of Liberties (1641) listed values, rights and interests of the community.<sup>113</sup> State constitutions were only one step further in the development of the primary covenants. Even if the name was different,<sup>114</sup> they tended to have a strong compact form. One very significant example is the Constitution of Massachusetts, which was written by a specially elected convention and approved in a referendum (1780).<sup>115</sup>

What is more, federal theory was taught in the colonial colleges. James Madison himself learned it at the College of New Jersey from an outstanding Scottish theologian, John Witherspoon. Madison is known as a Father of the Constitution, a principal author of this document and author of the third part of the *Federalist Papers*. In this most influential commentary to the US Constitution, written together with Alexander Hamilton and John Jay, we can read that the risk of tyranny by passionate majorities was reduced in larger republics where member units of shared interest could and would check each other. Hamilton quoted Montesquieu in claiming that splitting sovereignty between federal units and the center will also protect individuals' rights against abuse by authorities at either level.<sup>116</sup> Madison agreed that the member states were the ones best fit to address "local circumstances and lesser interests", otherwise neglected by the center, so he supported equipping them with relevant powers,<sup>117</sup> including a veto one.<sup>118</sup> Furthermore, authors of the *Federalist Papers* believed that because of the closeness and perpetual visibility of the local administration of criminal and civil justice, the people will maintain strong affection.<sup>119</sup> They also believed that a solution to overcome concerns of under-functionality of a central government is its proper composition, and not the extension of its powers.<sup>120</sup> The Founding Fathers created a federal system to overcome a tough political obstacle: namely, they had to convince independent states to come together to form a successful and effective union. Writing to George Washington before the Constitutional Convention, James Madison considered the dilemma, saying that establishing "one simple republic" that would do away with the states would be "unattainable." Alternatively, Madison wrote, "I have sought for a middle ground which may at once support a due supremacy of national authority, and not exclude [the states]". Federalism was the answer.

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<sup>113</sup> Donald Lutz, *From Covenant to Constitution in American Political Thought* (1980) 10 Publius 115

<sup>114</sup> Primarily the word 'constitution' was applied only to one of the parts of the colonial documents, i.e. the one that refers to the organization of a government. The whole document was normally presented under the term 'frame'. That explains as well why bills of rights were not labeled as part of a constitution, since they were not dealing with institutions (ibid 121).

<sup>115</sup> ibid

<sup>116</sup> *Federalist Papers* (first published 1787-88, Jacob E. Cooke (ed) 1961) *Federalist No 9*

<sup>117</sup> ibid *Federalist No 37*

<sup>118</sup> ibid *Federalist No 22*

<sup>119</sup> ibid *Federalist No 17*

<sup>120</sup> ibid *Federalist No 16*

As we can see, all these ideas were inspired by European political federalism. The founding fathers knew the most influential treatise of political thinkers and applied them in the Constitution. It can be easily concluded that the American base for federalism united two streams thereof. On the one hand, reading the preamble of the US Constitution we can clearly see the idea of repeating a pattern of covenant given in the Mayflower Compact, i.e. its essential elements and even the same language. On the other hand, the organization of government is drawn from Montesquieu's theory of separation of powers, because the Founding Fathers (Madison in particular) took heed of Montesquieu's warning by establishing an independent executive (the President), a legislative assembly (the Congress), and a judiciary (the Supreme Court) in the federal Constitution. Madison masterfully protected the separation of powers by establishing a thorough system of checks and balances. The Constitution of 1787 reflects diverse discussions carried by thinkers of different political tradition about the shape of a federation. It both establishes institutional frames of organization of a compound state, determining difficult questions concerning the horizontal and vertical separation of powers, and creates a political union that emphasizes the importance of interrelationship between the federation and the states, along with a common will and connections, especially those concerning aims and goals.

This second characteristic of US federalism is deeply entrenched in American political culture, which is often underestimated or even dissembled by the Europeans.

They came here--the exile and the stranger, brave but frightened--to find a place where a man could be his own man. They made a covenant with this land. Conceived in justice, written in liberty, bound in union, it was meant one day to inspire the hopes of all mankind. And it binds us still. If we keep its terms we shall flourish. (...) The American covenant called on us to help show the way for the liberation of man. And that is today our goal. Thus, if as a nation, there is much outside our control, as a people no stranger is outside our hope.

Is that a statement by one of the Founding Fathers? No, it is Lyndon Johnson's inaugural address from 1965.<sup>121</sup> Elazar states that for Americans, federalism is more than a governmental arrangement between the states. It was adopted by modern forms of social associations where contracts become a foundation for the operation and formation of larger units while preserving the integrity of the primary parts. It is rather a way of life, or at least of political life.<sup>122</sup>

The analysis of European federalism seems to be a substantially harder task. The most important reason for that is the form of the European Union. The discussion between scholars about the actual term for the shape of integration is far from bringing a final solution. I will elaborate this point further in the dissertation, but now let me touch on the topic of the philosophical underpinnings of the European integration without coming to any conclusions.

Before European federalism reached the idea of a continental union it was tested on a statewide level. Initially the covenant theory was applied in countries like Switzerland and

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<sup>121</sup> <[http://avalon.law.yale.edu/20th\\_century/johnson.asp](http://avalon.law.yale.edu/20th_century/johnson.asp)> accessed 25 March 2014

<sup>122</sup> Elazar *The Political Theory* (n 73) 24



the United Provinces of Netherlands. However, the theory dominant in Europe became purely secular.<sup>123</sup>

Nation-states were the primary architects of federalism in Europe. They always had to be taken into consideration as primary components of all European-wide proposals. Bodinian statism triumphed here undisputedly. The idea of a social contract and the concept of sovereignty were directly inspired by Hobbes, Locke, Montesquieu and Rousseau. According to Elazar, the federal idea rooted in the sixteenth-century theories was further developed and modified by Benjamin Constant and de Tocqueville, and later in the twentieth century by post-World War I integral federalists and the post-World War II personalists.<sup>124</sup> European federalism at the supranational level has been much less relationship-orientated than the American one, as the theory of covenant is less present in the former. Conversely, it is definitely more functional, concentrated around issues of organization of the system of government, together with authority, autonomy, legitimation and division of power. In 1952 the European Coal and Steel Community, the first supranational attempt towards European federation in the twentieth century, was a union of states - a union of governments, not of the people. This antecedent of the European Union was created with the clear political and economic aim of keeping peace and balance in the continent and supporting development of its member states. Elazar called this form of federalism a post-modern one.

Premodern federalism had a strong tribal or corporatist foundation, one in which individuals were inevitably defined as members of permanent, multi-generational groups and whose rights and obligations derived entirely or principally from group membership. Modern federalism broke away from this model to emphasize polities built strictly or principally on the basis of individuals and their rights, allowing little or no space for recognition or legitimation of intergenerational groups.<sup>125</sup>

Having that as a datum point, he describes post-modern federalism as a model that recognizes the need to secure individual rights in a civil society, at the same time acknowledging the right of groups reflected in their political status, usually entrenched in a constitution.

While European integration in the twentieth century was under construction and the idea of European federalism was widely discussed, there was not many goals that the European statesmen could agree upon. Also, there was no agreement concerning the characteristics of the process of integration/federalization. The discussion about the early shape of a European federation is sometimes personalized as a conflict between Jean Monnet and Altiero Spinelli. The latter supported a vision of strong, democratic and fully integrated Europe, with powerful common institutions and a constitution. His *Movimento Federalista*

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<sup>123</sup> Covenant theory paved the way to modern secularism. In the Netherlands, for instance, as James Skillen states, the succession of Calvinists from the 16th to the 20th centuries derived a uniquely Christian covenantal view of the state as a realm of tolerant public pluralism. (See BC Wearne, *Public Justice of All: An annotated bibliography of the works of James W. Skillen 1967-2008* (May 2008, 2nd edn)

<sup>124</sup> Daniel Elazar, *Toward a Civil Constitutionalism in The Covenant Tradition in Politics*. <<http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=386&PID=851&IID=1367>> accessed 25 March 2014

<sup>125</sup> Elazar *Federal-Type Solutions* (n 67) 447

Europeo opposed fragmentation of the integration process and downplay of the integration by omitting its political aspect and concentrating only on economy. He could not accept the version of integration proposed by the intergovernmentalists and believed in a redefinition of sovereignty where national states would not be a primary player anymore. Spinelli was a leading European federalist of his era and castigated the politics of integration adopted by the Community's authorities, especially what we can call the Monnet plan. This plan can be regarded as a symbol of European integration, even though its author can hardly be called a federalist. Sometime he is called an "incremental federalist" but more often a "functionalist". Monnet saw integration as a process that had one flagship goal: to secure peace, not only for Europeans but for the whole of civilization. His extremely practical way of reasoning convinced him that the best way to achieve this aim is to transform the political context, eliminating reasons for people to fight. He also said that "people only accept change when they are faced with necessity and only recognize necessity when a crisis is upon them", thus giving an important role to the concept of crisis. "I have always believed, he added, that Europe would be built through crisis and that it would be the sum of their solutions"<sup>126</sup> He believed in economy as a prime factor that would unite the not-so-long-ago-conflicting parties. Concrete material benefits would give impetus for a new solidarity and new society. This way of thinking was present at the very beginning of the Schuman Plan, when the idea that the door leading to actual Franco-German reconciling would only be opened after establishing a common basis for economic development. Real union between the people could be built gradually, step by step. Political integration would be a natural consequence of the process.

I have never believed that one fine day Europe would be created by some great political mutation, and I thought it wrong to consult the peoples of Europe about the structure of a Community of which they had no practical experience. It was another matter, however, to ensure that in their limited field the new institutions were thoroughly democratic; and in this direction there was still progress to be made. (...) [T]he pragmatic method we had adopted would (...) lead to a federation validated by the people's vote; but that federation would be the accumulation of an existing economic and political reality...<sup>127</sup>

Building the federation upon the Common Market was criticized by many. Opponents of this functionalist way claimed that without putting more effort on political integration itself and providing strong central institutions, national elements and their interests would dominate the whole process and Monnet's thesis would never come true.<sup>128</sup> Monnet intended to broaden the scope of the union through economic activities, without challenging national sovereignty. The consequences of that choice are still visible today.

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<sup>126</sup> Jean Monnet, *Memoir* (Doubleday 1978) 417

<sup>127</sup> *ibid* 392-393

<sup>128</sup> Eg Altiero Spinelli, *Come ho tentato di diventare saggio* (Il Mulino 1987); Hendrik Brugmans, *Europe: A Leap in the Dark* (Trentham Books 1985); Eugen Kogon, *Europäische Visionen* (Quadriga 1995)

### **3.5. Integration, federation and other forms of coexistence**

This clearly proves to us that a process of integration does not necessarily have a pure federation as its result; some other forms of compound organizations can be equally expected. Federation is thus one of many options in which smaller units (states) can arrange their coexistence without becoming a unitary state. They vary according to how much power belongs to the central unit, their set of institutional connections and their attitude towards sovereignty. Not every federation is the same. Very often, two states that carry this name differ one from another because they only accepted some sort of lowest common denominator for a federation - their concrete organizational structures are very diverse. As we will realize, federations vary as well because of the time that they were created. The lowest common denominator was different in the nineteenth century and it would be different now. Moreover, an ideal model of a federation is not identical today to that of the past. Still, we keep the name federation for a perfect union between states that decide to share their sovereignty and cede part of it to a union that will effectively help to exercise state functions and protect state interests without depriving them of their political identity.

A pivotal characteristic of a federation is that its political authority is divided into two sets of government, central (national) and areal (subnational), both of which operate directly on the people. On the other hand, a unitary state has only one government that covers all the territory of a country. Often unitary states are decentralized, but in this case administrative units exercise only the powers that the central authorities choose to delegate - the central power creates the divisions. We can distinguish as well the so-called devolved states (like the United Kingdom) where the powers devolved to the subunits may be temporary or ultimately replaced (from the Scottish Parliament, the Welsh or the Northern Irish Assembly) in a central government without changing the constitution; sub-national units can be granted sovereignty but this can be waived by the national authorities. In a federation, units can be merged into a bigger polity; they share sovereignty, and their power functions cannot be challenged unitarily by the central government. Basic rules of federal arrangements are normally entrenched in a constitution. Federations also vary in significant ways. Some are compounds of as few as two units (Bosnia and Herzegovina or Belgium), others of many (89 in the case of Russia). We can distinguish asymmetrical federations (like India or Malaysia), where some units entered the ring with different terms and conditions or were granted them at the beginning. Brazil is a unique example of a three-step federation where the municipalities are also federal entities (granted with special powers that seem similar to those of federal units and use "organic law" that is reminiscent of a constitution).<sup>129</sup> Twenty-four countries of the world are federal,<sup>130</sup> while their citizens comprise 40% of the world's

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<sup>129</sup> Jose Roberto Afonso, Luiz de Mello, *Brazil: an evolving federation* (Prepared for the IMF/FAD Seminar on decentralization to be held in Washington, DC, on November 2000, <<http://www.imf.org/external/pubs/ft/seminar/2000/fiscal/afonso.pdf>> 20-21

<sup>130</sup> According to Forum of Federation: Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nepal, Nigeria,

population, and seven out of the eight biggest countries choose this form of governance. The only exception on this list is China, which some people, especially economists, claim has now evolved into a *de facto* federal state. Other countries, like Spain and South Africa, have all aspects of a federation except the name. It seems that the attractiveness of federative systems is still growing and more polities could choose this form of organization in the future. Challenges of the modern world produce pressures at one and the same time for larger and smaller political organizations. This tendency has been generated by common goals such as progress, social justice, protection of the environment or influence on the international stage, since these all involve cooperation and economic and political influence that only big units have. The desire for smaller, closer and self-governing units has risen because of a conviction of the benefits of subsidiarity and the importance of a government that is close to its people and can thus react fast and effectively to their needs and problems.<sup>131</sup>

For our further deliberations, the most important will be the difference between federations and confederations. There are two classic forms of compound polities, both of which are included in the notion “federal political systems”. These two terms have been used at some time or other in the history of the United States to describe its structure. In the case of Europe, they still are used to name the form of governance in the Union because of the lack of agreement between social scientists.

The prime difference between these two concepts is that participation in a confederation is voluntary and states keep their independence. Confederation has no sovereignty, not even a shared one. In modern political terms, confederation is a union created by sovereign states for a common purpose or action in relation to foreign state(s). This purpose/action can be as crucial for further existence of the units as defense (war), or can secure their wellbeing (currency union). The genesis of a confederation is usually connected with a treaty, which might be replaced with a constitution. In everyday practice, confederations hallmark with unanimity in decision-making. Changes of the most fundamental legal acts must be approved without any opposition (consensus); this is virtually the same in the case of other important decisions. Sometimes special majority rules are adopted. Confederation is usually regarded as an intermediate form between an international organization and a federation.<sup>132</sup> This special position often provokes troubles with classifying confederations as other forms of governance. Murray Forsyth defined confederation as a federal union which

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Pakistan, Russia, St. Kitts and Nevis, South Africa, Spain, Switzerland, United Arab Emirates, USA, and Venezuela. According to the organization, there are two countries that are in the process of transition to federalism, Iraq and Sudan, and one that is considering a federal system, Sri Lanka.

<sup>131</sup> Ronald Watts, *Models of federal power sharing* <<http://www.forumfed.org/pubs/Models-of-Federal-Power-Sharing-e.pdf>> accessed 25 March 2014

<sup>132</sup> An organized international community is an international organization, and a confederation is more a form of a state (quasi-state). A confederation is often understood as the next step, after international organization, of integration of states. From outside, the term “confederation” looks like something more than an “international organization”, but in practice it may not be so. Sometimes the boundaries between confederations and international organizations are blurry. Some looser confederations are very reminiscent of international organizations. They even permit secession from the confederation. Of course, there are also confederations that are strong and are reminiscent of federations (See Hans Kelsen, *Principles of International Law* (Lawbook Exchange 1952) 171-75.

constituted the spectrum between inter-state and intrastate. Furthermore, confederations can evolve and become international organizations or federations. Some countries, namely Canada and Switzerland, keep the notion “confederation” in their names even though, from a political science perspective, they do not fulfill the definition. Switzerland, *Confœderatio Helvetica*, has been a federation since 1848.<sup>133</sup> From polities commonly known as states (not international organizations), Serbia and Montenegro (2003-2006) was called a confederation; some authors claim that Belgium can already be characterized as one in some aspects and that it is evolving to fully become a confederation in the future. Other examples are the Benelux Economic Union or the Commonwealth of Independent States.<sup>134</sup>

Federation should not be mixed up with a federacy. The latter is a specific asymmetrical federal form of government where one or more of the units enjoy markedly more power than the majority of the units. This special relation is guaranteed in the constitution. Sometimes it is described as a blend between a federation and a unitary state, where at least one of the parts of the territory is autonomous while the majority is either not autonomous or enjoys a far lesser degree of autonomy. The autonomous part carries its sovereignty as members of a federation do (sovereignty is shared with the central government); other parts are not sovereign themselves, as they share the situation of administrative divisions of a unitary state. Often the autonomous parts are given some special status in international relations, which is an advantage in comparison with units in a federation that are subordinated to foreign policy of the central government. To exemplify, Denmark is divided into five regions, two of which, Greenland and the Faroe Islands, are still part of the Kingdom yet enjoy a higher degree of autonomy. They have their home rules, local parliaments and governments. They send representatives to Folketinget (the Parliament). Although Copenhagen has full say over their foreign policy, both territories are represented in some Scandinavian institutions, such as the Nordic Council.

The last form worth mentioning here will be associations. An associated state is the minor partner in a formal, free relationship between a political territory with a degree of statehood and - in practice - a larger nation. An associated state delegates some powers, usually in the field of defense and foreign policy, to its protector, officially maintaining the status of an independent state. This is for example the case of Micronesia, which is associated with the United States under the Compact of Free Association that grants the ultimate control over the islands and sovereignty for the islanders although some aspects, such as defense and social service policy, are in the hands of Washington. Many other small states are linked in a similar way with their larger patrons, for instance their neighbors or, often, their former colonial power. In Europe we can point to one more specific form of relation between the states, which is a condominium. This is for example Andorra, where the role of monarch is exercised jointly by two co-princes, the president of France and the bishop of the Catalonian town of Urgell. Furthermore, Spain and France share the responsibility of protecting the principality.

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<sup>133</sup> The Canadian case is even more confusing because in Canada the term ‘confederation’ has one extra meaning - the process of establishing a federation.

<sup>134</sup> See *Le système institutionnel belge est déjà inscrit dans une dynamique de type confédéral* Michel Quévit *Le confédéralisme est une chance pour les Wallons et les Bruxellois*, *Le Soir*, 19 september 2008

Both the United States and the European Union today are what we call federal polities. They differ a lot but they belong to the same category of polities that are more integrated than the international organizations. The European Union is also not a standard confederation since its goals are very broad and not limited in time. Its competences are growing alongside its tasks. It is a community of general competences that is supposed to last forever for the wellbeing of its member states. The European Union can be (and is) compared more naturally with the USA than with the OECD or NATO. The European Union has remarkable similarities with the institutional context and the functional logic of the United States. The philosophical underpinnings are not exactly the same though they sprout from the same basic concepts of organization of society and government. The European Union is not the United States. Their systems are not identical. They were created in different times and in different historical and economic circumstances. But both polities see integration as a tool of development. The benefits of American unification have far outlasted the dangers posed by the aggression of Britain and the European states than at almost any time in history, and their collective power makes Europe strong even now, in one of its weakest moments.

Following the definition of Ostrom, a compound republic is a polity constituted by “concurrent and overlapping units of government” or “a system of government with multiple centers of authority reflecting opposite and rival interests ... accountable to enforceable rules of constitutional law”.<sup>135</sup> Then he adds, with reference to the Europeans:

To find (the American) theory useful for thinking about problems does *not* mean that Europe should copy the American model. That would show intellectual poverty – of doing no more than imitating the American example. The task, rather, is to use conceptions and the associated theoretical apparatus as intellectual tools to think through problems and make an independent assessment of appropriate ways for addressing the problem of contemporary Europe.<sup>136</sup>

The European Union and the United States occupy the same side of the diagram of compound polities, the far right one that groups the most integrated polities. This fact allows for comparing them in search of similarities and for reflecting on the EU through the lenses of the model of the American federal states, because the polities on that side are still diverse. The fact that a polity is a federal polity does not mean it is a federation in the classical meaning of that term. In the following chapters we will analyze whether or not the European Union has the characteristics of a federation using the doctrine of implied powers. This further study will help us understand what exactly the European Union is in terms of federalism.

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<sup>135</sup> V Ostrom, *The Meaning of Democracy and the Vulnerability of Democracies* (The University of Michigan Press 1987) 21, 106

<sup>136</sup> *ibid* 9

## 4. Implied powers and International Organizations

Implied powers exist not only in the context of compound states, as they can also be observed in international organizations. It is important to examine this and analyze their structure and how they were developed before proceeding to the analysis of the doctrine in both the United States and the European Union. The development of the doctrine in international organizations - especially the United Nations, which delivers the most important example of a judicially created doctrine of implied powers - can serve as a point of reference for further study. This should reveal to us that implied powers can be used in diverse types of compound polities. Consequently, we can analyze the differences between implied powers in diverse forms of compound polities. We will be able to place the doctrine of implied power on a scale of compound polities, from the loosest ones to the most integrated. This will allow us to reflect better on the character of the European Union on that scale.

Implied powers in the European context arose when the European Community was seen merely as an international organization, at the beginning of the process of integration. Therefore, it is essential to look at the development of the doctrine of implied powers in terms of international organizations. On that level, the doctrine sprouted up in the case law of the Permanent Court of International Justice (PCIJ).

But before looking more carefully at the landmark PCIJ cases, we should look at the general situation of the international organizations around the time the doctrine was announced.

Some say that we can find precursors of international organization as early as antiquity.<sup>137</sup> We shall not go as far back in time as that, but instead shall limit ourselves to the history starting in the nineteenth century when the first institutionalized interactions between the states appeared. The mosaic of sovereign states became fixed enough to open space for coordinated interactions. However, the word "sovereign" is crucial here and will bear on the very strong position of member states in organizations. An unprecedented conference system was established at the time of the Congress of Vienna.

The Universal Telegraphic Union (1865) and the Universal Postal Union (1874) were the first public international unions. They differed from the older forms of cooperation in possessing permanent operating organs (not periodical conferences). They did not challenge the sovereignty and could not take any decisions without the consent of all their members, but nonetheless they contributed to the establishment of international standing procedures. Observers of that time did not see these unions as anything more than mere fruits of ordinary multilateral treaties. It should also be mentioned that international treaties back then were rather diplomatic, not legally binding instruments. This started to evolve at the very end of the nineteenth century when the idea of an international legal system and

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<sup>137</sup> See Gerard J Magnone, *A Short History of International Organization* (McGraw-Hill 1954)

international organizations as distinct legal actors emerged; these were later established in the twentieth century.<sup>138</sup>

In these circumstances, the discussion on powers of the organizations arose in the 1920s. Questions as to the origin and scope of powers of international organizations appeared in one of the first requests for an advisory opinion submitted to the Permanent Court of International Justice.<sup>139</sup> The PCIJ, the predecessor of the International Court of Justice, was provided for in the Covenant of the League of Nations.<sup>140</sup>

The International Labour Organization (ILO), established with the task of regulating labor relations, wondered whether its powers extended to regulation of the conditions of labor in the agricultural sector.<sup>141</sup> The PCIJ answered:

It was much urged in argument that the establishment of International Labour Organization involved an abandonment of rights derived from national sovereignty, and that the competence of the Organization therefore should not be extended by interpretation. There may be some force in this argument, but this question in every case must resolve itself into what the terms of the Treaty actually mean, and it is from this point of view that the Court proposes to examine the questions.<sup>142</sup>

The PCIJ paid respect to the member sovereignty. However, it found that the ILO was empowered to regulate labor relations in the agricultural sector because it limited the question at hand to a matter of interpretation of the Treaty of Versailles, which established the Organization.<sup>143</sup>

On the same day, the PCIJ delivered another opinion relating to the powers of the ILO in the field of agriculture. It used similar reasoning to the previous case, upholding the idea that the powers must “depend entirely upon the construction to be given to the same treaty provisions from which, and from which alone, that Organization derives its powers”.<sup>144</sup>

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<sup>138</sup> Viljam Engström, *Understanding Powers of International Organizations: A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism - With a Special Focus on the Human Rights Committee* (Åbo Akademi University Press 2009) 42-43

<sup>139</sup> There is a presumption of interpretation in international law that a treaty should be interpreted so as to give full effect to its purposes. At first sight this presumption might seem to conflict with another presumption, that a treaty should be interpreted restrictively so as not to limit the sovereignty of states. In fact, however, the two presumptions are usually applied in different circumstances. The principle of restrictive interpretation is used most often to interpret treaties conferring jurisdiction in international tribunals, and treaties which place heavier burdens on one party than on the other party or parties (in such cases, restrictive interpretation seeks to minimize the inequality of the parties). Conversely, the principle of effectiveness is used most often to interpret treaties placing identical burdens on all parties - such as treaties setting up international organizations.

<sup>140</sup> The work of the PCIJ, the first permanent international tribunal with general jurisdiction, made possible the clarification of a number of aspects of international law, and contributed to its development. It held its inaugural sitting in 1922 and was dissolved in 1946.

<sup>141</sup> *Competence of the ILO to Regulate the Conditions of Labour of Persons Employed in Agriculture*, advisory opinion, (1922) Publ PCIJ, Series B, nos 2 and 3

<sup>142</sup> *ibid* 23

<sup>143</sup> *ibid* 35

<sup>144</sup> *ibid* 53-5. But in this case the PCIJ eventually refused to extend the powers of the ILO into regulating agricultural production. The PCIJ recognized that effects upon production processes may arise



Four years later, the PCIJ issued an opinion on the power to regulate incidentally the activities of employers. Again, the PCIJ based its opinion on interpretation of the relevant provisions of the Treaty of Versailles. It referred to the sovereignty of the members and focused on the intention of the treaty founders and left out the theoretical discourse:

So, in the present instance, without regard to the question whether the functions entrusted to the International Labour Organization are or are not in the nature of delegated powers, the province of the Court is to ascertain what it was the Contracting parties agreed on. The Court, in interpreting Part XIII (of the Versailles Treaty), is called upon to perform a judicial foundation, and, taking the question actually before it in connection with the terms of the Treaty, there appears to be no room for the discussion and application of political principles or social theories, of which, it may be observed no mention is made in the Treaty.<sup>145</sup>

The PCIJ assumed the intention of the contracting parties was to equip the organization with wide powers to cooperate. Consequently, it concluded that they did not want to prevent the organization from reaching its ends. If it had been intended conversely, the parties would have stated that in the treaty.

The League of Nations was created in 1919 and it was the beginning of an era of modern international organizations. The appearance of the League challenged the understanding of sovereignty of that time. The League became a new nucleus of international relations and legal justification of its actions and international competences similar to those owned by the states. The Permanent Court had to play a pioneering role of determining the scope of powers of international organizations. However, the very strong concept of sovereignty made this task very difficult, especially bearing in mind the special position of the ILO, which was seen as a semi-private institution.<sup>146</sup> The PCIJ addressed the question as regards the powers of the ILO simply by looking at the constituent documents as everyday treaties and did not develop any doctrine from those first opinions.<sup>147</sup>

Finally, in 1927 the PCIJ decided to formulate a general rule, instead of offering simple interpretation in a case-by-case model. In the Jurisdiction of the European Commission of the Danube, the PCIJ was asked a question regarding the competence of the European Commission of the Danube in ports, or more precisely: how to divide the competences between Romania and the Commission. The PCIJ stated:

When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them. As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise

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incidentally, and such effects should not prevent the organization from dealing with matters specifically committed to it. However, the principle of organizing and developing production from economic perspective was in itself an activity out of the sphere of activities listed for ILO (55-59).

<sup>145</sup> *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of Employer*, advisory opinion (1926) PCIJ Publ 1926, Series B, no 13, 23

<sup>146</sup> Engström (n 138) 45

<sup>147</sup> Jan Klabbbers, *An Introduction to International Institutional Law* (Cambridge University Press 2003)

these functions to their full extent, in so far as the Statute does not impose restrictions upon it.<sup>148</sup>

With these words, the PCIJ formulated the doctrine of attributed powers, known also as the principle of conferral. That means that organizations can act only on the basis of powers expressly attributed to them. Despite the fact that the Court used the word “functions” rather than “powers”, it is clear that the PCIJ’s opinion related to powers. On the one hand, this ruling is conservative in that it rooted capacities of organizations in the notion of state sovereignty; on the other hand, it extended jurisdiction to organizations, thereby empowering them, and started to refer to them as independent actors of international law.

Klabbers comments on the principle of attribution with the following words:

...[T]he principle of attribution encounters at least two problems, one more or less theoretical, the other one far more practical. Theoretically (or hypothetically, perhaps), if the notion of attribution is taken to its extreme, then organizations are little more than the mouthpieces of their member states, and, if that is so, then their very *raison d’être* comes into question. If an organization’s powers are limited to those powers explicitly granted, then the organization remains, in effect, merely a vehicle for its members rather than an entity with a distinct will of its own, and if it is merely a vehicle for its member states, then it is difficult to see why the particular form of an organization was chosen by those members over, say, a series of occasional conferences, or perhaps even the simple appointment of a joint public relations officer.

An objection with far more fundamental consequences in practice, however, is that while the notion of attribution may be a nice point of departure when it comes to discussing the powers of international organizations, organizations are usually held to be dynamic and living creatures, in constant development, and it is accepted that their founding fathers can never completely envisage the future.<sup>149</sup>

In other words, the constituent acts of organizations are drafted as a compromise between the requirements and expectations of all contracting parties. As such they are very open, general and contain gaps. Attributed powers are only a baseline and each organization needs some flexibility to function well and be efficient. It should respond to some degree to the dynamic situation around it.

A small departure from the doctrine of attributed powers was noted already in the *Danube* case. Further in its analysis, the PCIJ explained the phrase “power to exercise functions to their full extent”. It concluded that there are some additional activities that are “necessary corollary to the duties of the European Commission”. Therefore, the attributed powers should be interpreted as to give them full effectiveness. This is also known as the principle of effectiveness. In the case at hand, the PCIJ found out for example that assuring freedom of navigation was incomplete without power over ports, including supervision of loading and unloading and access to railways.<sup>150</sup>

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<sup>148</sup> *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, advisory opinion (1927) PCIJ Publ. 1927, Series B, 64

<sup>149</sup> Klabbers *An Introduction* (n 147) 65-66

<sup>150</sup> *Danube* (n 148) 65-67

But this was only a prelude. The doctrine of implied powers began to develop in *Interpretation of the Greco-Turkish Agreement* (1928). These two countries in 1926 concluded an agreement which conferred further powers on the Mixed Commission for the Exchange of Greek and Turkish Populations. This agreement stipulated that any question of principle which might arise in the Mixed Commission in connection with the new duties entrusted to it should be submitted to the President of the arbitral tribunal for arbitration. It provoked a different interpretation regarding the conditions of appeal to the arbitrator. Although the agreement failed to identify the parties entitled to resort to arbitration, the PCIJ declared that:

... from the very silence of the article on this point, it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the Mixed Commission when the body finds itself confronted with questions of the nature indicated.<sup>151</sup>

Therefore, the PCIJ found that some powers may be implied from the attributed powers.<sup>152</sup> The PCIJ confirmed a general rule that anybody possessing jurisdictional powers has the right in the first place to determine the extent of one's jurisdiction.<sup>153</sup> Additionally, the PCIJ focused on the "spirit" of several instruments mentioned in the agreement. It analyzed the function of the Mixed Commission and paid particular attention to the express powers to take measures necessitated by the execution of the agreement.<sup>154</sup> "It follows that any interpretation or measure capable of impeding the work of the Commission in this domain must be regarded as contrary to the spirit of the clauses providing for the creation of this body."<sup>155</sup> Eventually, it accentuated the "urgency to the carrying out of the provisions".<sup>156</sup>

*The Interpretation of Greco-Turkish Agreement* represents one of two ways in which the implied powers can be found to exist. This way holds that the implied powers flow from the rule of interpretation, which says that the treaty rules must be interpreted in such a way as to guarantee their full effect.<sup>157</sup> Consequently, it is constructed over the effectiveness principle. Therefore *Greco-Turkish Agreement* represents a very broad definition of implied powers in the UN context. Another, different way is connected with the famous Justice Hackworth's dissent in *Reparation for Injuries*.

The incident leading to this advisory opinion was the assassination of Count Bernadotte, the UN Secretary General's envoy to Palestine/Israel, by paramilitary units in Jerusalem in 1948. The question which arose referred to whether the United Nations could bring an international claim against Israel in order to obtain reparation for the damage caused to the

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<sup>151</sup> *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)*, advisory opinion (1928), PCIJ Publ 1928, Series B, no 16, 20

<sup>152</sup> Even before it was accepted that treaties may contain implied clauses, it had been argued that they contain implied *clausula rebus sic stantibus*. This meant that they were binding as long as the circumstances of their conclusion remain present. Other examples are listed in Sir Gerald Fitzmaurice, „Fourth Report on the Law of Treaties (1959/II) 91 YbILC 46-47 and 70-74 and Klabbers (n 58)

<sup>153</sup> *Greco-Turkish Agreement* (n 150 ) 20-21

<sup>154</sup> *ibid* 18

<sup>155</sup> *ibid* 18-19

<sup>156</sup> *ibid* 19

<sup>157</sup> Klabbers (n 147) 67

organization and to the victim or persons entitled through the latter.<sup>158</sup> By answering this question, the ICJ created one of the milestone decisions in the legal history of international organizations. It is a landmark decision when considering the international personality in general. After having listed the customary methods for the establishment, the presentation and the settlement of claims and reaffirming that these could be employed by states, the ICJ asserted that the UN was recognized as an international person and therefore had the capacity to make decisions. The ICJ observed that the UN Charter did not expressly settle the issue of an international personality. Then it stated:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable. (...)

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it is certainly not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims. (...)

Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice. The functions of the Organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions.<sup>159</sup>

But it is important to underline that the doctrine of implied powers was not applied to find the international personality, which is sometimes claimed. Now, the doctrine became pertinent in the opinion once international personality had been established so as to induce concrete duties, rights and capacities not expressly mentioned in the UN Charter.<sup>160</sup> Portmann underlines the difference between implied powers and implied recognition. At this first stage the Charter was examined with the aim of inferring from it whether the

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<sup>158</sup> *Reparation for the Injuries Suffered in the Service of the United Nations*, advisory opinion (1949) ICJ Reports 174, 176-7

<sup>159</sup> *ibid* 178-179

<sup>160</sup> See Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) *British Year Book of International Law* 111, 129-31; Ronald Portmann, *Legal Personality in International Law* (Cambridge 2010) 105

parties had intended to recognize the organization as an international person, which would lead to certain legal consequences, e.g. the capacity to bring an international claim. Such capacities are not implied powers of the organization but legal consequences of having a recognized international personality.<sup>161</sup> In the second part, the ICJ proceeded with defining the scope of UN powers:

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 12 dans son Avis consultatif no 13, du 23 juillet 1926 (Série B, no 13, p. 18), et il doit l'être aux Nations Unies.<sup>162</sup>

The principle of implied powers is clearly set here. The ICJ was of the opinion that the states of the agents would sometimes not be justified in bringing a claim, or would not feel inclined to do so, and the success of these missions depends on ensuring adequate protection for their members. The ICJ concluded with a general observation:

Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.<sup>163</sup>

The principle of effectiveness led the ICJ to find a general UN competence concerning damages. This solution is very pragmatic and functional; it reassures the proper functioning of the organization. The ICJ did not see any conflict between the newly established power and the right of the states to bring claims for their agents.<sup>164</sup>

A very different view as regards existence and finding of implied powers was expressed in the dissenting opinion of judge Green Hackworth:

There can be no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded

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<sup>161</sup> Portmann (n 159) 103

<sup>162</sup> *Reparation for the Injuries* (n 157) 182-183

<sup>163</sup> *ibid* 184

<sup>164</sup> *ibid* 185-6. On the potential conflicts between implied powers and expressed powers see ALL Campbell, *The Limits of the Powers of International Organizations*, (1983) 32 *Int'l and Comp. L. Quart.* 523, 523-533, (...) (T)he evidence seems heavily tilted in favour of the view that the exercise of [implied- MH] powers is in general not precluded by the existence of express powers. This is so, apparently, even if the powers expressly provided are in the same field, and even if the power is very similar to an expressed power in its particular purpose and effect." (p. 527)

by them. Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted. No necessity for the exercise of the power here in question has been shown to exist. There is no impelling reason, if any at all, why the Organization should become the sponsor of claims on behalf of its employees, even though limited to those arising while the employee is in line of duty. These employees are still nationals of their respective countries, and the customary methods of handling such claims are still available in full vigour. The prestige and efficiency of the Organization will be safeguarded by an exercise of its undoubted right under point 1 (a) *supra*. Even here it is necessary to imply power, but, as stated above, the necessity is self-evident. The exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents. (...)

The results of this liberality of judicial construction transcend, by far, anything to be found in the Charter of the United Nations, as well as any known purpose entertained by the drafters of the Charter.<sup>165</sup>

Hackworth did not reject the notion of implied powers but derived them from express powers. He based his reasoning on the Charter provisions and on the Convention on the Privileges and Immunities of the United Nations. He denied a power to bring claims in respect of damage as there was no necessity to maintain the independence and effectiveness of the organization. According to this view, implied powers should be grounded in specific express powers. He concluded that the UN employees would be well protected by customary principles. This reading is much more restrictive than the ICJ opinion.

Nonetheless, from these two versions of the implied powers doctrine in the UN, the wider one is often thought to prevail and was confirmed in many decisions.<sup>166</sup> Already in 1956, in the *Effect of Awards* opinion, the ICJ utilized very similar reasoning in accepting the legality of the creation of a judicial body by the General Assembly (GA) when no express provision in that respect can be found. The ICJ accepted the competence of the GA to set up an administrative tribunal, whose decisions were binding on the GA itself to ensure the protection of UN employees.<sup>167</sup> The Court implied from Article 101(1) of the UN Charter, which permits the appointment of staff under regulations established by the General Assembly, that the GA was "exercising a power which it had under the Charter to regulate staff relations".<sup>168</sup> The ICJ held that the power to create the tribunal arose "by necessary intendment" out of the Charter.<sup>169</sup> It was again the question of effectiveness: this power was essential to ensure the efficient working of the Secretariat, "and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity".<sup>170</sup> What is peculiar is the fact that the well-being of the organization at large is reformulated in terms of efficient working of one of its organs, the Secretariat.<sup>171</sup> Klabbers

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<sup>165</sup> *Reparation for Injuries* (n 157), Hackworth dissenting, 198-9.

<sup>166</sup> Klabbers (n 147) 61

<sup>167</sup> *Effect of Awards of Compensation made by the UN Administrative Tribunal* (1956) ICJ Rep. 1956, 77

<sup>168</sup> *ibid* 61

<sup>169</sup> *ibid* 57

<sup>170</sup> *ibid*

<sup>171</sup> Klabbers (n 147) 61

claims that this extends even to the implied powers doctrine, because if it is not only about efficacy of the organization as such but also about all the organs thereof, there would be no limits to the powers that can be implied.<sup>172</sup>

Justice Hackworth dissented again:

The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers. The General Assembly was given express authority by Article 22 of the Charter to establish such subsidiary organs as might be necessary for the performance of its functions, whether those functions should relate to Article 101 or to any other article in the Charter. Under this authorization the Assembly may establish any tribunal needed for the implementation of its functions. It is not, therefore, permissible, in the face of this express power, to invoke the doctrine of implied powers to establish a tribunal of a supposedly different kind, nor is there warrant for concluding [p81] that such a thing has resulted.<sup>173</sup>

This time he emphasized Article 22 as an adequate authorization for the establishment of a tribunal as a subsidiary organ of the GA. The ICJ on the other hand pointed out that the implied powers definitely do not have to be “absolutely essential”. Rather, they can be drawn from wider purposes and functions. We can see that both visions differ in their interpretation of the term “necessary”. Linderfalk claims that the opinions in the *Reparation and Effect of Awards* cases suggest that “necessary” means “something more than ‘important’ but less than ‘indispensably requisite’”.<sup>174</sup>

Eventually, in 1962 the ICJ issued the *Certain Expenses* opinion, which was an aftermath of UN financial difficulties provoked by the increasing expenses of peace-keeping operations in the Suez and Congo (UNEF and ONUC). As regards implied powers, the ICJ found that the enumeration of certain procedures of financing the UN and its operations does not exclude other funds: “It cannot be said that the charter has left the Security Council impotent in the field of an emergency situation when agreements under Article 43 have not been concluded.”<sup>175</sup>

Later the ICJ decided that there might be implied powers in the case at hand. The specific costs can be labeled as expenses of the organization only if they are in accordance with the purposes thereof.

The primary place ascribed to international peace and security is natural, since the fulfillment of the other purposes will be dependent upon the attainment of that basic condition. These purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of

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<sup>172</sup> Klabbbers (n 147) 62. He adds: “The Court must have felt that, somehow, its reasoning on this point required some bolstering, and added that the power to create an administrative tribunal derived in the end from the necessity ‘to do justice between the Organization and the staff members’”.

<sup>173</sup> *Effects of Awards* (n 166) Hackworth dissenting, 80-81

<sup>174</sup> Ulf Linderfalk, *On the Interpretation of Treaties* (Springer 2007) 292

<sup>175</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, advisory opinion, (1926) ICJ Reports 151, 167

the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization.

(...) If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent.<sup>176</sup>

We can see a remarkable change as compared with the previous cases. Powers of the UN, according to the ICJ, could be implied if they can be attached to the purposes of the Charter. So now the implied powers could exist not only to facilitate the effectiveness of the organization but also if they are related to any of the purposes thereof. It is a big change, a very broad conception of implied powers close to the concept of inherent powers.<sup>177</sup>

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<sup>176</sup> *ibid* 167-168. This case also sets the limitation that implied powers may not change the distribution of functions within the organization (See Campbell (n 163) 529-532)

<sup>177</sup> The doctrine of inherent powers allows international organizations to perform all the acts which they need to perform to attain their aims, not due to any specific source of organizational power, but simply because they inhere in organizationhood. The most known supporter of the doctrine was Finn Seyersted. According to this school of thought, the only restrictions on the powers of an International organization are, firstly, to act within their aims and purposes; secondly, to not perform acts which they are expressly precluded from performing; thirdly, to act through the proper organs; and fourthly, the principle that these organizations do not have general inherent Jurisdiction over the Member States. (Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend upon the Conventions Establishing them?* (Copenhagen 1963)). Inherent powers are sometimes reduced to inherent jurisdiction.

Nigel claims that the advantages of the doctrine of implied powers are basically two. Firstly, they help organizations reach their aims without being "hidebound by the legal niceties of its individual, and often obscurely drafted, provisions". Secondly, it is easier if it comes under the control of international organizations. It reduces the number of legal controls on the organization's functioning to two: the act must aim to achieve the organizational purpose and it may not be expressly prohibited. (Nigel White, 'UN Charter and Peacekeeping Forces: Constitutional Issues', in Michael Pugh (ed), *The UN, Peace and Force* (Cass 2001))

In the United Nations context, the inherent powers doctrine was an aftermath of a dissatisfaction with the implied powers doctrine. Nigel claimed that the search for a basis of implication is cumbersome, rarely completely convincing and not really necessary; and inherent powers address those problems perfectly since there is no need to resort to contrived finding of powers being implied by founders of organizations. (Nigel) In the EU context Alan Dashwood relaunched the doctrine mostly out of a growing sense of unease from viewing the external relations powers of the Community as being almost exclusively based on implied powers. (Dashwood, 'The Limits of the European Community' (1996) 21 ELR 114)

The doctrine has been criticized. Klabbers points out that the doctrine relies on some 'natural' vision of international organizations. Talking about inherent power must mean that there is something in the nature of organizations which warrants the conclusion that certain things 'inhere' them. (Klabbers *An Introduction* (n 147) 77).

Often inherent powers are used as a synonym of implied powers.

The concept of inherent powers exists also in the context of nations. The concept of inherent powers arises from the sovereignty of a nation. These powers are not derived from another nation. Using the Constitution of the United States as an example, the government that was created was given inherent rights in some matters but other rights were limited to the states or the people as express rights. Some nations claim more inherent powers for themselves than others, for example totalitarian, authoritarian or religious states as compared with liberal democracies.



Some justices expressed reservations from this broad reading of implied powers. Justice Moreno Quintana wrote in his dissent: “[t]he implied powers which may derive from the Charter so that the Organization may achieve all its purposes are not to be invoked when explicit powers provide expressly for the eventualities under consideration”.<sup>178</sup> President Winiarski was also critical:

The Charter has set forth the purposes of the United Nations in very wide, and for that reason, too indefinite terms. But (...) it does not follow, far from it, that the organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful. (...) It is only by such procedures, which were clearly defined, that the United Nations is sometimes not in a position to undertake action which would be useful for maintenance of international peace and security (...), but that is the way in which the organization was concerned and brought into being.

The same reasoning applies to the rule of construction known as the rule of effectiveness (ut res magis valeat quam pereat) and, perhaps less strictly, to the doctrine of implied powers.<sup>179</sup>

Moreover, other justices expressed their skepticism toward this liberal method of construction.<sup>180</sup>

Implied powers can sometimes be found in explicit provisions in their constitutive acts.<sup>181</sup> This is the case for the European Centre for Medium-Range Weather Forecasts. Its Council “shall have the powers and shall adopt the measures necessary to implement this Convention”.<sup>182</sup> Similarly, the constitution of the European Organization for the Exploitation of Meteorological Satellites (EUMETSAT) contains a provision which states that the Council “shall have the powers to adopt all the measures necessary for the implementation of this Convention”.<sup>183</sup> Explicit implied-powers provisions are not only limited to technical organizations.<sup>184</sup> For example, the Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea provides the following, in relation to the powers of the International Seabed Authority: “[t]he powers and functions of the Authority shall be those expressly conferred upon it by the Convention. The Authority shall have such

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<sup>178</sup> *Certain Expenses* (n 174) 245

<sup>179</sup> *ibid* President Winiarski dissenting 230

<sup>180</sup> Judge Alvarez: ‘An institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life’ (Individual Opinion by Judge Alvarez, *First Admission*, ICJ Reports 1948, 67). *Also see* Dissenting Opinion, 268. On the other hand, judge Bustamante was of the view that the operation in the Suez and Congo could be undertaken despite the fact that Article 43 agreements had not been concluded. He also asked whether such special agreements and their negotiations are, according to the spirit of the Charter, such a basic matter that if they are not concluded, the action ordered should not be undertaken. His answer would have been affirmative if the issue concerned had been “a basic one”, but it was not in the case at hand.

<sup>181</sup> Henry Schermers, Niels Blokker, *International Institutional Law: Unity Within Diversity* (Martinus Nijhoff 2011, 5th revised edition) 186

<sup>182</sup> Convention establishing the European Centre for Medium-Range Weather Forecast, Art. 4 (Trb. 1974, No 7) 43

<sup>183</sup> Convention establishing EUMETSAT, Art. 5.1.

<sup>184</sup> Schermers & Blokker (n 180) 186

incidental powers, consistent with the Convention, as are implicit in, and necessary for, the exercise of those powers and functions with respect to activities in the Area".<sup>185</sup>

Schermers and Blokker claim that since there are very widely differing views on the scope of implied powers in international law, the crucial thing is to indicate their limits. They point out four limits. First, recourse to the implied powers concerned must be necessary or essential for the organization to perform its functions. The second one is connected with the existence of certain explicit powers in the area concerned and whether implied powers can exist where specific explicit powers already exist. These situations require additional concern because, on the one hand, it is difficult to accept that the use of implied powers may violate explicit powers. But on the other hand, if certain powers are enumerated explicitly but their use encounters difficulties, it is arguably too strict to prohibit the organization from using any other powers, if this restriction would result in the organization being unable to perform its functions. Thirdly, the use of implied powers may not violate fundamental rules and principles of international law. Finally, implied powers may not change the distribution of functions within an organization.<sup>186</sup>

Implied powers clearly existed in the international law context before the European Communities were created. What is more, they existed in a few theoretical versions, supported by judicial writings of high quality. The broader one was dominant and accepted as a proper mechanism of international law required for good functioning of international organizations. These legal writings would not have been unknown to the European founding fathers and justices who were responsible for preparing and managing the European integration, an integration process without a precedent on the international level. They must have used those discussions, together with those of the US Supreme Court, when they introduced the doctrine in the European law.

#### ***4.1. Scholars on implied powers.***

I would like to end this chapter with a brief presentation of scholarly, more legal, theoretical, positions regarding implied powers in international organizations. These vary substantively from the opinions of those who attacked implied powers passionately and of those who supported them as a necessary component of the international organizations. The latter group got its voice heard in the previous section, and thus I will focus here on the opponents of the doctrine.

Scholars' views on the acceptable extent of implied powers differ significantly. Those who supported the inherent powers doctrine are at one extreme (From Finn Seyersted, including

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<sup>185</sup> Annex, Sect I, para I

<sup>186</sup> Schermers & Blokker (n 180) 184-85

Nigel White and Alan Dashwood)<sup>187</sup>. The opposite end of this scale would be those writers who ask for a restrictive interpretation of the powers of international organizations, in accordance with the principles of state sovereignty and with the consensualist bases of the international system.<sup>188</sup> This position, which was associated with the socialist doctrine, was developed in the post-war Soviet Union by Grigory Tunkin.<sup>189</sup> Tunkin did not give any definition of implied powers in his Russian language work “The Theory of International Law”, and during his lecture at the Hague Academy of International Law he only said briefly that implied power constituted a subsidiary competence which is not laid down in the Charter.<sup>190</sup> He cited Justice Hackworth’s dissenting opinion in support of his own view; however, he pointed out that this cannot be accepted without reservations either.<sup>191</sup> He saw it as too wide and feared the arbitrary extension of the competence, and found it dangerous to give an organization the right to interpret its competences by relying on the purposes and functions thereof. He was of the opinion that implied powers would eventually lead to chaos in international law.<sup>192</sup>

In the West, Hans Kelsen was a theorist who opposed the doctrine of implied powers.<sup>193</sup>

„... if the constituent treaty does not contain a provisions conferring expressly upon the community international juridical personality, that is to say, unrestricted legal capacity under international law, the community has only those special capacities as conferred upon it by particular provisions.“<sup>194</sup>

This opposition reflects his positivism and requirement of a normative base for each law. Kelsen rejected the possibility of competence-expanding interpretation. For example, he submitted that “it is impossible to interpret Article 24 to mean that it confers upon the Council powers not conferred upon it in other Articles of the Charter”.<sup>195</sup> He rejected the ingenious use of interpretative methods or recourse to the spirit of the UN Charter to decrease its shortcomings. And Kelsen believed that the Charter is full of them. His

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<sup>187</sup> Nigel White, *The Law of International Organizations* (Manchester University Press 2005, 2nd ed,) 87-89 and Nigel White, *The UN Charter and Peacekeeping Forces: Constitutional Issues* (1996) 3

International Peacekeeping 43; Dashwood (n 176)

<sup>188</sup> Guilielmo Verdirame, *The UN and Human Rights* (Cambridge 2011) 78

<sup>189</sup> But it has received support from other scholars concerned with the trend to interpret constituent instruments beyond their objective meaning: RJ Araujo, *Objective Meaning of Constituent Instruments Responsibility Today: Essays in Memory of Oscar Schater* (Martinus Nijhoff 2005) 346

<sup>190</sup> Arpad Prandler, *Competence of the Security Council and the General Assembly*, in B Harasziti, *Questions of International Law*, vol 1 (Springer 1980) 165

<sup>191</sup> Also FI Kozhevnikov adopted a stand similar to Hackworth’s dissent: “Treaties concluded by international organizations express, in the last analysis, the delegation of rights of states as subject of international law” (Kozhevnikov, *Mezhdunarodnoe pravo* (Pradhler 1957) 241)

<sup>192</sup> *ibid* 166 (‘The implied powers of international organizations exist actually in cases, when the organization as a whole or one of its organs is bound to resort to an activity in order to implement a clearly laid down competence and not with a view to implementing, in general, the organization’s purposes and to discharging its functions, to an activity which not only does not contradict the organization’s Charter but conforms with usual international legal practice.’ (Tunkin, *Teoriya mezhdunarodnogo prava* (Moscow 1970, 2<sup>nd</sup> edn) 387)

<sup>193</sup> Kelsen, *The Law of the United Nations* (Lawbook Exchange 2011) 422-24

<sup>194</sup> *ibid* 329-330

<sup>195</sup> *ibid* 284

commentary of the Charter describes many norms or parts of them as “superfluous”, “meaningless”, “unclear” or “contradictory”.<sup>196</sup>

Jörg Kammerhofer criticized the doctrine in *Reparation* for a logical error of the Court’s formulation of “necessary implication”. There is no causal necessity to imply anything from anything, he claims. In his eyes, all implication is in fact an act of creation, not cognition, like filling a gap, because the act of completing a regulation is possible only if the act is incomplete in the mind of the person looking at the regulation. Implying more powers for the United Nations is not logical.<sup>197</sup> What is more, he stresses that the doctrine of implied powers is an idea which is not common among most traditions of public law, even federative. Therefore, the doctrine has to be accepted as a part of international law before it can change the treaties. He cites Krzysztof Skubieszewski who wrote: “Obviously, the perception of the Charter as a constitution does not entail the power to extend, alter or disregard its provisions under the guise of interpretation.”<sup>198</sup>

Implied powers exist in diverse forms of compound polities. They can be found in well-established universal organizations and small specialized ones. Some of them have an implied-powers clause in their constitutive treaties; others are purely a result of judicial interpretation. In all cases, the existence of implied powers means acceptance of encroaching an area of sovereignty of independent states. The implied-powers doctrine in international organizations appeared around a century after implied powers as such were born in the United States. Therefore, the European Community, being clearly an international organization at the very beginning of its existence, could profit from the doctrine of implied powers on two levels - one being a federal-state level and the other an international level. The European founding fathers must have been aware of the existence of implied powers in both contexts. How did they use this knowledge? Did they simply want to copy a mechanism known from the context of international organizations to make the Community operative at the lowest level? Or perhaps they wanted to introduce a federal tool that is known from the USA, which is camouflaged like implied powers and known for instance from the history of the United Nations. One more question that should be asked here is whether these two kinds of implied powers are the same powers. Is there only one type of implied power or are there any others, significantly different from each other? This question should be answered in the following chapters.

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<sup>196</sup> Von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge 2010) 226

<sup>197</sup> Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Taylor & Francis 2010) 96-103

<sup>198</sup> *ibid*

# II. IMPLIED POWERS IN THE UNITED STATES

## 1. Introduction

Because the doctrine of implied powers was born in the United States, our study of implied powers in both polities will start exactly there. In this chapter we will see in what circumstances the doctrine was born and how it developed through the decades. The story had already begun in the eighteenth century when the Constitution of the USA was drafted and ratified, and was the time when the Necessary and Proper Clause, the constitutional embodiment of the doctrine of implied powers and its textual justification, was created. In those discussions we can track some crucial arguments as regarding the doctrine itself and the versions of federalism that different readings of the doctrine brought. But to understand the discussion of implied powers and federalism in the American context, we must take a closer look at the arguments presented during the first years of existence of the American federal republic. The Bank Bill case and *McCulloch v. Maryland*<sup>199</sup> are the key opinions in understanding notion of powers in American constitutionalism. Both sides of the constitutional conflict delivered their most elaborate reasoning and Chief Justice Marshall presented an opinion that not only became a starting point of discussions about federal powers in the USA until the present day, but also is one of the milestones of the American case law system.

In this chapter the legal historical methodology will be used. It is impossible to understand modern American federalism without comprehending its very beginnings. We will see how the Framers understood the Clause in the revolutionary moment of shaping US constitutionalism. We will take a closer look at the possible different constructions of the Clause and also examine particular words thereof to be sure that we operate with the same linguistic apparatus and use particular notions in the correct way. This will also be important in our comparative work in Chapter IV.

*McCulloch* has always been the case that dictates the way of discussion about implied powers in the USA. The arguments included in the opinion are so substantial and convincing that future debates always referred to *McCulloch*. The opinion has been developed and commented upon through decades of transformations of American federalism, but its theoretical core constructed in nineteenth century has remained untouched. We will see how the judicial opinion on implied powers has changed in different periods of US federalism. Scholars distinguish three basic eras in the development thereof: dual

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<sup>199</sup> 17 US 316 (1819)

federalism, cooperative federalism and new federalism. These will all be characterized in detail in this chapter, together with the changes in the doctrine of implied powers. The transformation of implied powers parallels the transformation of federalism. I will show that the doctrine of implied powers was one of the tools for transforming versions of federalism. I will analyze the most important cases of each period to prove how the majority decisions, often a 5-4 majority, on implied powers mirror general tendencies regarding federalism.

This will help us to understand the role of the Supreme Court in the process of transforming the doctrine. The question of who determines the extent of federal powers is as old as the American constitution. There was absolutely no agreement on that. Chief Justice Marshall finally closed that discussion, granting this extremely meaningful power to the Supreme Court. The justices reflected the will of political majority and used a very open-ended and spacious Necessary and Proper Clause to stress the constitutional principles that were helpful at the time for making a particular change of constitutional dimension. The Necessary and Proper Clause was a perfect tool for maneuvering between the plenary power principle and the state rights principle, and in fact American federalism is defined exactly between those two principles. What is more, the Supreme Court coupled the Necessary and Proper Clause with the Commerce Clause which escalated the effect of change. Pairing these two Clauses allowed congressional control of all areas of social life. I will demonstrate how this mechanism worked in practice, as well as how it was used to expand and to limit scope of authority of the federal government.

### ***1.1. Implied powers and judicial interpretation***

A very important question should be asked at the beginning: What is the relation between implied powers and extensive judicial interpretation in general? This matter is of course especially interesting in the field of constitutional law, since it involves questions of highest political importance, and the language of constitutions is vague and operates with very general rules and principles. On the one hand, there is strict construction that requires a judge to apply the text only as it is spoken. Judges - in this view - should avoid drawing inferences from a statute or constitution and focus only on the text itself. This theory is often considered too conservative and not many judges would identify with it. Strict constructivism in its pure form can lead to absurd results. That is why judicial restraint fits better to describe those judges who try to avoid extensive interpretation, as it emphasizes the limited nature of the court's power. On the very other side of the spectrum we have extensive interpretation. The so-called "extensive interpretation of statute law *ex ratione legis*" is the extension of the provisions of the law to a case to which they do not comprise because the case falls within the scope of the law, although the provisions of the law do not

include it.”<sup>200</sup> This is frequently connected with a teleological or purposive method of interpretation. Teleological interpretation happens when judges interpret legislative provisions in the light of the purpose, values, legal, social and economic goals these provisions aim to achieve.

Judicial activism is seen as a radical form of un-restrained judicial activities. It is an approach for the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions. In academic usage, activism usually means only the willingness of a judge to strike down the action of another branch of government or to overturn a judicial precedent with no implied judgment as to whether the activist decision is correct or not. Activist judges enforce their own views of constitutional requirements rather than deferring to the views of other government officials or earlier courts. The topic of judicial activism, widely discussed in the USA, is still rather virginal in European scholarship.<sup>201</sup> Nevertheless, some interesting writings on the issue concerning the European Court of Justice can be found. Their relations with other powerful actors are analyzed, along with the positive and negative reactions between them. This delivers a more complete picture of the Courts and helps us to understand the processes in which they are involved. These will be a departure point for a further discussion on the Courts’ role in transforming politics.

In 1986 Hjalte Rasmussen published *On Law and Policy in the European Court of Justice* (Martinus Nijhoff Publishers 1986) that became a landmark in the history of EC legal studies. He advanced the thesis that the ECJ was engaged in activist, pro-federalist, policymaking, which exceeded not only the textual limits and political mandate but also public acceptance. His theses deeply shocked the majority of European scholars and the book met strong opposition. Rasmussen's principal criticism of the Court is that in its definition of the Member States' relationship with the Communities "the ECJ accepted deep involvement in making choices between competing public policies for which the available sources of law did not offer (...) judicially applicable guidelines".<sup>202</sup> He also says that the Court is perpetuating a 'pernicious myth' that its teleological reasoning is a legal inevitability and not the outcome of a continuous policy process. Rasmussen broke the European tradition of looking at the Court from merely a judicial, non-political perspective and implemented the method (very well known in the United States) of realist analysis of the judiciary. His conclusions were groundbreaking in the 1980s, but now his general theses are commonly accepted.

We can agree that implied powers are a form of extensive judicial interpretation. The existence of implied powers is a consequence of denial of the strict reading of the text. The mere existence of implied powers means that the courts have to go beyond the text itself and are forced to use extra-textual methods of interpretation that are goal-oriented.

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<sup>200</sup> John Austin, *The Province of Jurisprudence Determined*, W Rumble (ed) (Cambridge University Press 1995), para 913

<sup>201</sup> Although in the US context allegations of activism have been raised more recently by conservatives than liberals, such charges can be deployed by both sides, and the primary determinant is probably where the courts stand politically with respect to other government actors.

<sup>202</sup> Rasmussen *On Law and Policy* (n 42) 508

What distinguishes implied powers from other forms of extensive reading is the fact that they are recognized as a separate doctrine. No matter what one thinks about the correctness and advisability of the existence of implied powers, they are known as a separate category of powers that are distinguished from other powers on a theoretical level. This allows the judges and scholars to use the doctrine officially, as one of the doctrinally recognized instruments of assuring proper functioning of the legal system, polity and society. Furthermore, extensive judicial interpretation deals with all kind of texts and all kind of findings and judicial consequences; the doctrine of implied powers is connected with the subject matter of competences. Extensive reading goes far beyond than that: it can, for example, determine a specific term in a statute or categorize an act differently to how it would be understood from textual interpretation. The doctrine of implied powers focuses only on granting, or not granting, particular competences. What is more, the doctrine of implied powers is usually associated with granting powers to some high multi-unit entity, such as a compound state or an international organization. Most typically, implied powers are connected with granting powers to a federal government. Also, implied powers are founded upon the effectiveness argument. They aim for better effectiveness of the entire legal system in which they are operating. Powers can be implied by a court only when they contribute to creating a more effective system. This is connected with the fact that implied powers are based on legal-textual basis. Some powers can be implied because of an *expressis verbis* clause that allows specific organs of administration or the judiciary to create specific conditions for them in order to make the entire body of law, or part of it, more or fully effective, or simply operational. The remaining implied powers are created to make specific provisions effective. They are based on some specific provisions of the Treaty and are created to attain the objectives for which the specific powers were intended.

## ***1.2. Necessary and Proper Clause***

The discussion about the doctrine of implied powers in the United States must start with the Necessary and Proper Clause of the US Constitution.<sup>203</sup> This Clause is the only base of implied powers in the USA. The Necessary and Proper Clause allows Congress "To make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Article I, Section 8, Clause 18).

The correct way to interpret the Clause was the subject of debate initiated by two of the Founding Fathers, Alexander Hamilton and James Madison. This debate reflected the differences between the two different concepts of the federal government held by the

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<sup>203</sup> The term 'Necessary and Proper Clause' was coined in 1926 by Associate Justice Louis Brandeis, writing for the majority in the Supreme Court decision in *Lambert v Yellowley* (272 US 581 (1926)). In its ruling on the case, the Court upheld a law restricting medicinal use of alcohol as a necessary and proper exercise of power under the 18th Amendment, which had established Prohibition.



Framers of the constitution. The supporters of the new Constitution wanted to grant the government all the adequate powers to achieve its delegated ends and to create a government more functional than the one created under the Articles of Confederation. On the opposing side, there was great concern about the states' rights and limited government that would not hegemonize the people and the local governments. The language of the Clause is ambiguous. It clearly grants that Congress possesses some powers not expressly mentioned in the Constitution, but it is not clear how broad those powers are. It can be interpreted very broadly or very narrowly. Both constructions had strong supporters and enemies, just like the vision of federal government they represented.

The Commission on Detail added the Necessary and Proper Clause to the Constitution without discussing it with the rest of the Constitutional Convention. It was not the subject of any discussion from its initial proposal to the Convention's final adoption of the Constitution. What is known from the legislative history of the Clause is the first wording thereof, proposed by Gunning Bedford and rejected by the Committee. This first version suggested that Congress has the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."<sup>204</sup> This means that the Convention rejected without discussion a clear proposal of an open-ended grant of powers to Congress, and instead opted for enumeration of particular powers which would later become the Necessary and Proper Clause.

What is really interesting is the fact that before Hamilton and Madison started disagreeing about the meaning of the Necessary and Proper Clause, they publicly supported the Clause and passionately fought the arguments of the opponents of the Constitution. Under the common pen name "Publius" in the *Federalist*, they offered a defense line for the Clause.<sup>205</sup> They both believed that the Clause adds nothing new to the enumerated powers of Congress. The main argument of the Anti-Federalists was that the ambiguity of the Clause will give no end to the federal government powers. This is why it was called by many an Anti-Federalist, Sweeping Clause.<sup>206</sup> The main fear was that the Clause would permit the government to invade the area of powers of the states, especially in the territory of taxation. Anti-Federalists were claiming that with the Sweeping Clause, Congress could pass a law preventing state governments from collecting taxes, if it was a necessary and proper tool to effectuate federal collection. Some even feared that the Clause would be a tool for abolishing state government entirely.<sup>207</sup>

Hamilton focused in *Federalist No. 33* on taxation, to ensure that the Clause did not threaten the states' competences in that field. He also argued that the Necessary and Proper Clause

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<sup>204</sup> James Madison, *Notes of Debates in the Federal Convention of 1787* (Ohio University Press 1987) 303.

<sup>205</sup> Alexander Hamilton, *The Federalist No. 33*; James Madison, *The Federalist No. 44* (first published 1787-88, Jacob E. Cooke (ed) 1961)

<sup>206</sup> Gary Lawson, Patricia B. Granger, 'The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause' (1993) 43 DUKE Law Journal 267

<sup>207</sup> See Herbert Storing (ed), *The Complete Anti-Federalists*, especially 'Essay of An Old Whig', 'Essay of Brutus' 1981; *The Documentary History of the Ratification of the Constitution*, statements of George Manson (p 151) and Eldridge Gerry (p 199), Letter from William Russell (p 468)

included no powers beyond what was implicit in a fair reading of other enumerated powers.<sup>208</sup> He tried above all to picture the Clause as innocuous to the states' rights:

What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the *means* necessary to its execution? What is a Legislative power but a power of making Laws? What are the *means* to execute Legislative power but Laws? ... What are the proper means of executing such a power but *necessary* and *proper* laws?<sup>209</sup>

From the other perspective, Madison started his defense of the Clause by showing four other options the Convention could choose from with respect to implied federal powers. These were:

- 1) to restrict Congress to the powers expressly delegated, as under the Articles of Confederation
- 2) to enumerate all federal powers
- 3) to enumerate all exceptions to the powers of Congress
- 4) to omit the implied powers and the Clause as such. He pointed out all problems connected with those alternatives.<sup>210</sup>

Later, he said that the cooperation between the executive branch and the judiciary, and eventually the popular election, would act to ensure that the powers of Congress would not expand unduly<sup>211</sup>.

### **1.3. The Bank case**

Hamilton and Madison drifted further and further apart with regards to the Necessary and Proper Clause during the Bank Bill debate. This debate became an intellectual foundation for the development of the doctrine of implied powers in the nineteenth, twentieth and also the twenty-first century. The statesmen involved in that debate guaranteed the highest level of legal and political debate. Their arguments have served both supporters and enemies of a strong central government in all stages of US federalism history. And they play the same role in the present debate.

In 1791 a national bank was proposed to the first Congress by Secretary of Treasury Hamilton. It provoked one of the hottest political debates of its times. The bank proposal was passionately opposed by James Madison. He delivered a speech that began with "a general review of the advantages and disadvantages of Banks" and finished with a clear

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<sup>208</sup> *The Federalist* No. 33 (n 204)

<sup>209</sup> *ibid* 204

<sup>210</sup> *The Federalist* No. 44 304-5 (n 204)

<sup>211</sup> *ibid* 305

denial of Congress's authority to pass the bill.<sup>212</sup> "Whatever meaning this clause may have, none can be said to give unlimited discretion to Congress."<sup>213</sup> Madison argued that the bank was not "necessary and proper". He found the preamble of the bank bill diffuse and too flexible, and therefore could not agree on giving Congress the authority to grant the bill as he was against the principles of enumerated powers and limited government.<sup>214</sup> He could not agree that the bank would carry the enumerated powers into execution. Rather, he claimed the bank would only facilitate the exercise of governmental powers. He also reflected on the extended chain of means and ends to achieve an object. What is a power to borrow money? Is it only a power to take out loans or also one to create a bank or any other institution?

On the other hand, supporters of the bank argued that it was justified as incidental to the power "[t]o lay and collect Taxes, Duties, Imposts and Exercises, to pay the Debts and provide for the common Defense and general Welfare of the United States"<sup>215</sup> and the power "[t]o borrow money on the credit of the United States."<sup>216</sup> Madison believed that Congress could not provide or use taxes for the common defense and general welfare as such.<sup>217</sup> He explained that the taxing power cannot be used to reach any such general goal. "To understand these terms in any sense, that would justify the power in question, would give the Congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the State Governments."<sup>218</sup> It could do so only when exercising one of the enumerated powers. Madison believed also that Congress should use only direct and incidental means to achieve constitutional ends.

Mark the reasoning on which the validity of the bill depends. To borrow money is made the *end* and the accumulation of capitals, *implied* as the *means*. The accumulation of capitals is then the *end*, and a bank *implied* as the *means*. The bank is then the *end*, and a charter of incorporation, a monopoly, capital punishments, &c. *implied* as the *means*.

If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy.<sup>219</sup>

In defense of this interpretation of the Clause, Madison presented several examples of enumerated powers that were not left to implication, though if a latitudarian interpretation of the Clause were correct, they could have.

Congress has the power to "regulate the value of money;" yet it is expressly added, not left to be implied, that counterfeiters may be punished.

It has the power "to declare war," to which armies are more incident, than incorporated banks to borrowing; yet "to raise and support armies" is expressly added; and to this again, the express power "to make rules and regulations for the government of armies;" a similar

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<sup>212</sup> Annals of Congress (Joseph Gales 1791) 1945

<sup>213</sup> *ibid* 1898

<sup>214</sup> *ibid* 1897-98

<sup>215</sup> US Constitution at I, §8, cl 1

<sup>216</sup> US Constituion st I, §8, cl 2

<sup>217</sup> Annals (n 211) 1946

<sup>218</sup> *ibid*

<sup>219</sup> *ibid* 1899

remark is applicable to the powers as well as to the navy.

The regulation and calling out of the militia is more appurtenant to war than the proposed Bank to borrowing; yet the former is not left to construction.

The very power to borrow money is a less remote implication of the power of war, than the incorporated monopoly Bank from the power of borrowing; yet the power to borrow is not left to implication.<sup>220</sup>

Madison also distinguished between interpretation and construction. He called the construction proposed by supporters of the bank a dangerous<sup>221</sup> one and noted that with their construction of the Necessary and Proper Clause "every possible power might be exercised. The government would then be paramount in all possible cases (...) and every limitation effectually swept away."<sup>222</sup> He later distinguished between a power that is necessary and proper for the government and a power that is necessary and proper for enumerated powers. He claimed that only the second category of unenumerated powers could be accepted.<sup>223</sup> Furthermore, he drew a line between necessity and convenience and applied it to the case at hand. Madison concluded that the bank was only a convenient tool for the government.<sup>224</sup>

Finally, Madison believed that there would always be some assessment as to whether the means chosen by the government were essential to the pursuit of enumerated ends. Restriction of liberties of the people could be accepted only when necessary and the level of necessity should be proved.<sup>225</sup>

It is worth noting that in Congress Madison was supported by Michael Stone (and others) who characterized broad reading of the Necessary and Proper Clause as "a serpent which was to sting and poison the constitution."<sup>226</sup> Stone, a lawyer from Maryland, continued with "all those who opposed the government, dreaded this doctrine [of implied powers] - those who advocated it, declared that it could be resorted to - and all combined in opinion that it ought not to be tolerated."<sup>227</sup> He claimed that if the Framers had accepted the doctrine of implied powers they would have written only the preamble, and have said: "Here is your constitution! Here is your bill of rights! Do these gentlemen require any thing more

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<sup>220</sup> *ibid* 1949

<sup>221</sup> William C. di Giacomantonio and others (eds), *Documentary History of the First Federal Congress 4 March 1789-March 1791*, Vol. 14. Debates in the House of Representatives: Third Session, December 1790-March 1791 (The Johns Hopkins University Press 1996) 380

<sup>222</sup> *ibid*

<sup>223</sup> *Annals* (n 211) 1950

<sup>224</sup> *ibid* 1951

<sup>225</sup> *ibid*. This was related to the connection between the Necessary and Proper Clause and the Ninth and Tenth Amendments that Madison saw. When Madison delivered his speech, these Amendments were not ratified, but were pending before states. Randy Barnett notes that the fact that they were proposed as eleventh and twelfth amendments, and Madison refers to them with these numbers, this constitutional argument of his has been, until recently, largely ignored. (Randy Barnett, *The Original Meaning of the Commerce Clause* (2001) 68 U. Chi. L. Rev. 101, 193)

<sup>226</sup> *Documentary* (n 220) 424

<sup>227</sup> *ibid*

respecting the powers of Congress, than a description of ends of government?"<sup>228</sup>

Also Secretary of State, Thomas Jefferson and Attorney General Edmond Randolph<sup>229</sup> from the executive branch, were against the bank bill. Jefferson, just like Madison, distinguished between necessity and convenience:

[T]he constitution allows only the means which are "necessary", not those which are merely convenient for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any non-enumerated power, it will go to everyone, for there is not one which ingenuity may not torture into a *convenience* in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one power, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of power would be nugatory.<sup>230</sup>

Jefferson concluded that while the bank was indeed a tool of convenience for the government, convenience did not equate to a necessity. For that reason he did not support the bank.

Hamilton started his argumentation in favor of the banks, with the suggestion that the United States possesses the powers of a sovereign in relation to those objects entrusted to its care.<sup>231</sup> And as such, the Union has "a right to employ all the means requisite, and fairly applicable, to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society."<sup>232</sup> Then he concludes that the creation of a corporation is a means available to a sovereign. The only question that must be asked is whether the means has "a natural relation to any of the acknowledged objects or lawful ends of the Government."<sup>233</sup>

Hamilton argued that the grammatical and popular sense of the word "necessary" often means no more than needful, requisite, incidental, useful, or conducive to. It is a common

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<sup>228</sup> *ibid* 425. And Representative Giles, for example, rejected the proposal that necessity should be construed as to produce the greatest quantum of public utility. That suggestion "if pursued, will be found to teem with dangerous effects, and would justify the assumption of any given authority whatever. Terms are to be so construed as to produce the greatest degree of public utility. Congress are to be the judges of this degree of utility. This utility, when decided on, will be the ground of Constitutionality. Hence any measure may be proved Constitutional which Congress may judge to be useful. These deductions would suborn the Constitution itself, and blot out the great distinguishing characteristic of the free Constitutions of America, as compared with the despotic Governments of Europe, which consist in having the boundaries of governmental authority clearly marked out and ascertained." (Documentary 1916-17)

<sup>229</sup> Randolph was a member of the Committee on Detail and he proposed empowering Congress to 'organize the government'. But the committee, and then the Convention, approved the version suggested by James Wilson. He proposed the "necessary and proper" clause as a substitute, authorizing laws 'for carrying into Execution' the other federal powers.

<sup>230</sup> Opinion of Thomas Jefferson, Secretary of State, on the Same Subject (15 February 1791)  
<[http://avalon.law.yale.edu/18th\\_century/bank-tj.asp](http://avalon.law.yale.edu/18th_century/bank-tj.asp)> accessed 8 March 2014

<sup>231</sup> Opinion of Alexander Hamilton on the Constitutionality of a National Bank (23 February 1791)  
<[http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_18s11.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_18s11.html)> accessed 8 March 2014

<sup>232</sup> *ibid*

<sup>233</sup> *ibid*

mode of expression to say that it is necessary for a government or a person to do this or that thing, when nothing more is intended or understood than the interest of the Government or person being required, or will be promoted by the doing of this or that thing.<sup>234</sup>

Therefore he did not agree with the restrictive interpretation of the term by Jefferson and called that reading unjustified, since there is a difference between "necessary" and "absolutely, or indispensably necessary".<sup>235</sup> He stated that "[t]he whole turn of the clause containing it, indicates that it was the intent of the convention, by that clause, to give a liberal latitude to the exercise of the specified powers."<sup>236</sup> An "obvious" relationship between means and goals is enough for the means to be constitutional. "If the end be clearly comprehended within any of the specified powers, and if the measure have obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority."<sup>237</sup>

Even the intrusion upon the state or individual rights would not, according to Hamilton, invalidate the legislation, but would require a higher level of scrutiny, a closer connection between means and ends.<sup>238</sup>

Randy Beck noted that close consideration of the arguments of Madison and Hamilton suggests that they only partially disagreed over construction of the Necessary and Proper Clause. He proves that Hamilton took a more relaxed approach than Madison to the identification of constitutional ends encompassed within an enumerated power. Nevertheless, they agreed that the Clause imposed requirement of immediacy or proximity in the connection between means and ends. Madison was talking about "direct" connections and Hamilton about "obvious" connections. Beck believes that these parallel each other and set limits on Congress.<sup>239</sup>

President Washington followed the opinion of his Secretary of Treasury. Hamilton, who was the leader of the Federalist party, gained a majority for the bank bill.<sup>240</sup> Washington signed

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<sup>234</sup> *ibid*

<sup>235</sup> *ibid*

<sup>236</sup> *ibid*

<sup>237</sup> *ibid*

<sup>238</sup> To understand this broad understanding of the the Clause, it is worth mentioning that during the Constitutional Convention Hamilton presented a scheme of consolidated government in which the legislature of the United States would have been given the "power to pass all laws whasoever", subject only to a nonoverridable veto power by the supreme executive authority (James Madison, Notes of Debates in the Federal Convention of 1787 (18 June 1787)

<<http://teachingamericanhistory.org/convention/debates/0618-2/>> accessed 8 March 2014). At the time of the bank dispute Hamilton did not believe that the enumerated powers of Congress should be given a narrow construction. According to the Secretary of Treasury "how much [power] is delegated [to Congress] in each case, is a question of fact, to be made out by fair reasoning and construction ... taking as guides, the general principles and general ends of government." (Hamilton Opinion)

<sup>239</sup> Randy Beck, 'The New Jurisprudence of the Necessary and Proper Clause' (2002) 3 University of Illinois Law Review 581, 598

<sup>240</sup> Randy Barnett shows how the consequences of that vote can be nowadays tracked back to the Americal party system and the party's attitude towards construction of federal powers: This controversy was among those that contributed to Jefferson (and Madison), eventually splitting from the Federalists and founding the competing 'Republican' party. This party, dubbed 'democrat' by the Federalists - a term of opprobrium - eventually took that name as its own and survives as the

the bill regardless of the objections of significant Cabinet officers. Nevertheless, the partition between Hamilton and Madison on the scope of the Necessary and Proper Clause will be present in the discussion over the application of the Clause in the context of the principles of plenary power and enumerated powers until the twentieth and even the twenty-first century.<sup>241</sup>

#### **1.4. *McCulloch v. Maryland***

The Supreme Court finally addressed the constitutionality of a congressionally chartered bank in the famous *McCulloch v. Maryland*.<sup>242</sup> The role of *McCulloch* in American judicial history cannot be overestimated, as this was the first interpretation of the Necessary and Proper Clause delivered by the Supreme Court. It is not only that, the importance of the decision is even greater because it was written by Chief Justice Marshall, a principal founder of the US system of the constitutional law. The arguments, legal reasoning and rhetoric of the decision are praised even nowadays. This is why we have to analyze this opinion in minute detail in order to understand the very basics of the doctrine of implied powers in the United States. Chief Justice Marshall, who gave us the meanings of the word “necessary” (but not really of the word “propriety”, that I will try to explain later in this chapter), pointed at the link between powers and sovereignty and created a means-to-end test. The latter will become an axis of rearrangement of the doctrine of implied powers in the upcoming periods of federalism. *McCulloch* is also crucial in understanding the role of the judiciary in the process of determining the scope of the doctrine and American federalism in general.

Congress chartered the Second Bank of the United States. Branches were established in many states, including one in Baltimore, Maryland. In 1818 the General Assembly of Maryland passed an act entitled, "an act to impose a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature".<sup>243</sup> The law was enacted clearly to force the United States Bank in Maryland to pay taxes to the state. James McCulloch, a cashier for the Baltimore branch of the United States Bank, was sued for violating this Act. McCulloch admitted he was not complying with the Maryland law. McCulloch lost in the Baltimore County Court and that court's decision was affirmed by the Maryland Court of Appeals. The case was then taken by writ of error to the United States Supreme Court.

It is worth noting that the bank in the case at hand is not the same bank as that discussed

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Democratic Party that exists today. The Federalist party eventually collapsed - it was initially supplanted by the 'Whigs, and then by the abolitionist Republican party, the party we know by that name today. Until the twentieth century, the Democrats largely maintained their Jeffersonian commitment to 'strict construction' of federal powers, with the Republicans favoring more expansive construction of those powers.

<sup>241</sup> See the discussion on the rational basis test on p 77.

<sup>242</sup> 17 US 316

<sup>243</sup> *McCulloch* (n 241) 318

previously. It is the Second Bank of the United States that came into existence after being signed by Madison as President (sic!). But this does not mean that Madison adopted the Hamiltonian position. No, he kept on supporting a strict construction as President, but he recognized during the War of 1812 that a national banking system was necessary in order for the nation to borrow money in emergencies and have the ability to transfer money between different sections of the country. He became convinced that governmental actors and the public had acquiesced in the congressional assertion of power to incorporate a bank, and that provided a constitutional basis for the new legislation.<sup>244</sup>

The Court began its analysis with the above-mentioned Madisonian theory of acquiescence. The Court stressed that a bank had been incorporated by the first Congress under the new Constitution after a debate on its constitutionality. It was signed into a law after an additional debate on the constitutional issue within the Cabinet.<sup>245</sup> The expiration of the bank bill would have harmed the economy of the country. Therefore, it was a practical argument that did not allow for calling the bill "a bold and plain usurpation, to which the constitution gave no countenance" and "convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law".<sup>246</sup> Nevertheless, the majority of the opinion in *McCulloch* does not reflect Madison's view, but rather it appears to be a copy of Hamilton's speech for President Washington.<sup>247</sup>

Marshall analyzed the nature of the Constitution and federalism. However, to begin with he disagreed with Hamilton and confirmed that the federal government has only enumerated powers.

This Government is acknowledged by all to be one of enumerated powers. "The principle that it can exercise only the powers granted to it would seem too apparent to be required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found necessary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise as long as our system exists."<sup>248</sup>

Then he argued, like Hamilton, that the bank is constitutional on the basis of the sovereignty of the Union. Marshall argued that the Framers afforded Congress the ability to select the most appropriate means for accomplishing particular objects. Marshall stressed the difference between a constitution and a bill. He claimed that the former specifies only "important objects" of federal government and cannot offer "the proximity of a legal code". Randy Beck summarizes Marshall's stand on the nature of the Constitution with the following words: "But if Marshall's overall conception of the nature of the Constitution drew from Madison, he followed Hamilton in deriving 'the minor ingredients which compose those [important] objects' of federal power."<sup>249</sup> Marshall, like Hamilton, underlined the

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<sup>244</sup> Beck (n 238) 599

<sup>245</sup> *McCulloch*, 17 US (4 Wheat) at 401-2

<sup>246</sup> *Ibid* 402

<sup>247</sup> Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Supreme Court Review 125, 198 (1996).

<sup>248</sup> *McCulloch* (n 241) 415

<sup>249</sup> Beck (n 238) 601



federal government's need for ample means to accomplish its delegated objects. The Framers wanted to give Congress broad tools for facilitating the execution of the important enumerated powers. While the power of incorporation is an important sovereign power, Marshall agreed with Hamilton that it could be implied as incidental to other powers or used as a means for their execution.<sup>250</sup>

Then Marshall invoked the Necessary and Proper Clause. He did it to confute the narrow construction of the term "necessary" suggested by Maryland.<sup>251</sup>

If reference be had to its use in the common affairs of the world or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.<sup>252</sup>

Then he distinguished the term "necessary" from "absolutely necessary", as in Article 1, section 10 (No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.) He claimed that the Framers used two different terms on purpose and equating them is a mistake from the point of view of textual interpretation – a mistake that Maryland committed.

The intention of those who gave these powers must have been such as to insure, insofar as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as to not leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a Constitution that is intended to last long into the future, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. "To have declared that the best means shall not be used, but those alone without which the

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<sup>250</sup> *ibid*

<sup>251</sup> "But the laws which they are authorized to make, are to be such as are necessary and proper for this purpose. No terms could be found in the language, more absolutely excluding a general and unlimited discretion than these. It is not "necessary or proper," but "necessary and proper." The means used must have both these qualities. It must be, not merely convenient-fit-adapted-proper, to the accomplishment of the end in view; it must likewise be necessary for the accomplishment of that end. Many means may be proper, which are not necessary; because the end maybe attained without them. The word "necessary," is said to be a synonyme of "needful." But both these words are defined as "indispensably requisite," and, most certainly, this is the sense in which the word "necessary" is used in the constitution. To give it a more lax sense would be to alter the whole character of the government as a sovereignty of limited powers. This is not a purpose for which violence should be done to the obvious and natural sense of any terms, used in an instrument drawn up with great simplicity, and with extraordinary precision." (*McCulloch* (n ) 366-7)

<sup>252</sup> *McCulloch* (n 241) 413-4

power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”<sup>253</sup>

Just like Madison, Marshall offered a few examples of enumerated powers that were not left to implication. Marshall gave some of the unenumerated powers that had already been implied, and which were not indispensably necessary to pursuit the constitutional objectives.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said with some plausibility that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a Court of the United States, or of perjury in such Court. To punish these offences is certainly conducive to the due administration of justice. But Courts may exist, and may decide the causes brought before them, though such crimes escape punishment.<sup>254</sup>

Therefore, Marshall pointed out three powers: the implied power to carry mail between post offices and along post roads, to punish any violations of its laws and to require congressional oaths of office. These examples were the object of critique. They look very weak, especially the first two mentioned powers that as if they are incidental in nature, and thus in accordance with the Madisonian concept of unenumerated powers. The last one, on the other hand, seems to be insignificant for an adequate functioning of its enumerated power.<sup>255</sup>

In this section, Marshall confirmed that the implied powers he supported were necessary to achieve the purposes underlying the delegated authority of Congress.<sup>256</sup> He believed that some powers have additional objectives and only a power to regulate those objectives makes the main power really useful and operative.<sup>257</sup> These additional powers are merely "essential to the beneficial exercise" of the delegated authority.<sup>258</sup> Nevertheless, Marshall

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<sup>253</sup> *ibid* 415

<sup>254</sup> *ibid* 416-417

<sup>255</sup> See Barnett (n 224) 203

<sup>256</sup> The Necessary and Proper Clause attaches not only to the enumerated constitutional powers, but also to 'all other powers vested by the Constitution of the United States, or any Department or Officer thereof.' The Court has also from time to time assessed whether federal statutes were necessary and proper to other constitutional powers, like the treaty power or the jurisdiction. See for example *Jinks v Richland County*.

<sup>257</sup> Marshall distinguished between incidental powers (e.g. 'powers to punish these who rob the mail') to an express power and "means" to execute an express power (e.g. a power to constitute a tribunal to punish those who rob the mail). (Friend of the Constitution essay, 172)

<sup>258</sup> *McCulloch* (n 241) 417

agreed with Madison that Congress may not pursue any objects it desires.<sup>259</sup> Not all powers can be seen as incidental and their only "natural construction is the true one".<sup>260</sup>

The most famous part of *McCulloch* is without any doubt: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."<sup>261</sup> It requires identifying an end within the scope of the powers enumerated in the Constitution and then allows choosing means that are "appropriate" and "plainly adopted", excluding those that are forbidden by the Constitution.<sup>262</sup>

### 1.4.1. Proper

A fundamental canon of grammatical construction says that every word of a statute or constitution is used for a particular purpose. The rules of linguistic interpretation show that the laws should be both necessary and proper - in the conjunctive.<sup>263</sup> Those two terms should have different meanings. What are those meanings?

Chief Justice Marshall focuses almost exclusively on the necessary part of the Clause and leaves the proper part thereof. Because of the monumental meaning of his opinion, many lawyers and commentators underestimated the word "proper" too. Not all of them though: some claimed that the term "proper" plays a crucial role in the interpretation of the Clause and in granting unenumerated powers to Congress. Gary Lawson and Patricia Granger have analyzed the Clause, referring to sources from the eighteenth and nineteenth centuries, and pointed out that the word "proper" has a very important meaning in the Clause and that omitting it in the interpretation of the implied powers is an error of constitutional importance.

Lawson and Granger collected historical proofs that necessary and proper were two distinct terms in the eighteenth century, used in different meanings. They quote dictionaries from the Framing era, like Samuel Johnson's dictionary in both its 1755 and 1785 editions, which offered nine different definitions of the word "proper." The first and fifth of those definitions are especially pertinent to their discussion: "1. Peculiar; not belonging to more; not common" and "5. Fit; accommodated; adapted; suitable; qualified."<sup>264</sup> They also show

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<sup>259</sup> Friend (n 255) 172

<sup>260</sup> *ibid* 168

<sup>261</sup> *McCulloch* (n 241) 421

<sup>262</sup> This formulation also resembles Hamilton's opinion. Hamilton just employed the term 'obviousness' where Marshall talks about 'propriety'. Hamilton's version limited the unenumerated powers. Marshall's opinion, which added the Constitution's 'spirit', could be more restrictive.

<sup>263</sup> Of course, some may claim that the word 'proper' was used only to strengthen the word 'necessary' or that it is totally redundant. Just like Daniel Webster, arguing on behalf of *McCulloch* and the Bank, suggested that '[t]hese words, 'necessary and proper,' in such an instrument, are probably to be considered as synonymous.' (Lawson & Granger (n 205) 324)

<sup>264</sup> Lawson & Granger (n 205) 291

examples from the ratification debates and from the bank dispute.<sup>265</sup> The word "proper", along with its modifications, could be found in four original state constitutions, namely those of Connecticut, Georgia, Vermont and Virginia.<sup>266</sup> In the last one we could read: "[t]he legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other."<sup>267</sup> They sum up that the word "proper" was often used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.<sup>268</sup>

Further, they add that:

If the word "proper" in that clause has a jurisdictional meaning, then the authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular national institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress's choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the "proper" allocation of authority within the federal government; second, such a law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the "proper" scope of the federal government's limited jurisdiction with respect to the people's retained rights. In other words, . . . executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.<sup>269</sup>

Lawson and Granger suggest that the word "proper" establishes external limits on congressional authority. The law must be within the jurisdiction of Congress, meaning it must be in accordance with the principle of separation of powers, the principle of federalism and the basic rights of the people. This makes perfect sense if we bear in mind the concept of necessity suggested by Marshall. This strict understanding of term "proper" should be paired with the loose reading of the term "necessary". This reading would be different if the Madisonian reading of the term "necessary" were accepted. The strict construction of that term would be redundant since there is already a very difficult requirement of necessity foreseen. Nonetheless, Granger and Lawson's study confirms that laws can be necessary but also improper at the same time.<sup>270</sup>

#### 1.4.2. Who decides what necessary and proper is?

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<sup>265</sup> *ibid* 289-290.

<sup>266</sup> *ibid* 292

<sup>267</sup> Constitution of Virginia 1776, 3

<sup>268</sup> Lawson & Granger (n 205) 297

<sup>269</sup> *ibid*. They offer also the following evidence to support this construction: statements by eighteenth- and nineteenth-century legal actors; the language and structure of other provisions of the Federal Constitution; the language and structure of the power-granting provisions of contemporaneous state constitutions; and inferences from the Framers' design of the national government. (*ibid* 298-312) See also Barnett (n 224) 773.

<sup>270</sup> See also documents from the Framing Era: Madison speech (n 203) and St. George Tucker (n 179).

"[W]ho is to determine the extent of such powers?" asked George Nicholas during the discussion on the Necessary and Proper Clause that took place during the ratification convention in Virginia. It is hard to imagine, but this question did not arise in the Constitutional Convention. Nicholas himself answered the question: "I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void."<sup>271</sup> But this opinion was not the only one.<sup>272</sup>

Madison also took part in the discussion. During his speech over the bank bill he rejected a standard of constitutionality that would preclude judicial review:<sup>273</sup> "We are told for our comfort, that the Judges will rectify our mistakes. How are the Judges to determine in the case; are they to be guided in their decisions by the rules of expediency?"<sup>274</sup> Some years later, Madison protested against the construction of "necessary" that would take it outside of judicial review.<sup>275</sup>

Randy Barnett quotes many voices from the Framing Era in the discussion as regards the meaning of the Necessary and Proper Clause.<sup>276</sup> He gives an example of an exchange of arguments between the Representatives Michael Stone of Maryland and William Smith of South Carolina. The latter was accused of holding the view that "all our laws proceeded upon the principle of expediency - that we were the judges of that expediency - as soon as we gave it as our opinion that a thing was expedient, it became constitutional."<sup>277</sup> Smith replied:

He had never been so absurd as to contend, as the gentleman had stated, that whatever the Legislature thought expedient, was therefore constitutional. He had only argued that, in cases where the question was, whether a law was necessary and proper to carry a given power into effect, the members of the Legislature had no other guide but their own judgment, from which alone they were to determine whether the measure proposed was necessary and proper.... That, nevertheless, it was still within the province of the Judiciary to annul the law, if it should be by them deemed not to result by fair construction from the powers vested by

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<sup>271</sup> Debates (n 220) 443

<sup>272</sup> Randy Barnett proves that there is some textual support for the Clause to be judicially enforceable. The first argument he uses is the fact that the Clause says that the laws should *shall* be necessary and proper. He claims that in legal discourse the term "shall" was nearly always a mandatory command, and when the law creates discretion, it uses the word "may" instead. And the Framers were aware and careful about this distinction. "This strongly suggests that the injunction, "to make all laws which *shall* necessary and proper," was not discretionary on the part of the law-making authority to which it is directed - Congress. It is mandatory, and like all other mandatory provisions, is presumptively enforceable by the other branches of government, including the courts." (Barnett (n 224) 209) He also adds that the Constitution explicitly grants when particular actors have unreviewable discretion over an important matter. Among others, he gave an example of Article I, Section 3, that stipulates that "[t]he Senate *shall have the sole Power* to try all Impeachments." Congress is also given no discretion over the application of the standard supplied in the Clause. Contary to some other sections of the Constitution where such discretion is explicitly provided, for example in Article II, Section 1 that states that "[e]ach State shall appoint [Electors], *in such Manner as the Legislature may direct*."

<sup>273</sup> Randy Barnett, 'The Original Meaning of the Commerce Clause' (2001) 68 U. Chi. L. Rev. 101 211.

<sup>274</sup> Annals (n 211) 2010

<sup>275</sup> Letter from James Madison to Judge Roane (2 September 1819), in 3 'Letters and Other Writings of James Madison' 143 (JB Lippincott 1867), 144

<sup>276</sup> Barnett (n 224)211

<sup>277</sup> Annals (n 211) 1983

the Constitution.<sup>278</sup>

Therefore, Smith opposed the accusation that Congress was the only judge of a measure's necessity and propriety. Barnett notes that Smith, who voted in favor of the bank, was affirming a conception of necessity that was narrow enough to be justiciable.<sup>279</sup>

Also, St. George Tucker, a professor of law at the College of William and Mary, a judge of the General Court in Virginia and the American editor of Blackstone's *Commentaries*, agreed that the exercises of power under the Necessary and Proper Clause were subject to judicial review.<sup>280</sup> He offered the following method of constructing the Clause and other powers of Congress:

Whenever, therefore, a question arises concerning the constitutionality of a particular power; the first question is, whether the power be expressed in the constitution? If it be, the question is decided. If it be not expressed, the next enquiry must be, whether it is properly an incident to an express power, and necessary to its [sic] execution. If it be, it may be exercised by congress. If it be not, congress cannot exercise it.<sup>281</sup>

And then he added:

[T]his construction of the words 'necessary and proper,' is not only consonant with that which prevailed during the discussions and ratifications of the constitution, but is absolutely necessary to maintain their consistency with the peculiar character of the government, as possessed of particular and defined powers, only; not of the general and indefinite powers vested in ordinary governments.<sup>282</sup>

Finally, Tucker approves that the judicial competence to declare the measures void:

If it be understood that the powers implied in the specified powers, have an immediate and appropriate relation to them, as means, necessary and proper for carrying them into execution, questions on the constitutionality of laws passed for this purpose, will be of a nature sufficiently precise and determinate, for judicial cognizance and control. If on the one hand congress are not limited in the choice of the means, by any such appropriate relation of them to the specified powers, but may use all such as they may deem capable of answering the end, without regard to the necessity, or propriety of them, all questions relating to means of this sort must be questions of mere policy, and expediency, and from which the judicial interposition and control are completely excluded.<sup>283</sup>

Also, Chief Justice Marshall believed that it is not Congress that is the only judge of what is necessary and proper. Marshall warned in *McCulloch* that the Supreme Court would annul a law that was not necessary and proper to effectuate one of the objects delegated to

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<sup>278</sup> *ibid*

<sup>279</sup> Barnett (n 224) 212

<sup>280</sup> *ibid*

<sup>281</sup> St. George Tucker, Appendix, in (1803) 1 'William Blackstone, Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia' 287

<sup>282</sup> *ibid* 288

<sup>283</sup> *ibid* 288-89

Congress.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the decree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power.<sup>284</sup>

Marshall was trying to defend his opinion in *McCulloch* from critics by writing under the pseudonym "A Friend of the Constitution".

In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, to such as are appropriate, but the court expressly says, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal..., to say that such an act was not the law of the land."<sup>285</sup>

In his other essay, signed as "A Friend of the Union", he referred to the issue of distant and remote means. He fought back the accusations that implied powers would expand Congress's powers indefinitely, especially without judicial review over those powers.<sup>286</sup>

[Amphyctyon] occasionally substitutes words not used by the court, and employs others, neither in the connexion, nor in the sense, in which they are employed by the court, so as to ascribe to the opinion sentiments which it does not merely not contain, but which it excludes. The court does not say that the word "necessary" means whatever may be "convenient" or "useful". And when it uses "conductive to," that word is associated with others plainly showing that no remote, no distant conduciveness to the object, is in the mind of the court.<sup>287</sup>

The last sentence proves that Marshall wanted his famous opinion to be read to prohibit

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<sup>284</sup> *McCulloch* (n 241) 423

<sup>285</sup> John Marshall, 'A Friend of the Constitution' *Alexandria Gazette* (5 July 1819), reprinted in John Marshall's Defense of *McCulloch v. Maryland* 186-87 (Gerald Gunther (ed), Stanford University Press 1969). Madison expressed some more doubts about Marshall's point of view: "But suppose Congress should, as would doubtless happen, pass unconstitutional laws, not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient, or conducive to the accomplishment of objects intrusted to the government; by what handle could the court take hold of the case?" (Letter from James Madison to Judge Roane (n 273) 144)

<sup>286</sup> See 'Amphyctyon No. 1' and 'Hampden No. 3', reprinted in John Marshall's Defense (ibid) 53 and 133. Those were two essays published pseudnimosly, the author of the latter one was judge Spencer Roane. They complained about the latitudinous construction of the Clause by Chief Justice Marshall and Hamilton.

<sup>287</sup> A Friend of the Union, 3 'Letters and Other Writings of James Madison' 100 (JB Lippincott 1867)

"remote" and "distant" congressional means implied from enumerated constitutional powers. *McCulloch* restricted Congress to appropriate means, those "plainly adapted" and "really calculated" to constitutional ends.<sup>288</sup>

In his essays, Marshall pertained to two hypothetical examples of laws that, according to opponents of the broad construction of the Clause, were possible and would shake the constitutional balance between the states and the federal government. First of all, Marshall denied that the Necessary and Proper Clause would permit Congress to prohibit state taxation of land in order to assist collection of a federal land tax.<sup>289</sup> In Marshall's opinion, that law is not incidental to any of the enumerated powers - he agreed only that it could facilitate the exercise of the federal tax collection. But it was not enough, because the Framers did not want to suppress state taxation as an end within the scope of Article I, section 8. Similarly, the author of the *McCulloch* opinion rejected a theoretical law to control inheritance.<sup>290</sup>

From all these documents, Randy Beck drew three limiting principles that tend to foreclose congressional resort to means remote or distant from enumerated powers.<sup>291</sup> First, the means must be directly producing an end; they should include the connotation of producing their effects without numerous intermediate or intervening causes.<sup>292</sup> Second, there is a requirement of "good faith" for the selection of congressional means. The Congress cannot use the Clause as a pretext for achieving other ends.<sup>293</sup> And it is a requirement of a search for objective inquiry into whether the means employed have a real tendency to produce an end within the scope of congressional power. Thirdly, *McCulloch* requires the means employed to be "plainly adapted" to the constitutional end.<sup>294</sup> Beck explains that a plainness limitation means that the relationship between a measure passed by Congress and a legitimate constitutional end must be readily discernible, without sophisticated explanations.<sup>295</sup> He sums up that these three requirements leave Congress with ample flexibility to accomplish the Framers' goals; Congress can still choose means to accomplish its delegated tasks.

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<sup>288</sup> ibid 421, 423

<sup>289</sup> See *Amphictyon* (n 284) 66-67. Marshall's response: 'Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an 'appropriate' means, or any means whatever, to be employed in collecting the tax of 'the United States. It is not an instrument to be so employed. It is not a means 'plainly adapted,' or 'conducive to' the end. The passage of such an act would be an attempt on the part of Congress, 'under the pretext of executing its powers, to pass laws for the accomplishment of objects not intrusted to the government.' (A Friend of the Union (n 287) 100)

<sup>290</sup> 'Congress certainly may not, under the pretext of collecting taxes, or of guaranteeing to each state a republican form of government, alter the law of descents; but if the means have a plain relation to the end - if they be direct, natural and appropriate, who, but the people at the elections, shall, under the pretext of their being unnecessary, control the legislative will, and direct its understanding?' (A Friend of a Constitution No. 3, 3 'Letters and Other Writings of James Madison' 173 (JB Lippincott 1867))

<sup>291</sup> Beck (n 238) 611

<sup>292</sup> ibid 611-12. Beck is aware that the term "direct" can be difficult to enforce, since it is a term of degree. He also stresses that *McCulloch* rejected a requirement of the "most direct" means to a given end, but a mere requirement of "relatively direct" means-end relationship tends to prevent Congress from employing remote means.

<sup>293</sup> ibid

<sup>294</sup> ibid 613

<sup>295</sup> ibid



## 1.5. The Position of *McCulloch* in American jurisprudence

The section concerning the very first discussions about the Necessary and Proper Clause and the opinion in *McCulloch* may look somehow long and outdated, especially from the European perspective, as debates from the late eighteenth and early nineteenth centuries may now appear very antiquated and distanced from modern legal problems. And *McCulloch* itself has been reinterpreted many times since its main principles were announced. Nevertheless, Chief Justice Marshall's key opinion, along with the historical context known from the documents from the Framing Era and commentaries, still play a primary role in comprehending the doctrine of implied powers. Any attempt at understanding or explaining the Necessary and Proper Clause without *McCulloch* would be doomed to failure. As Stephen Gardbaum noted:

*McCulloch* is ... one of a handful of fundamental decisions of the Supreme Court that are automatically cited as original sources for the propositions of constitutional law they contain. But *McCulloch* has the further (and even rarer) distinction of being treated as providing a full and complete interpretation of a particular clause of the Constitution. Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*.<sup>296</sup>

The legal argumentation of *McCulloch* is known to every student of American constitutional law, and its rhetoric is still an object of study at universities. Denning and Reynolds called *McCulloch* a quintessential example of penumbral reasoning. Marshall formulated a persuasive argument based on the whole structure of the Constitution, including its text, the interrelatedness of its provisions, and constitutional "first principles".<sup>297</sup> The argument on the sovereignty of the Union as a derivative of the people's will, and not the states' sovereignty, was and is highly appreciated. This decision is a distinctive example of Chief Justice Marshall's style. There have not been many opinions that left so many well-known phrases: It is not only the most famous one starting with the words "Let the end be legitimate...", but also "The power to tax involves the power to destroy", "We must never forget, that it is a constitution we are expounding...".<sup>298</sup>

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<sup>296</sup> Stephen Gardbaum, 'Rethinking Constitutional Federalism' (1996) 74 Texas Law Review 795, 814

<sup>297</sup> Brannon Denning, Glen Reynolds, 'What hath *Reich* Wrought? Five Takes', (2005) 9 Lewis & Clark Law Review. 915, 1093

<sup>298</sup> Most probably Marshall wrote his opinion before having been heard. Marshall's biographer noted: "Since it is one of the longest of Marshall's opinions and, by general agreement, is considered to be his ablest more carefully prepared exposition of the Constitution, it seems not unlikely that much of it had been written before the argument. The court was very busy every day of the session and there was little, if any, time for Marshall to write this elaborate document. (...) It appears to be reasonably probable that at least the framework of the opinion in *M'Culloch vs. Maryland* was prepared by Marshall when in Richmond during the summer, autumn, and winter 1818-19." (Albert Beveridge, *The Life of John Marshall* (vol 4, Cosimo Classics 1929) 287)

*McCulloch* is doubtlessly a milestone decision in the development of American federalism.<sup>299</sup>

Plous and Baker observed:

Probably more legislation extending the scope of federal powers has been based on *McCulloch v. Maryland* than any other case decided in the Supreme Court. The "implied powers" doctrine established by Chief Justice Marshall has withstood the buffeting of time, the attacks of states' righters and the anguished howls of strict constructionists. Yet the issues in the case, so widely and so vehemently argued and discussed prior to the turn of the century, have virtually vanished from the public mind. What remains is the decision - the decision which is vaguely identified by most political science students as having saved the federal government from being taxed to death by state governments.<sup>300</sup>

And they praise the opinion for "forceful style, brilliant phraseology and decisive logic "[that] cannot fail to convince most readers."<sup>301</sup>

The very special role of *McCulloch* in American legal history relies also on the fact that the interpretation of the Necessary and Proper Clause in a way finishes with *McCulloch*. All legal arguments as regards the reading of implied powers - and more broadly, the reading of US federalism - were delivered in *McCulloch*. The further development of the doctrine of implied powers was strongly connected with those cases. New interpretations of the Necessary and Proper Clause were merely using legal arguments suggested in *McCulloch*. Some scholars or justices supported the broad implied-powers doctrine and employed the means-end test created by Chief Justice Marshall. Others denied it and used Maryland's arguments. *McCulloch*'s great importance is of course closely connected with the fact that

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<sup>299</sup> It is interesting that *McCulloch* was cited by the Supreme Court of Australia in *D'Emden v Padden* ((1904) 1 CLR 91), which directly concerned the question of whether salary receipts of federal government employees were subject to state stamp duty, but also touched on the broader issue within Australian constitutional law of the degree to which the two levels of Australian government were subject to each other's laws. The case was the first of several in which the High Court applied the implied immunity of instrumentalities doctrine, which held that state and Commonwealth governments were normally immune from each other's laws, and which, along with the reserved State powers doctrine, was a significant feature of Australian constitutional law until both doctrines were thrown out in the landmark *Engineers'* case. Senator James Drake, who put forward four arguments for *D'Emden*'s case, argued that because of the similarities between the Australian and United States Constitutions in this respect, it was useful to look at decisions of American courts in United States constitutional law when interpreting the Australian Constitution. Drake claimed that implied powers should be applied next to the enumerated powers. He pointed out many decisions where *McCulloch* decisions were applied.

A unanimous opinion was handed down by the court, delivered by Chief Justice Griffith. The court found that the legislation governing salary receipts for employees of federal departments was clearly to do with "the conduct of the departmental affairs of the Commonwealth Government". The doctrine was clearly drawn from the US doctrine. Nevertheless, the court acknowledged that decisions of the Supreme Court of the United States were of course not binding in Australia but, given the similarities between the American and Australian Constitutions, such decisions "may well be regarded... not as an infallible guide, but as a most welcome aid and assistance. Then Griffith quoted extensively *McCulloch*, focusing on the ideological basis of taxation, the relationship between the various American states and the Union, and the implications of the Supremacy Clause.

<sup>300</sup> Harold Plous, Gordon Baker, 'Right Principle, Wrong Case' (1957) 9 *Stanford Law Review* 710, 711

<sup>301</sup> *ibid*

both parties benefited from the voluminous and pertinent documents from the Framing Era and the debates about the Bank of the United States. I believe that those debates, together with *McCulloch*, offered the full spectrum of legal arguments as regards the Necessary and Proper Clause, and any further deliberation about it was merely a secondary reflection thereof. Hamilton, Jefferson, Marshall and others clearly linked interpretation of the Clause with two different models of federalism. Their descendents had an easy job and used arguments delivered by the Founding Fathers. They have accepted a broad or narrow means-end scrutiny, depending on whether they favored a model of strong central government federalism or a model of state rights federalism. Scholars, judges and politicians have picked one of the versions according to their personal preference, but of course within the framework of the Necessary and Proper Clause. The Clause is broad and allows diverse interpretations. The post-*McCulloch* reading of the Necessary and Proper Clause has not brought any new legal arguments and the prevailing version of the doctrine - narrow or wide - changed according to the political majority.

## 2. Interplay with the Commerce Clause

The Necessary and Proper Clause tells Congress that it can additionally make any law it believes it needs to make in order to carry out enumerated powers. The power to enact necessary and proper laws is inextricably linked with the enumerated powers. The Commerce Clause is an example of an enumerated power. Not only that, it became the most important power when paired with the Necessary and Proper clause from a historical and practical perspective. The Commerce Clause has historically been viewed as both a grant of congressional authority and as a restriction on states' powers to regulate. The meaning of the word "commerce" is a source of much controversy, because some argue that the clause refers very broadly to commercial and social intercourse between citizens of different states (and within states). This makes the clause potentially very powerful, especially when paired with the Necessary and Proper Clause.

Defining the scope of the enumerated powers belongs to the area of constitutional interpretation. The Court defined the power to regulate commerce among the states in *Gibbons v. Ogden*.<sup>302</sup> It construed the power very broadly as regards all the linguistic parts of that provision. The meaning of commerce includes also navigation; the meaning of "among the states" includes all commerce involving more than one state, the power to regulate more than one state and the power to regulate the interstate aspect of that commerce and, finally, the plenary authority to determine the rules under which the commerce may be conducted. What is more, the power to regulate commerce encompasses very broad ends. This has implications for the effective scope of the Necessary and Proper Clause, and changed commerce to be a balancing point for federalism.

Marshall derived his ample interpretation of the Commerce Clause in *Gibbons* by pairing it with the Necessary and Proper Clause. Marshall conceded that commerce among the states "cannot stop at the external boundary line of each State, but may be introduced into the interior". Lawful federal action could be applied "to those internal concerns which affect the States generally." Federal regulation could not extend to those state concerns "with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."<sup>303</sup>

The Commerce Clause addresses the ends that Congress may pursue, but paired with the Necessary and Proper Clause, it addresses the means Congress may employ in pursuit of enumerated ends, the only limitation being that those means are both necessary and proper. It generally makes no real difference if the regulation of activity that is not itself commerce is analyzed under the Necessary and Proper Clause or directly under the

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<sup>302</sup> *Gibbons v Ogden* 22 US 1 (1824)

<sup>303</sup> *ibid* 195

Commerce Clause.<sup>304</sup> In both cases the Court would refer to the same ends as addressed by the Commerce Clause and the same ends as addressed by the Necessary and Proper Clause, regardless if these were mentioned explicitly or presumptively.

Regardless of the potentially very influential relevance of the Commerce Clause, “Congress did not begin to invoke the Commerce Clause to enact large-scale legislation until the late nineteenth century”.<sup>305</sup> The Court instead spent close to a century laboring over the permissible scope of state economic regulation under the Commerce Clause.<sup>306</sup> The relation between those two clauses had already become important for federalism before 1937. In the pre-New Deal period the Commerce Clause was used to constrain federal regulatory authority, the restrictive view of the commerce power embodied in *Schechter*<sup>307</sup> and *Carter*<sup>308</sup>. However, the best-known examples of using both clauses come from the post-New Deal era, when the Court applied the rational basis test<sup>309</sup> in commerce powers cases. Under this approach, the Court would ask whether there was a rational basis for a congressional determination that a regulated activity substantially affected interstate commerce. This test reflected McCulloch-style ends-to-means test insofar as the effect on the commerce established the link between means chosen and the ends within the commerce power. This test combined both clauses into a single inquiry insofar as the Court only rarely engaged in a separate application under the *McCulloch* scrutiny.<sup>310</sup>

Thus, the interpretation of "commerce" affects the appropriate dividing line between federal and state power. In the post-New Deal era the Court was able to permit virtually any activity to Congress, because both coupled constitutional clauses were read in a certain way.

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<sup>304</sup> Gary Lawson, David Kopel, ‘The PPACA in Wonderland’ (2012) 38 American Journal of Law and Medicine 3  
<<http://www.bu.edu/law/faculty/scholarship/workingpapers/documents/LawsonGKoppelD0211912rev.pdf>> accessed 18 May 2014

<sup>305</sup> Robert Pushaw ‘The Medical Marijuana Case: A Commerce Clause Counter-Revolution?’ (2005) 9 Lewis & Clark Law Review.879, 888

<sup>306</sup> See *Lopez v US*, 514 US 549 (1995), Kennedy concurring

<sup>307</sup> *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935)

<sup>308</sup> *Carter v Carter Coal Company*, 298 US 238 (1936)

<sup>309</sup> A judicial standard of review that examines whether a legislature has a reasonable rather than an arbitrary basis for enacting a particular statute. Courts employ various standards of review to assess whether legislative acts violate constitutionally protected interests. The US Supreme Court has articulated the rational basis test for those cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. When a court employs the rational basis test, it usually upholds the constitutionality of the law, because the test gives great deference to the legislative branch. When a court concludes that there is no fundamental liberty interest or suspect classification at stake, the law is presumed to be Constitutional unless it fails the rational basis test. Under the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. The challenger of the constitutionality of the statute has the burden of proving that there is no conceivable legitimate purpose or that the law is not rationally related to it. This test is the most deferential of the three levels of review in due process or equal protection analysis (the other two levels being intermediate scrutiny and strict scrutiny), and it requires only a minimum level of judicial scrutiny. (See Virginia Johnson, ‘Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review’ (2001) 23 Cardozo Law Review 347; Melissa Irr, ‘United States v. Morrison: An Analysis of the Diminished Effect of Congressional Findings in Commerce Clause Jurisprudence and a Criticism of the Abandonment of the Rational Basis Test’ (2001) 62 University of Pittsburgh Law Review 815)

<sup>310</sup> Richard E Levy, *The Power to Legislate* (Praeger Publishers 2006) 92

The Commerce Clause was understood very broadly in relation to the new dimension of nation economy that emerged in the first decades of the twentieth century. In terms of the Necessary and Proper Clause, the offered understanding of the means-end relation based on the *McCulloch* test was essential. At that time, this scrutiny was practically equated with deferential "rational basis scrutiny" under the Equal Protection Clause and the Due Process Clause. Consequently, the Congress could regulate what it pleased since the rational basis test permitted the Court to come up with any rational connection to one of the enumerated powers. As a matter of fact, the Court took into account any purpose regardless of whether it was actually articulated by Congress. Also, it did not matter if it was a real purpose that motivated Congress. Similarly, the Court did not pay much attention to the close connection between the means and the ends and the deferral of any reasonable legislative judgement that a particular means will further the legislative ends. For example, in *Darby* the Court stated that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgement upon the exercise of which the Constitution places no restriction and over which the courts are given no control".<sup>311</sup>

This change in reading of the Commerce Clause was immense when compared with some pre-1937 cases. Before 1937, the interpretation of the Clause was conservative - it asked for the real purposes of the bill and the real intentions of the lawgivers, and then compared these with the powers granted to Congress. For example, in *Hammer v. Dagenhart*<sup>312</sup> the Court concluded that a real purpose of the legislation prohibiting the shipment of goods manufactured with child labor was to regulate employment conditions in manufacturing and production which were not within the commerce power. Later, in *Bailey v. Drexer Furniture Company*<sup>313</sup> and *United States v. Butler*,<sup>314</sup> the Court stated that even when Congress acts by means expressly granted to it, the Court would inquire into the ultimate end of the legislation and require that end to be within the enumerated powers.

Such a new, post-1937 reading of the means-end scrutiny of the Necessary and Proper Clause and the scope of the Commerce Clause, redefined by the economic crisis, resulted in an important modification of US constitutional law. The reasoning in that era was that activities that are not interstate commerce, and thus are ones which cannot be regulated under the interstate commerce power, might nonetheless be regulated by Congress, if that regulation was "necessary and proper" for executing a genuine use of the commerce power. The government of limited powers was transformed into one of unlimited authority. This shift of great legal consequences was possible thanks to a specific interpretation of the *McCulloch*:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really

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<sup>311</sup> *United States v Darby Lumber Co*, 312 US 100 (1941) para 6

<sup>312</sup> 247 U.S. 251 (1918)

<sup>313</sup> 259 US 20 (1922)

<sup>314</sup> 297 US 1 (1936)

calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power.<sup>315</sup>

An extensive interpretation of this paragraph permitted such a dramatic change in the vertical balance of powers. Thus, we can conclude that that landmark opinion of Chief Justice Marshall kept its supreme position as a key in understanding the Necessary and Proper Clause. Marshall's words from 1819 were used to find justification for a new form of federalism, the one that favored the central government. The New Deal period was a time in the judicial history of the United States when the justices reached for the rich literature from the Framing Era and the first years of the republic to find a legal interpretation of the Constitution that supported their vision of federalism.

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<sup>315</sup> *McCulloch* (n 241) 42

### 3. Dual federalism

In the following paragraphs we will see how the doctrine of implied powers was developed after *McCulloch*. We will study chronologically the judicial decisions that influenced the reading of the doctrine, starting with the long era that began with the creation of American statehood, continued after the Civil War and lasted until the late 1930s. This was the time when the Necessary and Proper Clause was employed by the judiciary and new federal powers were granted, but not in a very expansive way. This era is called “dual federalism”. Then we will see how this strategy dramatically changed after 1937, when the Necessary and Proper Clause and the Commerce Clause became the foundations for new, almost unlimited, federal authority. This period is known as cooperative federalism. Finally we will proceed with the so-called new federalism that is associated with the conservative revival of the 1980s, when the Supreme Court started limiting itself in granting new powers for the central government and stressed states’ rights. At the very end of this chapter we will see that the judicial self-restraint was only an interim measure and the development of the doctrine reverted back to one of permanent growth of federal competences.

In this chapter the development of the doctrine of implied powers in each period will be shown in the context of the development of federalism as such, including landmark judicial decisions, political composition of the branches of federal government, and the general ideological atmosphere of the times. This will allow us to understand how these external factors influenced judicial readings of the Necessary and Proper Clause in every period and how the development of implied powers was intertwined with the development of US federalism.

*McCulloch* has continued to portray the classical opinion that there are implied powers. However, there have been many more cases where the doctrine has been developed by the Supreme Court. An important example of this was the *Legal Tender Cases*,<sup>316</sup> which primarily involved the constitutionality of the Legal Tender Act of 1862 that authorized issuance of paper money to finance the war without raising taxes.<sup>317</sup> Article I, Section 8 of the Constitution specifically gives Congress power to “borrow money” and also power to “coin money and regulate the value” of both American and foreign coins, as well as to regulate interstate commerce, but it does not explicitly grant Congress the power to print paper money or to make it legal tender. Before the Civil War, money was only issued by banks, which were private corporations chartered by the federal government. Nevertheless, the majority argued that it must follow that Congress could also consider and pursue the best means by which to do so. “Making the notes legal tenders gave them a new use, and it needs

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<sup>316</sup> The *Legal Tender Cases* reversed *Hepburn v Griswald* (75 US 603), beginning with *Knox v Lee* 79 US 457 (1870, Wall.) and *Parker v Davis* 79 US 457 (1871), and then *Juilliard v. Greenman* 110 US 421 (1884).

<sup>317</sup> *Knox v Lee* *ibid*



no argument to show that the value of things is in proportion to the uses to which they may be applied."<sup>318</sup> Because, the majority argued, legal tender power was necessary and proper to borrowing money to fund the government, it was therefore constitutional. In other words, the Court affirmed Congress's discretion to choose among the means thought to be conducive to enumerated-power ends. The Court upheld Congress's choice, even though better means might have been chosen.

The period lasting from the Civil War until 1930s, from the perspective of the relations between the states and the federal government, is described as dual federalism. According to this theory the federal government has authority only where the Constitution enumerates so. According to this theory, provisions of the Constitution are interpreted, construed and applied to maximize the authority of each government within its own respective sphere, while simultaneously minimizing, limiting or negating its power within the opposite sphere. Dual federalism was mainly concerned with the issue of constitutional balance, especially as concerns the separation between the national and state spheres of action. The idea of dual federalism was a reaction against the Adams' administration of the 1820s that symbolized the centralization of the government. On the other hand, dual theory was associated with the so-called Jacksonian democracy and its values, i.e. individual liberty and local autonomy.<sup>319</sup> Jacksonians said that they would guard against "all encroachments upon the legitimate sphere of State sovereignty."<sup>320</sup>

Dual federalism was a conceptualization of the idea embodied in the Constitution of the United States that the national government has only limited and enumerated powers, leaving only limited flexibility for the application of the Necessary and Proper Clause. Dual federalism was especially concerned with the state powers, their preservation and their protection from intrusion from the site of national government. In other words, dual federalism was especially concerned with not expanding powers of federal government and the fact that beyond the government there were people who remained at liberty to create and operate the state, in addition to local government that carried out most domestic functions. The federal government was given special authority in two spheres: the external affairs of the union and internal economic affairs.<sup>321</sup> The latter will be especially interesting in the discussion about the doctrine of implied powers, since the Necessary and Proper Clause is usually paired with the Commerce Clause. Their interplay influenced firmly the form of federalism in the entire period analyzed in this chapter, especially after the 1930s. Nevertheless, given the Founders' limited conception of externalities and the federal government's limited revenue raising authority, the Constitution's general Welfare Clause and the Congress's important spending power, these provisions elicited little attention in the

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<sup>318</sup> *ibid* 544

<sup>319</sup> Jacksonian Democracy refers simply to the ascendancy of Andrew Jackson and the Democratic party after 1828. Jacksonianism appears as a political impulse tied to slavery, the subjugation of Native Americans, and the celebration of white supremacy; also the laissez-faire entrepreneurialism of western interests.

<sup>320</sup> Andrew Jackson, *First Annual Message to Congress*. <<http://www.britannica.com/presidents/article-9116893>> accessed 3<sup>rd</sup> of October 2014.

<sup>321</sup> John Kincaid, 'From Dual to Coercive Federalism in American Intergovernmental Relations', in Jong S Jun, Deil Spencer Wright (eds), *Globalization and Decentralization: Institutional Contexts* (Georgetown University Press 1996) 30

nineteenth century.<sup>322</sup> Promoting prosperity by building a great commercial republic was the one objective that effected with concurrent and shared powers. The federal government was given powers to regulate externalities through the interstate, foreign and Indian commerce clauses,<sup>323</sup> the states sharing in this responsibility through the obligations of the "full faith and credit" and "privileges and immunities" clauses<sup>324</sup>. Otherwise, the authority to regulate intrastate commerce belonged to the states.

Even the Civil War did not significantly alter the concept of dual federalism. President Lincoln was very careful not to interpret the war victory as a victory of federal government against the states, but simply as a victory of the Union against the Confederation. The Supreme Court reaffirmed dual federalism in 1869 in its opinion *Texas v. White*.<sup>325</sup> The Court also applied the construction of the Eleventh Amendment favorable for the states that were in post-war debts and made it almost impossible for creditors to execute their loans.<sup>326</sup> It can be mentioned that the Court also acquiesced to racial segregation.<sup>327</sup>

The concept of dual federalism was structurally reinforced by dual federal and state constitutionalism, and by the federal governments and states. The judicial system was particularly important in this process. It was the courts, and foremost the Supreme Court of the United States, that played a major role in sketching the boundaries of federal and state powers.

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<sup>322</sup> *ibid* 31

<sup>323</sup> Article I, section 8

<sup>324</sup> Article IV, sections 1 and 2

<sup>325</sup> The Supreme Court held that the intention of the Confederate States to secede meant that they had only temporarily lost privileges of Union membership but had not lost membership itself. Writing for the Court, Chief Justice Salmon P. Chase commented that the federal Constitution "in all its provisions looks to an indestructible Union, composed of indestructible States." Thus, the Supreme Court decreed by law what the Union's Civil War victory had effected by force, namely, the principle that no state may secede from the Union.

<sup>326</sup> The Eleventh Amendment to the U.S. Constitution reads: The Judicial power of the United States shall not be construed to extend to any suit in law or Equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The text of the Eleventh Amendment limits the power of federal courts to hear lawsuits against state governments brought by the citizens of another state or the citizens of a foreign country. The Eleventh Amendment is rooted in the concept of federalism, under which the US Constitution carefully enumerates the powers of Congress to govern at the national level, while safeguarding the power of states to govern locally.

The amendment does not mention suits brought against a state by its *own* citizens, but in *Hans v. Louisiana*, 134 US 1 (1890), the Supreme Court ruled that the amendment reflects a broader principle of sovereign immunity. In *Alden v Maine* (527 US 706 (1999)) Justice Kennedy wrote: [S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. ... Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.

See *Ayers* 123 US 443, 8 S Ct 164, 31 L Ed 216 (1887)

<sup>327</sup> *Plessy v Ferguson* 163 US 537 (1896)

### **3.1. Implied powers in the pre-1937 era**

The Necessary and Proper Clause's enhancement of Congress's power over commerce among the states had already been judicially recognized in 1866. In *Gilman v. Philadelphia*<sup>328</sup> the issue concerned the validity of an act of the legislature of Pennsylvania, authorizing the construction of a bridge over the Schuylkill, "a common highway of the state." It appeared that the bridge, if constructed, would prevent the passage up the river of vessels having masts, would interfere with commerce, and would materially injure the value of certain wharf and dock property on the river. Congress had not passed any act on the subject, but the contention was that such an interference with commerce on public navigable water was inconsistent with the constitution of the United States.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England.<sup>329</sup>

Thus, Congress was within its powers in vesting the Secretary of War with the power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if this is the case. In exercising its power to foster and protect navigation, Congress legislates primarily on things external to the act of navigation. But navigation was also subject to Congress' power, if and when it enters into or forms part of "commerce among the several States." The case was based not only on the Commerce Clause, but also on the Necessary and Proper Clause, simply because control power is a necessary component of commerce power.

The Court also used the Clause in antitrust cases. In *Addyston Pipe and Steel Company v. United States*,<sup>330</sup> the defendants argued that the Commerce Clause of the Constitution did not empower Congress to regulate purely private agreements, but instead authorized Congress only to remove barriers to interstate commerce erected by individual states. The Court however disagreed. In an opinion written by Justice Peckham, the Court stated that the framers and ratifiers of the Constitution likely anticipated that the Commerce Clause would mainly authorize Congressional interdiction of state-created barriers to interstate commerce. Peckham also noticed that in some cases, purely private agreements can have

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<sup>328</sup> 70 US (3 Wall) 713, 729

<sup>329</sup> *ibid* 724-5

<sup>330</sup> The defendants were pipemakers who were operating in agreement, so that when municipalities offered projects available to the lowest bidder, all companies but the one designated would overbid, thus guaranteeing the success of the designated low bidder.

the same economic impact, that is directly restrain commerce among the several states. The Supreme Court's approved antitrust prosecutions for local monopolies when the government could prove a purpose to restrain interstate trade. The Court found it necessary in order to accomplish the ends for which the Commerce Clause was enacted.<sup>331</sup>

Another decision where the Court used the means-to-ends logic to grant implied powers to Congress was *Southern R. Co. v. United States*. Congress had required that all train cars be equipped with couplers as a safety measure. Southern Railway argued that the requirement only applied to train cars crossing state lines and not train cars that operated inside one state. The Court ruled that the Commerce Clause is plenary to protect persons and property moving in interstate commerce from all danger. Therefore US Congress can regulate safety measures concerning intrastate rail traffic because there is a close and substantial connection to interstate traffic.

Similarly to the previous case, the Court in *Houston E. & W. T. Ry. Co. v. United States*<sup>332</sup> found that the Interstate Commerce Commission could authorize carriers to disregard state limits on rates for trips within a state, as a means to eliminate price discrimination against interstate commerce. Justice Charles Evans Hughes wrote for the majority:

We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention.<sup>333</sup>

Regulation of the intrastate line was a means to the end of regulating interstate commerce, and was therefore allowed as an implied power.

The mechanism of functioning of the Necessary and Proper Clause is identical in every case. The Court proves that a particular implied power is not an extension of congressional authority but merely a grant to exercise powers necessary and proper to carry enumerated powers. Following this pattern, in *U.S. v. Gettysburg Elec. Ry. Co.*<sup>334</sup> the Court considered whether Congress had the power to condemn a railroad's land in what was to be Gettysburg National Military Park. The really important question to be determined in these proceedings

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<sup>331</sup> This is important especially when compared with *United States v. E. C. Knight Co.* Chief Justice Fuller wrote: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. . . . Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but . . . affects it only incidentally and indirectly." Therefore, the Court required from the government a proof of a purpose to restrain interstate trade.

<sup>332</sup> 234 US 342 (1914)

<sup>333</sup> *ibid* 353-354

<sup>334</sup> 160 US 668 (1896)

is whether the use to which the petitioner desires to put the land described in the petitions is of that kind of public use for which the government of the United States is authorized to condemn the land.

Upon the question whether the proposed use of this land is public one, we think there can be no well-founded doubt. And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war, and to create and equip armies and navies. It has the great power of taxation, to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appropriate to, the exercise of some one or all of the powers granted by congress, must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 421, in these words: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional.'<sup>335</sup>

Writing for the Court, Justice Peckham, quoting directly the most famous phrase from *McCulloch*, found that the power to condemn the railroad's land was implied by the powers of Congress to declare war and equip armies because creation of the park "tends to quicken and strengthen" the motives of the citizen to defend "the institutions of his country."

But dual federalism brought also cases where the Court declined to recognize some powers of Congress as implied powers. In *Linder v. United States*<sup>336</sup> the Court held that the federal government overstepped its authority to regulate medicine. At issue was the federal Harrison Anti-Narcotic Law, which taxed opium and coca leaves, along with their derivatives.<sup>337</sup> Ostensibly as part of the tax scheme, the Act also required registration of those drugs. In this case, the power to tax cocaine and morphine carried with it incidental powers to effectuate that tax, and the effectuation of the tax was the sole legitimate use of incidental powers.<sup>338</sup> Incidental powers could not be construed to control a physician's decision about properly taxed and registered products.

The declared object of the Narcotic Law is to provide revenue, and this Court has held that

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<sup>335</sup> *ibid* 159-160

<sup>336</sup> 268 US 5 (1925)

<sup>337</sup> The Harrison Narcotics Tax Act (Ch 1, 38 Stat 785) was a United States federal law that regulated and taxed the production, importation, and distribution of opiates.

<sup>338</sup> Even after 1937, the Court continued to rely on *Linder*, and in upholding other statutes, to distinguish them from the mis-application of the statute in *Linder*. "While there has long been recognition of the authority of Congress to obtain incidental social, health or economic advantages from the exercise of constitutional powers, it has been said that such collateral results must be obtained from statutory provisions reasonably adapted to the constitutional objects of the legislation. *Linder v. United States*." *Cloverleaf Butter v Patterson* 315 US 148 (1942)

whatever additional moral end it may have in view must "be reached only through a revenue measure and within the limits of a revenue measure. Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid and cannot be enforced."<sup>339</sup>

One of the most significant cases which relies on *Linder* is *Ashwander v. Tennessee Valley Authority*<sup>340</sup>. There, the majority opinion by Chief Justice Hughes affirms that "The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government.'<sup>341</sup> *Linder* was also relied upon in several cases in which it was found that Congress had exceeded tax power, namely *U.S. v. Butler*<sup>342</sup>; *Hopkins Federal Savings & Loan Ass'n v. Cleary*<sup>343</sup>; *U.S. v. Constantine*<sup>344</sup>; and *Trusler v. Crooks*.<sup>345</sup>

The above-mentioned cases show the mechanism of using the Necessary and Proper Clause by the Court during the decades of dual federalism. The implied powers were found but the construction of the Clause was rather narrow. Few implied powers of great political controversy were granted in that era. Generally speaking, dual federalism postulated an inflexible Necessary and Proper Clause and a capacious Tenth Amendment. There were more examples in that era that prove that the Court was not very likely to expand the federal authority. Some of them were mentioned in *Linder*.<sup>346</sup>

*Taxes License cases* concerned a license in the course of business trade, and the right of the internal activities of the states to be unimpeded by the federal government.<sup>347</sup> The Court made it very clear that there is a difference between regulating the interstate and intrastate commerce. And only the first one belongs to the sphere of authority of Congress.

Thus, Congress having power to regulate commerce with foreign nations, and among the several states and with the Indian tribes, may without doubt provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power, and the same observation is applicable to every other power of Congress to the exercise of which the granting of licenses may be incident. All such licenses confer authority and give rights to the licensee.<sup>348</sup>

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<sup>339</sup> *United States v. Jin Fuey Moy*, 241 US 394

<sup>340</sup> 297 US 288 (1936)

<sup>341</sup> In this case the Court formulated the doctrine of constitutional avoidance, that says that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis.

<sup>342</sup> 297 US 1 (1936)

<sup>343</sup> 296 US 315 (1935)

<sup>344</sup> 296 US 287 (1935)

<sup>345</sup> 269 US 475 (1926)

<sup>346</sup> *McCulloch v. Maryland*, 4 Wheat, 316, 17 US 423; *License Tax Cases*, 5 Wall 462; *United States v. De Witt*, 9 Wall 41; *Keller v. United States*, 213 US 138; *Hammer v. Dagenhart*, 247 US 251; *Child Labor Tax Case*, 259 US 20; *Linder v. United States*, 268 US 5 (1925)

<sup>347</sup> 72 US 462 (1866)

<sup>348</sup> *ibid*

But very different considerations apply to the internal commerce or domestic trade of the states. Congress has neither power of regulation over this commerce and trade, nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications: Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Limited in such a way, it reaches every subject and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a state in order to tax it.

If, therefore, the licenses under consideration might be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within state limits, they give none and can give none...

Similarly, in *United States v. Dewitt*<sup>349</sup> the Court ruled:

The questions certified resolve themselves into this: has Congress power, under the Constitution, to prohibit trade within the limits of a state?

That Congress has power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the states has always been understood as limited by its terms, and as a virtual denial of any power to interfere with the internal trade and business of the separate states, except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.<sup>350</sup>

In *Keller v. United States*<sup>351</sup> we read:

Speaking generally, the police power is reserved to the states, and there is no grant thereof to Congress in the Constitution.

Notwithstanding the offensiveness of the crime, the courts cannot sustain a federal penal statute if the power to punish the same has not been delegated to Congress by the Constitution.

Where there is collision between the power of the state and that of Congress, the superior authority of the latter prevails.<sup>352</sup>

But arguably the two best-known cases that show how dual federalism was trying to limit

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<sup>349</sup> 76 US 41 (1869)

<sup>350</sup> *ibid* 60

<sup>351</sup> 213 US 138 (1909)

<sup>352</sup> *ibid*

Congress's plenary powers are *Hammer v. Dagenhart*<sup>353</sup> and the so-called *Child Labor Tax Case*<sup>354</sup>. The former invalidated a federal statute prohibiting the interstate transportation of goods produced with child labor because it exceeded the limits of Congress's power under the Commerce Clause. The Keating-Owen Act of 1916, otherwise known as the Child Labor Act, prohibited the transportation in interstate commerce of goods produced at factories that violated certain restrictions on child labor. It was part of a congressional attempt to stop "the race to the bottom" where individual states, in order to provide themselves with a competitive advantage over other states, adopted a laissez-faire approach to business and industry. Adopting a less restrictive child labor law, some states made their economies more competitive. Mr. Dagenhart worked in a cotton mill in North Carolina with his two minor sons, both of whom would be banned from employment at the mill under the Act. Dagenhart brought this lawsuit seeking an injunction against enforcement of the Act on the grounds that it was not a regulation of interstate or foreign commerce. The government asserted that the Act fell within the authority of Congress under the Commerce Clause.

The Court was of a different opinion and invalidated the Act on the grounds that the statute represented an attempt to invade powers reserved to the states by the Tenth Amendment.<sup>355</sup> Speaking through Justice William R. Day, the Court said:

In interpreting the Constitution, it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved (...) The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government.

(...) This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

(...) The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that, if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed.<sup>356</sup>

The power to regulate interstate commerce is the power to control the means by which commerce is conducted. The Court further held that the manufacture of cotton did not in itself constitute interstate commerce. The commerce power was not intended to allow Congress to equalize the economic conditions in the States to unfair competition among them by forbidding the interstate transportation of goods made under conditions which Congress deems to produce unfairness. The Necessary and Proper Clause was not employed

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<sup>353</sup> 247 US 251 (1918)

<sup>354</sup> 259 US 20 (1922)

<sup>355</sup> The Tenth Amendment to the U.S. Constitution reads: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

<sup>356</sup> *Hammer v Dagenhart* 247 US 251 (1918) 175-76



to justify those powers. The Court added that the federal government was "one of enumerated powers" and could not go beyond the boundary "expressly" drawn by the Tenth Amendment. It clearly went against the implied powers. In fact, the Tenth Amendment does not use the word "expressly." If the Tenth Amendment used this word, the doctrine of implied powers would be practically impossible to apply.

Justice Day noted that the Framers would never have envisioned such a broad grant of authority, for it undercut the power of the states to regulate commerce within their borders. He concluded that "our system of government [would] be practically destroyed" if Congress could use the Commerce Clause to effect changes in work conditions within the states.<sup>357</sup> The Tenth Amendment won in this case with the Necessary and Proper Clause and the doctrine of expressed powers was announced supreme.

Similarly, the *Child Labor Tax Case* was about the child labor law. Congress passed the Child Labor Tax Law in 1919. It imposed a federal excise tax of 10% on annual net profits of those employers who used child labor in certain businesses. The statute created a standard, limiting the employment of children in certain industries. If an employer knowingly failed to comply with the standard, then the tax would be imposed.

Chief Justice Taft concluded that an act of Congress which clearly, on its face, is designed to penalize, and thereby to discourage or suppress, conduct the regulation of which is reserved by the Constitution exclusively to the States, cannot be sustained under the federal taxing power by calling the penalty a tax. Chief Justice Taft argued that the tax law in question did much more than simply impose an "incidental restraint" but exerted a "prohibitory and regulatory effect" in a realm over which Congress had no jurisdiction. He said that the Court must commit itself to the Constitution and the duty of the Court, even though this requires them to refuse legislation designed to promote the highest good. Taft feared that Congress could take control of many areas of public interest, which the States have control over and are reserved by the Tenth Amendment, by enacting regulating subjects and enforcing them by a so-called "tax." The Court decided it is not "necessary and proper" for the construction of the Tax Clause or the Commerce Clause. The implied powers could not be granted. This would destroy state sovereignty and devastate "all constitutional limitation of the powers of Congress" by allowing it to disguise future regulatory legislation under the cloak of taxes.<sup>358</sup>

For decades, dual federalism confounded the enumerated powers and the implied powers. The Court did not turn a deaf ear to appeals to states' rights,<sup>359</sup> but instead used the theory

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<sup>357</sup> Day concluded that it was up to the States to regulate child labor. Justice Oliver Wendell Holmes, in a dissenting opinion joined by three other justices, faulted the Court for imposing personal values 'upon questions of policy and morals.' Holmes rejected the idea that Congress could not prohibit the movement of goods in interstate commerce, whether the products were judged harmful in themselves or the result of a harmful practice. In his view, Congress had sufficient authority to regulate child labor. The states were free to regulate their internal affairs, but once goods crossed state lines, the Commerce Clause gave Congress the authority to regulate these shipments.

<sup>358</sup> Chief Justice Taft wrote that the case requires the application of the famous passage of *McCulloch*. 'But it is pressed upon us that this court has gone so far in sustaining taxing measures the effect to tendency of which was to accomplish purposes not directly within congressional power that we are bound by authority to maintain this law.' (*Bailey v Drexel Furniture Co*, 259 US 20 (1922) 39)

<sup>359</sup> The doctrine was proposed by Professor Howard Lee McBain in 1927 in *The Living constitution*,

of "reserved powers" of the states to delimit Congress's authority. It supported the idea of federal and state powers being mutually exclusive. The Court agreed to grant implied powers only in cases where a direct and telic relation with enumerated powers was proved. The Necessary and Proper Clause, paired with the Commerce Clause, was used to limit Congress's powers. Therefore, dual federalism altered the main rule as regards the Necessary and Proper Clause that was established in *McCulloch*.

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*consideration of the realities and legends of our fundamental law* (New York, 1927), p 66. It gained also lots of support from economic interest groups. See Albert J. Beveridge, *The Nation versus State's Rights* (Reader 1907) 357; William Gibbs McAdoo, *State Rights and the Jeffesonian Idea* (69<sup>th</sup> Congress, 1<sup>st</sup> Sess., Senate Doc.No. 121) 10.

## 4. The New Deal and cooperative federalism

There is a general agreement among scholars that the Presidency of Franklin D. Roosevelt ended the era of dual federalism. Roosevelt's administration had to deal with the Great Depression, which was the longest and most severe depression ever experienced by the industrialized Western world, sparking fundamental changes in economic institutions, macroeconomic policy and economic theory, at a time when unemployment in the U.S. rose to 25%.<sup>360</sup> As an answer to this, President Roosevelt proposed the New Deal program, which focused on what historians call the "3 Rs": Relief, Recovery, and Reform. Relief for the unemployed and poor; Recovery of the economy to normal levels; and Reform of the financial system to prevent a repeat of the depression.<sup>361</sup> It included vast reforms in industry, agriculture, finance, waterpower, labor, and housing. The New Deal gave rise to Social Security, unemployment compensation, federal welfare programs, price stabilization programs in industry and agriculture, and collective bargaining for labor unions. In general, the functions of the federal government expanded enormously.

The federal government had never before been involved in such undertakings because the power to regulate in these policy areas until this time had been seen as belonging exclusively to the states. These reforms would not have been possible without a change in thinking about federalism. The New Deal ended the division between the federal and state exclusive spheres of powers and gave rise to the notion of "cooperative federalism," a system by which the national and state governments may cooperate with each other to deal with a wide range of social and economic problems. In the New Deal era, cooperative federalism was best exemplified by federal grant-in-aid programs that encouraged state governments to implement programs funded by the national Congress. Instead of imposing a program nationally, the federal government offered significant financial resources to entice each state to implement and administer the program locally. Cooperative federalism characterized American intergovernmental relations through the 1950s and into the 1960s.

The Supreme Court also showed its new face during this period, which was probably the most progressive and liberal era in the history of this institution. *Brown v. Board of Education*<sup>362</sup> became a symbol of judicial activism in the twentieth century. Racial issues became one of the two most powerful arms - next to the states' rights - in activism of the Supreme Court. Many other decisions of the Warren Court (1953-1969) were highly controversial. They were welcomed by the liberal observers and increased federal commitment to enforce civil rights law in the states.<sup>363</sup>

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<sup>360</sup> <<http://www.britannica.com/EBchecked/topic/243118/Great-Depression>> accessed 3 April 2014

<sup>361</sup> Carol Berkin and others, *Making America, Volume 2: A History of the United States: Since 1865* (Cengage Learning 2011) 629–32

<sup>362</sup> 347 US 483 (1954)

<sup>363</sup> This view was challenged by B. Cushman who moved away from facile "conservative versus liberal" descriptions of the Court's members. He identifies three dominant strands of jurisprudential thinking that emerged after the Civil War. The first was rooted in republican fear of centralized authority; the second stemmed from the bifurcation of law into public and private realms intended to protect private

## 4.1. Implied powers in the post-1937 era

The judicial construction of implied powers started to change as early as 1937. With the National Labor Relations Act of 1935, Congress determined that labor-management disputes were directly related to the flow of interstate commerce, and thus could be regulated by the national government. Jones & Laughlin failed to comply with an order to end the discriminatory practices. The National Labor Relations Board (NLRB) sought the enforcement of its order in the Court of Appeals. The Court of Appeals found the order was outside the range of federal power. Chief Justice Charles Evans Hughes wrote the majority opinion in the case, which reversed the lower court's ruling. He concluded: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." The Court held that the Act was narrowly constructed so as to regulate industrial activities which had the potential to restrict interstate commerce, and therefore suggested a new position on the connection between labor relations and commerce. The Court suggested that the former has a direct effect on the latter.<sup>364</sup>

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interests from legislative corruption that sought limits on governmental authority to infringe on "vested rights"; and the third emerged from a tradition of Lockean property rights and freedom of contract. It is interesting that while scholars point to the Court's 1937 decision in *West Coast Hotel v Parrish* as the marker of the "switch," Cushman points at Court's decision in *Nebbia v New York* (291 US 502 (1934)). (B Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford University Press 1998). See also Neal Devins, 'Book Review: Government Lawyers and the New Deal' (1996) *Colum. Law Review* 237)

T. Hilbink claims that: "Cushman methodically (though not dryly) lays out the changes in jurisprudence that took place as a result of changing ideas about law and society in the late nineteenth and early twentieth centuries. Countering the dominant historiography, which he characterizes as "externalist" in its approach, Cushman argues that the Court was driven by considerations and concerns internal to its work and jurisprudence as well as by an increasing awareness of socio-economic changes in the outside world (namely worker-employer relations and the interconnectedness of production and commerce)." (<http://www.h-net.org/reviews/showrev.php?id=3511>> accessed 3 April 2014). (For criticism of Cushman see: William E Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford University Press 1995); William E Leuchtenburg, 'The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan' (1966) *Supreme Court Review* 347; William E Leuchtenburg, 'Franklin D. Roosevelt's Supreme Court Packing' Plan', in Harold M Hollingsworth and William F Holmes (eds), *Essays on the New Deal* (University of Texas Press, 1969) 94)

Karsten also argues that American legal history cannot be explained solely by pointing to economic considerations as the primary factor in judicial decision-making (Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (University of North Carolina Press 1997)). According to that theory, legal analyses must look beyond political and economic influences on jurisprudence to structural and institutional factors that shape and constrain the judicial decision-making process ('internalism', 'new institutionalism').

<sup>364</sup> The majority used the argument that the ability of employees to engage in collective bargaining, regulated by the Act, is essential for "industrial peace", and that the federal government has the power to punish those corporations that refuse to confer and negotiate with their workers and endanger the peace.

Nevertheless, the Court wrote also that if it gave the Act the scope suggested by its legislative history, its preamble and the sweep of its provisions:

[t]he Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. (...) The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.<sup>365</sup>

The Court noted that two different interpretations of the Act were possible, one that the act was unconstitutional and one that it was valid. It continued that the Court's duty is to adopt the version that would save the Act. The Court disregarded Congress's explicit findings and construed the NLRB to find the requisite impact on interstate commerce.<sup>366</sup>

The decision was taken by a 5-4 majority. It is remarkable because most of the former Supreme Court decisions striking down the New Deal acts were taken by the same majority, with Chief Justice Charles Evans Hughes joining four conservative justices to constitute a majority. In this case, Hughes joined the four liberal justices and wrote the majority opinion. This shift happened in exactly the same year that President Roosevelt presented his court packing plan.<sup>367</sup> Just before the controversial bill came to a vote in Congress, two Supreme Court justices came over to the liberal side and constituted a narrow majority. Eventually, the Senate struck the act down by a vote of 70 to 22 and President Roosevelt got his first chance to nominate new justices. By 1942, all but two justices were his appointees.<sup>368</sup>

Later, in 1941 in *Darby*<sup>369</sup> the unanimous Court reaffirmed the classic rule of plenary federal power over interstate commerce.<sup>370</sup> This case considered the Fair Labor Standards Act of 1938 (FLSA). It established a minimum wage and maximum hours for employees engaged in the production of goods for interstate commerce. The FLSA imposed criminal penalties including fines and imprisonment for violations of the Act, and for the shipment of goods in interstate commerce of goods produced in connection with such violations. A Georgia-based lumber company did not meet these standards and was charged with violating the law, but

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<sup>365</sup> *NLRB v Jones & Laughlin Steel Corp* 301 US 1 (1937) 29-30

<sup>366</sup> *ibid* 29-32

<sup>367</sup> The Judicial Procedures Reform Bill of 1937 was a controversial plan to expand the Supreme Court to as many as 15 judges, allegedly to make it more efficient. The most controversial provision of the bill would have granted the President power to appoint an additional Justice to the Supreme Court, up to a maximum of six, for every sitting member over the age of 70 years and 6 months. Critics immediately charged that Roosevelt was trying to "pack" the Court and thus neutralize the justices hostile to his New Deal. (During the previous two years, the Court had struck down several key reforms of New Deal legislation on the grounds that the laws delegated an unconstitutional amount of authority to the executive branch and the federal government.)

<sup>368</sup> Engdahl claims that by 1941 the remaining conservative justices on the Court - Chief Justice Hughes, Justice Roberts and Justice Fiske Stone - had achieved a much better understanding of federalism than they had enjoyed before, and far better than most of Roosevelt's appointees ever would ('The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power' (1998) 22 *Harvard Journal of Law and Public Policy* 107, 110).

<sup>369</sup> *United States v Darby Lumber Co* 312 US 100 (1941)

<sup>370</sup> Engdahl (n 364) 110

won after appealing. The district court held that the Act sought to regulate manufacturing activity within a state and was therefore unconstitutional for exceeding Congress's authority under the Commerce Clause.

The Court ruled that Congress can regulate the hours and wages of workers who produce goods that will enter interstate commerce. Furthermore, Congress can exclude from interstate commerce those articles which deteriorate the health, welfare and morals of the nation. And more generally, Congress has plenary power to regulate anything that affects interstate commerce. Regardless of Congress's motive, Congress may regulate commerce as long as the regulations do not infringe on any other constitutional prohibitions. This decision overruled *Hammer v. Dagenhart*, which came to the opposite conclusion.

Engdahl noted that the Court upheld the wage and hour terms of the Act, relying not on the Commerce Clause but instead citing *McCulloch*, "the quintessential elucidation of the Necessary and Proper Clause."

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.<sup>371</sup>

Engdahl observes that Justice Stone did not say in *Darby* that Congress's power embraces the general activity of manufacturing, or even all of the various activities of Darby Lumber Company.<sup>372</sup> It is not a power over all activities affecting interstate commerce. It is a *particular* activity identified as "the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce."<sup>373</sup> Later, Engdahl explains that:

[t]his "particularity" feature is plain on the face of the Necessary and Proper Clause, which only gives Congress the power to make "[l]aws... for carrying into Execution" the other enumerated powers. Where a particular statutory provision fulfills this telic requirement, it does not matter how local activity is to which the provision applies. Conversely, no matter how great an activity's effect on interstate commerce, its effect alone cannot legitimate a particular statutory provision that is not calculated to carry into execution Congress's will regarding an enumerated end. It is the telic connection of a particular statutory provision that is crucial, not any interstate effect of the activity to which the statute applies. This crucial point is easily overlooked when the effects doctrine is attributed to the Commerce Clause, because the power given by the Commerce Clause itself is plenary and, therefore, not contingent on a telic relation to enumerated concern.<sup>374</sup>

After analyzing this landmark case for the first years of the era of cooperative federalism,

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<sup>371</sup> *Darby* (n 12) 118-119

<sup>372</sup> Engdahl (n 364) 111

<sup>373</sup> *Darby* (n 12) 117

<sup>374</sup> Engdahl (n 364) 111-12

Engdahl says that *United States v. South-Eastern Underwriters*<sup>375</sup> should attract our attention. Decided in 1944, it was a Supreme Court case involving the federal antitrust statute and the insurance industry. The South-Eastern Underwriters Association had control of 90% of fire and other insurance markets in six southern states and was believed to have an unfair monopoly, brought on through price fixing. The Court had to answer a question whether insurance was a type of interstate commerce that should fall under the United States Commerce Clause.

The Supreme Court held that insurance companies that conduct significant portions of their business across state lines were in fact engaging in interstate commerce. Therefore, insurance was no longer seen as local activity.<sup>376</sup> Thus, instead of the Necessary and Proper Clause, Justice Black, writing for the majority, invoked the Commerce Clause, saying that the criterion by which to judge whether Congress can act should not be a "technical legal conception" - "the mechanical" distinction between different levels of activities. Instead, in every case "the competing demands of the state and national interests involved can be accommodated."<sup>377</sup> Engdahl calls this shift in argumentation "Justice Black's putsch" that ended Justice Stone's attempt to resurrect "the classic analysis of American federalism", meaning the plenary power of Congress.<sup>378</sup>

Nevertheless, the new trend in judicial construction of the Clause was a fact and the federal government's authority was expanded. Chief Justice Stone again repeated his way of understanding the Clause in *United States v. Wrightwood Dairy Co.* He made it clear that the power over local activity stemmed from the Necessary and Proper Clause:

We conclude that the national power to regulate the price of milk moving interstate into Chicago, Illinois, marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective...<sup>379</sup>

Later, Justice Jackson quoted *Wrightwood* directly to defend a wide scope of federal power in *Wickard v. Filburn*. Justice Jackson also observed that:

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are, at most, "indirect." In answer, the Government argues that the statute regulates neither production nor consumption, but only marketing, and, in the alternative, that, if the Act does go beyond the regulation of marketing, it is sustainable as a "necessary and proper" (...) implementation of the power of Congress over interstate commerce.<sup>380</sup>

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<sup>375</sup> 322 US 533 (1944)

<sup>376</sup> The Court majority called the distinction between "local" and "interstate" "a type of a mechanical criterion". Distinguishing among the acts comprising a business according to the Court was "a metaphysical separation" and "the entire transaction, of which that contract is but a part... may be a chain of events which becomes interstate commerce." (*United States v South-Eastern Underwriters Association* 322 US 538 (1944) 547)

<sup>377</sup> Engdahl (n 364) 113

<sup>378</sup> *ibid*

<sup>379</sup> 315 US 110 (1942) 121

<sup>380</sup> 317 US 111 (1942) 119

*Wickard* is known as one of the landmark cases of the era. In this case the Court showed its total deference to Congress' claims of Commerce Clause powers. It is difficult to prove that the link between regulated action and the Commerce Clause was direct and tight. Filburn produced more wheat than he was allowed, according to the Agricultural Adjustment Act (AAA), so he sold part of his wheat crop and used the rest for his own consumption.<sup>381</sup> But the Court said that this was an implied power of the Commerce Clause. The power to regulate interstate commerce includes the power to regulate commodity prices and practices affecting them. Thus, Filburn's production could be regulated by the federal government. And even if production of wheat for consumption on the farm may be trivial in some cases, it is not enough to remove the grower from the scope of federal regulation where the aggregate effect of such behavior by many others is far from banal. This was the Court's sweeping "cumulative effects" test.

With the abandonment of formal dichotomies, and the adoption of both the "substantially affects" and "cumulative effects" doctrines, Congress enjoyed expansive authority to enact legislation thought necessary to regulate interstate commerce.<sup>382</sup> Until 1964, or the adoption of the Civil Rights Act, the Court did not engage in the post-hoc review of the propriety or wisdom of congressional conclusions that the regulation of certain interstate activities was necessary to regulate interstate commerce, or even to articulate the standard of review that would control congressional exercises of the commerce power. This changed with *Katzenbach*, where the Court made explicit the test which stated that "where we find that the legislators, in light of the facts and the testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."<sup>383</sup>

The Court itself noted the revision of doctrine of implied powers and underlined the role of the democratic electoral process in confining the abuse of the Congressional power:

At the beginning Chief Justice Marshall described the Federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce....

<sup>384</sup>

It should be noted that in the time of expansion of the federal powers in that era, the

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<sup>381</sup> The Agricultural Adjustment Act of 1938 limited the area that farmers could devote to wheat production. The stated purpose of the act was to stabilize the price of wheat in the national market by controlling the amount of wheat produced.

<sup>382</sup> See Earl M Maltz, 'The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy' (1995) 19 *Harvard Journal of Law and Public Policy* 121, 129 ("In the wake of *Jones & Laughlin* and *Wickard*, it has become clear that . . . Congress has authority to regulate virtually all private economic activity").

<sup>383</sup> David M Crowell, '*Gonzales v. Raich* and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug?' (2006) 38 *Rutgers L.J.* 251

<sup>384</sup> *Wickard* (n 15) 316



Necessary and Proper Clause was usually not expressly mentioned in the opinions of the Courts. Usually, the opinion pointed only at the Commerce Clause.<sup>385</sup> This is clearly seen in the analyzed cases above, where sometimes the Necessary and Proper Clause is not visible on the surface. The Necessary and Proper Clause and *McCulloch's* interpretation thereof were used to expand the scope of the Commerce Clause, though it was not always called upon by its name. Most of the time, the Necessary and Proper Clause became an implicit ingredient of the long-term expansion of the congressional powers officially based on the Commerce Clause.

[T]he New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states. That is, the Court did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce.<sup>386</sup>

That is why most of the observers saw the Commerce Clause as an exclusive cause of the expansion of Congress authority.<sup>387</sup> In my opinion, this is a wrong impression. It was not the Commerce Clause itself that made that change possible.<sup>388</sup> The Commerce Clause itself did not provide a good enough basis for regulating local matters: it gave only the legitimate end, and the Necessary and Proper Clause permits specific regulations as a means to that end. Gardbaum was the one who stressed this connection and underlined the role of the Necessary and Proper Clause in the post-New Deal era. He claims that surprisingly few observers have noted that the New Deal Court's constitutional justification for the expansion of the scope of federal power was the Necessary and Proper Clause.<sup>389</sup>

He noted that it was the Court itself which decided to downplay the Necessary and Proper Clause, especially since the early 1950s.<sup>390</sup> The Court's analysis ignored the question of whether or not federal regulation of local economic activities was itself an exercise of the specifically enumerated power to regulate interstate commerce. Instead, the regulation of local activities was viewed as an available means for achieving the legitimate objective contained in the Commerce Clause. Gardbaum concludes: "[t]hus, the Necessary and Proper Clause is central to the structure of modern constitutional law, even though recourse to it became increasingly less explicit to the point at which it is now unclear if it is generally understood to be explicit at all."<sup>391</sup>

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<sup>385</sup> See II.2

<sup>386</sup> Gardbaum (n 294) 807-08.

<sup>387</sup> See eg Richard Epstein, 'The Proper Scope of the Commerce Power' (1987) 73 Virginia Law Review 1387, 1388

<sup>388</sup> See II.2

<sup>389</sup> These few include David Engdahl, Justice O'Connor and Martin H. Redish. (Gardbaum (n 807).

<sup>390</sup> Gardbaum (n 294) 809-10

<sup>391</sup> *ibid* 808

It is noteworthy that Gardbaum also claims that the power of preemption derives from the Necessary and Proper Clause. (A doctrine of state law that holds that a state law displaces a local law or regulation that is in the same field and is in conflict or inconsistent with the state law. The federal preemption

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doctrine is a judicial response to the conflict between federal and state legislation. When it is clearly established that a federal law preempts a state law, the state law must be declared invalid. A state law may be struck down even when it does not explicitly conflict with federal law, if a court finds that Congress has legitimately occupied the field with federal legislation.)

It is a consequence of the fact that it does not derive from the Commerce Clause, since the latter one is not a source of Congress's power to regulate local activities. What is more, he disagrees with standard views that the power of preemption comes from the Supremacy Clause. (Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States ... shall be the supreme Law of the Land." It means that the federal government, in exercising any of the powers enumerated in the Constitution, must prevail over any conflicting or inconsistent state exercise of power.) The concept of federal supremacy was developed by Chief Justice John Marshall and leads us again to *McCulloch*. Marshall concluded that "the government of the Union, though limited in its power, is supreme within its sphere of action." The supremacy means that federal laws are valid and are supreme, so long as those laws were adopted in pursuance of—that is, consistent with—the Constitution. (See more: *The Federalist No. 44*) He proves that the assumption that Congress's power of preemption is an automatic implication of the Supremacy Clause is wrong. He stresses that supremacy and preemption are two different legal principles that constitute two different methods of regulating the relationship between their respective contents. Preemption, contrary to supremacy, means that the states are deprived of their power to act at all in a given area and this is so regardless of existence of any conflict between state and federal law. Therefore, preemption constitutes a bigger inroad on the states' powers and the legal position of states in general (Stephen Gardbaum, 'The Nature of Preemption' (1994) 79 Cornell Law Review 767, 771-73). He argues that the main argument in favor of this principle is a practical one - the need for uniform national regulation. In other words, Congress has to pass one set of rules in certain areas in order to exercise its enumerated powers effectively. And supremacy does not guarantee uniformity. (Supremacy does not guarantee uniformity because it does not do away with nonconflicting state laws. Gardbaum quoted Justice Frankfurter who noted that: "[T]his Court has not stifled state action unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commended or forbidden..." In discussing in the Federalist Papers the respective areas of federal and state constitutional powers, Hamilton wrote that state powers would be superseded by federal authority if continued authority in the States would be "absolutely and totally *contradictory* and *repugnant*." "I use these terms," he wrote, "to distinguish this... case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugancy in point of constitutional authority." (*Farmers Educ & Coop Union v WDAY* 360 US 525 (1959) 542-46 (Frankfurter dissenting) (Gardbaum *Rethinking* (n 294) 807)) He observes that most often this need arose under the power to regulate commerce and in situations where Congress is authorized to use the Necessary and Proper Clause. (The Nature of Preemption 807)

Gardbaum shows the important connection between the preemption and federalism as such. He proves that the role of exclusive competences in a discussion about federalism is often overestimated and, on the other side, the one of shared competences is underestimated. The former competences are the sine qua non condition of federalism but the latter are needed for federalism to operate. Therefore, preemption is very important.

Congress's power to preempt the states is taken to be co-extensive with its general legislative power, whatever the outer boundaries of that power: if Congress can legislate at all in a given area, then it can always preempt state power in that area. By means of this unlimited power of preemption, Congress thus has complete and unfettered discretion to determine the actual allocation of power between itself and the states in areas of concurrent competence. The role of the courts is limited to interpreting any such determination that Congress has chosen to make; i.e. preemption analysis is a matter of statutory, and constitutional, interpretation (The Nature of Preemption 797).

Gardbaum proposed his model of federalism, which is based on policing Congress's deliberative processes. It guarantees states rights and protects their interests by imposing requirements of justification and reasonableness on Congress's decision-making process. (In case of local activities, when these requirements are not satisfied, Congress cannot regulate them even if they substantially affect interstate commerce. The concurrency of state and federal powers remains and any conflicts that

In the 1980s the role of the Necessary and Proper Clause was directly acknowledged in the *Garcia* case (1985), but only in a dissenting opinion written by Justice O'Connor, along with Chief Justice Rehnquist and Justice Powell.<sup>392</sup>

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." (...) It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power. [A]nd the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce.<sup>393</sup>

She cited *McCulloch*. What makes this dissent even more interesting and important is O'Connor's interpretation of *McCulloch*:

It is worth recalling the cited passage in *McCulloch* (...) that lies at the source of the recent expansion of the commerce power. "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall said, "and all means which are appropriate, which

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arise as a result of their respective exercise are resolved through the explicitly enumerated mechanism of the Supremacy Clause.) (Gardbaum *Rethinking* (n ) 837)

Gardbaum also notes that a discussion about the required and best conception of federalism is not only typical for the United States and offers a comparative perspective, where he discusses European federalism. He introduces certain parallels that characterize current thinking about federalism in the European Union and the USA.

He claims that his model of new federalism has close affinities with European Union "federal" structure based on the principle of subsidiarity. They both express the idea that in the area of concurrent federal and local competence, exercises of central legislative power ought to be understood in some very general sense as exceptional, subsidiary. Therefore it needs to be justified. This model prefers local competence to constitutional status. Nevertheless, he quotes George Bermann who believed that the subsidiarity principle was very welcome in the European context but that there is no constitutional or normative basis for any similar principle in the USA. The Tenth Amendment and the Commerce Clause cannot be seen as such since they do not regulate concurrent powers. Therefore the only basis for a similar principle could be nonconstitutional (George Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *Columbia Law Review*, 331, 407-16). Gardbaum suggests that the Necessary and Proper Clause could be a source of a subsidiarity-like principle in American federalism, since it already protects interests of the states and asks for a specific type of justification when exercising unenumerated powers (Gardbaum *Rethinking* (n 294) 831-36)).

<sup>392</sup> Gardbaum points out that in that era there were moments when even the Court was confused about the rationale on which federal power was based. He gives an example of *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, where citing *Darby* the Court stated: 'The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding. This established, the only remaining question for judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution (...) Judicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress.'" (452 US 264 (1981) 276)

<sup>393</sup> *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985) 584-85. Also in *New York v United States* 505 US 144, 158 (1992), where she stated that '[t]he Court's broad construction of Congress's power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress's power generally, by the Constitution's Necessary and Proper Clause.'

are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional" (emphasis added). The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. (...)

It is not enough that the "end be legitimate"; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy.<sup>394</sup>

She claimed, contrary to the prevailing doctrine, that the congressional means must be "appropriate" and "consist with the letter and spirit of the constitution", not merely plainly adapted to legitimate ends.

The majority ruled that the guiding principles of federalism established in *National League of Cities v. Usery*<sup>395</sup> were unworkable and that San Antonio Metropolitan Transit Authority (SAMTA) was subject to Congressional legislation under the Commerce Clause. Consequently, the Commerce Clause empowers the federal government to regulate the terms of employment of state workers. *Garcia* upheld the minimum wage requirement of the Fair Labor Standards Act (FLSA), as applied to state governments.<sup>396</sup>

SAMTA, the main provider of transportation in the San Antonio metropolitan area, claimed it was exempt from the minimum wage and overtime requirements of the FLSA. SAMTA argued that it was providing a "traditional" governmental function which exempted it from federal controls according to the doctrine of federalism established in *National League of Cities v. Usery* (1976).<sup>397</sup> The Court found that rules based on the subjective determination of "integral" or "traditional" governmental functions provided little or no guidance in determining the boundaries of federal and state power, and so it overruled *National League of Cities*.<sup>398</sup> The Court noted that "the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." Therefore the federal system itself, rather than any "discrete limitations" on federal authority, protected state sovereignty.<sup>399</sup>

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<sup>394</sup> *ibid* 421

<sup>395</sup> 426 US 833 (1976)

<sup>396</sup> *Garcia* (n 389) 537

<sup>397</sup> The Supreme Court ruled that Congress cannot regulate the employment practices of state governments. It argued that this is a power reserved to the states, and that to force the states to comply with Congress' view of how they should operate their traditional affairs destroys the states' separate and independent existences. This opinion was the first attempt by the modern Supreme Court to establish a jurisprudence of state sovereignty based on the text of the Tenth Amendment.

<sup>398</sup> The test of *National League of Cities* (also the third prong of the test in *Hodel*), that Congress may not interfere with 'traditional' state government functions, is unworkable. There is no meaningful way to determine what is a "traditional" or 'integral' part of a state government's function, and what belongs to the state's authority. Also, leaving the process of distinguishing between those categories to the judiciary is counterdemocratic.

<sup>399</sup> *Garcia* (n 389) 552. It adopted the views proposed by Professor Herbert Wechsler, who stated that the principal protection of for the states' role in the constitutional system was to be found in the congressional legislative process rather than through judicial review. (H Wechsler, *The Political*

Justice O'Connor in her dissent made the point that the spirit of the constitution "concerns for state autonomy" and, consequently, the exercise of the Necessary and Proper Clause should be understood to be subject to federalism constraints.<sup>400</sup> Justice O'Connor states also that "the central issue of federalism, of course, is whether any realm is left open to the States by the Constitution - whether there remains any area in which a State may act free of federal interference."<sup>401</sup> In other words, she supports the prevailing theory, saying that exclusive powers are the key factor of a federal system.

The fact that until the 1980s the commerce power was almost unlimited explains why there was very little interest in the Fourteenth Amendment and its relation with the Necessary and Proper Clause.<sup>402</sup> Although Congress did not have to rely on the Reconstruction Amendments to support its civil rights legislation, it is important to mention it to obtain a complete picture of the development of legal doctrine as regards implied powers. An interpretation of the Necessary and Proper Clause was discussed in *Katzenbach v. Morgan*.<sup>403</sup>

We therefore proceed to the consideration whether [the statute at issue] is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution".

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*Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government* (1954) 54 Colum L Rev 543, 543-60)

<sup>400</sup> *Garcia* (n 389) 585

<sup>401</sup> *ibid* 580-1

<sup>402</sup> The Fourteenth Amendment was ratified on 9 July 1868. It, along with the Thirteenth and Fifteenth Amendments, are collectively known as the Reconstruction Amendments. However, of these three, the Fourteenth is the most complicated and the one that has had the most unforeseen effects. Its broad goal was to ensure that the Civil Rights Act passed in 1866 would remain valid, ensuring that "all persons born in the United States...excluding Indians not taxed...." were citizens and were to be given "full and equal benefit of all laws." (Quotes from the Civil Rights Act of 1866) However, it went beyond the provisions of the Civil Rights Act in many ways. The Fourteenth Amendment, particularly its first section, is one of the most litigated parts of the Constitution. The amendment's first section includes several clauses: the Citizenship Clause, the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. The Citizenship Clause provides a broad definition of citizenship, overruling the Supreme Court's decision in *Dred Scott v Sandford* (60 US 393 (1857)), which had held that Americans descended from African slaves could not be citizens of the United States. The Due Process Clause serves three functions in modern constitutional doctrine: 'First, it incorporates [against the States] specific protections defined in the Bill of Rights....Second, it contains a substantive component, sometimes referred to as 'substantive due process.'...Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process.'...'- *Daniels v Williams*, 474 US 327 (1986) (Stevens concurring). The Equal Protection Clause prohibits states from denying any person within its jurisdiction the equal protection of the laws. The laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. The equal protection clause is not intended to provide "equality" among individuals or classes but only "equal application" of the laws. Therefore, the Fourteenth Amendment paired with the Necessary and Proper Clause could have been a powerful weapon in the hands of those who favored a strong central government. But this joint interpretation was not necessary since the Commerce Clause was expanded so that it covered all activities, far beyond interstate commercial activities.

<sup>403</sup> 384 US 641 (1966)

In *Katzenbach* the Court concluded that the Fourteenth Amendment added “appropriate legislation” to the McCulloch test. Justice Brennan determined that the legislation prohibiting states from imposing English literacy requirements as a prerequisite to voting is unconstitutional.

## 5. New Federalism

This era of broad reading of Congress authority ended in the mid 1980s. It is connected with President Reagan and 104th Congress (led by Newt Gingrich and the Contract with America platform)<sup>404</sup>. Reagan started a reform of federalism by scaling back federal government intervention at all levels.<sup>405</sup> It is a political philosophy of devolution, or the transfer of certain powers from the United States federal government to the states. It was a reaction for post-New Deal reforms. Ronald Reagan as president was very doctrinaire when it came to his theory of federalism, grounded in the Tenth Amendment to the US Constitution, that reserves to the states or to the people all powers not delegated to the national government.<sup>406</sup> New federalism was supposed to be a medicine for centralization that served to "de-humanized government, to separate the citizen from the centers of decisions affecting his life" on the local level.<sup>407</sup>

The new federalism was adopted by most of the liberal and conservative post-Reagan administrations.<sup>408</sup> Both Democratic and Republican presidents and Congresses took steps to limit federal government measures in favor of programs administered by the state authorities. Even President Clinton – the first Democrat in office after 12 years of GOP domination in the White House - supported the idea of limited government.<sup>409</sup> President

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<sup>404</sup> The idea of new federalism comes from Richard Nixon. It was inspired by the working paper 'New Federalist Paper No. 1', written by Special Assistant to the President William Safire under the pseudonym 'Publius'. Therein, Publius concedes that the federal government must oversee monetary policy and foreign affairs, as well as superintend additional national areas of regulation, including raising revenues and borrowing money. The Nixon Administration proposed many of the Publius proposals in the form of legislation. Nixon proposed a dramatic restructuring of American government. He believed in a system which directed money and power away from the federal bureaucracy and toward states and municipalities. New federalism was supposed to permit ordinary citizens to 'regain control' over government through a new order of "national localism" (Christopher Banks, John Blakeman, *The U.S. Supreme Court and New Federalism* (Rowman & Littlefield 2012) 51-53).

<sup>405</sup> Shortly after taking office, Reagan proposed massive cuts in federal domestic programs and drastic income tax cuts. The Reagan administration's budget and its policies dramatically altered the relationships among federal, state, and local governments. For the first time in thirty years, federal aid to state and local governments decreased.

<sup>406</sup> It was one of his main political goals since being elected the governor of California. When he was seeking the Republican presidential nomination in 1976, he delivered a speech calling for a 'systematic transfer of authority and resources to the states.' Four years later, in his inaugural speech he promised to restrict federal powers and to "demand recognition of the distinction" between federal powers and "those reserved to the states."

(<<http://www.reagan.utexas.edu/archives/speeches/1981/12081a.htm>> accessed 11 March 2014)

<sup>407</sup> Banks & Blakeman (n 400) 51

<sup>408</sup> *ibid* 53

<sup>409</sup> The Clinton era was different to that of other Democratic presidents. Clinton had to govern with a conservative and fiscally driven 104<sup>th</sup> Congress. Picking up the fiscal signals, Clinton righted himself (this is the correct term) and moved to more modest, centrist and incremental domestic public policies in 1996 in his second term. The Clinton administration was pro-state also in the extension of waivers that provided states with greater flexibility of action in the form of extra and special authority. Also, the addition of two justices by President Clinton did little to stem the course of the Supreme

G.W. Bush also embraced new federalism, but during his administration the doctrine was altered as a consequence of the terrorist attacks on September 11.<sup>410</sup> New federalism is still present strongly in the Tea Party movement, the health care reform debate, the 2010 midterm elections, and the presidential contest in 2012.

The preferences of conservative presidents were quickly reflected in the composition of the Supreme Court. In 1971 Nixon elevated William Rehnquist, a former conservative Arizona senator speechwriter and legal adviser during the 1964 presidential campaign, to the Supreme Court. He was known as a fervent critic of the Warren Court. Nixon nominated three more justices who were all critics of progressive jurisprudence. The Rehnquist Court (1986-2005) became a symbol of conservative revival and gave judicial signature to the new federalism. It broke new ground in setting limits on congressional power and insulating state governments from federal intrusiveness.<sup>411</sup>

The Court showed its new attitude very clearly in 1995 when, by a five to four majority, it held for the first time since 1937 that a federal statute was unconstitutional as exceeding "the authority of Congress [t]o regulate Commerce ... among the several States."<sup>412</sup> For many commentators this decision was a symbol of revival of the pre-New Deal federalism and the Court's green light for a new balance between the states and the union, where the latter's authority would be limited when compared with the previous era.

## **5.1. Lopez**

The landmark case for the beginnings of New Federalism was *United States v. Lopez*.<sup>413</sup> The Gun-Free School Zones Act of 1990 (GFSZA) made it unlawful for any individual knowingly to possess a firearm at a place that he knew or had reasonable cause to believe was a school zone. According to the government, GFSZA was a constitutional exercise of Congress's power pursuant to the Commerce Clause. The Fifth Circuit had a contrary view, holding that the Act exceeded Congress's power under the Commerce Clause and was therefore unconstitutional. The Government's principal argument was that the possession of a firearm in an educational environment would most likely lead to a violent crime, which in turn would affect the general economic condition because violent crime causes harm and creates expense; raises insurance costs, which are spread throughout the economy; and limits the willingness to travel in the area perceived to be unsafe. Additionally, the Government argued that the presence of firearms within a school would be seen as dangerous, resulting in students being

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Court bent on rebalancing the nature of the federal system.

<sup>410</sup> A struggling economy and the events of 9/11, however, have led to substantial growth in the power and scope of the federal government.

<sup>411</sup> Banks & Blakeman (n 400) 68

<sup>412</sup> 115 S Ct 1624 (1995)

<sup>413</sup> 514 US 549 (1995)



scared and disturbed; this would, in turn, inhibit learning; and this, in turn, would lead to a weaker national economy since education is clearly a crucial element of the nation's financial health. The Supreme Court nevertheless found that the GFSZA exceeded Congress's Commerce Clause authority. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce. The Court rejected a means-end relationship offered by Congress. Congress's attempt to regulate gun possession as a means of reducing crime, which was a means of avoiding economic losses, which was a means of preventing the spread of those losses to society through insurance, which was a means of preventing such effects on interstate commerce as the reduction of purchases across state lines was rejected by the Court. The law is a criminal statute that has nothing to do with "commerce" or any sort of economic activity. The statute contains no jurisdictional element which would ensure that the firearms possession in question has the requisite nexus with interstate commerce. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity ... that Congress [cannot] regulate [under the Commerce Clause]", the Court observed. It feared that accepting the Government's argument meant that it would have to agree on almost unlimited authority of Congress under the Commerce Clause. Accordingly, Congress had overstepped its limited Commerce Clause powers and instead usurped the state's typical role in policing these crimes.

The Court maintained that Congress could constitutionally regulate three things under the Commerce Clause: instrumentalities of commerce, the use or channels of commerce, and activities that substantially affect interstate commerce. Here, these three categories appear to define the commerce power itself, and not to describe the types of regulation that the Court had upheld under the rational basis test. This test defined the scope of federal legislative power under the Necessary and Proper Clause and Commerce Clause combined, omitting the *McCulloch* test. The rational basis test permitted Congress to regulate any activity it wanted to regulate since there was always a way to come up with a rational connection to one or more of the enumerated powers. With this shift, courts would accept any plausible purpose for a proposed legislation. Coupled with the Commerce Clause, this became a very powerful tool that was empowered by the changes in the national economy after 1937.<sup>414</sup>

The above-mentioned categories include legislation that falls within the Commerce Clause itself and the Commerce Clause read together with the Necessary and Proper Clause (this approach was confirmed in later cases, like *Morrison*.) This act could only be seriously justified under the third category, but even there it ultimately fails because the regulation of guns in school does not "substantially affect interstate commerce." In *Lopez*, this third category suggested less deference to congressional judgment than had previously been accorded under the rational basis test.<sup>415</sup>

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<sup>414</sup> The rational basis test was criticized as inconsistent with the Necessary and Proper Clause., e.g Justice Thomas wrote a separate concurrence in *Sabri v US* 541 US 600, basing his argument on the linguistic difference between 'appropriate' and 'plainly adapted' (similarly, Justice Scalia did this in *Jinks v. Richland County* 538 US 456).

<sup>415</sup> As Levy noted: [T]he Court limited the so-called 'cumulative effects' doctrine from *Wickard v.*

As for as legal construction is concerned, *Lopez* suggested a clear departure from an expansive reading of the Commerce Clause and the Necessary and Proper Clause together, which was a step away from the *McCulloch* test although it did not bring about an explicit rejection of the rational basis test. The new test replaced de facto the means-end scrutiny, and was clearly narrower than the previous one. The last *Lopez* category was definitely more restricted in scope than the result of the rational basis test, in that the Court limited the circumstances under which it is permissible to consider the cumulative or aggregate effects on interstate commerce to circumstances under which the regulated activity is commercial or economic in character. The rational basis test would not accept such a restriction, because it is hardly irrational to conclude that a noncommercial activity may have a cumulative effect on interstate commerce such that regulating the activity is a reasonable means to effectuate a commerce power purpose.<sup>416</sup>

*Lopez* thus marked the first time in more than 50 years that the Court limited Congress's ever-growing commerce power. Chief Justice Rehnquist concluded:

To uphold the Government's contentions here, we have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.<sup>417</sup>

Many commentators saw *Lopez* as a revolutionary case.<sup>418</sup> Professor Calabresi pointed out that it was "a mild corrective to a half-century of steady and sometimes ill-considered expansions of national power."<sup>419</sup> McGinnis claimed that *Lopez* was not as "an attempt to roll

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*Filburn* (1942), which permits the consideration of the aggregate or cumulative effects of an activity on commerce and thus obviates the need to establish a connection to commerce in each individual case. The Court characterized the cases applying the doctrine as involving regulation of activities that were themselves commercial or economic in character, and refused to consider the cumulative effects of "noncommercial" activities being regulated... Both decisions include language suggesting that the Supreme Court will make an independent evaluation of the factual basis for Congress's conclusion that an activity has a substantial effect on interstate commerce and suggesting that, when federal laws regulate activity traditionally within the state police power, the Court will not accept broad end-means arguments that would in effect cede plenary authority over these areas to Congress (Levy (n 308) 93).

<sup>416</sup> *ibid* 108

<sup>417</sup> *Lopez* (n 409) 921

<sup>418</sup> See different opinion about *Lopez*: Donald Regan, 'How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*', (1995) 94 *Michigan Review*. 554, 554; Leon Lazer, William E. Hellerstein, 'Tiptoeing Through the Tulips: The Supreme Court's Major, but Modest by Comparison, Criminal Law Rulings During the 1994-95 Term', (1996) 12 *Touro Law Review* 267, 269; John Copeland Nagle, 'The Commerce Clause Meets the Delhi Sands Flower-Loving Fly', (1998) 97 *Michigan Review*. 174, 176; Glenn Reynolds, Brannon Denning, 'Lower Court Readings of *Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?', (2000) *Wisconsin Law Review*. 369, 401

<sup>419</sup> Steven Calabresi, 'Federalism and the Rehnquist Court: A Normative Defense', (2001) 574 *Annals of the American Academy of Political & Social Science* 33-34

back the Commerce power, but rather an attempt to prevent it from becoming all-embracing."<sup>420</sup> The case was seen as a correction of too expansive jurisprudence, as a counterbalance for the expansive Congress,<sup>421</sup> exactly as Chief Justice Rehnquist explained it.<sup>422</sup>

*Lopez* was an attempt to utilize the judicial branch as a counterweight to Congress's power appetite which, in the eyes of the majority, totally disregarded the plain language of the Constitution.<sup>423</sup> But the consequences of *Lopez* were not clear for most of the observers at the time of its announcement. It was not supposed to be known "until the next case explained it to us" how lasting the shift in reading the implied powers was.<sup>424</sup> In 1997, another case as regards handguns showed a new preference of the Supreme Court towards federalism. The Brady Handgun Violence Prevention Act (Brady Bill) required "local chief law enforcement officers" (CLEOs) to perform background-checks on prospective handgun purchasers, until such time as the Attorney General establishes a federal system for this purpose. Two local law-enforcement officers challenged the constitutionality of the Act's interim provisions in *Printz*.<sup>425</sup> The question at stake was whether Congress's use of the Necessary and Proper Clause might compel a state or local government to even temporarily implement and administer a federal regulatory program. The government countered this argument with an historical assertion, stating "the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws." The government also relied on early written sources to assert that participation by state officials in the implementation of federal laws was consonant with early constitutional interpretation. Finally, the government pointed out certain recent federal statutes which require participation of state or local officials to implement federal regulatory schemes. The Court did not agree with the government and stated that the state legislatures are not subject to federal direction. While Congress may require the federal government to regulate commerce directly, in the case at hand by performing background-checks on applicants for handgun ownership, the Necessary and Proper Clause does not empower it to compel state CLEOs to fulfill its federal tasks for it - even temporarily. Therefore, the interim provisions of the Brady Bill are unconstitutional.

Justice Scalia, who wrote the opinion for the majority, refers again to "dual sovereignty". In the analysis of the Constitution's structure, the Court held first that "[t]he power of the

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<sup>420</sup> John McGinnis, 'Reviving Tocqueville 's America: The Rehnquist Court's Jurisprudence of Social Discovery', (2002) 90 California Law Review 485, 519

<sup>421</sup> See Jonathan H. Adler, 'Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose', (2005) 9 Lewis & Clark L. Rev. 751, 756 ('If the only question is whether a particular class of activities impacts interstate economic activity in some identifiable way, there is hardly anything that falls outside of Congress's authority. And that is the whole point of the *Lopez* test...')

<sup>422</sup> See Thomas Merrill, 'Rescuing Federalism After *Raich*' (2005) 9 Clark & Lewis L.Rev 825 ('A central theme of the Rehnquist Court . . . was that the federal courts do have a vital role to play in determining the allocation of powers in the federal system.').

<sup>423</sup> 'If the only question is whether a particular class of activities impacts interstate economic activity in some identifiable way, there is hardly anything that falls outside of Congress's authority. And that is the whole point of the *Lopez* test...' Adler (n 417) 756

<sup>424</sup> John T. Parry, 'Society Must Be [Regulated]: Biopolitics and the Commerce Clause in *Gonzales v. Raich*', (2005) 9 Lewis & Clark Law Review. 853, 855

<sup>425</sup> *Printz v United States* 521 US 898 (1997)

Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States."<sup>426</sup> *Printz* extended the anti-commandeering principle established in *New York v. United States*<sup>427</sup>, another key case for new federalism, involving the Tenth Amendment and the "guarantee clause" of Article Four.<sup>428</sup> Justice Scalia found the distinction between "policymaking" and "implementation" both difficult to mark, since most instances of executive action that involve setting policy are ultimately unhelpful to the Government's case, because the violation on state sovereignty is if anything greater when the Government reduces states "to puppets of a ventriloquist Congress." Unlike *New York*, the opinion in *Printz* offers the Necessary and Proper Clause as a source of anti-commandeering principle. The majority referred to it in response to the dissent's invocation of that provision; calling relying on the Clause by the dissent "the last, best hope of those who defend ultra vires congressional action":

What destroys the dissent's Necessary and Proper Clause argument... is not the Tenth Amendment, but the Necessary and Proper Clause itself. When a "La[w]... for carrying into Execution the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a "La[w]... proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."<sup>429</sup>

Consequently, *Printz* saw commandeering of state officials as a means of violating the propriety requirement of the Necessary and Proper Clause.<sup>430</sup> Unlike in *Lopez* (or later in *Morrison*), the Court did not find that the act was unconstitutional because it was remote from legitimate constitutional ends. In the case at hand, it was about an erroneous connection between means and ends.

It also relied on Justice O'Connor's opinion in *New York* when it comes to the state

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<sup>426</sup> *ibid*

<sup>427</sup> 505 US 144 (1992)

<sup>428</sup> Anti-commandeering means that Congress does not have the power to force states to implement regulations. The Low-Level Radioactive Waste Policy Amendments Act of 1985 attempted to force states to arrange for the disposal of radioactive waste. The Court upheld two of the three provisions of the Act under review, reasoning that Congress had the authority under the Commerce Clause to use financial rewards and access to disposal sites as incentives for state waste management.

The Court mentioned the Necessary and Proper Clause in *New York*, but not in the part regarding anti-commandeering (*New York* (n 423) 158-59). The source of anti-commandeering principle was historical analysis, structural analysis and various precedents (161-66).

<sup>429</sup> *Printz* (n 421) 923-24

<sup>430</sup> Randy Beck observed that even before the *Printz* decision, Professor Regan had argued that the propriety requirement of the Necessary and Proper Clause provided the most appropriate textual ground for *New York*'s anti-commandeering principle: "It would be much more sensible... to assign this idea to Necessary and Proper Clause rather than Tenth Amendment. Roughly speaking, the Tenth Amendment addresses, truisitically, the question of what kinds of things Congress may regulate. The Necessary and Proper Clause addresses the question of what means Congress may use to achieve its regulatory ends. Nobody doubted in *New York v. United States* that Congress could regulate radioactive waste... The only issue was about the means Congress had chosen. The Necessary and Proper Clause suggests, by implication, that some means are improper. If we think the means Congress used in this case were improper, this seems the natural clause to appeal to."

(Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite *United States v. Lopez*, (1995) 94 Mich. L. Rev. 554, 593, in Beck (n 238) 629)

sovereignty.<sup>431</sup> She viewed the constitutional structure as one which provides Congress with a certain amount of authority over individuals but not over states.<sup>432</sup> One of the themes of the new federalism cases has been the importance of preventing federal actions that blur the lines of accountability within political entities embodied by states. In *Printz*, Justice Scalia returned to the theme, viewing it as "an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."<sup>433</sup> Scalia stresses the central idea of federalism as the Framers' intentional division of government power into two independent spheres that can compete with each other to prevent the tyranny and enhance liberty of the people:

The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.... The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other - a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.<sup>434</sup>

Justice Scalia observed that the Framers established a system of "dual sovereignty" precisely to avoid the inefficiencies and conflicts bred by the Articles of Confederation's use of the states as instruments of the federal government.

*Printz* stand for the proposition that, even within its enumerated powers, Congress cannot impose duties on state legislative and executive branches.<sup>435</sup> Most of the Court's focus was laid on the scope of state sovereignty here. The Necessary and Proper Clause and the enumerated powers received only limited attention by the justices.<sup>436</sup> However, the Court described those two approaches as "mirroring images of each other". It looks like they were both equally important, but the Court decided in this case to support its findings on state

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<sup>431</sup> *New York v United States*, 505 US 181 (1992). She quoted *The Federalist Papers*: '[A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity....' (180, citing Alexander Hamilton & James Madison, *The Federalist No. 20* (Clinton Rossiter (ed) 1961) 138)

<sup>432</sup> Justice Scalia found *New York* controlling. He rejected the Government's plea to distinguish *New York* on the ground that the statute there required states to make policy, whereas the Brady Act compels administration of a final directive.

<sup>433</sup> *Printz* (n 421) 928

<sup>434</sup> *ibid* 919-20 (citing Alexander Hamilton *The Federalist No. 15* (Clinton Rossiter (ed) 1961)

<sup>435</sup> It is worth noting that *Printz* was the only case remaining on the Court's docket on the Term's final day 1996-1997. It is something of an annual tradition at the Supreme Court that each Term's most controversial cases are announced on the last day.

<sup>436</sup> Beck claims that if the Court had begun by analyzing the reach of enumerated powers of Congress, the importance of the Clause to the case (and *New York*) might have been more apparent. Also he notes that the the Court suggested in *Printz* that the dissent's Necessary and Proper Clause argument had been tacitly resolved in *New York*, when the Court discussed the appropriate scope of congressional power: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit the acts. (*Printz* 924, citing *New York* 166) (Beck (n 238) 629)

immunity.

The Court relied on *Printz's* understanding of "proper" in *Alden v. Maine*. In this case, the Court found that Congress may not use its Article I powers to abrogate the states' sovereign immunity. Both the terms and history of the Eleventh Amendment suggest that States are immune from suits in their own courts.<sup>437</sup> However, the Congress may abrogate sovereign immunity when the suit is to enforce a statute protecting the *Fourteenth Amendment* rights:

We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved...Congress may authorize private suits against nonconsenting States pursuant to its §5 enforcement power...When Congress enacts appropriate legislation to enforce this Amendment (...) federal interests are paramount.<sup>438</sup>

*Alden* was an extension of the Court's 1996 ruling in *Seminole Tribe v. Florida*<sup>439</sup>, which had held that Congress cannot use its powers under Article I of the Constitution to subject nonconsenting states to suit in federal court.

The majority of justices ruled that Congress has no authority to subject nonconsenting states to private suits in their own courts, under the original unamended Constitution, to abrogate states' sovereign immunity:

Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.<sup>440</sup>

Since the Constitution contains no express power to subject the states to litigation by individuals, it is questionable whether there is an implied power to do so under the Necessary and Proper Clause. The answer was negative and was supported by the *Printz* doctrine of state sovereignty. In other words, the laws violating state sovereignty are improper for carrying enumerated powers and, therefore, are unconstitutional.

## 5.2. Morrison

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<sup>437</sup> 527 US 706 (1999) 712

<sup>438</sup> *ibid* 756. Beck states that *Alden* can be seen as a further, limited extension of the anti commandeering principle (See *Alden* at 749). In *Printz* and *New York* the Court found that the state legislators cannot be pressed into federal service, and in *Alden* that state judges could not be forced to hear federal claims against the state, though they may be required to enforce federal law against other defendants. (Beck (n 238) 631)

<sup>439</sup> 517 U.S. 44 (1996)

<sup>440</sup> *Alden* (n 433) 732

In *United States v. Morrison*<sup>441</sup> in 2000, the Supreme Court confirmed that *Lopez* was not really an on-the-job accident but a beginning of a new trend. In this case, the Court held that the parts of the Violence Against Women Act of 1994 were unconstitutional because they exceeded congressional power under the Commerce Clause, or the *Fourteenth Amendment*. In a 5–4 decision, *United States v. Morrison* invalidated the section of the Violence Against Women Act (VAWA) of 1994 that gave victims of gender-motivated violence the right to sue their attackers in federal court. The Court stressed "enumerated powers" that limit federal power in order to maintain "a distinction between what is truly national and what is truly local."

The government again argued that "a mountain of evidence" indicated that the Violence Against Women Act (VAWA) did have a substantial effect on interstate commerce. In enacting the law, Congress had reasoned that gender-motivated violence affects interstate commerce "by determining potential victims from traveling interstate, and from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce... by increasing medical and other costs, and decreasing the supply of and demand for interstate products."<sup>442</sup> It relied on *Wickard v. Filburn*<sup>443</sup>, which held that Congress could regulate an individual act that lacked a substantial effect on interstate commerce if, when aggregated, acts of that sort had the required relation to interstate commerce. The majority said that the result was controlled by *United States v. Lopez*. The opinion concluded<sup>444</sup> that acts of violence such as those that VAWA was meant to remedy had only an "attenuated" effect, not a substantial one, on interstate commerce.<sup>444</sup> Chief Justice Rehnquist wrote for the majority that the acts of violence such as those that VAWA was meant to remedy had only an "attenuated" effect, not a substantial one, on interstate commerce. The Court observed the need to distinguish between those economic activities that directly affect interstate commerce and those that indirectly affect it was due to "the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority."<sup>445</sup> The reasoning employed by the government could just as well apply to Congress in "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, childrearing on the national economy is undoubtedly significant."<sup>446</sup> What is more, the majority quoted *NLRB v. Jones & Laughlin Steel Corp.*<sup>447</sup> to say that the scope of the commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."<sup>448</sup> The Court cleared up the novelty of *Lopez*, solidifying it. It introduced a new, more evident test: Congress may not regulate noneconomic conduct

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<sup>441</sup> 529 US 598 (2000)

<sup>442</sup> *ibid* 615

<sup>443</sup> See p 92

<sup>444</sup> *ibid*

<sup>445</sup> *ibid*

<sup>446</sup> *ibid* 615-16

<sup>447</sup> 301 US 1 (1937)

<sup>448</sup> *ibid* 608

under the Commerce Clause. The Court refused to indulge in deferential “rational basis” review if it found Congress’s method of reasoning to be a screen for regulating conduct with a tenuous link to interstate commerce. This test will have serious consequences because the Court could use it to eliminate non-economic federal laws adopted under the Commerce Clause (like regulation of the possession of drugs). Some commentators feared that application of Morrison’s core principles would prove unworkable in practice.<sup>449</sup>

Rehnquist said that the Court was the ultimate arbiter of an act’s constitutionality. He cited one of his previous opinions for the proposition that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”<sup>450</sup> The Chief Justice disregarded Congress’s findings because they relied “so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.”<sup>451</sup> The Court noted the historical unwillingness to permit this broad use of the commerce power. The opinion stressed that the nature of a regulated activity is an essential aspect of constitutional inquiry.

*Lopez* and *Morrison* show us how the means-end test influenced the process of creating the balance of powers within the federal state. Those cases can be described as raising the level of scrutiny when federal legislation intrudes upon areas of legislation traditionally reserved for the states. It is worth noting that those cases involved federal laws addressing private noncommercial activities belonging to the traditional areas of state authority. They affected the reserved powers of the states, a very sensitive sphere of federalism. The Court refused the aggregate effect of those noncommercial activities on interstate commerce as the basis for the legislation, stressing the lack of a jurisdictional nexus. Consequently, there was no place for implied powers. The Court suggested also an additional and independent inquiry into the factual basis for that legislation. The Court could not at that time accept the arguments based on the commerce powers as corroding the constitutional construction of a limited government of enumerated powers. Therefore, the Court decided to alter the practice of using the means-end principle. From then on, means-end should be better fitted to protect state rights and federalism.<sup>452</sup>

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<sup>449</sup> See e.g. Christy H. Dral, Jerry Phillips, ‘Commerce by Another Name: The Impact of *United States v. Lopez* and *United States v. Morrison*’, (2001) 68 Tenn. L. Rev. 605, 605; Elizabeth Saylor, ‘Federalism and the Family after Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers’, (2002) 25 Harv. Women’s L.J. 57, 58. Other commentators feared Morrison’s potential impact on popular regulatory schemes that did not purport to regulate intrastate “economic” activity. See e.g. Bradford Mank, ‘Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?’, (2002) 36 Ga. L. Rev. 723, 724; Louis Virelli III, David Leibowitz, ‘Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After *United States v. Morrison*’, (2001) 3 U. Pa. J. Const. L. 926, 949-50.

<sup>450</sup> *Morrison* (n 437) 614. (See *Hodel v Va Surface Mining & Reclamation Ass’n* 452 US 254 (1981) 311 (Rehnquist concurring))

<sup>451</sup> *Morrison* (n 437) 615

<sup>452</sup> Professor Beck, when summing up all the above-mentioned cases, concluded that the Court neglected to mention the “necessary and proper” standard in context where it would support the



### 5.3. Raich

With the cases analyzed above, the Court clearly demonstrated a trend and showed that it was serious about enforcing the enumerated powers scheme found in Article I<sup>453</sup>. Nevertheless, in recent years we can see that this trend was not irreversible, or at least that it is not impossible to alter it. In 2005, the Court turned away a Commerce Clause challenge to the Controlled Substances Act in *Gonzales v. Raich*.<sup>454</sup> Medical marijuana users argued that the Controlled Substances Act - which the Congress passed using its constitutional power to regulate interstate commerce - exceeded Congress' commerce clause power. California's Compassionate Use Act, legalizing marijuana for medical use, conflicted with the federal Controlled Substances Act (CSA), which banned possession of marijuana. The Ninth Circuit Court of Appeals reversed and ruled the CSA unconstitutional. It relied on two US Supreme Court decisions, *Lopez* and *Morrison*, that narrowed Congress's Commerce Clause power. The Ninth Circuit ruled that using medical marijuana did not "substantially affect" interstate commerce and therefore could not be regulated by Congress.

In *Raich* the Supreme Court held that Congress may regulate intrastate activity where the behavior, in the aggregate, can impact interstate commerce. In a 6-3 opinion delivered by Justice John Paul Stevens, the Court held that the Commerce Clause gave Congress authority

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Court's analysis, and instead relied upon it in contexts where it offered no assistance. He said that the Court's approach towards the Clause was, in the light of history, backwards.

In the commerce-power decisions, *Lopez* and *Morrison*, the Court failed to invoke the Necessary and Proper Clause. This (...) omission was material. The best explanation for those decisions derives from the historical understanding of the restraints imposed by the Necessary and Proper Clause on implied congressional powers. On the other hand, when the Court did rely upon the "necessary and proper" standard, in *Printz* and *Alden*, it erroneously concluded that laws commandeering state officials or abrogating state sovereign immunity are not "proper" as that term is used in Article I, section 8. Careful analysis suggests that the propriety limitation should instead be understood to regulate the relationship between congressional means and constitutional ends, rather than a repository for implied principles of federalism. The commandeering and sovereign immunity cases may be defensible on structural grounds, but the construction of the Necessary and Proper Clause offered by the Court provides a dubious basis for the decision. (Beck (n 238) 584)

<sup>453</sup> *Morrison* also suggests that the Court will not permit a broad reading of the Reconstruction Amendments to avoid commerce power limits from *Lopez*. The scope of the Fourteenth Amendment powers was re-created in *City of Boerne v. Flores*, 521 US 507 (1997). The Court in *Boerne* tightened the ends and the means and components of the *McCulloch* test. 'While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wider latitude in determining where it lies, where the distinction exists and must be observed. There must be a congruence and proportionality between the injury to prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the amendment.' This test has been applied several times after *Boerne*. In *Kimmel v. Florida Board of Regents and Board of Trustees of the University of Alabama v. Garrett* the Court held that remedies against states for employment discrimination based on age and disability were beyond the scope of Fourteenth Amendment power. See also *Nevada Department of Human Resources v. Hibbs*, *Tennessee v. Lane*. (See Levy (n 308) 98-101)

<sup>454</sup> 545 US 1 (2005)

to prohibit the local cultivation and use of marijuana, despite state law to the contrary. The Court does not have to necessarily look for a "substantial impact", but should only require that a "plausible story" be told to uphold Congressional action pursuant to the Commerce Clause. In the case at hand, the federal government cannot precisely distinguish between marijuana grown in one's own home and the marijuana sold in interstate commerce.<sup>455</sup> In order to regulate the latter, Congress must be able to regulate the former. "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."<sup>456</sup> Congress could ban local marijuana use because it was part of such a "class of activities" with a substantial effect on interstate commerce: the national marijuana market.<sup>457</sup>

Justice Stevens' majority opinion states that *Wickard* "is of particular relevance" and notes that "[t]he similarities between this case and *Wickard* are striking."<sup>458</sup> He explained that since the Court has "never required Congress to make particularized findings in order to legislate," the majority was content with a finding that Congress "could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial."<sup>459</sup> The rational basis test from *Wickard* was, therefore, restructured and given new strength.

The majority distinguished the case from *Lopez* and *Morrison*. In the case at hand, the Court was asked to strike down a particular application of a valid statutory scheme. Per *Lopez*, the regulation of all incidences of marijuana possession was an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>460</sup> Through *Morrison*, the Court stated that growing marijuana was a "quintessentially economic" activity.<sup>461</sup> Antonin Scalia wrote a separate concurrence where he explained why his understanding of Necessary and Proper Clause made him vote in favor of the construction of the Commerce Clause in the marijuana case.<sup>462</sup> It is especially interesting because Justice Scalia voted in favor of strict construction of the Clause in *Lopez* and *Morrison*:

Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could ... undercut" its regulation of interstate commerce. ... This is not a power that threatens to obliterate the line between "what is truly national and

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<sup>455</sup> *ibid* 19

<sup>456</sup> *Raich* (n 450)

<sup>457</sup> *ibid* 17

<sup>458</sup> *ibid* 18

<sup>459</sup> *ibid* 21 and 32

<sup>460</sup> *ibid* 24

<sup>461</sup> *ibid* 25

<sup>462</sup> Also Justice Thomas started his dissent with reference to the Necessary and Proper Clause. Because the activity was neither interstate nor commercial, Justice Thomas did not believe the regulation could pass muster under either the Commerce Clause or the Necessary and Proper Clause. (61-62)

what is truly local.”<sup>463</sup>

Therefore Scalia read the Necessary and Proper Clause as a primary source of Congress's ability to regulate intrastate activities. He even went one step further, saying that those intrastate activities do not even have to affect "substantially" interstate commerce to be within Congress's scope of authority.<sup>464</sup> Scalia adapted Marshall's understanding of "necessary" being "appropriate" and "plainly adapted" to attain a legitimate end and argued that noneconomic local activity could be regulated, if necessary, to a more general regulatory scheme.<sup>465</sup> Scalia relied fully on the Necessary and Proper Clause to uphold the law. He called the categories from the *Lopez* test "misleading" because the powers to regulate activities affecting commerce derive rather from the Necessary and Proper Clause than from the Commerce Clause itself, and are "incomplete" because the authority to enact necessary and proper laws to implement the Commerce Clause also includes the authority to regulate activities that do not themselves substantially affect interstate commerce when these are necessary to make the regulation of interstate commerce more effective.<sup>466</sup> Scalia recognized the congressional right to exercise "every power needed to make... effective" the regulation of interstate commerce, thus it eliminated economic-noneconomic dichotomy of regulated activities that requires creativity in linguistic interpretation.<sup>467</sup> The Necessary and Proper Clause imposed only the requirements noted by Chief Justice Marshall in *McCulloch*, namely that the means chosen to exercise an enumerated power be "reasonably adapted" to the attainment of a legitimate end. According to Scalia's minimalism, the Court should only use the Necessary and Proper Clause to invalidate congressional action in narrow, obvious cases such as *Raich* - cases that demonstrate obvious encroachment into state sovereignty.<sup>468</sup>

On the other hand, Justice Stevens writing for the majority did not use the Necessary and Proper Clause as a basic justification for his findings. Nonetheless, he referred to Congress's authority to "make all laws which shall be necessary and proper" to carry out its power to regulate interstate commerce in order to support Congress's rational belief that certain intrastate activities "substantially affected" interstate commerce.<sup>469</sup> The Necessary and Proper Clause, regardless of the little attention it got from the Court, is still an important part of the opinion. It justified Justice Stevens' claim that federal government can reach intrastate medical marijuana use, without the need to fit that use into a particular "class of

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<sup>463</sup> *Raich* (n 450) Scalia concurring

<sup>464</sup> *ibid* 35

<sup>465</sup> *ibid* 39-40.

<sup>466</sup> The relation between the Necessary and Proper Clause and the Commerce Clause had already been altered, when compared with *Lopez*, in *Pierce County*, 537 US 129 (2003). The Court observed in a footnote that [b]ecause we conclude that Congress has authority under the Commerce Clause [to enact statutory provisions] we need to decide whether they could also be a proper exercise of Congress' authority under the Spending Clause or the Necessary and Proper Clause."

<sup>467</sup> *Raich* (n 450) 37 (citing *United States v Wrightwood Dairy Co*, 315 US 110 (1942) 118-19).

<sup>468</sup> Cf. when a 'La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such.' (*Printz* (n 421) 923-24 (citing *The Federalist No. 33* (n ) 204)

<sup>469</sup> *Raich* (n 450) 22

activities“.<sup>470</sup>

*Raich* does not look as revolutionary as *Lopez* because it relies on *Lopez*.<sup>471</sup> Justice Stevens used the language of the latter case to justify his position on the scope of federal powers. The *Lopez* and *Morrison* Courts created a de facto requirement that the regulated intrastate activity should be “economic” in nature. But they did not define precisely what “economic” means. Also, the phrase “substantially affected” left some room for interpretation for the future Courts. Therefore, the *Lopez* opinion was very flexible: it left room for many readings, and only waited for a new majority to reinterpret it. As Professor Pushaw notes, *Lopez* and *Morrison* “invite discretionary application of imprecise standards on a case-by-case basis.”<sup>472</sup> Luckily for the pro-strong government judges, Justice Scalia joined them with his originalist reading of the Necessary and Proper Clause. *Raich* signals a return to the pre-*Lopez* era of nearly unchecked federal incursion into traditional state powers and provides a definition for economic activity - “the production, distribution, and consumption of commodities” - that admits no limit to the scope of activity within Congress’s regulatory power.<sup>473</sup> *Raich* reasserted the “rational basis” scrutiny for assessing congressional determinations that a particular activity, taken in the aggregate, substantially affects interstate commerce. It suggested that the Court will uphold legislation touching even intrastate noneconomic activity if a rational basis for such an effect exists.<sup>474</sup>

The new majority in the case provoked a reaction from the conservative justices. Justice Thomas wrote in his dissent:

The majority’s rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively (...) If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 states.<sup>475</sup>

Dissenting justices warned that virtually all activity involves the “distribution” or “consumption” of a commodity that has traveled through interstate commerce or affects the market demand for that product. They could not understand how the Commerce Clause

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<sup>470</sup> There were also different opinions where the Court decided that some of Congress's power is not based on the Necessary and Proper Clause at all. In *Pierce County, Washington v Guillen* the Court uphold a federal ban on using information gathered by states under the Federal Highway Safety Act from being used as evidence in a subsequent tort suit against the state as within the scope of federal power. The ban was within Congress's Commerce Clause power. Then it is noted that “we need not decide whether they could also be a proper exercise of Congress's authority under the Spending Clause or the Necessary and Proper Clause.” Here the Court expressly excluded the Necessary and Proper Clause as a basis for the Congress's power and stated that the power is one of those enumerated in the Constitution.

<sup>471</sup> The *Raich* Court’s most obvious innovation was its adoption of an extraordinarily broad definition of “economics,” taken from a 1966 Webster’s dictionary: “refers to ‘the production, distribution, and consumption of commodities.’” (*Raich* 125 SCt 2211 (citing Webster’s Third New International Dictionary (1966) 720).

<sup>472</sup> Robert Pushaw Jr, ‘The Medical Marijuana Case: A Commerce Clause Counter-Revolution?’, (2005) 9 *Lewis & Clark Law Review*. 878, 908

<sup>473</sup> *Raich* (n 450) 25-26

<sup>474</sup> *ibid* 32

<sup>475</sup> *ibid*, Thomas dissenting

had become a regulation controlling all activities involving the production, distribution, or consumption of a commodity whose aggregate effect exerts a substantial impact on interstate commerce. Justice O'Connor lamented in her dissent that Raich relegates Lopez to "nothing more than a drafting guide," makes it easier for Congress to regulate noneconomic, intrastate activity.<sup>476</sup>

In *Raich* the Court came back on the path of providing more extensive congressional powers. Therefore, the "trend" marked by *Lopez*, *Printz* and *Morrison* broke down. The Commerce Clause was interpreted very broadly, granting new powers that were very delicate from the point of view of public opinion. The Court majority did not treat the Necessary and Proper Clause with great care as part of the process of strengthening the federal power, but the opinion of Justice Scalia delivered a powerful theoretical argument supporting the Clause as an integral part of the shift.

#### **5.4. Comstock**

This tendency continued with *United States v. Comstock*,<sup>477</sup> in which the Court had to answer whether Congress had the constitutional authority to enact the Adam Walsh Protection and Safety Act. The US Court of Appeals for the Fourth Circuit held that the Protection and Safety Act exceeded the scope of Congress' authority since it enacted a law that could confine a person solely because of "sexual dangerousness," and the government need not even allege that this "dangerousness" violated any federal law. Argued in January 2010 by Solicitor General Elena Kagan, today a Supreme Court Justice, the United States' position was that the Necessary and Proper Clause gave Congress the power to enact the law.<sup>478</sup> The Supreme Court held that the Necessary and Proper Clause grants Congress sufficient authority to enact the Adam Walsh Protection and Safety Act, which had empowered federal officials to order the indefinite civil commitment of "sexually dangerous" individuals who had already finished serving their prison sentences. The Supreme Court held that Congress acted pursuant to its Article I powers in enacting a federal civil-commitment statute that authorized the Department of Justice to detain mentally ill, sexually dangerous prisoners beyond the term of their sentences. The Court concluded that the Necessary and Proper Clause authorizes any exercise of congressional power that "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock* represents the Supreme Court's detailed application of Necessary and Proper Clause doctrine.<sup>479</sup> The Court relies strongly on *McCulloch* for the proposition that "the

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<sup>476</sup> *ibid* 46

<sup>477</sup> 560 US 126 (2010)

<sup>478</sup> Kagan focused her arguments exclusively on the Necessary and Proper Clause and did not press the Commerce Clause argument that federal prosecutors had raised in the lower courts. (Brief for Petitioners, *United States v Comstock*, 130 S Ct 1949 (2010) (No. 08-1224), 2009 WL 2896312)

<sup>479</sup> *Comstock* (n 473) 1965

Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise'.<sup>480</sup> The majority opinion enumerated five "considerations" that supported the statute's constitutional validity: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope."<sup>481</sup>

Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.<sup>482</sup>

The Court reflected on all five considerations in relation with the case at hand. The *Comstock* Court noted, quoting *McCulloch*, that (1) the federal government is a government of enumerated powers, but (2) is also vested "with ample means" for the execution of those powers. It is a role of the Supreme Court to establish whether a federal statute "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."<sup>483</sup> "[T]he relevant inquiry is simply 'whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement."<sup>484</sup> As to the second one, the Court was of the opinion that the new law represented "a modest addition to a longstanding federal statutory framework, which has been in place since 1855."<sup>485</sup> Turning to the last factor, the Court found the statute not "too sweeping in its scope" and the link between the act at hand and an enumerated Article I power "not too attenuated."<sup>486</sup> Justice Stephen G. Breyer, writing for the majority, concluded that the *Lopez* admonition that courts should not "pile inference upon inference" did not present any problems with respect to the civil-commitment statute.<sup>487</sup> More precisely, the *Comstock* Court discerned that "the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well."<sup>488</sup> The Supreme Court rejected the notion that "Congress's authority can be no more than one step removed from a specifically enumerated power."<sup>489</sup>

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<sup>480</sup> *ibid*

<sup>481</sup> *ibid*

<sup>482</sup> *ibid*

<sup>483</sup> *ibid*

<sup>484</sup> *ibid* 1957

<sup>485</sup> *ibid* 1961

<sup>486</sup> *ibid* 1963

<sup>487</sup> *ibid* 1964

<sup>488</sup> *ibid* 1963

<sup>489</sup> *ibid* 1963

As regards factors 2 and 3 the Courts stated that: The federal government: (1) is the custodian of its prisoners and (2) has the power to protect the public from the threats posed by the prisoners in its

The Court explained in some detail why the Adam Walsh Act may be considered “necessary,” but it did not even consider the possibility that it might be “improper.” This was important from the perspective of the *Obamacare*<sup>490</sup> case that was scheduled to be decided soon after *Comstock* and could conceivably play a large part in how future decisions define “proper.”

Anthony Kennedy and Samuel Alito filed opinions concurring in the judgment. The first one claimed that:

[r]espondents argue that congressional authority under the Necessary and Proper Clause can be no more than one step removed from an enumerated power. This is incorrect. When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain.<sup>491</sup>

Alito noted that the majority opinion should not be construed as granting an unlimited ability by Congress to extend its power.<sup>492</sup>

The dissents, Justice Thomas joined by Justice Scalia, and other supporters of limited federal government feared that the majority's opinion would open doors for a new wave of expansion of federal authority. They found it really dangerous that the opinion uses a "rational basis" test for assessing assertions of power under the Necessary and Proper Clause. Justice Kennedy reminded us that the term should be employed with care, because it was most often employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause.<sup>493</sup>

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charge. The statute required the Attorney General (1) to allow (and indeed encourage) the state in which the prisoner was domiciled or tried to take custody and (2) to immediately release the prisoner if the state seeks to assert authority over him (1961-62).

<sup>490</sup> See II.5.5

<sup>491</sup> *ibid*, Kennedy concurring

<sup>492</sup> ‘The Necessary and Proper Clause does not give Congress *carte blanche*. Although the term ‘necessary’ does not mean ‘absolutely necessary’ or indispensable, the term requires an ‘appropriate’ link between a power conferred by the Constitution and the law enacted by Congress... And it is an obligation of this Court to enforce compliance with that limitation’. Nevertheless, Justice Alito argued that Section 4248 can be upheld as a necessary and proper adjunct to Congress’s authority to operate a federal prison system because “[j]ust as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners, it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment.’ (*Comstock* (n 473) 1970)

<sup>493</sup> See ‘The terms ‘rationally related’ and ‘rational basis’ must be employed with care, particularly if either is to be used as a stand-alone test. The phrase ‘rational basis’ most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause. Referring to this due process inquiry, and in what must be one of the most deferential formulations of the standard for reviewing legislation in all the Court’s precedents, the Court has said: ‘But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.’ *Williamson v Lee Optical of Okla*, 348 US 483 (1955) 487-88. This formulation was in a case presenting a due process challenge and a challenge to a State’s exercise of its own powers, powers not confined by the principles that control the limited nature of our National Government. The phrase, then, should not be extended uncritically to the issue before us.

Questions about the five-factor test were also asked many times, particularly that of what happens in a case where one or more of these considerations cuts the other way. If an act is "narrow in scope" or lacks "long history of federal involvement", can Congress still enact it?

## **5.5. Obamacare**

Most of the critical voices about *Comstock* were not abstract. They were declared in light of the fact that the *Obamacare*<sup>494</sup> case - an extremely hot political topic that sharply divided the political scene and public opinion - was about to be decided by the Supreme Court. Conservative observers feared that *Comstock* would lead liberal justices to announce constitutionality of the Affordable Care Act (ACA).<sup>495</sup>

The Patient Protection and Affordable Care Act was signed by President Obama in March 2010. The ACA sought to address the fact that millions of Americans had no health insurance yet actively participated in the health care market, consuming health care services for which they did not pay. The ACA aims to increase the quality and affordability of health insurance, lower the uninsured rate by expanding public and private insurance coverage, and reduce the costs of healthcare for individuals and the government. ACA includes a minimum coverage provision by amending the tax code and contains an individual mandate that requires all individuals not covered by an employer-sponsored health plan, Medicaid, Medicare or other public insurance programs (such as Tricare) to secure an approved private-insurance policy or pay a penalty. The ACA also contained an expansion of Medicaid, which states had to accept in order to receive Federal funds for Medicaid, and an employer mandate to obtain health coverage for employees. Shortly after Congress passed the ACA, Florida and 12 other states brought actions in the United States District Court for the Northern District of Florida, seeking a declaration that the ACA was unconstitutional on several grounds. These states were subsequently joined by 13 additional states, the National Federation of Independent Business, and individual plaintiffs Kaj Ahburg and Mary Brown. The plaintiffs argued that: (1) the individual mandate exceeded Congress' enumerated powers under the Commerce Clause; (2) the Medicaid expansions were unconstitutionally coercive; and (3) the employer mandate impermissibly interfered with state sovereignty.

From the perspective of this dissertation, the first question is the most important one. Eventually, the Supreme Court had to face it too. The main argument of the government was based on the Commerce and Necessary and Proper Clauses. The individual mandate is a regulation because it is part of a comprehensive overhaul of the nation's insurance industry. According to the Administration, as long as the Mandate is "an integral part of the regulatory program and...the regulatory scheme when considered as a whole is within the commerce

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<sup>494</sup> *National Federation of Independent Business v Sebelius* 567 U.S. \_\_\_\_ (2012)

<sup>495</sup> See Ilya Somin, 'Taking Stock of *Comstock*: The Necessary and Proper Clause and the Limits of Federal Power', (2009-10) *Cato Supreme Court Review* 239



power,” it is constitutional under existing Commerce Clause precedents. On the other hand, the plaintiff argued that the commerce power of Congress is so broad that any activity can be seen as part of that authority. Their main claim was that Congress lacks authority under Article I to compel individuals, simply by virtue of their status as lawful United States residents who earn income above the tax-filing threshold, to acquire and maintain insurance. What is more, the *Obamacare* cases involved regulations that told people *how* to do something they *chose* to do. Opponents of the individual mandate assert that under the Commerce Clause the federal government can regulate only activity, not inactivity. This argument derives principally from the Supreme Court’s decisions in *Lopez* and *Morrison*. The plaintiffs have pressed a slippery slope argument, contending that if Congress has authority to compel individuals to purchase health insurance, then Congress can compel individuals to do anything.<sup>496</sup> The plaintiffs *argued*, first, that Congress may regulate conduct that is not itself commerce only when that conduct “functions as a barrier or stimulant that interferes with Congress’ preferred conditions in, or regulation of, interstate commerce”.

Chief Justice Roberts, writing for the majority, agreed with the latter opinion:

Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to *regulate* commerce, not to *compel* it. Ignoring that distinction would undermine the principle that the Federal Government is a government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress’s power to “regulate Commerce.”<sup>497</sup>

Chief Justice Roberts concluded that the individual mandate was not a valid exercise of Congress' power to regulate commerce. The Commerce Clause allows Congress to regulate existing commercial activity, but not to compel individuals to participate in commerce. Justice Ginsburg, as part of an opinion concurring in part and dissenting in part, joined by Justices Breyer, Sotomayor, and Kagan disagreed with this conclusion, arguing that the Chief Justice's distinction between economic "activity" and "inactivity" is ill-defined and unsupported by either the Court's precedents or the text of the Constitution. Furthermore, individuals who fail to purchase insurance nonetheless frequently participate in the healthcare marketplace, substantially impacting healthcare commerce, and may therefore be regulated by Congress.

There was no majority as regards the opinion on whether the individual mandate fell within the Commerce Clause and the Necessary and Proper Clause. Consequently, a majority of the Justices were of the opinion that the individual mandate did not fall under these powers.<sup>498</sup>

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<sup>496</sup> Peter Smith, ‘Federalism, Lochner, and the Individual Mandate’, (2011) 91 Boston Law Review 1723, 1729 (See citations in footnote 1)

<sup>497</sup> *Obamacare* (n 490) 27

<sup>498</sup> Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, would have held that the individual mandate lay within Congress's Commerce Clause and Necessary and Proper Clause powers.

Chief Justice Roberts wrote in his ruling that the mandate cannot

be sustained under the Necessary and Proper Clause as an integral part of the Affordable Care Act's other reforms. Each of this Court's prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. [...] The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power and draw within its regulatory scope those who would otherwise be outside of it. Even if the individual mandate is "necessary" to the Affordable Care Act's other reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.<sup>499</sup>

Instead, Roberts concluded that: "The Affordable Care Act's requirement which certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness." In other words, the Individual Mandate penalty *is* a tax for the purposes of the Constitution's Taxing and Spending Clause and is a valid exercise of Congressional authority.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, chastised the majority for refusing to defer to Congress's judgments about national economic policy, as the Court had done since 1937.<sup>500</sup> She noted that the Court in *Wickard* recognized that Congress could regulate interstate commerce in wheat, "forcing some farmers into the market to buy what they could provide for themselves". Similarly, cases like *Wickard* and *Raich* countenanced federal regulation of current conduct (even noncommercial) because of its predicted future impact on interstate commerce.<sup>501</sup> Finally, she stated that under the Necessary and Proper Clause Congress could reasonably have decided that the mandate was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Congress logically found that the mandate was essential to carry into effect its overall regulatory program of reconstructing health insurance, because otherwise its goal of universal and affordable insurance would be thwarted, and the statutory guarantee of obtaining insurance would reward those who chose to wait until they had a major illness to buy a policy.<sup>502</sup>

The *Obamacare* cases were called by the *New York Times* the most significant federalism cases since the New Deal,<sup>503</sup> and received wide comment by scholars.<sup>504</sup> It was a crucial decision for drawing the boundaries of the Commerce Clause and the usage of the Necessary and Proper Clause. But those participating in the discussion cannot agree who the real

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<sup>499</sup> *Obamacare* (n 490)

<sup>500</sup> *ibid* 2619, Ginsburg concurring in part, and dissenting in part)

<sup>501</sup> *ibid* 2617-20

<sup>502</sup> *ibid* 2615-26.

<sup>503</sup> <[http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all&_r=0)> accessed 11 April 2014

<sup>504</sup> See Kenneth Cuccinelli II, 'Victory in Defeat: The Supreme Court's health-care ruling reaffirmed limits to Congress's authority', *National Review Online* (29 June 2012, retrieved 29 June 2012); Randy Barnett, 'A weird victory for federalism' *SCOTUSblog* (28 June 2012, retrieved 1 July 2012); David Kopel (June 28, 2012). "Major limits on the Congress's powers, in an opinion worthy of John Marshall", *SCOTUSblog* (28 June 2012, retrieved 1 July 2012)

winner was and what this opinion really means for the Clauses. Conservatives characterized the decision as "losing the battle but winning the war." They lost the battle over the medical insurance, but they altered the New Deal construction of the Commerce Clause.<sup>505</sup>

*Obamacare* is important for the construction of the Necessary and Proper Clause, but is neither easy nor straightforward. The most important point is that the majority could not agree if the individual mandate fell within the Clause, therefore, the Court could not say it did. Chief Justice Roberts was able to conclude in his ruling that even if the mandate was necessary it was not proper. He offered a narrow construction of implied powers, and the Necessary and Proper Clause was muffled. The supporters of state rights triumphed as regards the construction of the federal power. But four justices did not agree with that, stating that the mandate was essential for carrying into effect the Commerce Clause. Again, the rule of 5 proved to be the most important one in the Court. One justice decided on the scope of implied powers in the USA. Both sides delivered value arguments. Therefore, the scope of implied powers may change in the near future.

This case was often described as a personal victory of Chief Justice Roberts in his decades-long struggle for narrow construction of the Commerce Clause and in pushing back the Necessary and Proper Clause. By ruling that the individual mandate was permissible as a tax, he joined the Democratic appointees to uphold the law - while joining the Republican wing to gut the Commerce Clause and Necessary and Proper Clause. And he did so in an elegant, nonpartisan manner. Striking down the law at that moment would have brought the Court to tipping point and Roberts, as Chief Justice, could jeopardize its legitimacy and respect as the president of a super-institution settling all final partisan and mostly politically controversial disputes.<sup>506</sup> Will *Obamacare* become a new beginning in construction of Congress's implied powers? I do not believe so. Rather, it would be one more shift in the post-New Deal era that would not last for long. Chief Justice Roberts reached his goal and wrote a majority opinion that could potentially limit Congress's authority as compared with the doctrine developed after 1937. But its potential is limited by the Court's majority, which is very likely to change soon. Justices Scalia and Kennedy are over 75 years old and it is very

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<sup>505</sup> Consequently they did not see the Rehnquist Court - *Lopez, Printz, Morrison* - as a permanent change of the doctrine but only a temporary shift, and hoped that *Obamacare* will bring a permanent shift.

<sup>506</sup> Roberts' position was crucial since he operated in a Court of five Republican-appointed justices expected to vote to rewrite doctrine and reject *Obamacare*, and four Democratic-appointed justices expected to dissent. In fact, it's possible that Roberts was initially willing to join the four conservatives, but then flipped sides when they implacably insisted on gutting the entire measure. Media reported that Roberts probably changed his opinion because of potential "damage to the court - and to Roberts' reputation - if the court were to strike down the mandate" and increase the external pressure on Roberts, who 'is keenly aware of his leadership role on the court [and] is sensitive to how the court is perceived by the public', and pays attention to media coverage of the Court. Other observers have believed, though, that Roberts' opinion was influenced by his philosophy of judicial restraint and the lack of precedents available (Jan Crawford, CBS News, 1 July 2012). 'Roberts switched views to uphold health care law' (CBS News, 1 July 2012). This first argument is especially interesting in the light of the fact that in 2005 Senator Barack Obama opposed Roberts' nomination, stating he did not trust Roberts' political philosophy on tough questions such as 'whether the Commerce Clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce.' (Congressional Record, 109th Congress, Senate - 22 September 2005)

likely that President Obama will nominate their successors during his second term. Those nominations would finally change for good the 5-4 majority and guarantee a national, government-friendly construction of the Commerce and Necessary and Proper Clauses.

## 6. Conclusions

There are two fundamental principles of federalism: the plenary power principle and the reserved powers principle. Principles of constitutional law are nothing more than high rules or standards. Principles provide normative guidance at a higher level of abstraction and generality. Some constitutional principles may be derived from particular clauses or provisions of the Constitution.<sup>507</sup> Constitutional principles are not possible to reconcile fully because some principles are concurring, embracing the same area of activity (e.g. the principle of free speech and the principle of privacy). It is not possible to observe these principles to the full extent in any democratic constitutional system. In the USA the enumerated powers are very broad and there is no activity that could not be justified as a means rationally related to some ends within the scope of these powers. The full realization of one of the principles will often mean a deeper violation of other one(s). Principles can be fulfilled to a smaller or larger extent; in case of conflict thereof, both are still binding but one may be given priority. The law-givers and judges had to weight them to keep them balanced. The plenary power principle and the reserved powers principle form a pair of two such concurring principles. The plenary power means that Congress would possess the full measure of legislative power with respect to the enumerated powers. The plenary power of Congress allows for passing laws, levying taxes, waging wars, and holding in custody those who offend against their laws. This principle reflects the constitutional goal of creating a functional union. On the other hand, the reserved powers principle means that by the enumeration of powers the federal powers authority is limited, and states would retain a sphere of their own sovereign legislative powers. Ultimately they are impossible to reconcile. In some periods of the history of the United States, sometimes the judiciary that has the final task of balancing the principles has emphasized one of the principles, sometimes the other one. In a process of normal constitutional interpretation, the Court gives greater preference to state rights or to the plenary power. The Necessary and Proper Clause is a tool that enables the Court to change their preference if it comes to these dual principles. The Clause, along with other clauses, served as a justification for the Court's preferences. When the justices favor the plenary power principle, they use the Necessary and Proper Clause to find the nexus between the proposed legislation and the enumerated powers, even when these would fall within the scope of reserved state powers. When the majority in the Court favors the state powers, they simply would not find this nexus and interpret the Necessary and Proper Clause very narrowly.

The Necessary and Proper Clause is a source of implied powers. The only source in American constitutional law. It is a very general clause whose construction troubled the most important and wisest statesmen, the judges of the Founding Era and all consecutive ones. *McCulloch v. Maryland* became the key case that offered legal arguments for both sides of the legal-political conflict. What is more, the famous opinion of Chief Justice Marshall is still the starting point for any discussion of the scope of federal powers in the United States. The

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<sup>507</sup> There can be other sources of constitutional principles: constitutional structure or constitutional theory.

Necessary and Proper Clause was able to change the internal balance between state rights and the federal government. This is the reason why it was so important, since it was proposed in the Constitutional Convention. The person who owned the key to the construction of the Clause at the time could alter the vertical relations within the federation. The twentieth century brought an important change in the interpretation of the elastic clause that gave it even more significance: it was paired with the Commerce Clause. From that moment on, theoretically, the Court could not find any power that was within the scope of federal government authority. Practically speaking, any power could be called necessary and proper for the federal government to carry its commercial authority. The Commerce Clause addresses the ends that Congress may pursue, but paired with the Necessary and Proper Clause, it addresses the means Congress may employ in pursuit of any of its enumerated ends or powers, with the only limit that those means are both necessary and proper. This duet was responsible for some of the most dramatic changes in the judicial constitutional law in last century, from creating almost unlimited federal powers during cooperative federalism to the restraint of the new federalism.

The fact that the Necessary and Proper Clause is part of the US Constitution, together with the need for balancing the constitutional principles by the Supreme Court, explains why we cannot call the Supreme Court's behavior in the Necessary and Proper cases "judicial activism". The Court was dealing with legal cases that could not possibly be answered with a simple "yes" or "no". They were all dealing with abstract legal principles and required wise balancing. And balancing constitutional principles is not judicial activism, it is a normal judicial activity, a natural part of the constitutional legal system. The Framers saw the Supreme Court as a final check on the national government. The Court plays an active role in safeguarding other aspects of the constitutional framework - separation of powers, checks and balances, and judicial review.<sup>508</sup> When it comes to the constitutional principles, a simple subsumption is not possible. Balancing legal principles by its nature requires some subjective input. In this sense, the judicial activity of the Supreme Court is political.

With its Constitution and legal practice, the United States of America created a new form of state, a compound polity that became a modern symbol of a federation. Nothing like that was known before in legal and political history. But the success of the United States as a state over the centuries elevated the American model to the role of an example and inspiration for other compound states. However, this new country did not remain in exactly the same form as when it was born, as the model and characteristics of this republic shifted over the years. The relation between the states and the central government is a dynamic process that has been adjusting the balance of powers to the current socio-economic situation. This relationship was of special interest to many political leaders. They were trying to use their authority to shift this relationship, depending on the model of federation they favored. For obvious reasons, this issue is usually associated with Republican presidents, but Democrats also fought to design federal relations within the republic. Because the process of amending

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<sup>508</sup> 'Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers.' (*Lopez* (n 409) 577, Kennedy concurring)

the Constitution is extremely hard, a judicial path of shifting the vertical balance of powers with the Necessary and Proper Clause seemed attractive. The history of the Necessary and Proper Clause reflects the development of American federalism, and vice versa.

At the very beginning, the constitutional framework foresaw the USA as a country with a very limited national government, one of limited power and broad competences for the states. Today the situation is very different. The system has evolved and the governmental authority is clearly less limited. By decisions of Congress, administration and the courts, the government is now able to regulate most, if not all, areas of life. From parking spaces to medical care, the government is present everywhere. Both conservatives and liberals worked for that expansion. The Necessary and Proper Clause played an important role in that process.

With those changes, American federalism has evolved over the years. Political scientists have pointed out three main stages of that development: dual federalism, cooperative federalism and new federalism. During each of these periods, the balance and boundaries between the national and state governments have changed substantially. The first period was the longest, lasting for some 150 years. This was the era that shaped the American statehood and political identity; it started with the Framing era and was influenced by the people who actually designed and wrote the Constitution. This type of federalism is also called layer-cake federalism because, like a layer cake, the states and the national government each had their own distinct areas of responsibility, and the different levels rarely overlapped. The national government role was very limited. For the most part, it dealt with national defense, foreign policy and fostering commerce, whereas the states dealt with local matters, economic regulation and criminal law. Although the new system was not as loose as the one under the Articles of Confederation, many saw the new country as belonging to the states, not the people, and therefore the states' authority came first. The later period of that era was strongly influenced by the Civil War (1861-1865) and its consequences. The strong Southern sentiment - that the states should have power to overcome the wrongful decisions of the national government, especially as regards slavery - exploded. The states believed that it was they who ratified the Constitution and had the final word in that compound polity. Most Southern states eventually seceded from the Union because they felt that secession was the only way to protect their rights. Nevertheless, Abraham Lincoln's position and the final result of the military conflict saved the union and ended the debate over unlimited states' rights. The Constitution was amended and the Fourteenth Amendment was added to protect basic rights of the citizens and limit states' rights.

This was also the time when the implied powers were created. The famous *McCulloch* was a revolutionary case that allowed granting new powers. The Supreme Court used that opportunity, but in a modest way. The new republic was growing, also in terms of authorities and the use of diverse tools. The doctrine of implied powers was found to be very useful for the beginning of American statehood, but it was not abused. The spirit of dual federalism was also present in the Court and the justices did not interpret the Necessary and Proper Clause expansively (especially when compared with the next period in history). Even the Civil War and victory did not change this trend dramatically. New powers were granted,

of course, just like in *Legal Tender Cases*,<sup>509</sup> where the Supreme Court argued that legal issuance of paper money to finance the war was necessary and proper to borrowing money to fund the government, but the Court was still accepting the basic idea of dual federalism.

The twentieth century brought changes to the economy and the make-up of society, which was not inconsequential for the balance of powers between the states and national government. Industrialization and globalization resulted in deeper intervention of the government in the economy. Central administration was better equipped to deal with the new economic circumstances, and it started regulating economic activities much more than in the *laissez-faire* period of the late nineteenth century. Also, global challenges of trade justified giving more power to national authorities instead of the states. The Great Depression and its dramatic consequences for the American people created even more public concern for a more powerful government. In that atmosphere, Roosevelt introduced his New Deal and a vision of broad powers for national government. In order to implement socio-economic programs, the national government had to grow dramatically, which consequently took power away from the states. This started the era of cooperative federalism, or what we call marble-cake federalism, where there is mixing of powers, resources, and programs between and among the national, state, and local governments. In cooperative federalism, there is intermingling of all levels of government in policies and programming. One example of instruments developed in that era is categorical grants that were given to the states for specific purposes. Discretion largely remained in the hands of federal officeholders. President Johnson announced his War on Poverty program when he bypassed conservative legislatures and administrators and gave money to constituencies that would spend it on urban renewal, education, poverty programs, and job training.

The doctrine of implied powers became a mechanism of primary importance for the supporters of fast-track social changes required by the new economic reality. This was also the period when the Court paired the Necessary and Proper Clause with the Commerce Clause. This move made the growth of the federal powers almost unstoppable. Cases such as *United States v. Wrightwood Dairy Co.*,<sup>510</sup> *Wickard v. Filburn*<sup>511</sup> and others were decided and utilized the expansive reading and the means-to-end logic to create new powers of the federal government. The implied powers were granted very generously. They were part of the constitutional shift that favored a strong and active central government.

Things changed in the 1970s. The conservatives were on their wave. They were not only winning elections but they also spread and successfully promoted their ideas regarding federalism in society. They argued that the national government had grown too powerful and that power should be given back to the states. The new federalism was born. Since Nixon, every president has supported this doctrine. Alongside the signals from the White House, other political leaders and scholars were also building a narrative that favored giving back powers to the states. They believed that the national government had grown too much and that states should be given back their authority. Even President Clinton emphasized

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<sup>509</sup> *Knox v Lee* 79 US 457 (1870, Wall), *Parker v Davis* 79 US 457 (1871), *Juilliard v Greenman* 110 US 421 (1884)

<sup>510</sup> 315 US 110 (1942)

<sup>511</sup> 317 US 111 (1942)



greater efficiency and responsiveness, with national government steering but state and local governments providing the motor. Supporters of that version of federalism announced that local and state governments can be more effective because they understand the circumstances of the issue in their local communities. They argue that the one-size-fits-all program imposed by Washington DC cannot function as effectively. Therefore one of the main tools of the new federalism was block grants, that empowered the states and gave them federal dollars to spend. The people supported that vision since they were convinced that the central government is ineffective and should be restricted in what it can do

New federalism was altered as an aftermath of dramatic challenges that the United States had to face at the beginning of the twenty-first century. The war on terror and the economic crisis again justified deeper intervention of the government. The Obama administration brought a change towards progressively more active government. With more powerful federal administration, some states started to legislate in social policy areas that traditionally have been ignored or scorned by federal officials.<sup>512</sup> It looked like new federalism was only a temporary shift during a long period of time in which competences were growing, when the changes were permanent and effectively changed the authorities and the states

But it was not only the President, Congress and administration that dictated these switches over time. There was one very significant player that always had to give a final approval to the changes and legitimize the political branches' amendments in the federal system of the republic. This was the Supreme Court. Every time when the political branches were trying to introduce and reinforce new versions of federalism, it was the political branch that initiated the interpretation of the Constitution and approved the new concept of sovereignty and distribution of powers. These processes were intertwined with sustaining new concepts within society. However, it was always the Court that had the last word. There have always been judges who, using their discretion and evenhandedness or fair-mindedness, approved - or not - the new principles and theories of federalism. They used discretionary powers (part of every judicial power) to read open-ended language of the Constitution, as well as employing diverse methods and philosophical underpinnings to justify their favorite form of federalism in specific times.

This is reflected the New Deal revolution in federalism, which was initiated by external circumstances, economic in nature. The administration of the time suggested a pack of profound reforms that shook the balance between the states and the national government. But all these changes could have been stopped by the Court. And they almost have been. But Roosevelt's political agenda and personality put so much pressure on justices that his acts were declared constitutional and provoked an earthquake in American federalism not known before. Roosevelt even used the threat of "packing the Court" with new justices to

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<sup>512</sup> And '[t]hese initiatives, which encompass advancing gay and lesbian rights, banking regulation, health care, environmental control, and international law principles, have coalesced to form 'blue state federalism,' a progressive metaphor favoring the cooperative brand of federalism that defined post-New Deal politics up until 1960s. Notably, blue state federalism stands in stark contrast to the conservative 'Constitution in Exile' movement of an earlier time period, which fits more comfortably with the model of dual federalism and its assumption of strictly defined governmental powers.' (Banks & Blakeman (n 400) 19)

change the majority - a drastic tool, alien to American democracy. The New Deal Court almost abandoned the Tenth Amendment in its reading of the constitutional provisions and expanded heavily Congress's authority under the Commerce and Necessary and Proper Clauses. The Court was very consistent in its pro-governmental rhetoric. The Court was also building different versions of federalism on the foundation of progressive social policy. The Court showed that it was going to protect politically marginalized citizens. The liberal Warren Court had a strong preference of a political model of the USA. It supported and catalyzed egalitarian social change. One of the most important decisions here was *Brown v. Board of Education* that gave an impulse to finish racial segregation in schools. This coincided with progressive Lyndon Johnson's Great Society project and his "creative federalism". Johnson believed in greater governmental presence in the society. The liberal Court became the avant-garde of this program. It constructed the Constitution in such a way that it was accused of transforming the states into "objects of federal regulations, rather than independent partners."

But *Brown* was not the only decision through which the Court was facilitating construction of the cooperative federal model of the United States. Other landmark cases included *Gideon v. Wainwright*<sup>513</sup> and *Miranda v. Arizona*,<sup>514</sup> in which the Court showed that a strong national government was required to protect people from the states and started allowing Congress more freedom to define the scope of federal powers. The Supreme Court largely gave up on trying to enforce borders between state and national authority. As I mentioned earlier, this started with the New Deal cases. We can point to a chain of opinions that were indispensable for that new reading of federalism: *Hines v. Davidowitz*,<sup>515</sup> *Pennsylvania v. Nelson*<sup>516</sup> and *Guss v. Utah Labor Relations Bd*<sup>517</sup> all influenced the doctrine of preemption. The Court has also applied the Due Process Clause of the Fourteenth Amendment in several areas related to state civil proceedings: *Slochower v. Board of Higher Education*,<sup>518</sup> *Konigsberg v. State Bar*<sup>519</sup> and *Speiser v. Randall*.<sup>520</sup> The Court influenced the sensitive issue of taxation, in its relation to commerce, in *Michigan-Wisconsin Pipe Line Co. v. Calver*,<sup>521</sup> *Railway Express Agency v. Virgin*,<sup>522</sup> and *Youngstown Sheet & Tube Co. v. Bower*.<sup>523</sup>

This era ended when the judges that Reagan and his successor George H.W. Bush placed in

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<sup>513</sup> 372 US 335 (1963). The Supreme Court unanimously ruled that state courts are required under the Fourteenth Amendment to the US Constitution to provide counsel in criminal cases to represent defendants who are unable to afford to pay their own attorneys.

<sup>514</sup> 384 US 436 (1966). The Court held that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and that the defendant not only understood these rights, but voluntarily waived them.

<sup>515</sup> 312 US 52 (1941)

<sup>516</sup> 350 US 497 (1956) 502

<sup>517</sup> 353 US 1 (1957)

<sup>518</sup> 350 US 551 (1956)

<sup>519</sup> 353 US 252 (1957)

<sup>520</sup> 357 US 513 (1958)

<sup>521</sup> 347 US 157 (1954)

<sup>522</sup> 347 US 359 (1954)

<sup>523</sup> 358 US 534 (1959)

the federal courts developed the jurisprudence of federalism to counter the previous doctrine, i.e. the more federation-friendly jurisprudence of the Warren and Burger Courts. When the Reagan and Bush appointees finally attained a majority, they placed new limits on the power of the national government. In the period of new federalism, we can see how much the implied power cases shaped federalism as such to a greater extent than before. The most important Supreme Court cases for reinstallation of dual federalism philosophy are those concerning the Commerce Clause and the Necessary and Proper Clause: *Garcia v. San Antonio Metropolitan Transit Authority*, *United States v. Lopez*, and *Seminole Tribe*. But the Court also attempted to draw constitutional boundaries in other cases by distinguishing between the “truly local” and the “truly national”: *United States v. Morrison*<sup>524</sup> and *Schechter Poultry Corp. v. United States*. “This Rehnquist Court brand of federalism differed in important respects from dual federalism. The Rehnquist Court did not seek to divide the world into two regulatory fields, one the exclusive preserve of the federal government, the other the exclusive domain of the states. Unlike dual federalism, the Rehnquist Court accepted substantial areas of concurrent state and federal authority.”<sup>525</sup>

It was the same in the case of the first period of dual federalism. The main difference between that period and the two other above-mentioned ones is that it lasted much longer. Therefore, there are many more cases that could be described as significant. One has to start with *McCulloch* and point to *Gibbons v. Ogden*,<sup>526</sup> *Prigg v. Pennsylvania*,<sup>527</sup> *Dred Scott v. Sandford*,<sup>528</sup>, *Plessy v. Ferguson*<sup>529</sup> or *Bradwell v. Illinois*<sup>530</sup>. The Court tended to limit the national government’s authority in areas such as slavery and civil rights. The fact that justices felt that they should protect the model of federalism they knew was described by Justice David Brewer in 1905:

We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere, is the peculiar duty of all courts, preeminently of this ...<sup>531</sup>

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<sup>524</sup> 529 US 598

<sup>525</sup> Robert Shapiro, ‘Interactive Federalism: Feeling the Gaps. From Dualist Federalism to Interactive Federalism’ (2006) 56 *Emory Law Journal* 6

<sup>526</sup> 22 US 1 (1824). The Court held that the power to regulate interstate commerce was granted to Congress by the Commerce Clause of the United States Constitution.

<sup>527</sup> 41 US 539 (1842). The Court held that the Federal Fugitive Slave Act precluded a Pennsylvania state law that prohibited blacks from being taken out of Pennsylvania into slavery.

<sup>528</sup> 60 US 393 (1857). The Court held that African Americans, whether slave or free, could not be American citizens and therefore had no standing to sue in federal court, and that the federal government had no power to regulate slavery in the federal territories acquired after the creation of the United States.

<sup>529</sup> 163 US 537 (1896). The Court upheld the constitutionality of state laws requiring racial segregation in public facilities under the doctrine of ‘separate but equal’.

<sup>530</sup> 83 US 130 (1873)

<sup>531</sup> *South Carolina v United States*, 199 US 437 (1905) 448

We should point out the parallel between the cases that regard federalism as such and the cases on implied powers. The Court used the issue of implied powers, especially in the area of commerce, to influence its doctrine of federalism in general. Most of the time the Necessary and Proper Clause was paired with the Commerce Clause. This is one of the most sensitive components of federalism. In some of the periods distinguished above, the Court cases concerning implied powers were mentioned as the most important ones for the development of federalism in general. In others, they were simply within a broader catalogue of opinions that established fundamentals of the current version of judicially enforced federalism. The development of the doctrine of implied powers was always commensurate with the development of federalism as such. When the Court was giving more space for Congress activities, it also protected its implied powers. When federal authority was restricted, the scope of implied powers shrank too. For the Court, implied powers became one of the significant instruments to recreate federalism. A change in perception of balance between the states and the national government was not possible without commenting and recreating the implied powers. The Necessary and Proper Clause became the easiest tool to show to political branches, to the bureaucracy and to scholars, in that justices were willing to offer a new reading of the Constitution and federalism. The Necessary and Proper Clause became the litmus paper of the system. This provision is so general and open-ended that it was perfect to use as an instrument for big changes in the constitutional order of the compound republic. Justices were giving new meaning to the Clause whenever they could to accomplish big systemic goals.

The Necessary and Proper Clause became a dangerous gun in the hands of those willing to modify American federalism, in particular to expand governmental powers, when it was coupled with the Commerce Clause.<sup>532</sup> The Commerce Clause has historically been viewed as both a grant of congressional authority and as a restriction on states' powers to regulate. The Commerce Clause represents one of the most fundamental powers delegated to the Congress by the founders. Therefore, the Commerce Clause alone was important and dangerous for the authority of the states, and connecting it with the doctrine of implied powers only strengthened its centrifugal force in the constitutional construction of the American republic.

It is noteworthy that the Commerce Clause powers were very probably the most important expressed powers to be coupled with the Necessary and Proper Clause from the federalism perspective. However, it was not the only clause that had something to say here. As stated earlier in this chapter, the implied powers were also paired with the Fourteenth Amendment. Also the taxing and the spending powers had some importance. Two additional powers have inspired the Court to reflect on its relation with the Necessary and Proper Clause, namely the war power and related powers to provide for and regulate an army and navy, and to call up the militia (Article 1, §8, cls 11-16), and the patent and copyright powers (Article 1, §8, cl 8). Levy writes with reference to the first of those powers:

The Court has construed the war power and the related powers, taken together with the Necessary and Proper Clause, broadly. For example, in *Woods v Cloyd W. Miller Co.* (1948),

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<sup>532</sup> See II.2

the Court upheld the Housing and Rent Act of 1947 as a valid exercise of the war power notwithstanding its adoption after the termination of the World War II, because it responded to the housing crisis created by the demobilization of the armed forces at the end of the war. (...) Of particular relevance for the Necessary and Proper Clause is the Court decision in *Toth v. Quarles* (1955), which invalidated the court martial of a former member of the military for a nonmilitary crime committed while serving outside the country. The Court reasoned that such a military trial could not be sustained by the power to make rules to govern the armed forces, adopting the premise that the authority was "the least possible power adequate to the end proposed".<sup>533</sup>

He sums up that it is a narrow approach, contrary to the *McCulloch* test, because of the objective of protection of individual rights. When it comes to the patent and copyright powers, Levy observes that they are:

both a grant of power and a limitation. (...) In its recent decision upholding the extension of the terms of copyrights for existing works, *Eldred v. Ashcroft* (2013), the Court applied a deferential rational basis test to uphold the Copyright Term Extension Act, without mentioning the Necessary and Proper Clause or *McCulloch*. In the course of its analysis, the Court rejected the argument that legislation pursuant to the Clause should be subject to "heightened" judicial review because it, like the Fourteenth Amendment power, was substantively limited by the terms of its grant. The Court stated broadly that the congruence and proportionality test 'does not hold sway for legislation enacted, as copyright laws are, pursuant to Article 1 authorization'.<sup>534</sup>

But it was the Commerce Clause that was changed into a transmitter, letting the national government regulate whatever the American people deems to be a national problem.<sup>535</sup> Until at least 1920, the Commerce Clause referred to trade, transportation, and communication that took place across state lines. It was a definition taken from *Gibbons v. Ogden*. Chief Justice Marshall supported in *Gibbons v. Ogden* his findings on the Necessary and Proper Clause. He coupled the two clauses to find new competences of Congress. Towards the end of the nineteenth century, the Commerce Clause became embroiled in the political turmoil of the Progressive Era.<sup>536</sup> In *Wickard v. Filburn*, the most influential Commerce Clause case ever since the New Deal, Justice Jackson's opinion for the Court discouraged any discussion of how the Clause relates to contemporary ideals, individual rights, or good government. "[W]ith the wisdom, workability, or fairness, of [Congress's] plan for regulation" under the Commerce Clause, he concluded, "we have nothing to do." Commerce Clause was given a meaning that no one had expected before. The definition of commerce was expanded at the beginning of the twentieth century to be again limited in the 1970s. The Court used extensively the fact that there was no binding definition for "local activity affecting interstate commerce". The Constitution does not explicitly define those words. The notions "local activity" and "interstate commerce" were so vague that justices transformed them into a platform to expand Congress's powers. The word commerce was given diverse definitions; some claim that it refers simply to trade or exchange, while others

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<sup>533</sup> Levy (n 308) 100

<sup>534</sup> *ibid* 101

<sup>535</sup> Eric Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison* (2003) 11 *William & Marry Bill of Rights Journal*. 403

<sup>536</sup> *ibid* 412

argue that the Framers intended to describe more broadly commercial and social links between citizens of different states. This process of expansion looked like an endless one. The Court found more and more powers that were connected with commerce, both economic and non-economic. The outer boundary of the Commerce Clause became the outer boundary of American federalism.

But it cannot be forgotten that the expansion of the Commerce Clause was possible only as a result of pairing it with the Necessary and Proper Clause. All new powers and all new activities were discovered as an exercise of the specifically enumerated power to regulate interstate commerce. In other words, the new powers viewed the regulation of local activities as an available means to achieve the constitutional goals of the Commerce Clause. They were powers implied from the Commerce Clause, thanks to the Necessary and Proper Clause. This puts the Necessary and Proper Clause in the very middle of this accelerated process of shifting federalism in the USA.

### III. IMPLIED POWERS IN THE EUROPEAN UNION

As we saw, in the United States implied powers are recognized as an important part of constitutional legal order and a crucial tool in shifting the balance of power between the federal government and the states. The situation looks very different in the European Union. There, the position of the implied powers is much more complicated because the implied powers have not been analyzed as deeply and their role is not commonly acknowledged by the lawyers and scholars as essential for the form of the European government. In this chapter I will deliver a complete picture of the doctrine of implied powers in the European context and their relations with the two fundamental principles of the EU.

I will start by studying the exhaustive case law of implied powers in greater depth. I will analyze all cases that have contributed to the creation of implied powers in the Community and have transformed the doctrine through the decades. Luckily, there are not as many of them as in the American context. I will divide them into two groups, external and internal implied powers. This division should be clear and perceptible, because I would like to give a clear signal that the implied powers in the EU are not only external powers, as many people believe. Of course, the external implied powers came first and the development thereof was the longest, with the largest number of cases and doctrinal nuances. The famous ERTA case <sup>[1]</sup> gave rise to all of the implied powers in the EU and all implied powers have been analyzed in the context of that famous case. The ERTA decision will be analyzed very carefully in this chapter as a key to the whole doctrine. Nevertheless, we will see that some very important internal powers also exist. Some of them, namely implied powers in criminal affairs, are some of the most substantial in the whole development of the doctrine, since they encroach heavily on sovereignty and thus shift the balance of authority inside the EU in a very significant way that may be decisive for the federal characteristics of the EU. The study of implied powers, which is based on the teleological interpretation of the ECJ, will also be supplemented with an analysis of the flexibility clause that is a separate source of implied powers. This clause has existed since the Treaty of Rome and has been transformed alongside the new treaties. We will examine whether the clause was a useful mechanism for the EU institutions and how it has changed through the decades.

The case study will allow us to arrive at some conclusions. The first one will concern the variety of implied powers. All of the ECJ decisions that have been analyzed make it clear that one type of implied powers does not exist. The notion of implied powers in the European context is very diverse. Different implied powers have different positions and play different roles in the European system of government. I will suggest an original division of implied powers. This classification will serve us in the final chapter, during the discussion about the connection between implied powers and federalism as such. The latter will allow us to reflect on the European Union as a federal polity.

The complete study of the development of the doctrine of implied powers since its beginning makes it possible to make general conclusions about the development itself. The process will be highlighted. The decisions were not unrelated. We should not see them as independent entities that changed the balance of power spontaneously. We can group them and show periodic shifts in the development of the doctrine. Periods of rapid progress were always followed by periods of slack. Knowing that, I will try to find out why this development had a periodic, sinusoidal characteristic. I will look at the ECJ decisions in a broader context of other crucial judicial decisions and the general political atmosphere of the time. I will show that the shifts in the doctrine of implied powers are a consequence of all these factors.

Finally, I will show the ECJ's role in the whole process of the development of the doctrine. These shifts – along with the general, permanent progress of the scope of implied powers – are connected with the Court's long-time agenda and its relations with other actors. The Court built the doctrine of implied powers on its relations with the main political participants. The Commission and the European Parliament were its allies, the Member States and the Council were its opponents. The Court used the power crises inside the EU to push forward its agenda and, conversely, acted more moderately in times of political strength of the Member States. The Court built its very unique role on that interplay - a role that allowed it to consequently create a stronger Union of the peoples of Europe.

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<sup>[1]</sup> Case 22/70 Commission v Council (ERTA) [1971] ECR 263



## 1. External Implied Powers

For many, the doctrine of implied powers in the European Union is equated with the external competences. There is often a mechanical thinking: “I say implied powers in the EU, you think the external implied powers.” As we will observe, this is not true: implied powers in the European context cannot and should not be reduced to those connected with international capacities of the EU. This being said, it must be stressed that the history of the doctrine of implied powers started for real with the development of the external competences. This was connected with a very specific construction of the Treaty that focused on the internal measures, leaving the external competences of the Community practically unregulated. This also provided opportunities for the ECJ to fill that gap. Their discovery was a groundbreaking moment in the early history of the Community and happened in the famous *ERTA* case, which is why I will start this chapter with an extensive analysis of that ECJ decision. It will be studied in detail since it is the foundation of the doctrine of implied powers and understanding thereof is crucial for understanding the entire policy of granting implied powers in the EU. The acceptance thereof gave a green light for the doctrine to speed up integration in the Community and, consequently, to change the new international organization into a new form of a compound state as we know it today. *ERTA* started a whole stream of cases that developed the doctrine of external implied powers. We will see here the full picture of that process, ending with codification of those powers in the Treaty - a symbolic validation of those powers in the supreme law of the polity.

### 1.1. *The ERTA case*

The European Road Transport Agreement (hereinafter *ERTA*; sometimes *AERT* in the judgements) is an agreement on the working practices of the international road transport crews, signed in Geneva on 19 January 1962, under the auspices of the UN Economic Commission for Europe. Among the signatories were five out of six original Member States. However, the agreement never went into force as it lacked the sufficient number of ratifications. New negotiations took place, starting in 1967. Meanwhile, Regulation 543/69 was adopted to cover the area of transport that *ERTA* was intended to regulate. Consequently, the Council decided on the position it would take on *ERTA* negotiations and announced this in a resolution, on 20 March 1970. The Council decided that the negotiations would continue to be conducted by the Member States, and thus it did not agree with the Commission’s proposal that the Community should negotiate instead of the Member States. Finally, the Member States conducted and concluded *ERTA* negotiations on the basis of the afore-mentioned position. The Commission submitted an application for annulment of the Council resolution on the grounds that: (1) the Regulation 543/69 transferred the competence for a common transport policy to the Community, therefore the Community

was empowered to negotiate and conclude the agreement in question, and (2) the Council breached articles 75, 228 and 235 of the Treaty concerning the distribution of powers between the Council and the Commission and, consequently, the rights of the Commission to negotiate the agreement.

The Council argued that the action for annulment itself was inadmissible, on the grounds that the proceedings in question were not an act subject to review under Article 173 of the Treaty.<sup>537</sup> The ECJ was required - in order to take a decision on this point - to determine which authority was empowered to negotiate and conclude the ERTA Agreement. The legal effect of the proceedings differed according to whether they were regarded as constituting the exercise of powers conferred on the Community or as acknowledging a co-ordination by the Member States of the exercise of powers which remained vested in them. The examination of the Community's external powers was placed in a section of the "initial question", even before the examination of admissibility. Having that in mind, we can say that the *ERTA* judgment has a complex structure. For instance:

6. The Commission takes the view that Article 75 of the Treaty, which conferred on the Community powers defined in wide terms with a view to implementing the common transport policy, must apply to external relations just as much as to domestic measures in the sphere envisaged.

9. The Council on the other hand, contends that since the Community only has such powers as have been conferred on it, authority to enter into agreements with third countries cannot be assumed in the absence of an express provision in the Treaty.<sup>538</sup>

69. The Commission claims that in the view of the powers vested in the Community under the Article 75, the AETR should have been negotiated and concluded by the Community in accordance with the Community procedure defined by Article 228(1).

70. Although the Council may, by virtue of these provisions, decide in each case whether it is expedient to enter an agreement with third countries, it does not enjoy discretion to decide whether to proceed through inter-governmental or Community channels.<sup>539</sup>

Therefore, the kingpin of the legal argument was the question of the division of powers. More precisely, it centered on the issue of whether the action questioned constituted the exercise of powers conferred on the Community or powers that belong to the Member States and should be exercised by a coordinated action thereof. The Commission represented the position that in the *ERTA* case the power was vested in the Community, and only the Community could take action. On the other hand the Council was trying to convince the Court that in this case the authority had never been transferred to the Community and it still belonged to the Member States, and that only their will could be decisive in signing (or not signing) the *ERTA* agreement.

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<sup>537</sup> *ibid* 2-3

<sup>538</sup> *ERTA* (n 533)

<sup>539</sup> *ibid*

### 1.1.1. External Powers of the Communities

The dispute about the competences of the Community in the *ERTA* case was not abstract. The Court case did not deal with a general question of the division of powers or the vertical transfer of the competences. In the case in question, the Court had to decide about the issue of external relations of the Community and the competence to enter into international agreements.

The Commission and the Council presented two very different visions of the solution of the problem. They represented two diverse standpoints on the issue of the powers of the Union and the relation of powers between the Union and the Member States. The Commission's stand on the issue was clear: the Community powers in the field of the common transport policy applied not only in internal affairs but also in external relations. It believed that only these powers ensure the full effect of the domestic rules. The Council's position was based on the theory that the Community has only as much power as it had been granted by the Member States and, when the Treaties do not comprehend such a provision, the power to enter into agreements with third parties cannot be assumed. Article 75 authorizes only the internal measures. Therefore, in the absence of specific provisions on the conclusion of international agreements in the field of transport policy, the general system of Community law should obtain.

The importance of the competences debate in this area can be partially attributed to the Community's constitutional pattern. In the original Treaty - and in all the amendments - emphasis was put on the internal structure of the Communities and the domestic policies, with a common market as a symbol placed in the very heart of the document. The treaty-makers disregarded the external competences, creating a minefield for future decision-makers and the Court. Before the *ERTA* case, the position of the Community as an international person had been a process of an ongoing interaction between the Member States as the authors of the Treaty and the Court.<sup>540</sup> The latter, without avoiding very controversial decisions, gained a strong position among other European institutions and became a primary player in a game where the constitutional design of the Community was at stake.

The Treaty contains no general provision which expressly recognizes the international capacity of the Community. The most important in this sphere are Articles 210 and 211 of the Treaty:

Art. 210. The Community shall have legal personality.

Art. 211. In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.

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<sup>540</sup> Antonis Antoniadis, 'The EU's Implied Competence to Conclude International Agreements after the Reform Treaty. Reformed Enough?' in Finn Laursen (ed), *The EU in the Global Political Economy* (PIE Peter Lang 2009) 68

Additionally, some provisions provided explicitly for competence to enter into agreements with third countries or international organizations in specified policy areas. In the original Treaty, the only such provisions were those on the common commercial policy. The procedure was described in Articles 111(2), 113 and 114.<sup>541</sup> Furthermore, Article 238 deals with agreements establishing associations, according to which the Community could conclude with one or more states or international organizations agreements establishing an association involving reciprocal rights and obligations, common actions, and special procedures.<sup>542</sup> Moreover, there were three provisions on other forms of international cooperation: Article 229 on the duty of the Commission to maintain appropriate relations with the United Nations, the GATT organs and other international organizations; Article 230 on cooperation with the Council of Europe; and Article 231 on cooperation with the OECD.

The Single European Act (1986) extended the Community's explicit external competences to other fields that were thought to form part of the newly introduced concept of the 'internal market': agriculture and fisheries (Article 37), transport (Article 71), competition (Article 83), the harmonization of indirect taxation (Article 93), and the general approximation of legislation and administrative practices (Article 94). In the process of amendment, the SEA added Article 130m (prev. 130r), relating to agreements on co-operation in research and technological development, and Article 130r(4) (prev. 130r(5)) on research in environmental matters; thus, we have been able to witness an evolution in tracing out the express external powers of the Community. The EU Treaty added Article 109(3) on the agreements on monetary or foreign exchange regime matters in the third stage of the EMU and 130(y) on

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<sup>541</sup> Article 111.2. The Commission shall submit to the Council recommendations for tariff negotiations with third countries in respect of the common customs tariff. The Council shall authorise the Commission to open such negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

Article 113. 1. After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

Article 114 The agreements referred to in Article 111(2) and in Article 113 shall be concluded by the Council on behalf of the Community, acting unanimously during the first two stages and by a qualified majority thereafter.

<sup>542</sup> Art. 238. The Community may conclude with a third State, a union of States or an international organisation agreement establishing an association involving reciprocal rights and obligations, common action and special procedures. These agreements shall be concluded by the Council, acting unanimously after consulting the Assembly [European Parliament]. Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

development co-operation.<sup>543</sup> The Treaties of Maastricht, Amsterdam and Nice subsequently provided not only for a broadening of the scope of the Common Commercial Policy, but also for external powers in development policy (Article 181), monetary matters, cooperation powers with third states (related to education, culture, health and trans-European networks), including a new legal basis for economic, financial and technical cooperation with third countries (Article 181a).<sup>544</sup>

Irrespective to the limited number of explicit provisions in the original Treaty, the Community was already involved in many agreements by the end of the 1960s. Because of the Court's activity, the capacity of the Community to enter into legal relations with third states or other international organizations has been undisputed. It is noteworthy that the original Treaty did not mention the international personality<sup>545</sup> of the Community at all. This is in clear contrast with the explicitness found in the Coal and Steel Treaty and the Euroatom Treaty. According to Article 6 ECSC, "In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives". And the Article is preceded and followed by paragraphs that correspond, respectively, to Article 210 and to the first sentence of Article 211 EC. The Euroatom Treaty provides in Article 101(1) that "The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, and international organization or a national of a third State".

The Court referred to the legal personality of the Community in its landmark decision of *Costa v. ENEL*<sup>546</sup>. It confirmed there the Community's "own personality, its own legal capacity and capacity of representation on the international plane".<sup>547</sup> Therefore, the Court reaffirmed Article 210 of the Treaty, and expressly mentioned the international aspect thereof. On top of that, in another milestone decision, *Van Gend en Loos*,<sup>548</sup> the Court declared the direct effect of the European law.<sup>549</sup> To arrive at this conclusion, it argued that the Community represents a new legal order of the international law. By proclaiming that as a precondition for the direct effect of the Treaty, this decision, paradoxically, represents a manifestation of the state-only conception of international personality.<sup>550</sup> These two

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<sup>543</sup> A power to foster co-operation with third countries and the international organizations in the sphere of trans-European networks.

<sup>544</sup> Andrea Ott, Ramses Wessel, 'The EU's External Relations Regime: Multilevel Complexity in an Expanding Union' in S Blockmans, A Łazowski (eds), *The European Union and its Neighbors* (TMC Asser Institute 2006) 25-26

<sup>545</sup> International legal personality applies to those entities which international law regards as an independent personality. States are the paradigmatic example of this and not all of the various different entities participating in international relations can be regarded as international legal persons. International legal personality requires some form of international acceptance through the granting by states of rights and/or obligations under international law to this entity.

<sup>546</sup> Case 6/64 *Costa v ENEL* [1964] ECR 585

<sup>547</sup> On the distinction between 'personality' and 'capacity', see RA Wessel, 'Revisiting the International Legal Status of the EU' (2000) 5 *European Foreign Affairs Review*. 507

<sup>548</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

<sup>549</sup> *ibid* 12

<sup>550</sup> Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2013) 77-78, inspired by Ole Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *Eur.J.Int'l.L.* 763, 765-766 and JHH Weiler 'The Transition of Europe' (1991) 100 *YLJ* 2403, 2413-14

decisions should be read together, since they are the foundation of the Court-made theory about the Community as a special constitutional, rather than international, order.<sup>551</sup> Regardless of this judicial explanation, the international legal personality has not been questioned. To the contrary, even if the international legal personality was not mentioned in the Treaty, no one doubted it, and the judgments were only a powerful confirmation thereof.<sup>552</sup>

But the question of whether the Community enjoys *objective* legal personality was not answered. Objective legal personality is when an entity is recognized as having legal personality on the international arena and powers that are independent in relation to its member states. In other words, it determines if the entity can enter into legal arrangements with non-Member States as an organization. This is usually - in the theory of international organizations - entrenched through treaties, agreements, or the sharing of international responsibilities.<sup>553</sup> This question had to be answered by the Court, together with the one of whether article 281 constitutes a general basis for international action by the Community. The question was answered in the *ERTA* judgment.

### 1.1.2. ERTA judgement

The Court decided that the fact that by the time the contested decision was taken by the Council on the ERTA Agreement a common policy on social aspects of the road transport had already been adopted by the Community made it possible to imply external powers on the part of the Community. And conversely, the ECJ ruled that until the internal rules had been adopted, those powers remained in the Member States.<sup>554</sup> To put it differently: When a measure is taken internally to regulate a given subject matter the Community acquires the competence to adopt measures on the same subject matter externally. As a result, when the Community occupies internally the policy field that the Member States formerly possessed, a counterpart competence to act externally is assumed by the Community which affects the

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<sup>551</sup> Compare with the opinion on the EEA Agreement from 1991 where the ECJ referred to *Van Gend* and drew a sharp distinction between the EEA Agreement and a regular international treaty which 'merely creates rights and obligations as between the Contracting Parties' and the EEC Treaty constitutes 'the constitutional character of the Community' being directly applicable to the individuals. (Opinion 1/91 *Draft Agreement Relating to the Creation of the European Economic Area* [1991] ECR I-6079, paras 20-1)

<sup>552</sup> The Treaty was the constituency act, the subjective source of the international personality of the Community, because it revealed the intentions of the Member States. This corresponds with the theory saying that international organizations are usually created by the member states of the international community and they are entrenched through treaty ratification and charters outlining the duties and responsibilities passed onto the organization. (Philipp Gautier, 'The Reparation for Injuries Case Revisited: The Personality of the European Union' in *Max Planck Yearbook of United Nations Law* (Kluwer law International 2000) 331)

<sup>553</sup> Qualified personality easily arises when any legal person accepts that another entity possesses personality in relation to itself. Effectively, this is a bilateral legal relationship where duties and responsibilities are shared between two entities, rather than with the entire community.

<sup>554</sup> *ERTA* (n 533) 82

corresponding competences of the Member States.<sup>555</sup> Dashwood and Heliskoski summarize the Court's reasoning as follows: "in whatever field common rules may be enacted, corresponding external relations competence will arise".<sup>556</sup>

Some legal writers interpret the ruling of the Court as establishing a full parallelism.<sup>557</sup> They express the rule with the Latin phrase *in foro interno in foro externo*. They believe that the *ERTA* case equalizes the scope of external competences and internal competences:

19. With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relation.

Therefore they are of the opinion that the EC Treaty, read as interpreted in *ERTA*, provides a system of parallelism similar to the Euroatom Treaty.<sup>558</sup>

The issue of parallelism will be presented in detail later ,together with some rival theories.<sup>559</sup>

For this dissertation, the crucial sentences of the *ERTA* case are the following:

15. To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.

16. Such authority arises not only from an express conferment by the Treaty – as in the case with Articles 112 and 114 for tariff and trade agreements and with Article 238 for association agreements – but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the community institutions.

In this judgment, the ECJ confirmed the earlier observation that the Community is competent to enter into international agreements with third states. In particular, the Court pointed out the previously mentioned articles that expressly allow the external actions of the Community. However, what is most important: the Court acknowledged the treaty-making capacity of the Community in cases where this was not explicitly provided for in the Treaty.

Consequently, some other provisions of the Treaty may justify the Community's power to act externally. This statement did not limit the scope of the sources of implied powers; potentially every single provision of the Treaty could become a basis for the foreign action of the EC. In the *ERTA* case, the Court found the justification in Article 75. The Court decided that this article itself provided for the treaty-making power. In other cases, however, other Treaty provisions could serve as bases for the external action.

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<sup>555</sup> Alan Dashwood, Joni Heliskoski, 'The Classic Authorities Revised', in Alan Dashwood, Christophe Hillion (eds), *The General Law of the EC External Relations* (Sweet & Maxwell 2000) 6

<sup>556</sup> *ibid*

<sup>557</sup> Paul Reuter, *La Communauté Européenne du Charbon et de l'Acier* (Paris 1953) 116-140; see also Pierre Pescatore, 'External relations in the case law of the Court of Justice of the EC' (1979) 16 *Common Market Law Review* 615, 618-621; C Shachor-Landau, 'The international Legal Personality of the EEC and its Treaty-Making Power, (1985) 20 *Israel Law Review* 341, 348

<sup>558</sup> See footnote 588

<sup>559</sup> See III.1.2

The ECJ added that treaty-making powers can also result from the “measures” adopted within the frameworks of the provisions of the Treaty. What are those measures? The Court used this term to name the secondary law of the Community, i.e. directives, regulations, recommendations and opinions by the European Commission, European Council and/or the European Parliament according to the competences laid down in the Treaty<sup>560</sup>. The difference between primary and secondary law is crucial, both in general and in the case of the implied powers. The primary law is the supreme source of law in the European Communities; it consists mostly of the Treaties. Contrarily, secondary law can be adopted, revoked and amended by the Community institutions and, depending on the subject matter, a simple majority of votes in the competent body is enough to pass it.<sup>561</sup> As Martin Bartlik claims, according to the *ERTA* doctrine the degree of treaty-making powers depends on the scope of secondary law.<sup>562</sup> The more secondary law is adopted, the more treaty-making powers arise for the Community.<sup>563</sup> Nevertheless, Bartlik does not agree that the extent of the treaty-making powers depends solely on secondary law. Instead, he claims, for a treaty-making power pursuant to the *ERTA* decision to exist, it must be first determined whether a competence laid down in the EC Treaty and empowering to adopt internal regulations can also include an implicit treaty-making power.<sup>564</sup>

Based on Article 281 in the section “General and Final Provisions”, the Court held “that in its external relations the community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in the Part One of the Treaty”.<sup>565</sup> Nevertheless, the ECJ made it clear that “capacity” cannot be interpreted as a “competence” to enter every agreement with third countries. The ECJ reminded the public of the principle

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<sup>560</sup> As listed in Article 249 EC.

<sup>561</sup> Under Article 148 of the Treaty of Rome, Council decisions had to be adopted by a simple majority, by a qualified majority or unanimously. Simple majority decisions can be taken only for minor matters. From 1958 to the end of 1968, most decisions had to be unanimous. The intention was to leave the unanimity rule for a limited number of issues of major importance during the transitional period, which was scheduled to end in 1965. However, France under de Gaulle blocked the transition. In 1966 the Luxembourg Compromise was to shift the institutional balance of power away from the Commission in favor of the Council. Each member state was able to veto important legislation. Until the SEA (1993), most decisions had to be unanimous. More than 300 issues were brought to the qualified majority procedure. The number was later increased with the Maastricht Treaty (1993). Both of these treaties also increased the legislative powers of the European Parliament. The co-decision method was introduced. In co-decision, the Commission has the right of initiative and issues a proposal, which is sent to the European Parliament and the Council, both institutions working in parallel in analyzing and amending this proposal. Before the entry into force of the Lisbon Treaty, the co-decision procedure applied to nearly 70% of the legislative procedures and basically covered all of the areas requiring at least a qualified majority in the Council with the exception of the common agricultural policy and commercial policy. After the entry of the Lisbon Treaty, there are 40 moves to the codecision procedure, and it is known as the ordinary legislative procedure (Art. 294 TFEU).

<sup>562</sup> Although the judgment seems to be very pro-European and one might have expected a speeding up of the integration process in the EC, the contrary happened. The Member States were afraid of losing further treaty-making powers if they adopted more EC regulations. As a consequence, the Council stopped enacting regulations, which resulted in a total standstill in the common transport policy in the following years. (Martin Bartlik, *Impact of the EU Law on the Regulation of International Air Transportation* (Ashgate 2007)

<sup>563</sup> *ibid* 52.

<sup>564</sup> *ibid* 52-53

<sup>565</sup> *ERTA* (n 533) 14



of conferral (or attribution), which states that the Community is a construct of Member States and that all its competences are voluntarily conferred on it by its Member States. Andrea Ott and Ramses Wessel claimed that the *ERTA* decision made the link between the international competence and existing provisions looser since the Community gained a general capacity to enter into international agreements, as long as authorization follows either from explicit attribution of that competence or from other provisions implying an international competence.<sup>566</sup>

### 1.1.3. Exclusivity

Further in the decision, the Court explained that the implied powers can also be exclusive. This statement made the implied powers even more significant because the Member States lost, under some conditions, the possibility of acting externally at all. Acting individually or even collectively, the Member States can no longer undertake obligations with third countries which affect Community rules. The ECJ chose a broad version of the doctrine, fully supported on the principle of effectiveness.

In this part of the decision, the Court referred to Article 3(e), which lists a common policy in the sphere of transport as one of the Community's objectives, and to Article 5, which states that the Member States are required to take all appropriate measures to ensure fulfillment of the obligations (the principle of loyalty).<sup>567</sup> The prohibition of assuming obligations outside the framework of the Community institutions which might affect those rules or alter their scope can be easily read as a consequence of reading the two above-mentioned articles at the same time. According to Article 75(1), the Council is competent to lay down common rules and, in addition, "any other appropriate provisions".<sup>568</sup> Analyzing Article 75(1)(a), which states that the common rules are applicable "to international transport to or from the territory of a member state or passing across the territory of one or more member states", the ECJ ruled that that the powers of the Community "extend to the relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries".<sup>569</sup> The Court read these provisions together with Regulation 553/69, and the fact that it vested in the Community powers to enter into international agreements.<sup>570</sup> Consequently, the Court concluded the power of the Community to conclude (and negotiate) the *ERTA* Agreement. In the next paragraph of the judgment we read as follows:

These Community powers exclude the possibility of concurrent powers on the part of the Member States, since any steps taken outside the framework of the Community institutions

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<sup>566</sup> Ott & Wessel (n 541)

<sup>567</sup> *ERTA* (n 533) 22

<sup>568</sup> *ibid* 24

<sup>569</sup> *ibid* 27

<sup>570</sup> Art. 3 of the Regulation

would be incompatible with the unity of the common market and the uniform application of Community law.<sup>571</sup>

Thus, in the *ERTA* case the Court did not hesitate to state that the implied external powers are exclusive. It did so to exclude the possibility of concurrent powers on the part of the Member States that could harm the unity of the common market and the uniform application of Community law. The implication of this statement is very important, given that when the Community has exclusive powers, the Member States have no right, acting individually or even collectively, to undertake obligations with third countries which affect Community rules.

The exclusive nature of the external competence is a consequence of the adoption of the Council Regulation, which is seen clearly from the reading of the judgment. The existence of only a Treaty-based competence to adopt internal regulations could lead the Court to find that the Community also has implied treaty-making powers that would, however, be concurrent. It is only because the Community has made use of these internal competences and adopted respective regulations that the Court could announce them exclusive. With the adoption of the regulation the implicit, concurrent treaty-making power became an exclusive, implicit treaty-making power, but only in the scope of that regulation.<sup>572</sup>

What would be the consequence of leaving this implicit power non-exclusive? First of all, the Member States would retain the competence to conclude international agreements whose provisions could conflict with Community law. Therefore, they would face conflicting obligations. The Court decided to prevent possible conflicts rather than to wait for an opportunity for the Member States to be forced to solve problems at an international level. Moreover, from the angle of the transfer of competences within the Community it was a pragmatic solution to characterize the Community's competences as exclusive - both internally and internationally - when the Community rules in a specific field have been adopted.<sup>573</sup>

Having that in mind, we can conclude that the doctrine of implied powers is based on the principle of effectiveness. To ensure the *effete utile* of Community law, any activity of the Member states that could affect secondary law, and is based on the primary law, should be precluded. The exclusive nature of the implied external powers is a safeguard that protects the integrity of the Community law system.

#### **1.1.3.1. The doctrine of implied powers and pre-emption**

A very different theoretical approach that should be mentioned here for the completeness of the picture was presented by Dashwood. He believes that in the *ERTA* case the Court did not elaborate on the question of the nature of implied powers at all. He claims that the

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<sup>571</sup> *ERTA* (n 533) 31

<sup>572</sup> Bartlik (n 559) 53

<sup>573</sup> Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011, 2<sup>nd</sup> ed) 76

judgment was primarily a reply to the question of “existence”, and not to the question of the “nature” of the external competence. Dashwood claims that the exclusion of all Member States actions in the external field covered by Resolution 553/69 only indirectly pointed at the nature of the implied powers and it was based on “somewhat fuzzy preemption logic”.<sup>574</sup> And I agree that it is incorrect to confuse pre-emption with exclusivity.

The doctrine of pre-emption governs the question of when there is a conflict between laws and what the consequences of the conflict are.<sup>575</sup> The doctrine elucidates how the Community law and the national law have to be arranged when they regulate a single policy field. The pre-emption means also a debate about the different types of intervention in case of a legal conflict. The doctrine originates in the US constitutional law, where the application of laws precludes any corresponding regulatory powers of the States.<sup>576</sup> Pre-emption is a federal concept, which seemed to play no part in the design of the framers of the Treaties. However, the doctrine was adopted in the EC law.<sup>577</sup> It evolved at just around the same time as the doctrine of implied powers and became an important part of the European legal system.<sup>578</sup> This principle prescribes that when Community law and national law clash, only the Community law should be applied. Consequently, some people believe that the *ERTA* doctrine should be subsumed under the principle of the primacy of the Community law. In the *ERTA* judgment, the logics of pre-emption led to the conclusion that Regulation 553/69 had pre-empted all the areas covered by the Regulation, at both internal and external levels.<sup>579</sup> Dashwood is citing Lenaerts, who stated that the issue of relation of the two doctrines is a question of ascertaining the primacy of Community law over national law.<sup>580</sup> Lenaerts claims that the engagement of a Member State into an international agreement with a third country would be an act of national law that could hinder the Community from making use of the external competence in the field.<sup>581</sup>

Both doctrines have indeed a common aim, namely to secure the effectiveness and interest of the Community. But mixing up pre-emption and the doctrine of exclusive implied powers is a misunderstanding. Exclusivity arises at the moment of creating implied powers and its consequence is determined by who can cover a certain subject matter. Exclusivity tells us

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<sup>574</sup> Dashwood (n 176) 118

<sup>575</sup> R. Schütze, ‘Supremacy without Pre-Emption. The Very Slowly Emergent Doctrine of Pre-Emption’ (2006) 43 *Common Market Law Review* 1012, 1033

<sup>576</sup> See for example T. Tribe, *American Constitutional Law* (Foundation Press 1988, 2<sup>nd</sup> ed)

<sup>577</sup> Sionaidh Douglas Scott, *Constitutional Law of the European Union* (Pearson Longman 2002) 169.

Further discussion on pre-emption see: Waelbroek, ‘The emerging Doctrine of Community Pre-Emption, Consent and Re-delegation’, in T Sandalow, E Stein (eds), *Courts and Free Market* (Clarendon Press 1982)

<sup>578</sup> However, the Court of Justice has never used this term and there is no academic consensus on its use. See R Holdgaard, ‘The European Community’s Implied External Competence after the Open Skies Cases’ (2003) 8 *European Foreign Affairs Review* 369

<sup>579</sup> Dashwood (n 176) 118

<sup>580</sup> Koen Lenaerts ‘Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de «préemption»’, in Paul Demaret (ed), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Collège d’Europe 1986) 58

<sup>581</sup> Additionally, there can be a third option pointed out: This one argues that the prohibition for the Member States to adopt laws that could affect secondary law adopted in the area of common transport policy can be based on Article 10 in connection with Art. 3(1)(f) EC (Bartlik (n 559) 61).

who has the right to act, to avoid conflicts in the future. Pre-emption tells us how to solve conflicts when they appear. The latter principle is activated only when there is an actual legal conflict concerning the dependency of norms. Regulation 553/69 did not pre-empt the area covered by the Regulation: it only created particular exclusive external implied powers that exclude actions of the Member States. Pre-emption could do nothing more than invalidate conflicting Member States' legislation in this area (and there was none).

Hereunto, the substance of the *ERTA* case derives not only from the fact that it introduced the term of implied powers but also because it provided the conditions under which these competences are exclusive (namely that a particular area of activity has been covered internally by the European law). Reading the *ERTA* case may lead to conclusions that the Court proposed a very broad scope of the exclusiveness of the implied external powers. If the frames of the external competences are defined by the internal measures and the principle of effectiveness, it means that the Community gained a very powerful tool, since its discretion in using this tool has very flexible limits. The Community could now cover every field that has been regulated internally with a net of international agreements, depriving the Member State from this legal instrument of extraordinary importance. This pro-Community interpretation brought some to conclude that the external implied powers are *ab definitio* exclusive.<sup>582</sup> Whenever the Community adopts provisions that lay down common rules, whatever they might be the Member States no longer have the right to undertake obligations with third countries which affect those rules. When these common rules came into being, the Community alone was in a position to assume and carry out contractual obligations towards other members of the international community, affecting the entire sphere of application of the legal system of the EC.

#### 1.1.4. Argumentation

The Court solved the "initial question" in a way that surprised many, especially the Advocate General. AG Duheillet de Lamothe agreed with the Council. He referred in his opinion to the opening sentence of Article 228, on the procedure for negotiating and concluding international agreements, which spoke of "where this Treaty provides for the conclusion of agreements". He presented himself as a settled supporter of strict interpretation of the principle of conferred powers. For him, recognizing external powers in the field of transport did not flow from the Treaties and it would be on a discretionary construction of law, a judicial interpretation far exceeding the tasks assigned to the ECJ. The Court did not hold the conclusions of the AG. It decided to be innovative and recognize the powers to conclude international agreements in the absence of any express recognition thereof.

The Court had difficulties accepting that the only legal basis of the external power would be the doctrine of implied powers. In para. 28 of the *ERTA* decision it ruled:

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<sup>582</sup> Pescatore (n 554) 623

Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of regulation 543/69 of the Council on the harmonization of certain social legislation relating to road transport (OJ L 77, p. 49) necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation.

Thus, in addition to the implied external powers theory, the Court supported its decision on an existing secondary law.<sup>583</sup> This regulation laid down that the Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing thereof. And since *ERTA* falls within this regulation, the Community had been empowered to act internationally.<sup>584</sup>

Frid adds that the Court clearly had a hard task to prove that the Regulation granted the Community explicit external power. The complicated argumentation led to the conclusion that the Court, in search for an explicit external treaty-making power, based itself in fact on the secondary law which should also - with regard to Article 3 of the Regulation 543/69 - be based on the interpretation of implied external powers.<sup>585</sup> This creates a loop where support of the Regulation appears to be an ostensible solution, since it requires using the implied powers anyway to reach the legal results expected by the Court. If this were not so, than Article 75 of the Treaty, as far as the Regulation is concerned, would be a basis good enough to conclude the external competences.

The Court, after having resolved the “initial question“ with which it was confronted, decided that the Commission’s action was admissible, since the Council proceedings constituted an act having legal effects. On this substance, however, the Court rejected the Commission’s assertion to annul the proceedings. The ECJ ruled that the negotiations in the field of transport policy were not a simple continuation of the 1962 process.<sup>586</sup> The Court pointed out that the first round of the negotiations took place when there was no internal policy covering the area in question, namely the Regulation had not been adopted. The Court decided that the best option for the Community was to let the Member States keep the competence to lead the negotiations to an end, instead of granting that competence to the Community. A change of the negotiating parties could put the final outcome in jeopardy.<sup>587</sup>

Eeckhout says the Court’s ruling in *ERTA* may be characterized as both principled and pragmatic.<sup>588</sup> He adds that if the Court:

had sought to go the other way, it could only have based itself on a strict interpretation of the principle of conferred powers, and it would have had to disregard both the fact that the

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<sup>583</sup> *ERTA* (n 533) 29-30

<sup>584</sup> *ibid* 28-29

<sup>585</sup> Rachel Frid, *The Relations Between the EC and International Organizations: Legal Theory and Practice* (Martinus Nijhoff Publishers 1995) 77. But she claims that she does not think this complicated argumentation undermines the solidity of the legal basis of the Community external power. On the contrary, she believes that the fact that that power was based upon both an interpretation of implied powers under Article 75 and upon Article 3 of the Regulation, reinforced the legal basis.

<sup>586</sup> *ERTA* (n 533) 82-85

<sup>587</sup> *ibid* 86

<sup>588</sup> Eeckhout (n 570) 75

subject matter of the *ERTA* agreement came within Community competence, and the fact that the Treaty provisions on a common transport policy were imprecise in terms of defining the legal instruments which could be employed.<sup>589</sup>

Additional problem with the principle of conferred powers is the fact that it was nowhere precisely defined in the Treaty.<sup>590</sup>

The *ERTA* decision was of outstanding importance for Community law. It was one of the landmark decisions in the history of the ECJ, as well as one of the most controversial ones.<sup>591</sup> The Court's approach can be called teleological. It was nicely defined by the ECJ justice Robert Lecourt who put it: "Law (is) in the service of an objective. The goal is the motor of the law".<sup>592</sup> The goal here was to increase the effectiveness of the European law and – indirectly - to accelerate the integration. The Court used in this judgment its purposive style of interpretation, which is more commonly found in the analysis of the constitutional acts. Traditional treaty interpretation includes the principle that the encroachment by the treaty on the sovereignty of the nation-state should be as little as possible.<sup>593</sup> The Court went in

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<sup>589</sup> *ibid*

<sup>590</sup> The principle was codified in Article 5 of the Treaty of Maastricht.

<sup>591</sup> The Court's legal argument was contested many times, especially with regard to its elaboration of the "implicit" transfer to justify that the entry into force of a Community regulation could transfer the capacity to negotiate and conclude international agreements in a specific subject matter from the Member States to the Community. See: AG Lamothe, 'The argument of implied and automatic transfer of authority outside the cases laid down by the treaty meets with very serious objections apart from a general objection relating to the methods of interpretation of the EEC treaty. First of all, in practical terms, it would be impossible to confer such an effect upon all Community regulations, some of which govern matters which by their nature are quite distinct from those which the provisions of an International treaty could refer (...) No matter what legal basis the Court finds for it, recognition for the Community's authority in external matters for negotiating and concluding the AETR concedes by implication that the Communities authorities exercise, in addition to the powers expressly conferred upon them by the Treaty, those implied powers whereby the Supreme Court of the United States supplements the powers of the federal bodies in relation to those of the confederate states. I for my part consider that the Community powers should be regarded as those termed in European law "conferred powers". Such conferred powers may indeed be very widely construed when they are only the direct and necessary extension of powers relating to intra-community questions, as the Court has already ruled with regard to ECSC but (...) [i]t appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the community's authority in external matters to the cases which they expressly laid down'. (Opinion of Lamote AG, 291-93)

Another example was delivered by Akehrst: 'One cannot help feeling that the reasoning is singularly fragile. Article 210 is probably concerned with personality in municipal law, not in international law. Article 5 appears to deal with the obligations of the Member States inter se, not with their capacity to enter into treaties with non-member States. Article 3 of the regulation 543/69 can equally well be regarded as a delegation of power by Member States to the Community, i.e. as an exception (and confirmation of) the general principle that the treaty making power normally belong only to the Member States. Similarly, the fact the EEC Treaty expressly transfers treaty-making power from Member States to the Community in some fields surely suggests that a similar transfer cannot be interfered in other fields. It is also worth pointing out that Article 101 of the Euratom treaty gives Euratom the power to conclude treaties on all questions governed by the Euratom Treaty; the omission of a similar provision from the EEC Treaty was surely deliberate.' (M Akehrst, 'Decisions of the Court of Justice of the European Communities during 1971-1972' (1972) 46 BYBIL 439)

<sup>592</sup> Robert Lacourt, *L'Europe des Juges* (Bruylant 1976) 1976, 305

<sup>593</sup> See CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005) chap 2

the opposite direction and enlarged the scope of *sovereignty* of the Community at the expense of the Member States.<sup>594</sup> The judgment was openly pro-European. It was even called bold and creative by Hjalte Rasmussen. He noticed that, following *ERTA*, institutional disputes over the *ERTA*-principle reportedly broke out between the Commission and the Council and that several years passed before the Council members familiarized themselves sufficiently with that constitutional principle to make a frictionless application of it eventually possible.<sup>595</sup> The adoption of this principle has even encountered some opposition in national foreign ministries.<sup>596</sup>

The Member States' governments could be called the real parties of interest in the case, vis-à-vis the Commission that represented the Community.<sup>597</sup> On the merits of the case, the Court refused the Commission's claim and Member States were free to conclude the negotiations. But if it comes to the most important dimension of the judgment, the one changing the distribution of powers, the one we can call of constitutional importance, the Court was led by the Commission's argumentation. It was another from a series of cases from the early years of European Integration - starting with *van Gend*<sup>598</sup> in 1963 - where the Court leaned towards the Commission's progression and was directed to more legal integration.<sup>599</sup>

To some extent, the Court's tactics in the *ERTA* case bring to mind its earlier fundamental decisions, when it was establishing the most significant principles of Community law, with the principle of supremacy as the main example. In those cases, the ECJ sided with the Council or a Member State on the merits of the cases, but simultaneously announced a new constitutional principle - which it also did in *Costa vs. ENEL*, when it was not going to overturn the nationalization of the Italian energy industry on the basis of a \$3 challenge. It ruled that European law is supreme to national law and found that the Italian nationalization law did not violate the Community law. Given that no change in domestic policy was required, there was nothing for the government in Rome to respond to. It is worth noting here that some authors see the *ERTA* judgment as a logical consequence of the acceptance of the ECJ supremacy doctrine.<sup>600</sup> In the past, the ECJ used to establish a new doctrine as a general principle but suggested that it was subject to various qualifications, including that it was not applicable in the case at hand.<sup>601</sup> The Court used the strategy because it understood political incentives and tried to play on them.<sup>602</sup> The Member State governments consist of politicians who think from the perspective of the electoral cycle. By using this advantage, the

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<sup>594</sup> Weiler (n 547) 2416

<sup>595</sup> Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Martinus Nijhoff Publishers 1986) 77

<sup>596</sup> See Eric Stein, *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism* (University of Michigan Press 2000) 34; Pescatore (n 554) 615

<sup>597</sup> Eric Stein, *Lawyers, Judges, and the Making of Transnational Constitution*, 75 *AJIL* 1 (1981)

<sup>598</sup> *Van Gend* (n 545)

<sup>599</sup> Stein *Thoughts* (n 593) 10. Additionally, Stein found that *ERTA* was the only exception in the series of the most important judgments from the early era of the Court, when the justices did not parallel the conclusions of the AG (at 11).

<sup>600</sup> Alter *Establishing the Supremacy* (n 54) 190.

<sup>601</sup> Trevor Hartley, *The foundations of European Community* (Oxford University Press 1988) 78-79

<sup>602</sup> *ibid*

Court developed its own doctrine and its own power.<sup>603</sup> If there were not too many protests, the Court re-affirmed the doctrine in later cases. So let us see if the Court re-affirmed the *ERTA* doctrine, and if so, what the amendments were...

## **1.2. The Kramer case**

The case of Kramer arose out of the criminal prosecution of three Dutch fishermen for exceeding their catch quotas. They defended themselves, arguing that these quotas, which were based on the North-East Atlantic Fisheries Convention, were void because the Convention was incompatible with Community law. The Convention was signed in 1959, when the Common Agriculture Policy did not yet exist. However, under the Convention an international organization, the North-East Atlantic Fisheries Commission, was created which would set the catch quotas for each year and for each country. All the Member States, except Italy and Luxembourg, were parties to that agreement. Each contracting party had one seat in the Commission. Pursuant to decisions that had been taken within the framework of this convention, the Dutch authorities took measures to restrict catches of sole and plaice. Many fishermen were prosecuted for failing to observe these rules.<sup>604</sup>

The question that arose concerned how the Member States that were also contracting parties to the Convention should act in the Fisheries Commission, and whether or not the Community should take their place.

Referring both to its case law from *ERTA* and to the objectives of the Community, the Court ruled that the Community has the exclusive competence to conclude international agreements such as the Fisheries Convention. The judgment was very similar to *ERTA*. The Court ruled:

To establish in a particular case whether the Community has authority to enter into international commitments, regard must be had to the whole scheme of community law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the acts of accession and from measures adopted, within the framework of those provisions, by the Community institutions.

(...) In these circumstances it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea.<sup>605</sup>

The Court referred to:

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<sup>603</sup> Alter *Who Are the Masters* (n 876)

<sup>604</sup> Joined Cases 3, 4, and 6/76 *Cornelis Kramer and others* [1976] ECR 1279

<sup>605</sup> *ibid* 19-20, 33



1. The Treaty provisions on the Common Agricultural Policy, and
2. To the Council Regulations 2141/70 and 2142/70 that – respectively - laid down a common structural policy for the fishing industry and on the common organization of the market in fishery products,<sup>606</sup> and
3. Article 102 of the Act of Accession, that is a guideline for the Council to “determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea”.<sup>607</sup>

As in the case of the *ERTA* judgment, the implied power to conclude international agreements was based not only on the relevant Treaty provisions but also the secondary law. As can be easily spotted, the Court added (to the catalogue known from *ERTA*) the acts of accession, which form part of the primary law and thus have the status of the Treaty in this particular case. The *ERTA* principle was therefore confirmed. Whenever the Community has promulgated internal rules in a certain field, then the implied powers to act externally in that field are created. What is more, under certain conditions, these powers will be of an exclusive nature.

Reading them together, the Court ruled that the Community had the internal competence to lay down measures for the conservation of the biological resources of the sea. The effectiveness principle formed the natural basis for stating that the Community also has the external powers. The Court concluded that the Community competence extends - insofar as the Member States had similar competences under public international law - to the high waters. Effective conservation can only be provided by ensuring the possibility of concluding international agreements. Common sense points out that it is extremely hard to manage fish conservation only in the territorial waters and without cooperation with non-Member States.

As to the obligation now incumbent on the Member States concerned, it should be stressed first that under Article 5 of the Treaty, “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community”, and “shall facilitate the achievement of the Community’s tasks”. Under Article 116 of the Treaty, “from the end of the transitional period onwards, Member States shall, in respect of all matters of particular interest to the common market, proceed within the framework of international organizations of an economic character only by common action”, the Commission being under a duty to submit proposals in this connection to the Council and the Council being under a duty to act on these proposals.<sup>608</sup>

As for the functioning of the Fisheries Commission, the Court ruled that, because the transition period established in the Act of Accession of the United Kingdom, Ireland and Denmark was not yet over, the Member States still had the authority to act within the Fisheries Commission. Thus, the Member States could act in the field of fisheries and conservation of the sea, provided that they did not hinder the Community in carrying out its tasks. When the Community decided to start implementing its duties, the Council had the

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<sup>606</sup> [1970] OJ Spec Ed III 703 and 707

<sup>607</sup> The Act of Accession of Denmark, Ireland and the UK, [1972] OJ L 73/194

<sup>608</sup> *Kramer* (n 601) 42-43

obligation of finding a permanent solution before the end of the transition period and the Member States had the obligation of ensuring the participation of the Community in the convention and in other similar agreements.<sup>609</sup>

Therefore, the quotas were legal. The Dutch government was not deprived of the authority to adopt conservation measures. Once again, the Court sided with the Council and the Member States on the merits of the case (Holland was supported by the UK and Denmark). Nevertheless, it took the opinion of the Commission when it came to the essential part, i.e. supporting the principle of effectiveness and implied powers. It re-affirmed the *ERTA* principle and rooted the doctrine of implied powers.

As far as the Community competences in the field of fish conservation are concerned, the *Kramer* judgment should be read in the light of later case law. The Court examined the effect of the expiry of the transitional period of Article 102 of the Act of Accession, which happened on January 1st 1979. In its 1981 judgment in *Commission v. United Kingdom*, it held that the Member States were no longer entitled to exercise any power in the field and that the competences had “belonged fully and definitively to the community”.<sup>610</sup> The judgment confirmed that the competences became exclusive.<sup>611</sup> The Community was definitively granted its exclusive implied power.

### **1.3. Opinion 1/76**

*Opinion 1/76* concerned a Draft Agreement to set up a European laying-up fund for inland waterway vessels, which was to be concluded by both the Community and six (out of nine) Member States and Switzerland.<sup>612</sup> The aim of the agreement was to rationalize the economic situation of the inland waterway transport industry. The agreement was supposed to introduce a system intended to eliminate the disturbances arising from the surplus transport capacity for goods by inland waterways in the Rhine and Moselle basins and by all the Netherlands and German inland waterways linked to the Rhine basin. A Fund Tribunal and a Supervisory Board were established. The Fund, financed by contributions imposed on all vessels, was to be responsible for compensation. The Fund authority's decisions were supposed to be directly applicable within the Community.

The Commission requested the Court's opinion to clarify the Community's competence to conclude the agreement and to establish the compatibility thereof with the Treaty. The reason for this request was the issue of delegation of judicial powers and powers of decision to independent bodies.

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<sup>609</sup> *Kramer* (n 601) 34-35

<sup>610</sup> Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paras 17-18

<sup>611</sup> This was confirmed in the Treaty Article 3(1)(d).

<sup>612</sup> Such international treaties as the 1868 Convention of Mannheim guarantee that all states that control a part of the river Rhine, including Switzerland, can use the river freely.

The Court started by acknowledging the existence of implied powers in Community law by referring to the cases of *ERTA* and *Kramer*. The Court then agreed with the proposal of the Commission, which concluded that when the Community has a power under the Treaty to lay down rules applicable within the Community in a specific field governed by the Treaty (the implementation of common policies) and it appears necessary for the third countries to be associated with it for the purposes of the application of the same rules, it must have a choice, according to the facts and using the same powers, either:

Laying down those rules first of all autonomously and only afterwards negotiating and concluding with the third countries concerned an agreement for the extension of these rules to those countries, or

Even if there have been no previous developments of secondary law in the field in question, negotiating and concluding with the countries concerned an agreement to introduce at one and the same time common rules into the community and identical rules into those countries.<sup>613</sup>

The Court found that the agreement was an important tool to rationalize the common transport policy, the establishment of which was settled as one of the Community objectives and was laid down in (then) Article 3. In order to implement this policy, the Council was instructed by (then) Article 75 (91 TFEU) to lay down common rules applicable to international transport to or from the territory of one or more Member States. It was impossible to do that because of the participation of Switzerland in the agreements regulating the inland waterways on the principal river within the Community. Therefore, the involvement of a third country was necessary to reach the goal.<sup>614</sup> A mere internal secondary law would not have been effective.

The Court concluded that there is no requirement of prior internal Community legislation for the exercise of external competence. The Court therefore altered the *ERTA* doctrine. The latter said that the Community has the authority to enter into international commitments in cases when internal power has already been used in order to adopt measures. Now it is ruled that the authority may be exercised even in the absence of the internal measures.

The former case law made it hard to distinguish between the issues of the existence of the implied powers and its exclusivity. *Opinion 1/76* was not helpful in this matter either.<sup>615</sup> The Court ruled that even in the absence of an express power to act externally and in the absence of common rules, the Community may still act externally and such competence is

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<sup>613</sup> Ibid, summary of the observations of the Commission

<sup>614</sup> Ibid 1-2

<sup>615</sup> In particular, the Court referred to the problem of the participation of six Member States, not only the Community, in the agreement as a 'special problem'. The ECJ considered that the participation of those states in this particular agreement was justified, which had to be considered as being solely for this purpose and not necessary for the attainment of other purposes of other features of the system. That was stated in light of Article 234 (then 351) on international agreements, concluded by Member States before membership. The Court also stated that the legal effects of the agreement with regard to the Member States resulted, in accordance with Article 228(2) (then 216(2) TFEU), exclusively from the conclusion by the Community, and this special undertaking was only an exception. Having that in mind, the participation of the six Member states was not such as to encroach on the external power of the Community. (para 7)

exclusive when action is necessary in order to attain one of the objectives of the Community.<sup>616</sup> The Court spoke three times in the judgment<sup>617</sup> of the Community's participation in the international agreement when necessary.<sup>618</sup> Antoniadis states that the Community competence constitutes a two-tier approach.<sup>619</sup> First, once it has been proven necessary for the Community to act externally, which requires a very high threshold, the Community will conclude an international agreement establishing common rules. In a reverse application of the *ERTA* principle, these common rules will render the Community competence over the subject matter exclusively governed by them.<sup>620</sup>

Overall, in the *ERTA* case the Court established that exclusive implied powers resulted from internal legislation and in the absence of such legislation the Community's power to conclude agreements in the sphere of transport is concurrent. The competence becomes exclusive only when the necessity test has been passed by the Community. This is clear, considering the wording of the judgment. Furthermore, the Court observed that once the decision is taken, participation of the Member States as contracting parties is permissible only if some parts of the provisions of the agreement are not covered by Community competence at all, i.e. only in cases where the Community's participation is not necessary.<sup>621</sup>

This also limits them in *foro interno in foro externo* theory. It is not possible to say that *Opinion 1/76* allows full parallelism. Full parallelism means that the Community external relations competence coincides completely with the scope of its internal jurisdiction. The profit of adopting this theory lies in the ability to adapt the Community's powers to changing circumstances. This would create a productive tool that adjusts the powers of the Community to the needs of its institutions. However, it would result in alienating from the Treaties - the primary source of power of the Community - the embodiment of the Member States' intentions. This was recapped by DW Bowett: "the attribution of implied powers (...) means that the organization is conceived as a dynamic institution, evolving to meet changing needs and circumstances and, as time goes by, becoming further removed from its treaty base".<sup>622</sup>

But it is not only the legal arguments of a general, theoretical dimension which do not allow for accepting the full parallelism, it is also the wording of the *Opinion 1/76* that also ensues from para. 3 of the *Opinion*. Rachel Frid suggests that the crucial sentence of this paragraph should be divided in two:

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<sup>616</sup> Detailed analysis of this sentence in: Eeckhout (n 570), ch 3; Panos Koutrakos, *EU International Relations Law* (Hart Publishing 2006), 112; Dashwood (n 176); Dashwood & Heliskoski (n 552) 10.; Robert Schütze, 'Parallel External Powers in the European Community: From 'Cubist Perspectives Towards 'Naturalist' Constitutional Principles ?' (2004) 23 Yearbook of European Law 225.

<sup>617</sup> *Opinion 1/76* (n 609) 2-4

<sup>618</sup> Cf *Opinion 1/94 WTO* [1994] ECR I-5267

<sup>619</sup> Antoniadis (n 537)

<sup>620</sup> This reading of *Opinion 1/76* has been given academic (Dashwood & Heliskoski (n 552) 14) and judicial recognition (AG Tizzano in Case C-466/98 *Commission v UK*, Case C-467/98 *Commission v Denmark*, Case C-468/98 *Commission v Sweden*, Case C-469/98 *Commission v Finland*, Case C-471/98 *Commission v Belgium*, Case C-472/98 *Commission v Luxembourg*, Case C-475/98 *Commission v Austria*, Case C-476/98 *Commission v Germany* [2002] ECR I-9427, para 49)

<sup>621</sup> *ERTA* (n 533) 31

<sup>622</sup> DW Bowett, *The Law of International Institutions* (FA Praeger 1980), 338

Whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into (the) international commitments (...) even in the absence of an express provision in that connection“ – That is in its face a declaration of the principle *in foro interno in foro externo*. But once properly read without omitting part 2 the Court stipulated that: “the Community has authority to enter into the international commitments *necessary* for the attainment of that objective“.<sup>623</sup>

The latter part of the sentence introduces the test of necessity to limit the principle of parallelism stated in the previous part.

The Court raised a general issue about the extent to which the Community institutions could transfer powers granted to them in the Treaties to non-Community bodies.<sup>624</sup> However, the ECJ did not find it necessary to examine that question. In this particular case, the powers transferred were of a narrow scope, merely “executive“, and did not require the Court to reflect on this issue in general. Nevertheless, the Court found the establishment of a Fund Tribunal was incompatible with the Treaty. Its jurisdiction would sometimes overlap with that of the ECJ.<sup>625</sup>

*Opinion 1/76* is important because the Court recognized that sometimes it is possible to achieve rationalization of a policy through an international agreement rather than through the mere adoption of internal legislation. It changed the *ERTA* doctrine and ruled that it is possible to enter into agreements with third countries as well in the absence of a secondary regulation covering a given field. Rass Holdgaard said that *Opinion 1/76* was a “remarkably dialectic and open reasoning. The Opinion leaves the impression that the Court genuinely respects, and attempts to create a dialogue between the need for practical and workable solutions in international relations, on the one hand, and Community law, on the other.“<sup>626</sup> But the necessity criterion makes the scope of *Opinion 1/76* quite narrow. Hence, analogies to the concrete reasoning in *Opinion 1/76* are difficult to draw. *Opinion 1/76* provoked many questions about the doctrine of implied powers. These questions would be answered, and the Opinion would be recalled in future case law.

Before we proceed to the 1990s case law, it is worth summing up the early *ERTA* doctrine with the observation of judge Pescatore. He noticed that some features of the doctrine had been supplemented by a ruling given on 14 November 1978 under the procedure of Article 103 of the EAEC Treaty in relation to a draft Convention on physical protection of nuclear material. He continues that it should be noted that whereas the *ERTA* judgment was still a pre-enlargement affair, the judicial doctrine expressed in this judgment has not only been confirmed but developed even further after 1973, which shows that this case law, which had aroused some discussion in the first instance, has to be considered now as a well-established

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<sup>623</sup> Frid (n 582) 81. She also proposes an example of Case 8/73 Hauptzollamt Bremerhaven v Massey-Fergusson GmbH [1973] ECR 897 that used the instrument of Article 235 to show limits of the doctrine. The internal power is based on the Treaty provision, which only provided for issuing of directives. According to the principle of parallelism, the external power derived from it cannot provide for the issuing of different provisions than regulations.

<sup>624</sup> *Opinion 1/76* (n 609) 15-16.

<sup>625</sup> *ibid* 7

<sup>626</sup> Rass Holdgaard, *External Relations Law of the European Community* (Kluwer 2008), 82

part of the *aquis communautaire*.<sup>627</sup> This point was made by the French Government, intervening in the *Irish Fisheries Case*.<sup>628</sup> Furthermore, the doctrine became accepted by the Council.<sup>629</sup> In the preamble to Regulation No. 2829/77 of 12 December 1977, it appears that the negotiations on the *ERTA* have been wound up and concluded according to the ruling of the Court; the text of the agreement itself has been published on the basis of this regulation in the Official Journal.<sup>630</sup>

#### **1.4. Opinion 2/91**

The International Labor Organization (ILO) is the UN specialized agency which seeks the promotion of social justice and internationally recognized human and labor rights; it is also responsible for drawing up and overseeing international labor standards. ILO conventions are open for ratification by ILO Member States only<sup>631</sup> and are limited to providing minimum requirements for labor standards which members are free to exceed.<sup>632</sup> All Member States of the European Community are also members of the ILO, but the ILO constitution prohibits the Community itself from joining in its own right as accession is reserved to states. Consequently, the Community only has an observer status. It apparently creates a number of problems when conventions are negotiated in the framework of ILO in the field covered by EU law. All the parties concerned have tried to find some *modus vivendi* to make the Community's position visible and protected, if necessary.

The ILO Convention No. 170 seeks to protect workers against the harmful effects of using chemicals in the workplace, and contains rules on topics as diverse as the handling of chemical products from their point of origin to their actual use, the rights and responsibilities of employers and workers, and health and safety requirements for the export of hazardous chemicals. The Community directives had covered the subject matter of the Convention, from minimum- to total harmonization, based on Articles 100, 100a and 118a of the Treaty. The Commission was of the opinion that the Community had exclusive competence to conclude ILO Convention No. 170. Just after the adoption thereof, the Commission wrote to the Council stating its view that the Member States were under an obligation to inform the Director-General of the ILO that the competent authorities were the Community institutions, according to Article 19(5)(c) of the ILO Constitution. The Commission requested an advisory opinion from the Court on the compatibility of Convention No. 170 with the Treaty. In addition, it argued that in the light of the *ERTA* doctrine, the Community had the competence to conclude an international agreement on

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<sup>627</sup> *Pescatore External Relations* (n 554) 617

<sup>628</sup> *Cases 61/77 Commission v Ireland* [1978] ECR 417, 59-62

<sup>629</sup> *Pescatore External Relations* (n 554) 625

<sup>630</sup> OJ 1977, L 334/11 and 1978, L 95, respectively

<sup>631</sup> Article 19(5)(d) of the ILO Charter, UNTS 15, 35

<sup>632</sup> Article 19(8) of the ILO Constitution

any subject matter which fell under the internal legislative jurisdiction of the Community. The Commission invoked Article 118a of the Treaty that provided for a general legislative competence of the Community to regulate the safety of the working environment. Since, it reasoned, the subject matter of Convention No. 170 was covered by internal Community legislation, the Community's competence was exclusive.

Germany and the Netherlands contended that the Commission's request was inadmissible. The conclusion of Convention No. 170 by the Community was excluded by Article 19(5)(d) of the ILO Constitution, which reserved ratification exclusively to the Member States, while subparagraph 2 of Article 228(1) mentions only agreements concluded by the Community. Therefore, the admissibility founded on the basis of this article must be contested. The Court omitted this question by stating that the request for an opinion did not concern the Community's capacity to enter an ILO convention (an international aspect) but was related to the scope of the competence of the Community and the Member States within the field covered by the Convention. It is not for the Court to assess any obstacles which the Community may encounter in the exercise of its competence because of constitutional rules of the ILO. In any event, though, under the ILO Constitution the Community cannot itself conclude Convention No. 170; its external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the Community's interest.<sup>633</sup>

After rejecting the plea of inadmissibility, the Court recalled - from *Kramer* and *Opinion 1/76* - the principles of express and implied powers regarding international agreements:

Before examining whether Convention No 170 falls within the scope of the Community's competence and whether the Community's competence is exclusive, the Court must point out that, as it stated in particular in paragraph 3 of *Opinion 1/76*, cited above, authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions. The Court concluded, in particular, that whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. At paragraph 20 in its judgment in Joined Cases 3, 4 and 6/76 *Kramer and Others* [1976] ECR 1279, the Court had already pointed out that such authority could flow by implication from other measures adopted by the Community institutions within the framework of the Treaty provisions or the acts of accession.<sup>634</sup>

The next step was to turn to the nature of the Community's external competence. This stated that the exclusive competence had been recognized with respect to Article 113 of the Treaty (then Article 207 TFEU)<sup>635</sup> and to Article 102 of the Act of Accession.<sup>636</sup> It reaffirmed that following from this line of authority the existence of such competence arising from a Treaty provision excludes any competence on the part of Member States which is

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<sup>633</sup> Opinion 2/91 *ILO Convention* [1993] ECR I-1061, 1-6

<sup>634</sup> *ibid* 7

<sup>635</sup> Opinion 1/75 [1975] ECR 1355

<sup>636</sup> Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, 17-18.

concurrent with that of the Community, in the Community sphere and in the international sphere.<sup>637</sup> Afterwards, the Court turned to exclusive implied powers. It stated:

The exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis. As the Court stated at paragraph 22 in its judgment in Case 22/70 *Commission v Council* [1971] ECR 263 (the AETR judgment), where Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.<sup>638</sup>

The Court made it clear that the argument saying that the *ERTA* doctrine is limited to the "common policies" as stated by the Treaty is not correct. German, Spanish and Irish governments tried to restrict the authority of the Community with this argument. In contrast, in all the areas corresponding to the objectives of the Treaty, Article 5 requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.<sup>639</sup> These objectives, likewise the Community tasks, would be compromised if the Member States were able to enter into international agreements capable of affecting rules already adopted in areas falling outside common policies or of altering their scope.<sup>640</sup>

Finally, the Court stated a principle saying that an agreement may be concluded in an area where competence is shared between the Community and the Member States.<sup>641</sup> In such a case, negotiation and implementation of the agreement require joint action by the Community and the Member States.<sup>642</sup>

The Court concluded that the field covered by the Convention No. 170 fell within the "social provision" of the EEC Treaty, because the latter focuses on safety in the use of chemicals at work and preventing or reducing the incidence of chemically induced illnesses and injuries at work by ensuring that all chemicals have been evaluated to determine their hazards, by providing employers and workers with the necessary information and by establishing principles for protective programs. It corresponds with the requirements set up by Article 118a of the Treaty to pay particular attention to encouraging improvements, especially in the working environment as regards the health and safety of workers, and to set as their objective the harmonization of conditions in this area, while maintaining the improvements made. After concluding that, the Court stated:

In order to help achieve this objective, the Council has the power to adopt minimum requirements by means of directives. It follows from Article 118a(3) that the provisions adopted pursuant to that article are not to prevent any Member State from maintaining or

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<sup>637</sup> *Opinion 2/91* 7

<sup>638</sup> *ibid* 9

<sup>639</sup> *ibid* 10

<sup>640</sup> *ibid* 11

<sup>641</sup> *ibid*

<sup>642</sup> *ibid* 12



introducing more stringent measures for the protection of working conditions compatible with the Treaty.<sup>643</sup>

Therefore, the Community enjoys an internal legislative competence in the area of social policy. The Court ruled this to be the case, even in a situation when it was the Member States, not the Community, which was supposed to encourage improvements in health and safety (Article 118a EEC). The Community's competence at the time was only subsidiary.

*Opinion 2/92* stated that implied competence might not only flow from common rules laid down by the Community, but also from the minimum standards.

The issue of exclusivity of the competence was more complicated. The Court had to face a unique situation where the international agreement covered the same subject matter as the Community legislation and both allowed for the adoption of more stringent provisions. On the one hand, the Community may decide to adopt rules which are less stringent than those set out in an ILO convention, and Member States may, in accordance with Article 118a(3), adopt more stringent measures for the protection of working conditions or apply for that purpose the provisions of the relevant ILO convention. If, on the other hand, the Community decides to adopt more stringent measures than those provided for under an ILO convention, there is nothing to prevent the full application of Community law by the Member States under Article 19(8) of the ILO Constitution, which allows Members to adopt more stringent measures than those provided for in conventions or recommendations adopted by that organization.<sup>644</sup> Therefore, the *Opinion* stated that there was no exclusive competence. Conflicts between the provisions of the Convention and those of the Community directives were excluded - it seems that this was the most important message of the Court in this part of the opinion. However, the question of the exclusivity of competences arises before we can even measure if there is a conflict. It appears even before the negotiations start, because it is strictly connected with the power to negotiate. Consequently, the tenor of the reasoning should be understood in the following way: where the agreement covers the same subject matter as Community legislation, the Community needs to negotiate so as to avoid conflict, or, alternatively, so as to be persuaded that new rules need to be adopted at international level which may require the amendment of existing EU legislation.<sup>645</sup> This argumentation was omitted in *Opinion 2/92* because of the character of minimum rules of both directives and Convention provisions.

The Court concluded that Part III of the Convention was concerned with an area which was already covered to a large extent by Community directives progressively adopted since 1967 with a view to achieving a greater degree of harmonization. Therefore, the commitments arising from Part III of Convention No. 170, falling within the area covered by the directives, are of such a kind as to affect the Community rules laid down in those directives and that consequently Member States cannot undertake such commitments outside the framework of the Community institutions.<sup>646</sup>

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<sup>643</sup> *ibid* 16

<sup>644</sup> *ibid* 18

<sup>645</sup> Eeckhout (n 570) 86

<sup>646</sup> *Opinion 2/91* 22-26

In other words, in this case the conditions from the test of exclusivity of the Community implied powers from *ERTA* were repeated:

Where the international commitments fall within the scope of the common rules, or any other area which is already largely covered by such rules, the Member States cannot enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules.

The Community acquires an exclusive external competence in the spheres covered by the acts that included provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries.

The same applies when the Community has achieved complete harmonization in a given area, because the common rules could be affected if the Member States retained freedom to negotiate with non-member countries.

The Court's overall conclusion was that Convention came within the joint competence of the Member States and the Community.<sup>647</sup> The Court for the first time developed a more coherent doctrine of shared competences. This has been interpreted as a sanctioning of shared competence as the main rule when external competence is derived from an internal competence.<sup>648</sup> The Member States, although they are full members of the organization, cannot act outside the framework of the Community. "It is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into".<sup>649</sup>

## **1.5. Opinion 1/94**

On 15 April 1994, representatives of the governments of the industrialized countries found themselves gathered in Marrakesh (Morocco) to sign the Final Act embodying the results of the Uruguay Round multilateral trade negotiations. Launched by the Punta del Este declaration of 20 September 20 1986, these "most complex negotiations in world history"<sup>650</sup> had been going on during more than seven years within the framework of the General Agreement on Tariffs and Trade (GATT). As a result of the negotiations, the World Trade Organization (WTO) was created. Representatives of the Council and of each Member State signed the Final Act of the Uruguay Round. Nine days before, the Commission had invoked

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<sup>647</sup> Given that the Community alone had the exclusive competence to conclude part of the ILO Convention, while the Member States retained concurrent competence regarding other parts of the agreement, the conclusion of Convention No. 170 was a matter falling within the joint competence of the Member States and the Community.

<sup>648</sup> Koutrakos (n 613) 104-105

<sup>649</sup> *Opinion 2/91* 36

<sup>650</sup> *Opinion 1/94* [1994] ECR I-5267, 5279

Article 228(6) of the Treaty to request a consultative opinion from the ECJ on the following questions:

1. Does the Community have the power to conclude all parts of the WTO General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade on Counterfeit Goods (TRIP), on the basis of the EC Treaty, especially on the basis of Article 113 alone, or in combination with Article 100a and/or Article 235.
2. Does the Community have the competence to conclude alone also those parts of the WTO Agreement that concern products and/or services falling exclusively within the ECSC and the EAEC Treaties?
3. If the answer to the above two questions is in the affirmative, does this affect the ability of Member States to conclude the WTO Agreement already reached that they will be "original" members of the WTO? Once again the Commission's intention was to establish exclusive Community competence. The Commission, in pursuit of greater goals, concentrated on question of exclusivity.<sup>651</sup>

As regards GATS, the Commission's first argument was that there was no area or specific provision in GATS in respect of which the Community did not have corresponding powers to adopt measures at an internal level. The relevant Treaty chapters funding the internal powers explained, according to the Commission, exclusive external competence.<sup>652</sup> The Court rejected this argument. Instead, in a reiteration of its *ERTA* decision, it declared that in the context of transport services, exclusivity of the Community is attained only if and insofar as common rules have been established at the internal level.

With particular regard to GATS, the Commission cites three possible sources for exclusive external competence on the part of the Community: the powers conferred on the Community institutions by the Treaty at internal level, the need to conclude the agreement in order to achieve a Community objective, and, lastly, Articles 100a and 235.

The Commission argues, first, that there is no area or specific provision in GATS in respect of which the Community does not have corresponding powers to adopt measures at internal level. According to the Commission, those powers are set out in the chapters on the right of establishment, freedom to provide services and transport. Exclusive external competence flows from those internal powers.<sup>653</sup>

Turning to the case at hand, it concluded that not all transport matters are already covered by common rules.

However, even in the field of transport, the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the *AETR* judgment (paragraphs 17 and 18), the Member States, whether

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<sup>651</sup> Nanette Neuwahl, 'The WTO Opinion and Implied External Powers of the Community: a Hidden Agenda', in Dashwood and Hillion (n 552) 142. For a criticism of the Commission's handling of this and other cases, see A Arnall, 'The Scope of the Common Commercial Policy: A Coda on Opinion 1/94', in N Emilio, D O' Keefe, *The European Union and World Trade Law After the GATT Uruguay Round* (John Wiley & Sons, 1996) 358

<sup>652</sup> *Opinion 1/94* (n 615) 74

<sup>653</sup> *ibid* 73-74

acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules.<sup>654</sup>

The Court also rejected the Commission's argument that the Member States' continuing freedom to conduct an external transport policy would inevitably lead to distortions in the flow of services and would progressively undermine the internal market. It concluded that the Treaty provisions do not prevent the institutions from arranging concerted actions in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings.<sup>655</sup>

Afterwards, the Court analyzed services other than transport:

Unlike the chapter on transport, the chapters on the right of establishment and on freedom to provide services do not contain any provision expressly extending the competence of the Community to 'relationships arising from international law'. As has rightly been observed by the Council and most of the Member States which have submitted observations, the sole objective of those chapters is to secure the right of establishment and freedom to provide services for nationals of Member States. They contain no provisions on the problem of the first establishment of nationals of non-member countries and the rules governing their access to self-employed activities. One cannot therefore infer from those chapters that the Community has exclusive competence to conclude an agreement with non-member countries to liberalize first establishment and access to service markets, other than those which are the subject of cross-border supplies within the meaning of GATS, which are covered by Article 113 (...).<sup>656</sup>

The Court quotes here the *ERTA* judgment. The phrase "relationships arising from international law" (para 27 thereof) was used there to analyze the substantive scope of external competence of the Community; precisely, where the Court considered that the Treaty rules on the common transport policy extended to international transport to or from third countries, in so far as the transport takes place on Community territory. Likewise, in *Opinion 1/94* the Court focused on whether the Treaty chapters on right of establishment and freedom to provide services have a substantive external dimension. The Court observed that, as regard services and establishment, the Treaty did not provide for an external dimension (with the exception of cross-border supplies of services), in contrast with goods, where the external dimension comes within the common commercial policy.

The Court provided more of the general clarification of the *ERTA* doctrine in the further paragraphs:

Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.

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<sup>654</sup> *ibid* 77

<sup>655</sup> *ibid* 76-79

<sup>656</sup> *ibid* 81

The same applies in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries.<sup>657</sup>

As we can see, the Court has modified the *ERTA* test. The methodology based on the *ERTA* case and *Kramer* consisted of two conditions: (1) the existence of a specific competence was established (by the express Treaty provisions, common rules or the whole scheme of the Treaty), and (2) the nature of the competence is exclusive, which flows from the principle of necessity and the existence of common rules, the scope of which Member States' actions may affect or alter.<sup>658</sup> But here, in *Opinion 1/94*, the Court committed a methodological error in implicitly assuming that the Community has competence over the whole field of GATS and TRIPS and examining whether this competence is exclusive.<sup>659</sup> The Court danced to the Commission's tune.

The Court also referred to *Opinion 1/76*. The Commission argued that the Community's exclusive external competence was not confined to cases in which use had already been made of internal powers, but that, whenever Community law had conferred on the institutions internal powers for the purposes of attaining specific objectives, the international competence of the Community implicitly flowed from those provisions. Consequently, it was enough that the Community's participation in the international agreement was necessary for the attainment of a Community objective. The Commission argued that the Community had exclusive competence because it had internal competence in fields of freedom of establishment and freedom to provide services. Although it had not fully exercised those powers, because Community participation in the GATS Agreement was necessary for the attainment of the Treaty objectives, the Community acquired exclusive external competence.<sup>660</sup> The Commission used two kinds of arguments here: one was at internal level, saying that the coherence of the internal market would be impaired without participation in the GATS Agreement; the other was at external level, claiming that the Community could not allow itself to remain inactive on the international stage.

The Court rejected this argument and pointed out that the international convention analyzed in *Opinion 1/76* was different from GATS, because in the case of the waterway sector it was impossible to achieve the objective without bringing Switzerland into the scheme.<sup>661</sup>

*Opinion 1/76* related to an issue different from that arising from GATS. It concerned rationalization of the economic situation in the inland waterways sector in the Rhine and Moselle basins, and throughout all the Netherlands inland waterways and the German inland waterways linked to the Rhine basin, by elimination of short-term overcapacity. It was not possible to achieve that objective by the establishment of autonomous common rules,

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<sup>657</sup> *ibid* 95-96

<sup>658</sup> The Court recognized this methodology in *Opinion 2/92 Third Revised Decision of the OECD on National Treatment* [1995] ECR I-521.

<sup>659</sup> Antoniadis (n 537)

<sup>660</sup> *Opinion 1/94* (n 615) 82

<sup>661</sup> *ibid* 82-83

because of the traditional participation of vessels from Switzerland in navigation on the waterways in question. It was necessary, therefore, to bring Switzerland into the scheme envisaged by means of an international agreement.<sup>662</sup>

Similarly, in the context of conservation of the resources of the seas, the restriction, by means of internal legislative measures, of fishing in the high seas by vessels flying the flag of a Member State would hardly be effective if the same restrictions were not to apply to vessels flying the flag of a non-member country bordering on the same seas.“[I]t is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted.<sup>663</sup> The situation with regard to services was different: “attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member states or in non-member countries to nationals of Member States of the Community“.<sup>664</sup>

The above-mentioned paragraphs have raised many questions. One is connected with the fact that the Court elaborated the issue of the exclusivity of the competence without even establishing this competence. As mentioned previously, in the preceding part of the Opinion the Court found that the Treaty provisions on the right of establishment and freedom to provide services did not cover the subject matter of GATS. The most significant question is whether the Court agreed with the Commission’s analysis of *Opinion 1/76*, claiming that it was a case of exclusive competence. Or did the Court agree that in the absence of any inextricable link, implied external competence is acquired only after the exercise of the internal power?

Alan Dashwood claims that there are some reasons that this could not have been the Court’s meaning. The issue for the Court was the alleged exclusivity of Community competence, in respect of the WTO Agreement, which the Commission sought to found in *Opinion 1/76*. It is clear for him that from paragraphs 76 and 77 of the Opinion the competence to conclude agreements on international transport matters exists independently of the enactment of internal legislation: the relevance of the latter event is that it renders an exclusive power previously enjoyed concurrently with the Member States. However, it cannot be said that, in the case of transport, internal and external powers are “inextricably linked“. Had the Community regulated the matters which were the subject of *ERTA* purely on the basis of autonomous secondary law, it would simply have been less effective than cooperating with the third countries concerned.<sup>665</sup> Dashwood concludes that paragraph 86 should not be understood as indicating that the Court took a restrictive view of the principle of complementarity. Nevertheless, it is hard to understand why in some situations it is more effective to create exclusive competences, and in particular that the principle of complementarity would give a special status to one particular transport policy while leaving aside all others.

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<sup>662</sup> *ibid* 85

<sup>663</sup> *ibid*

<sup>664</sup> *ibid* 86

<sup>665</sup> Dashwood (n 176) 14

I think that para. 86 creates a very high threshold that was supposed to clarify *Opinion 1/76* and limit its application. The Court did not settle unambiguously the misunderstanding caused by *Opinion 1/76* that implied that competence may flow and be exclusive even in the absence of explicit provisions from the whole scheme of the Treaty. Rather, it did that directly by requiring a very high level of necessity. Holtermann claims that when the Court analyzed *Opinion 1/76* in paragraph 85 of *Opinion 1/94*, it decided that, although it is in fact possible that the Community has an implied power to act internationally in a field where it has not yet acted internally, such a situation would only occur in exceptional circumstances.<sup>666</sup> Some authors were even more radical. Essentially, necessary is defined as indispensably necessary. It narrowed dramatically the circumstances in which action to attain the objectives of the Community may be necessary, rendering thereby the doctrine of necessity an ineffectual concept without any realistic possibility for application in the future.<sup>667</sup> It looked like the Court limits the principle of *Opinion 1/76* to the facts of that case. What is more, in dealing with the exclusivity question, the Court uses a very restrictive word, “indispensable”, to exclude the possibility of action by the Member States. It sets up that the external competence and as yet unused internal competence must be inextricably linked. Antoniadis claims that the “inextricably linked” requirement, coupled with the high threshold that the concept “necessary” requires in itself, would ordinarily lead to complete abandonment of the doctrine of necessity.<sup>668</sup>

Finally, the Commission argued that Articles 100a and 235 (later: 114 and 352 TFEU) of the Treaty formed the basis for exclusive external competence. The Court replied that Article 100a, where harmonizing powers had been exercised, could limit, or even remove, the freedom of the Member States to negotiate with non-member countries. However, an internal power which had not been exercised in a specific field could not confer exclusive external competence in that field on the Community. Article 235, in turn, could not itself vest exclusive competence in the Community at international level. As mentioned in the previous paragraphs, save where internal powers could only be effectively exercised at the same time as external powers, internal competence could give rise to exclusive competence only if it was exercised, and this applied a fortiori to Article 235.<sup>669</sup>

The Court referred again to the treatment of non-nationals. Although the only objective expressly mentioned in the chapters on the right of establishment and on freedom to provide services is the attainment of those freedoms for nationals of the Member States of the Community, it does not follow that the Community institutions are prohibited from using the powers conferred on them in that field in order to specify the treatment which is to be accorded to nationals of non-member countries.<sup>670</sup> The Court discussed some Community acts which contained provisions to that effect. After finding diverse objectives thereof, it effectively accepted such practice and summed up in paragraph 95 that:

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<sup>666</sup> Martin Holtermann, *The Importance of Implied Powers in Community Law* (LLM Thesis, Rijks Universiteit Groningen 2005)

<sup>667</sup> Antoniadis (n 537) 77

<sup>668</sup> *ibid* 14

<sup>669</sup> *Opinion 1/94* (n 615) 87-89

<sup>670</sup> *ibid* 90

Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts. The same applies even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the *ERTA* judgment if the Member States retained freedom to negotiate with non-member countries.<sup>671</sup>

The Court confirmed that the harmonization of the EU measures has an external dimension and when an area is fully harmonized (e.g. self-employment), the Member States lose their freedom to conclude agreements with third countries on access to this area of nationals of non-member countries.

The end point as regards GATS was that the competence to conclude the agreement was shared between the Community and the Member States.

After concluding that, the Court referred to TRIPS. The Commission used the same argumentation, like the existence of internal legislative acts which could be affected in the meaning of *ERTA*, the need to participate in the conclusion in order to achieve one of the objectives of the Treaty, and Articles 100a and 235. The Court replied that the reference to *Opinion 1/76* was disputable because the unification or harmonization of intellectual property rights in the Community did not have to be accompanied by agreements with non-member countries in order to be effective. As regards Articles 100a and 235, it repeated the argumentation from the GATS-part of the Opinion. Finally, harmonization within the Community in certain areas covered by TRIPs was only partial, and in other areas there was no harmonization whatsoever. The Court concluded that the *ERTA* doctrine does not apply to the whole of TRIPS.<sup>672</sup>

In the end, the Court ruled that the Community only had the exclusive competence to conclude GATS where it concerned cross-border supply of services, basing this on the fact that such a supply of services is “not unlike trade in goods”. In all other cases, the Community and the Member States were jointly competent, which meant that they would both have to ratify GATS. The ultimate solution to this problem is quite unique: The Treaty of Amsterdam added a new paragraph to Article 133 EC, stating:

5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

This amendment does not mean that the scope of the common commercial policy would be affected in any way. Moreover, the drafters carefully avoid making any statements to the extent to which the common commercial policy includes trade in services and TRIPS, even though the Court’s opinion on this matter had already been obtained.

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<sup>671</sup> *ibid* 90-98

<sup>672</sup> *ibid* 99-103



The option proposed in this new paragraph was never used, so the issue was discussed again during the next IGC. The result was that the new paragraph 5 extended the scope of the first four paragraphs to trade in services and TRIPS, while again carefully avoiding the issue of how much of these policy fields were already covered by paragraph 1. This breakthrough was qualified by a new paragraph 6, which limits the scope of paragraph 5 in that the Community cannot do more internationally than it can do internally, a requirement that will be discussed below. The new paragraph 7 creates a similar option to the one that existed before the Treaty of Nice for those aspects of intellectual property rights that are not covered by paragraph 5.<sup>673</sup>

*Opinion 1/94* is often ambiguous and provokes new questions instead of answering the previous ones. It is noteworthy that the Court accepted that legislative provisions conferring on the Community external negotiating powers give rise to exclusive external competence. In other words, the Community may withdraw the competence to conclude international agreements from the Member States either by way of substantive regulation of a particular field or simply by stating that henceforth it will be for the Community to negotiate internationally. But again the Court, when touching upon the matter of implied powers, did this only in order to address the question of exclusivity. *Opinion 1/94* is seen as one that embodies greater reluctance by the Court to confirm external competence, compared to earlier case law.<sup>674</sup> Some authors claim it signaled a new phase of judicial retrenchment.<sup>675</sup> Maybe the Court left the *ERTA* doctrine fully intact, but it was already commonly accepted by all the actors. It accepted the claim that *Opinion 1/76* brought about exclusive external competence, but restrained it basically to the one case and established a very high threshold of necessity. The logic of parallelism contended by the Commission was overturned. The “common rule” requirement of *ERTA* is read to mean “complete harmonization” in the new conservative interpretation. Nanette Neuwahl commented on that in the following way:

In hindsight, given the fact that the Commission failed to convince the Court that the Community’s treaty-making powers concluding agreements on the basis of articles 133, 308 and/or 95 EC was an exclusive one, the price to be paid for neglecting to raise further question explicitly is two-fold:

- (a) Continued lack of clarity concerning the Community legal basis for concluding this and other international agreements; and
- (b) The necessary imposition of a mixed agreement formula for many future mixed agreements, even where this could be avoided.<sup>676</sup>

Then she adds, “[w]orse still, whatever it does say about implicit external powers is rather restrictive and offers ammunition to advocates of the most restrictive interpretation of these powers”.<sup>677</sup>

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<sup>673</sup> Holterman (n 663) 12

<sup>674</sup> Eeckhout (n 570) 94

<sup>675</sup> J de la Rochere, ‘L’ère des compétences partagées’ (1995) 390 RMCUE 466; JHJ Bourgeois, ‘The EC in the WTO and Advisory Opinion 1/94: an Echernach Procession’ (1995) 32 Common Market Law Review 780; M Hilf, ‘The ECJ’s Opinion 1/94 on the WTO- No Surprise, but wise?’ (1995) 6 European Journal of International Law 254 and 258

<sup>676</sup> Neuwahl (n 648) 142

## 1.6. The OECD opinion

The Community was not a formal member of the Organization for Economic Cooperation and Development (OECD), but had cooperated closely with the institution in accordance with Article 231 EC and Article 13 of the OECD Convention.<sup>678</sup> In December 1991 the OECD Council passed a policy statement in the form of a so-called Revised Declaration on national treatment, whereby the member countries expressed their intention to accord the same treatment to undertakings by other members as to domestic undertakings. While the Declaration itself was not binding, it contained a Third Decision, which was part of a larger package called “the Strengthened National Treatment Instrument”, and introduced procedures for the notification of national derogations, the monitoring of implementation and the settlement of disputes with which the members had to comply. Article 7 of the Third Decision provided that the Decision was open to accession by the Community. Belgium asked the Court for an opinion on the correct legal basis for accession to the Third Decision and on the nature of the Community's competence.<sup>679</sup>

The Court pointed out that it was incumbent on itself to examine the admissibility of the request for an opinion *ex officio*. But, since Belgium's request also concerned the division of powers between the Community and its Member States, it was appropriate for the Court to accede to this request for an opinion.<sup>680</sup>

As for implied powers, the Commission argued that participation by the Community in the Third Decision could be based not only on Article 113 but also on Article 57 and, in the further alternative, on Article 100a.<sup>681</sup> In both cases the Commission considers it appropriate to apply the principles laid down by the Court in the *ERTA* judgment and in *Opinion 1/76*.<sup>682</sup> The Court, citing its judgment in the *ERTA* case, pointed out that the Community's exclusive external competence does not automatically flow from its power to lay down rules at the internal level. Distinguishing *Opinion 1/76*, the Court confirmed its jurisprudence in *Opinion 2/91* and *Opinion 1/94*. The Court held that in some of the areas covered by the Decision, the EC had adopted measures which could prevent Member States participation, though not

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<sup>677</sup> *ibid*

<sup>678</sup> UrCTS 888, 179

<sup>679</sup> The Court at the beginning of the Opinion noted that the Third Decision would be binding for the Community after accession, despite the 'soft law' character of the Revised Declaration. It therefore must be treated as an agreement in the sense of Article 228 EC, i.e. as an undertaking, with binding force, entered into by subjects of international law. *Opinion 2/92 OECD* [1995] ECR I-525, 8

<sup>680</sup> *ibid* 9-15. The Council objected to the admissibility of the opinion, since it considered that Belgium had not questioned the competence of the Community but had raised the issue of the correct legal basis.

<sup>681</sup> A number of governments which have submitted observations, as well as the European Parliament, argue that the matters forming the subject of Third Decision fall within Treaty provisions other than Article 113, in particular: Articles 54(2), 57(2), 75, 84, 92, 93, 98, 100, 100a and 235 (*ibid* 30)

<sup>682</sup> *ibid* 29

in the whole field of the Decision. And since the internal measures of the Community do not cover all the fields of activity to which the Third Decision relates, the Community and its Member States share joint competence to participate in that decision.<sup>683</sup>

In that regard, the Court has consistently held, most recently in *Opinion 1/94* (paragraph 77), that the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the AETR judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to enter into obligations with non-member countries as and when there are common rules which could be affected by such obligations.

It is true that, as the Court stated in *Opinion 1/76*, the external competence based on the Community's internal powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted. However, this relates to a situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules (see *Opinion 1/94*, paragraph 85). It is undisputed that that is not the case here.

Accordingly, it is necessary to ascertain whether the matters covered by the Third Decision are already the subject of internal legislation containing provisions on the treatment to be accorded to foreign-controlled undertakings, or empowering the institutions to negotiate with non-member countries, or effecting complete harmonization of the rules governing the right to take up an activity as a self-employed person. It follows from the case-law of the Court (see, in particular, *Opinion 2/91* [1993] ECR I-1061 and *Opinion 1/94*) that in those circumstances the Community has exclusive competence to enter into international obligations.<sup>684</sup>

The Court clarified *Opinion 1/76* by refining a very broad interpretation of the doctrine of implied powers as a special exemption, which is only to be used when it is necessary to achieve Treaty objectives that cannot be attained by the adoption of autonomous Community rules. In other words, the external powers of the Community can be applied even when internal Community measures are lacking, if the internal measures would be useless to achieve the goals and the goals could be reached only with external measures. Whenever the Community includes the treatment of nationals of non-member countries in its internal legislative acts or provisions, or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts. The same applies even in the absence of any express provision that authorizes Community institutions to negotiate with non-member countries, where the Community has achieved complete harmonization in a given area, because the common rules thus adopted could be affected within the meaning of the *ERTA* doctrine if the Member States retained freedom to negotiate with non-member countries. The Court confirmed its jurisprudence on the exclusivity of implied competences as previously laid down in *Opinions 2/91* and *1/94*. Exclusivity based on pre-emption was confirmed as being

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<sup>683</sup> *ibid* 30-36

<sup>684</sup> *ibid* 31-33

broad in scope, but the application of this principle was narrowly construed compared with the *ERTA* case and *Rhine Navigation Opinion*.<sup>685</sup>

### **1.7. Opinion 2/94**

The European Community appeared as a peace project that was supposed to ensure stability in the continent after World War II. The fundamental human rights discourse is a part of it. Due to the broad scope of contemporary EU law, some of the legislative acts give rise to human rights concerns. Starting out as an economic union, human rights did not really have a place in EU law in the early years. The Member States were rather slow in incorporating the protection thereof in the constitutional basis of the Community. It happened gradually, through sequences of Treaty amendments. The role of the ECJ in this process was substantial. It was compelled to discover the protection of fundamental rights in the Community legal order. The Court derived them from the constitutional traditions of the Member States and from international human rights regimes that bind the Member States. One of the agreements that the Member States were party to was the European Convention of Human Rights. In practice, the Community had to respect the provisions of the ECHR as part of the general principles of Community law, but the European Court of Human Rights (ECtHR) had no jurisdiction over acts of the Community institutions. The ECHR has a functioning court system where individuals may file complaints against their Member States after exhausting all domestic remedies.

The discussion about the accession started in the 1950s. When it was conceived in the early fifties, there were talks of creating formal ties between it and the already existing Council of Europe, including an accession to the ECHR. The debate on that was long and intense. In the 1979 the Commission published a memorandum<sup>686</sup> to encourage discussion on the issue, but the Council was not in favor and no concrete steps ensued. In 1990, the Commission reignited the debate by asking the Council for authority to negotiate the details of accession. The Commission observed that “no matter how closely the Luxembourg Court monitors human rights, it is not the same scrutiny by the Strasbourg Court, which is outside the Community legal system and to which the constitutional courts and supreme courts of the Member States are subject“. The Commission envisaged Community accession not only to

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<sup>685</sup> The causes of this turn may be many. Some have suggested that the Court was reacting to the Maastricht decision of the German Constitutional Court. In that decision, the German Constitutional Court denounced that the Court’s case law on Community powers was too expansive, that the use of *effet utile* was excessive, that interpreting the Treaty was one thing and amending it another, and that the Court could not achieve through interpretation what should be done through Treaty revision. In addition, the German Constitutional Court announced that a Community act that in its view overstepped the boundaries of Community competence would not be applicable in Germany even if the Court of Justice had considered that it did not exceed the competences of the Community. (See more Alter *Establishing the Supremacy* (n 54) 105-113)

<sup>686</sup> Bulletin of the European Communities, Supplement 2/79

the Convention itself, but also to each of the Protocols which have been added to it, insofar as they were relevant to the field of application of Community law.<sup>687</sup> Finally, on 26 April 1995 the Council requested an opinion on whether accession of the Community to the European Convention of Human Rights (ECHR) was compatible with the Treaty. In the request, the Council stated that no decision on opening negotiations could be taken before the Court pronounced on the capability of the accession with the Treaty. The Council argued that, despite the fact that a final text of the Convention did not yet exist, the legal issues regarding accession were sufficient for the Court to provide an advisory opinion. According to the Council, the accession was incompatible with the Community primary law. It agreed with the observation of several Member States<sup>688</sup> that the convention would “continue to apply in the areas falling within national jurisdiction”.<sup>689</sup> Furthermore, the Council believed that the accession would require amending the Convention and its Protocols since currently these are only open to accession by member states of the Council of Europe,<sup>690</sup> which the Community does not propose to join.

The Council requested an opinion regarding two questions: (1) the competence under the Treaty to join the ECHR, and (2) the compatibility of accession with substantive provisions and principles of Community law, in particular the exclusive jurisdiction of the Court of Justice and the autonomy of the Community legal order. As regards the latter, the Court decided it was inadmissible:

In order fully to answer the question whether accession by the Community to the Convention would be compatible with the rules of the Treaty, in particular with Articles 164 and 219 relating to the jurisdiction of the Court, the Court must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention.<sup>691</sup>

Nonetheless, the Court admitted the first part of the request because answering that would be in the interest of the Community institutions, the Member States and non-member countries, even before the main points of the argument were negotiated.<sup>692</sup> The only condition which the Court referred to in that Opinion is that the purpose of the envisaged agreement be known before negotiations are commenced. And, in this case it was doubtless that accession to the ECHR would take place and the subject matter and the significance of the Convention for the whole Community were well known.<sup>693</sup>

As far as implied powers are concerned, there are two aspects of the Court’s Opinion that are significant:

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<sup>687</sup> AM Arnall, ‘*Opinion 2/94 and its Implications for the Future Constitution of the Union*’, in *Human Rights Opinion of the ECJ and its Constitutional Implications*, (1996) 1 CELS Occasional Paper

<sup>688</sup> It is noteworthy that there was even no consensus among the Member States on the question as to whether such negotiations, and resulting accession, were desirable. Four governments said that the request was premature

<sup>689</sup> *Opinion 1/94* (n 615) Council Request for the Opinion, para 4

<sup>690</sup> ECHR Art 66, 213 UNTS 221

<sup>691</sup> *Opinion 1/94* (n 615) 20

<sup>692</sup> *ibid* 10

<sup>693</sup> *ibid* 10-12

1. While reiterating the classic statement of implied powers the Court links this to the principle of conferred powers as explicitly stated in what was then Article 3b EC (now 5 TEU) and stresses the need for a clear internal power, created for the purpose of attaining a specific objective, to form the basis of an implied external power necessary to attain the objective.<sup>694</sup> In contrast to (for example) fisheries or transport, no general power to enact rules in the field of fundamental human rights was conferred on the institutions and there is therefore nothing from which to imply external powers. No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. Fundamental human rights are recognized as general principles of Union law; however, an implied distinction is drawn between such underlying general principles and provisions which form a concrete basis for specific legislative competence. Respect for fundamental human rights may be “a condition of lawfulness of Community acts” but general principles of law cannot themselves alone provide a legal basis for implied external Union action.<sup>695</sup>

2. In the absence of express or implied powers, the Court stated it was necessary to consider whether Article 235 (then 352 TFEU)<sup>696</sup> could constitute a legal basis for accession.<sup>697</sup> While it recognized the gap-filling role of this provision, the Court nevertheless sets limits to its use in keeping with its earlier emphasis on conferred powers:

Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.<sup>698</sup>

Respect for human rights, the Court continues, is a condition of the lawfulness of the Community acts; however, accession to the ECHR would entail a substantial change in the Community system for the protection of human rights in that it would entail the entry into a distinct international system as well as integration of all the provisions of the ECHR into the Community legal order. Such an amendment is of fundamental constitutional significance (It is noteworthy that the Court does not explain what that means, especially in the situation whereby the principles of ECHR had been part of Community law for years) and could not be effectuated under Article 352. A Treaty amendment, a decision of the masters of the Treaty,

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<sup>694</sup> *ibid* 23-26

<sup>695</sup> Marise Cremona, ‘External Relations and External Competence of the European Union. The Emergence of an Integrated Policy’, in Paul Craig, Gráinne de Burca, *The Evolution of the EU* (Oxford University Press 2011) 223

<sup>696</sup> See II.5

<sup>697</sup> The Commission, the Parliament and a number of Governments had argued that a legal basis for accession to the Convention could be found in Article 235 of the Treaty. They maintained that the protection of human rights was a ‘transverse’ or ‘horizontal’ objective to be pursued by the Community in the exercise of all its activities and that such protection was essential for the proper functioning of the common market.

<sup>698</sup> *Opinion 1/94* (n 615) 30

would be the only way to take this fundamental amendment.. Therefore, as Community law stood, the Community had no competence to accede to the ECHR.<sup>699</sup>

Under the precise rule of the Court in *Opinion 2/94*, it needed a Treaty amendment for the Community (of the time) to accede to the ECHR as an outcome of the absence of an explicit competence. This amendment was forwarded and a specific provision was entered in the Treaty establishing the Constitution for Europe, a Treaty that was never enacted. However, the matter of accession was followed up within the EU agenda and was subsequently included in the Treaty of Lisbon which finally came into force on 1 December 2009. The new Article 6, para. 2, section 1 TEU, stated: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." The way that this provision is formulated describes the Union's accession not simply as a wish or a general idea, but more as a duty.<sup>700</sup>

The European Union has not yet become a party of the ECHR. The Lisbon Treaty requires the EU to become a formal party to the Convention, rather than simply treating its substantive rules as a source of the fundamental rights that are respected in the EU, as at present.

In the light of the Court's essential argument from *Opinion 2/94*, all the discussion about the implied powers and Article 235 looks rather redundant. Firstly, *Opinion 2/91* was not very clear about the doctrine of implied powers. Moreover, it looks like the Court again (after *Opinion 1/94*) leaves the final decision to the Member States - and does so in the face of the long-standing and unfinished political dispute about the desirability of the Community joining the ECHR. It was hard to deduce broader principles from the ruling, in particular regarding general EU competence to conclude human rights treaties. The Opinion does not allow for answering the question of whether the Community is capable of concluding other international agreements for the protection of human rights. The Opinion is seen, though, as setting limits both to the doctrine of implied powers and to the use of the flexibility clause, in the sense that both are subject to the principle of conferred powers.

As noted by some authors, the Court does not provide an exhaustive analysis of EC powers from the standpoint of the doctrine of implied powers. Instead, after having pointed out that no Treaty provisions expressly conferred on the Community institutions any general power to enact rules or to conclude international conventions in the field of human rights, the Court turned to consider whether Article 235 could constitute an appropriate legal basis, without addressing the issue of possible implied powers. But if we take seriously the part of the Opinion that says that the human right is a condition of the lawfulness of Community acts and the fact that the Community is already bound by the principles of the ECHR, it is easy to conclude that the doctrine of implied powers could itself be used to justify the entry of the Community into a new institutional system. This new system would ensure the lawfulness of the Community acts; it would provide a system of external revision (by the ECtHR). The Court could use here the principle of effectiveness to justify the application of the implied powers. If the Community has a duty to ensure to a greater extent that the acts

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<sup>699</sup> *ibid* 32-36

<sup>700</sup> ATJM Jacobs, *The European Constitution. How it was created. What Will Change* (Wolf Legal Publishers 2005) 119

are not violating fundamental rights in all the areas of conferred competences, it also has the power to employ the tools to fulfill its obligation. Eeckhout calls this the functional human rights competence.<sup>701</sup> Nevertheless, the Court in a conservative reading decided that the Treaty contains only a “horizontal” obligation to respect human rights.<sup>702</sup>

## 1.8. Open Skies cases<sup>703</sup>

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<sup>701</sup> Piet Eeckhout, ‘The Charter of Fundamental Rights and the Federal Question’ 39 *Common Market Law Review* 984

<sup>702</sup> Dashwood claims that this Opinion had implications for an understanding of the Community constitution in the era of the Maastricht Treaty which goes well beyond the sphere of human rights protection. He explains:

‘My first point relates to the principle of the attribution of powers (or, as it is called in the Opinion, “the principle of conferred powers”). This is now enshrined in the first paragraph of Article 3b EC which states: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. [T]hat wording - banal as it may seem - does two important things. First, it states plainly that the powers of the Community are, in principle, limited. Secondly, it confirms that the Community does not enjoy general, or even residual, law-making competence: the Treaty paradigm is of powers specifically conferred in furtherance of distinct objectives. In the crude but telling language of the Edinburgh text on subsidiary (language which, be it noted, originated with the Commission), “national powers are the rule and the Community’s the exception”.

The Opinion should dispel any lingering doubts about the justifiability of Article 3b EC, first paragraph (and the same must surely go for the other provisions of the Article, on subsidiary and proportionality). The paragraph is treated by the Court, not as a rhetorical flourish or an essentially political statement, but as expressing one of the general organizing principles of the post-Maastricht constitution. The attribution principle is shown to be operational in precisely the same sense as the other general principles of the order, providing a tool for use by the Court in interpreting the Treaty and texts based on it.

In the light of the Opinion, I would venture these rather more specific remarks about the function of the attribution principle in the Court’s reasoning:

(a) The usefulness of the principle as a tool of interpretation relates to a particular category of Treaty provisions, namely the power-conferring provisions (or “legal bases”) which authorize action to be taken at Community level, through the common institutions.

(b) The principle applies, whether the power in question relates to internal or to international EC action.

(c) It applies both when the Court is called upon to determine the scope of expressly conferred powers (in this case, the subsidiary power of the Council under Article 235, see below) and when it has to decide whether a text which is silent as to the taking of certain action should nevertheless be understood implicitly to authorize it.

(d) The effect of the principle is to place the onus of proof on the party to assert that a power exists, or can be used in a certain way. Thus the Court stated baldly that “No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field”. Apparently, it saw no need to refute possible arguments to the contrary. In summary, it is submitted that the attribution principle steers the Court of Justice, in the particular case of power-conferring provisions, towards a strict construction, though one that must, to be sure, take account of the general and specific objectives pursued by the Community and of the structure and values of the order as a whole.’ (Dashwood, ‘Commentary’, in *Human Rights Opinion of the ECJ and its Constitutional Implications* (1996) 1 CELS Occasional Paper, 21-22)

<sup>703</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98



The EC has been acquiring jurisdiction over various aspects of air transportation since the adoption of a first set of measures in 1988. In 1992, the Member States of the European Union agreed to create a Single Market in air transport. This meant liberalizing aviation and allowing all European Community airlines the right to fly passengers and goods throughout the EU. Successive legislative measures adopted over the years have expanded the Community's authority over many aspects of air transportation, safety and, lately, even security within the EC.<sup>704</sup> These powers have dealt with the internal market, but the Commission, whose mandate is to ensure respect for the founding treaties and other rules of EC law, has sought a mandate to negotiate new air transportation agreements with foreign states. Member States of the EC have been very reluctant to concede this function to the Commission and have argued variously that the Commission has no authority over the external air services market and that all matters pertaining to international air services remain within national jurisdiction. After three refusals to grant it a negotiating mandate, and in the situation when Member States were negotiating new bilateral air transport agreements with the United States, the Commission took these Member States to the Court, challenging the legality of various aspects of the agreements that had either been concluded or were under negotiation with the US.

The Commission decided to bring enforcement proceedings against a large number of Member States, arguing that their agreements with the US violated the Community's exclusive competence. The Commission claimed, inter alia, that the commitments undertaken by the Member States infringed the Community's exclusive external competence which arose firstly from the necessity, within the meaning of *Opinion 1/76*, of concluding an agreement at Community level and secondly, because the disputed commitments affect, within the meaning of *ERTA* doctrine, the rules adopted by the Community in the field of air transport.<sup>705</sup> The Commission also argued that the clauses on ownership and control of airlines in these agreements were contrary to provisions on the right of establishment.<sup>706</sup> The Commission argued that by virtue of adopting extensive Community legislation governing air transportation, Member States lost the authority to negotiate these matters with foreign states. It contended that there was an external competence within the meaning of *Opinion 1/76*, and that such competence was exclusive in nature. The Commission referred to the Court's statements in *Opinion 1/94*, where it stated that *Opinion 1/76* concerned exclusive competence in cases where an international agreement was required for the effective exercise of internal competence, and that external powers could be exercised - and thus become exclusive - without any internal legislation having first been adopted.<sup>707</sup> And in the case at hand, the purely internal measures would

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<sup>704</sup> P Dempsey, 'Competition in the Air: European Union Regulation of Commercial Aviation' (2001) 66 *J. Air L. & Com.* 979

<sup>705</sup> Case 431/92 *Commission v Germany (Re Open Skies)* ECR I-2189, 70

<sup>706</sup> Case 467/98 *Commission of the European Communities v Kingdom of Denmark*; Case 468/98 *Commission of the European Communities v Kingdom of Sweden*; Case 469/98 *Commission of the European Communities v République de Finlande*; Case C-471/98 *Commission of the European Communities v Kingdom of Belgium*; Case 472/98 *Commission of the European Communities v Grand Duchy of Luxembourg*; Case 475/98 *Commission of the European Communities v Republic of Austria*; Case 476/98 *Commission of the European Communities v Federal Republic of Germany*

<sup>707</sup> *Commission v Germany (Re Open Skies)* (n 702) 71-72

not be effective since the air transportation is of global character and it would not be possible to separate the internal and external markets both economically and legally. Therefore, only the agreement between the Community and the United States could protect the Community market.<sup>708</sup> This deduction could not hold without the Court's clarification of the meaning of *Opinion 1/76*.

Advocate General Tizzano delivered his opinion on 31 January 2002. He stated that in the absence of an appropriate basis in an express legislative provision (as is the case here), the necessity to conclude an international agreement in order to attain one of the objectives of the Treaty may give rise to an exclusive external competence of the Community only where such necessity is formally affirmed by the competent Community institutions. Tizzano continues that it may be debated - possibly even before the Court - whether in a specific case the assessment of the 'necessity' for an agreement was properly carried out (or omitted), although there can certainly be no escaping from the fact that the institutions empowered to carry out the assessment and the procedures to be followed are those specified in the Treaty.<sup>709</sup> Otherwise, there is a risk of introducing (or, what is worse, of imputing to the Court the intention of introducing) elements of uncertainty, even arbitrariness, into the division of powers between Community and Member States, and of distorting the procedures and the inter-institutional balances established by the Treaty.<sup>710</sup>

Since the Council considered there was no necessity to conclude, at Community level, an agreement of the "open skies" type with the USA, contrary to the Commission's view on the matter, the Advocate General considers that the claimed exclusive competence of the Community to conclude such an agreement cannot, therefore, be founded on its alleged "necessity". The AG stressed that the Conclusions drawn by the Commission from the case law stemmed from a mistaken belief that in affirming the Community's competence in the situations referred to in *Opinion 1/76*, the Court also held this competence to be automatically exclusive.

On the other hand, the Advocate General considers that, by virtue of the case law of the Court of Justice, whenever the Community adopts common rules in a given sphere (on the internal level), the Member States lose the power to contract with non-member countries obligations which affect those rules. Accordingly, in matters covered by the common rules, the Member States may not under any circumstances conclude international agreements: any steps taken unilaterally would be incompatible with the unity of the common market. He was of the opinion that the Member States could not even conclude international agreements that were entirely consistent with the common rules.<sup>711</sup> In the

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<sup>708</sup> *ibid* 73-74

<sup>709</sup> Case 466/98 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* Joined opinion of Tizzano AG delivered on 31 January 2002

<sup>710</sup> *ibid*

<sup>711</sup> *Commission v Germany (Re Open Skies)* (n 703) 72. To remain consistent with this approach, however, further consequences should logically be inferred from that case law. The first is that Member States may not conclude international agreements in matters covered by common rules, even if the texts of the agreements reproduce the common rules verbatim or incorporate them by reference. The conclusion of such agreements could prejudice the uniform application of Community law in two distinct respects. First, because the 'reception' of the common rules into

case at hand, he considers that the disputed agreements may affect the common rules only as far as concerns the air fares chargeable by United States carriers on intra-Community routes and the computerized reservation systems. Those matters are governed by Community regulations (Nos. 2409/92 and 2299/89 respectively) and accordingly come within the exclusive external competence of the Community. Even though they only secured access to intra-Community routes for Community carriers (and did not, as the Commission claimed, lay down exhaustively the conditions for access to intra-Community routes with regard to all carriers), they also amended the pricing rules contained in earlier bilateral agreements, and therefore infringed exclusive Community competence. And it was irrelevant that some of the changes were only minor and some were intended to preserve the application of the regulation. Thus the Member States were not entitled to undertake international obligations in such matters.<sup>712</sup>

This analysis was a consequence of establishing the AG principle that said considerable areas of the agreements were in clear conflict with common rules and agreements which covered the same subject matter as that governed by common rules. In order to establish that the common rules were “affected”, it was not enough to cite general effects of an economic nature which the agreements could have on the functioning of the internal markets, as it was necessary to specify in detail the aspects of the Community legislation which could be prejudiced by the agreement.<sup>713</sup>

In conclusion, the AG recognized that the *Opinion 1/76* did not establish an *a priori* exclusive competence of the kind which exists in matters of commercial policy and conservation of fish resources, or in cases where the EU has previously exercised internal competence by the adoption of internal rules which are liable to be affected by the provisions of international agreements (*ERTA* case). It is only the exercise of competence that creates its exclusive character.

The Court did not, however, use this opportunity to clarify its previous case law by linking necessity/exclusivity with exercise of external competence. It distinguished the *Open Skies* cases from *Opinion 1/76*. The Court stated that the hypothesis envisaged in *Opinion 1/76* is that where the internal competence may be effectively exercised only at the same time as the external competence (*Opinion 1/94*, paragraph 89), the conclusion of the international agreement is thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules. And this was not the case in the air transportation cases. The institutions could have arranged concerned action in relation to the USA or prescribe the approach to be taken by the Member States in their external dealings, so as to mitigate any discrimination or distortions of competition. It has therefore not been established that, by reason of such discrimination or distortions of competition,

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the agreements would be no guarantee, as the the Commission also points out that the rules would then in fact be uniformly applied and, especially, that any amendments which might be adopted internally would be fully and promptly transposed into the agreements. Secondly, because in any case such ‘reception’ would have the effect of distorting the nature and legal regime of the common rules, and entail a real and serious risk that they would be removed from review by the Court under the Treaty.

<sup>712</sup> *ibid* 71-75, 89-97

<sup>713</sup> *ibid* 75-77

the aims of the Treaty in the area of air transport cannot be achieved by establishing autonomous rules. The Court stressed that the Council did not consider it necessary to conduct negotiations with the United States of America at Community level. Furthermore, contrary to what the Commission maintains, the character of provisions concerning nationals of non-member countries is relatively limited and it precludes inferring from them that the realization of the freedom to provide services in the field of air transport in favor of nationals of the Member States is inextricably linked to the treatment to be accorded in the Community to nationals of non-member countries, or in non-member countries to nationals of the Member States. In the light of the foregoing considerations, the Community could not validly claim that there was an exclusive external competence, within the meaning of *Opinion 1/76*, to conclude an air transport agreement with the USA.<sup>714</sup> The Court restricted the meaning of *Opinion 1/76*. It set conditions that make it quite impossible to imagine situations where internal competence could not be exercised without concluding an international agreement. Eeckhout claims that this reading confirms that *Opinion 1/76* is better looked at as a case which did not establish exclusive external competence, but simply confirmed general parallelism between internal and external powers.<sup>715</sup>

When it comes to the *ERTA* doctrine, the Court essentially followed the approach of the AG. It considered that, if the Member States were free to enter into international commitments affecting the common rules adopted on the basis of Article 80(2), this would jeopardize the attainment of the objective pursued by those rules and would thus prevent the Community from fulfilling its task in the defense of the common interest. Therefore, the *ERTA* rules also apply here.<sup>716</sup>

In the following paragraphs the Court collected all the key rules of the doctrine of implied powers from its case law and recalled the test of exclusivity:

107. It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.

108. According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (AETR judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

109. Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).

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<sup>714</sup> *ibid* 80-90

<sup>715</sup> Eeckhout (n 570) 104-06

<sup>716</sup> *ibid*

110. The same applies, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization in a given area, because the common rules thus adopted could be affected within the meaning of the AETR judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).

111. On the other hand, it follows from the reasoning in paragraphs 78 and 79 of Opinion 1/94 that any distortions in the flow of services in the internal market which might arise from bilateral 'open skies' agreements concluded by Member States with non-member countries do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community.

112. There is nothing in the Treaty to prevent the institutions arranging, in the common rules laid down by them, concerted action in relation to non-member countries or to prevent them prescribing the approach to be taken by the Member States in their external dealings (Opinion 1/94, paragraph 79).<sup>717</sup>

Having said that, the Court established that the Community had exclusive competence as regards subject matters covered by Regulation 2409/92, Regulation 2299/89, and Regulation 95/93. Therefore it followed Tizzano AG's opinion and concluded that the Member States had violated the *ERTA* principle.<sup>718</sup> The Court characterized these violations as a breach of the combined provisions of (current) Article 4(3) TEU, which embody the principle of loyalty, and the regulations on the issue.<sup>719</sup> But this judgment is not only a simple summary of the rules established earlier. It is important to stress the Court's comparison between the scope of the common rules and those of the envisaged agreements. Although it had been established earlier, the *Open Skies case* introduced the need for a much more detailed scrutiny of the scope of the internal measures to pass the *ERTA* test (para 108). Antoniadis also points out that it sets paragraph 95 of *Opinion 1/94* in context:

Previously, that paragraph determining that the Community acquires exclusive external competence when the common rules provide for the conclusion of an international agreement with a third country or for the treatment of third country nationals seemed to hang in a vacuum and felt difficult to justify with regard to the AETR, that is apart from the factual coincidence that Regulation 543/69 at issue in AETR also concerned third country nationals and authorized the Community to enter into negotiations with third countries so as to implement the Regulation. Following the *Open Skies* formulation it can be interpreted together with paragraph 96 of Opinion 1/94 as providing examples in which there is a presumption that the common rules would be affected were the Member States entitled to conclude an international agreement falling within the scope of those rules. (Footnotes omitted).<sup>720</sup>

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<sup>717</sup> *Commission v Germany (Re Open Skies)* (n 703)

<sup>718</sup> *ibid* 136

<sup>719</sup> Eeckhout (n 570) 108

<sup>720</sup> Antoniadis (n 537) 79

## 1.9. Constitutional Treaty

The case law presented above formed the doctrine of implied powers at the time when the Constitutional Treaty was adopted. One of the changes discussed in this important document was the codification of the doctrine.

The drafting for European Constitution began in a call for a new debate on the future of Europe at the Laeken European Council in December 2001. A European Convention was founded shortly afterward and was chaired by former French President, Valéry Giscard d'Estaing. The Convention was composed of representatives from national parliaments, national governments, the European Parliament, and the Commission. The treaty was not pre-ordained; it was only briefly mentioned in the Laeken declaration. The convention established its own institutional vision, going far beyond what many observers had expected. The idea took hold that the Convention should indeed produce a coherent document of a Constitutional Treaty. The *Treaty establishing a Constitution for Europe* was signed in Rome on 29 October 2004 by 53 senior political figures from the 25 member states of the European Union.<sup>721</sup>

For the changes important from the perspective of the discussion on implied powers, what was essential was the codification of the external action under a single title, namely Title V which contains only 2 articles<sup>722</sup>, and information in the form of a single set of objectives.<sup>723</sup> Paragraph 4 of Article I-3 is devoted to the Union's promotion of its values and interests in its relations with the rest of the world. This paragraph brings together the objectives from the EU Treaty relating to the common foreign and security policy, and the provisions of the EC Treaty relating to development cooperation. In terms of competences, the Constitutional Treaty laid down in Article II-293(1):

On the basis of the principles and objectives set out in Article III-292, the European Council shall identify the strategic interests and objectives of the Union.

European decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area.

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<sup>721</sup> Craig & de Burca (n 692) 22-23

<sup>722</sup> Article II-292 and II-293

<sup>723</sup> See Marise Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 *Common Market Law Review* 553, 565-568; Marise Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 *Common Market Law Review* 1347, 1348; Christoph Herrmann, 'Gripping Global Governance: The External Relations of the EU between the Treaty of Nice and the Convention on the Future of Europe' in T Tridimas, P Nebbia (eds), *EU Law for the 21st Century: Rethinking the New Legal Order*, Vol. I (Hart Publishing 2004) 300

European decisions of the European Council shall be implemented in accordance with the procedures provided for in the Constitution.

The Constitutional Treaty also recognized the division of competences into 3 types,<sup>724</sup> and in this manner the authors of the Treaty borrowed concepts developed by the Court of Justice and academic commentary:<sup>725</sup>

1. Exclusive competence (Article I-13). The Union has exclusive competence in a specific area when it alone is able to legislate and adopt legally binding acts. The Member States may intervene in the areas concerned only if empowered to do so by the Union or in order to implement Union acts. Article I-13 specifies the areas in which the Union has exclusive competence. These areas are the same as before.
2. Shared competence (Article I-14). In this particular case, the Member States and the Union have powers to legislate and adopt legally binding acts in a specific area. The Member States exercise their powers in so far as the Union has not exercised, or has decided to stop exercising, its competence. This is an affirmation of the case law on preemption. Most of the Union's competences fall into this category. Article I-14 contains a non-exhaustive list of shared competences that correspond more or less to existing ones except that they also include some advances in certain areas such as freedom, security and justice. This Article also lists certain competences which were previously regarded as parallel. The areas in question are research, technological development, space, development cooperation and humanitarian aid. However, in these areas the principle of preemption does not apply, in that Member States may continue to exercise their competences in parallel with the Union, even if the Union has exercised its own competences in these areas.
3. Supporting, coordinating or complementary competences (Article I-17). In certain areas and in the conditions laid down by the Constitution, the Union will have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. The Union's support will essentially be financial in nature. Legally binding acts adopted by the Union in this connection may not entail harmonization of Member States' laws or regulations. The areas in which this type of competence applies are listed exhaustively in Article I-17. It should be emphasized that the explicit referral to the Union's competence in the areas of sport, administrative cooperation, tourism and civil protection is an innovation.

The Common Commercial Policy was recognized as an exclusive Union competence.<sup>726</sup>

The Convention tried to codify the case law on the existence of implied external powers in Article III-225:

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<sup>724</sup> Apart from this new classification, a limited number of Member States will always be able to exercise competences using the enhanced cooperation mechanism. For example, Article I-44 states that Member States that wish to do so may establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences.

<sup>725</sup> Antoniadis (n 537) 86

<sup>726</sup> Article I-13(e) Constitutional Treaty

1. The Union may conclude agreements with one or more third countries or international organizations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives fixed by the Constitution, where there is provision for it in a binding Union legislative act or where it affects one of the Union's internal acts.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.<sup>727</sup>

Thus, the Union may conclude agreements where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve one of the objectives set by the Constitution and where there is provision for it in a binding Union legislative act, or where it affects one of the Union's internal acts. A surprising fact that should be underlined here is that this Article was placed in Part III instead of Part I, whereas it is a provision of great constitutional importance that illuminates the system of division of competences between the European Union and its Member States.<sup>728</sup> Instead, in Part I we can find another attempt to codify the doctrine of implied powers, namely Article 12(2), which states the following:

The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act.

They both look very similar. Bruno de Witte calls it misleading and adds:

Draft Constitution seem to have mixed up, when writing this clause, the ECJ's general statements about implied external competence (which are correctly rendered in Article III-225) and its statements about the more specific question when such implied competence is, or becomes, exclusive.<sup>729</sup>

Thus, the case law on exclusive implied external powers is summarized and codified in Article III-323 and Article 13(2) of the Constitutional Treaty. The former codifies the existence of the doctrine and technically repeats the above-mentioned Article from the Draft. Likewise, Article 13(2) states:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope".<sup>730</sup>

Of course this codification brings all the advantages and disadvantages of a codification. It roots the doctrine in the highest Union law, but does so in a very short and limited way that will not close a discussion about the scope of the doctrine. It also seems that this would lead to a considerable extension of the exclusive as opposed to the shared implied powers of the European Union. The confusion from the Draft was not removed. No Convention member

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<sup>727</sup> CONV 850/03

<sup>728</sup> Bruno de Witte, 'The Constitutional Law of External Relations', in Marise Cremona, Bruno de Witte, *EU Foreign Relations Law* (Hart Publishing 2008) 101

<sup>729</sup> *ibid* 101

<sup>730</sup> Article I-13(2) Constitutional Treaty



proposed an amendment of this draft article when it was first proposed by the Praesidium, probably because everyone took at face value the accompanying statement of the Praesidium that this was merely the codification of ECJ case law.<sup>731</sup> Nevertheless, this wording suggests that the implied shared competence would disappear, and that all “implied” competence, as defined in Article III-323 (1), would be exclusive, as defined in Article I-13 (2).<sup>732</sup> This reading would entail a potentially large expansion of exclusive competence if it were no longer possible for the Union to exercise non-exclusive competence in fields where there is otherwise no express treaty-making power. This would cover many areas of shared and complementary competence, such as justice and home affairs or public health, and thus could not be accepted. Summing up, it is hard to understand why these two articles were kept in the final Treaty.

These two attitudes on implied powers are very similar but not the same. Article III-323 (1) refers to the competence to conclude agreements “where the conclusion of an agreement ... is likely to affect common rules or alter their scope”, whereas Article I-13 (2) has exclusive competence arising “insofar as its conclusion may affect common rules or alter their scope.” Therefore, competence would cover the whole agreement (even if only part of it affects common rules), whereas exclusivity would be limited to those aspects of the agreements that actually have such an effect (“insofar as its conclusion may affect ...”). The variation is hard to justify. Furthermore, where Article III-323 (1) states “necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution”, Article I-13 (2) states “necessary to enable the Union to exercise its internal competence”. A literal reading of the two provisions would suggest that the former is a condition of competence while the latter is a condition of exclusivity. The latter criterion appears to be based on the *Opinion 1/76* type of exclusivity but without the condition of “inextricable link”.<sup>733</sup> This would mean the return to the commonly criticized, very broad scope of exclusive implied powers (see *Opinion 1/76*). Finally, there is the difference between “provided for in a legally binding Union act” in Article III-323 (1) and “provided for in a legislative act of the Union” in Article I-13 (2). Not all legally binding acts are legislative acts and legislative acts may confer an exclusive competence to conclude an international agreement, but other legally binding acts, such as European decisions, will only confer non-exclusive competence (unless, presumably, one of the other Article I-13 (2) conditions applies).<sup>734</sup>

I agree with Dashwood who claims that Article I-13 (2) is unnecessary. For the exclusivity of external implied powers, the reading of Article III-323 together with Article I-5 (2) - on the principle of loyal cooperation - would be enough.<sup>735</sup> The codification provoked confusion, instead of clarifying the case law. It again introduced chaos between the existence of the

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<sup>731</sup> De Witte (n 725) 101

<sup>732</sup> S Griller, ‘External Action: Towards More Efficiency, Coherence and Clarity?’, lecture at University of London, 10 February 2005

<sup>733</sup> Maricse Cremona, ‘A Constitutional Basis for Effective External Action’ (2006) EUI LAW <[http://cadmus.eui.eu/bitstream/handle/1814/6293/LAW\\_2006-30.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/6293/LAW_2006-30.pdf?sequence=1)> 10, accessed on 17 July 2014

<sup>734</sup> *ibid*

<sup>735</sup> Alan Dashwood, ‘The Relationship between the Member States and the European Union/European Community’ (2004) 41 *Common Market Law Review* 355, 372-75

principle and its nature. The doctrine was rather well composed and summarized in *Opinion 2/94*, and the puzzling codification could open old debates about the very basic principles that could jeopardize the constitutional position of the principle of implied powers.<sup>736</sup>

Before the Constitutional Treaty could enter into force, it had to be ratified by all member states. Ratification takes different forms in each country. In 2005 the Treaty was rejected by referendums in France and the Netherlands. A “group of wise men”,- consisting of former Prime Ministers, ministers and members of the European Commission - was created to reflect on possible courses of action. In June 2007, the European Council agreed to convene an International Conference (IGC) to draw up a “Reform Treaty” to amend the existing EU and EC treaties. According to the mandate for the ICG, the provisions on implied powers from the Constitutional Treaty should be preserved in the new treaty.<sup>737</sup>

### **1.10. Opinion 1/03**

Shortly after the constitutional project collapsed in Europe, the Court delivered *Opinion 1/03*.<sup>738</sup>

The Brussels Convention of 1968 governed conflicts of jurisdiction between national courts and the enforcement of judgments in civil and commercial matters between the Member States. The Member States of the Community and those of the European Free Trade Association (EFTA) concluded the Lugano Convention in 1980 in order to establish among themselves a system similar to the Brussels Convention. Following the entry into force of the Amsterdam Treaty, which conferred new powers on the Community as regards judicial cooperation in civil matters,<sup>739</sup> the Council adopted Regulation 44/2001 to replace the Brussels Convention. The purpose of the “new Lugano Convention” (which was to replace the original one) is to align it with Regulation No 44/2001. Both regulations contain a set of rules on the jurisdiction in the various legal systems of the Member States. The crucial question was whether the Lugano Convention draft, which aimed to extend the system of the regulation to a number of EFTA countries and which is very similar to Regulation 44/2001, would come within the Community’s exclusive *ERTA*-type powers.

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<sup>736</sup> The general approach to Part III, of making minimal changes to most policy sectors, has meant the retention of a number of differences when it comes to their external dimension without clear rationale. The standard example of the implied powers doctrine, the transport policy, could serve as an example here, since no express external provisions were foreseen in this subject matter. The external dimension of sectoral policies remained as it had been- mostly implied. What is more, the Constitutional Treaty preserved the historical choice and expressly excluded the transport policy from the scope of CCP. That is why the provisions relating to implied powers are still so important. (See Cremona (n 730) 13)

<sup>737</sup> Council of the EU, Brussels European Council 21/22 June 2007. Presidency Conclusions, Annex I, para 18.

<sup>738</sup> *Opinion 1/03 Lugano Convention* [2006] ECR I-1145

<sup>739</sup> Articles 61(1) and 65 EC

The Court starts by explaining its methodology. It analyzes the competence to conclude international agreements in general terms. The opportunity is taken to recall the principles built up over the whole line of cases concerning the doctrine. It recalled *ERTA* and *Opinion 1/76*, pointing out that the principle established in the former judgment was the relevant one for the case at hand. It also refers to *Opinion 2/91*, where it established that the *ERTA* principle also applies where rules have been adopted in areas that fall outside the common policies and, in particular, in areas where there are harmonizing measures.<sup>740</sup> The Court then pointed out the rules of exclusivity of implied powers established in *Opinion 1/94* and in the *Open Skies* judgment. The Court decided to underline that these situations are only examples, formulated in the light of the particular context with which the Court was concerned. It added:

Ruling in much more general terms, the Court has found there to be exclusive Community competence in particular where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law (*ERTA*, paragraph 31), or where, given the nature of the existing Community provisions, such as legislative measures containing clauses relating to the treatment of nationals of non-member countries or to the complete harmonization of a particular issue, any agreement in that area would necessarily affect the Community rules within the meaning of the *ERTA* judgment (see, to that effect, *Opinion 1/94*, paragraphs 95 and 96, and *Commission v Denmark*, paragraphs 83 and 84).

On the other hand, the Court did not find that the Community had exclusive competence where, because both the Community provisions and those of an international convention laid down minimum standards, there was nothing to prevent the full application of Community law by the Member States (*Opinion 2/91*, paragraph 18). Similarly, the Court did not recognize the need for exclusive Community competence where there was a chance that bilateral agreements would lead to distortions in the flow of services in the internal market, noting that there was nothing in the Treaty to prevent the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings (*Opinion 1/94*, paragraphs 78 and 79, and *Commission v Denmark*, paragraphs 85 and 86).<sup>741</sup>

With these words, the Court evoked a paragraph of the *ERTA* judgment which has never been mentioned in case law after being laid down, namely paragraph 31, to explain that the Community possesses exclusive competence where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law. This was potentially a very powerful statement that could expand the scope of implied powers. In the subsequent paragraph it also included common rules which provide for the treatment of non-member state nationals provided for in *Opinion 1/94* in the category of exclusive Community competence.

In the next paragraph the Court recalled the principle of conferred powers. It subsequently analyzed the term “an area which is already covered to a large extent by Community rules”, that could be found in former *Opinion 1/94*, paragraph 103; *Opinion 2/92*, paragraph 34; and *Opinion 2/00*, paragraph 46. It stated that it was not necessary for the areas covered by the

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<sup>740</sup> *Opinion 1/03* (n 735) 125

<sup>741</sup> *ibid* 122-23

agreement and the Community legislation to coincide fully. The assessment had to be based not only on the scope of the rules in question but also on their nature and content. It was necessary to take into account not only the current state of law but also its future development, insofar as that was foreseeable at the time of the analysis. In short, the Court concluded, it was essential to ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they established in order to preserve the full effectiveness of Community law.<sup>742</sup>

The Court immediately excludes two criteria adduced in support of shared powers: first, the existence in an agreement of a so-called “disconnection clause”<sup>743</sup> does not constitute a guarantee that the Community rules are not affected by the provisions of the agreement but rather may provide an indication that those rules are affected<sup>744</sup>; and second, the fact that the legal basis for the internal Community rules requires that to determine whether an international agreement affects Community rules, the judicial cooperation must be related to the proper functioning of the internal market (Article 65 of the EC Treaty). Finally, where an international agreement contains provisions it presumed a harmonization of legislative or regulatory measures of the Member States in an area for which the Treaty excluded such harmonization and where the Community did not have the necessary competences to conclude the agreement; these limits concern the very existence of external competence and not whether they are exclusive.

Then the Court concluded its general remark as regards the doctrine of implied powers:

133. It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.

Moving on to its detailed analysis of the content of the new Lugano Convention, the Court of Justice looked at the connection between the Regulation and the Convention. It declared that the rules of the jurisdiction in the Regulation formed a unified and coherent system, resolving conflicts between different rules of jurisdiction, which applied also to relations between Member States and non-member countries. The purpose of Regulation No. 44/2001 and that of the proposed Convention are the same - to constitute a “uniform and coherent” system. In such a situation, “any international agreement also establishing a unified system of rules on conflict of jurisdiction such as that established by that regulation is capable of affecting those rules of jurisdiction”. The provisions of the new Lugano Convention that relate to the rules on jurisdiction accordingly affect the uniform and

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<sup>742</sup> *ibid* 125-128.

<sup>743</sup> A clause providing that the agreement does not affect the application by the Member States of the relevant provisions of Community law.

<sup>744</sup> *Opinion 1/03* (n 735) 130, 154

consistent application of the Community rules on jurisdiction and the proper functioning of the system established by those rules.

The Court comes back to the disconnection clause. In the present case, the purpose is not to ensure that Regulation No. 44/2001 is applied each time that is possible, but rather to regulate in a consistent manner the relationship between that Regulation and the new Lugano Convention.<sup>745</sup> The Court summarized that the clause is not a guarantee that the Community law would not be affected.

The Court observes that the rules of jurisdiction and those relating to the recognition and enforcement of judgments do not constitute distinct and autonomous systems but are closely linked.<sup>746</sup> The simplified mechanism of recognition and enforcement rests on mutual trust between the Member States and, in particular, on that placed in the court of the State of origin by the court of the State in which enforcement is required, as stated in the Regulation. The Court analyzes a series of provisions of Regulation No. 44/2001 which confirm the link, and comes to the same conclusion as for the rules on jurisdiction. This clearly demonstrates that the Community rules on the recognition and enforcement of judgments are indissociable from those on the jurisdiction of courts, with which they form a unified and coherent system, and that the new Lugano Convention would affect the uniform and consistent application of the Community rules.<sup>747</sup>

In *Opinion 1/2003* the Court clarified that existence and exclusivity of implied powers are two different stages in the examination of the Union's external competence to conclude international agreements. The Court did not examine the notion of necessity here, but it sets the ground for interpreting necessity in accordance with its previous case law, which require that a specific action must be necessary to fulfill the objectives of the Treaties, as they are specified in the provisions chosen as the legal bases for the contested action. This clearly corresponds with the principle of effectiveness as one of the most important ones in the ECJ case law.<sup>748</sup>

We can see that with this opinion the Court supported the basic idea of the *ERTA* principle. It did this to ensure the uniformity of the Community law and to protect its effectiveness. To

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<sup>745</sup> *ibid* 154-158. It also contains the exceptions from the clause.

<sup>746</sup> *ibid* 164

<sup>747</sup> *ibid* 167-172

<sup>748</sup> A different understanding was put forward (Markus Klamert, Niklas Maydell, 'Lost in Exclusivity' (2008) 13 *European Foreign Affairs Review* 493, 496-502, 505-07; Thomas Eilmansberger, 'Bilateral Investment Treaties and the EU Law' (2009) 46 *COMMON MARKET LAW REVIEW* 383, 390-401) according to which the term necessity requires that external competences "facilitate" the objectives of the Treaty. If facilitation is understood as "further(ing) the attainment of internal objectives" (Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 *ELR* 113, 136-37), then the existence of the external competence is based on the same criteria that determine internal competence (this does not establish parallelism of external and internal powers in the sense of *Opinion 1/94*, as the authors rightly point out and is explained in the following para). However, if facilitation is perceived as an additional criterion, providing "a lower threshold test" in comparison to the necessity required for exclusivity, it would actually add to the obscurity concerning the existence of external competence, given that, as some authors contemplate, "unresolved is the question of the exact standard of facilitation to be required for establishing non-exclusive competence". (Angelous Dimopoulos, *European Union Foreign Investment Law* (Oxford University Press 2011) 69, note 15)

secure these, the Court established the “common rules which may be affected or their scope altered” as a criterion for the exclusivity of the Community’s implied powers. This criterion may work perfectly fine with Regulation 44/2001, with the system of conflict rules which it created, but in other cases it could be more problematic. Antoniadis comments on this in a slightly excessive way:

Looking at the broader picture, it could be argued that in *Opinion 1/2003* the Court re-invents itself and offers a formulation which is potentially even more broad and sovereignty-encroaching than the original implied powers doctrine as established in the 1970s. In fact, it is argued here that that the Court meant the broadening of possibilities for the establishment of exclusive competence under the guise of unity of the Common Market and uniform application of Community law. What is more striking is that, in doing so, the Court disregards the codification attempted by the Constitutional treaty not only in terms of substantive grounds for exclusivity to emerge but also the systemic characteristics thereof.<sup>749</sup>

*Opinion 1/03* was not expected by the European politicians. It showed the power and selfconfidence of the ECJ. The Court ignored the codification proposal laid down in the Constitutional Treaty. and also re-developed its own doctrine. It did this in a broad and more sovereignty-encroaching way than its original version, since it cited para. 31 from *ERTA* to explain that the Community possesses exclusive competence where the conclusion of an agreement by the Member States is incompatible with the unity of the common market and the uniform application of Community law. Connecting the exclusive nature of implied powers with the protection of the “unity of the common market” and “uniform application” of law could have brought revolutionary change in the application of implied powers in the EU.

### **1.11. The Lisbon Treaty**

After the failure of the Constitutional Treaty and a "period of reflection", the Member States agreed instead to maintain the pre-existing treaties but amend them, salvaging a number of the reforms that had been envisaged in the constitution. An amending "reform" treaty was drawn up and signed in Lisbon in 2007. The original intention was to have this ratified by all member states by the end of 2008, but this timetable failed, primarily due to the initial rejection of the Treaty in 2008 by the Irish electorate - a decision which was reversed in a second referendum in 2009 after Ireland secured a number of concessions related to the Treaty. The Czech instrument of ratification was the last to be deposited in Rome on 13 November 2009. Therefore, the Treaty of Lisbon entered into force on 1 December 2009.

The Treaty codifies the doctrine of implied powers in two provisions of the TFEU. Article 216(1) provides that:

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<sup>749</sup> Antoniadis (n 537) 85

The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

This provision regulates express and implied competences to conclude international agreements in general. The exclusive competences are addressed by Article 3(2) TFEU:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

The provisions were written in an identical way to that of the Constitutional Treaty, and therefore raise the same kinds of questions as regards how far Article 216(1) goes beyond Article 3(2) in terms of competence reach, or why Article 216(1) is to a large extent identical with Article 3(2). The codification is confusing yet again and will most probably raise many practical questions for the Court to answer.<sup>750</sup>

Despite all the questions that this wording of the codification raises, I will follow the interpretation that Article 216(1) gives the EU external competence without defining its nature and only becomes exclusive when the requirements of Article 3(2) are fulfilled. The nature of Article 216(1) becomes clear only in the interplay with Article 3(2). In other words, Article 216(1) always provides the EU with exclusive external competence, if it has the same meaning or identical wording as Article 3(2). Since the meaning of the two is almost identical, we can assume that Article 216(1) generally establishes exclusive competence. The only difference in these two provisions is when Article 216(1) refers to “objectives referred to in the Treaties” and Article 3(2) to “internal competences”. Therefore, the only situation

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<sup>750</sup> The wording of the provision provoked many fears from the Member States that are particularly concerned about their foreign policy as a crucial factor of their sovereignty. The Czech Constitutional Court, for example, considered it the most troublesome of all the Lisbon Treaty provisions, because it allows the Community to act in very vaguely defined circumstances: “186. On the other hand, however, we must emphasize that Article 216, because of its vagueness, is on the borderline of compatibility with the requirements for normative expression of a legal text that arise from the principles of a democratic, law-based state. The Constitutional Court itself – considering, elsewhere, the content of transfer of powers under Art. 10a of the Constitution – concluded that this transfer must be delimited, recognizable, and sufficiently definite. It is precisely the “definiteness” of a transfer of powers to an international organization that is quite problematic in Article 216 of the Treaty on the Functioning of the EU; it is obvious at first glance that its formulations (... “or” ... “either” ... “or” ... “or” ... “or” ...) “vague”, and difficult to predict. Here, for comparison, we can mention, for example, the generally known settled case law of the European Court of Human Rights, which – as regards the term “law” – requires that it be accessible, precise, and with predictable consequences. Even though the Constitutional Court recognizes that the requirements for precision in an international treaty (obviously) cannot be interpreted as strictly as in the case of a statute, it nevertheless concludes that an international treaty must also meet the fundamental elements of precision, definiteness and predictability of a legal regulation. However, with Article 216 of the Treaty on the Functioning of the EU is quite disputable; nevertheless it does not go so far that the Constitutional Court could and should declare – only as regards the above-mentioned normative expression of the given text – that Article 216 is inconsistent with the constitutional order of the Czech Republic.” (ÚS 19/08 *Treaty of Lisbon*, Judgement of 26 November 2008)

when the competence is shared is described in the part of Article 216(1) that states “where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties.”<sup>751</sup>

Still, Article 216(1) mentioned the “Union objectives” which can cause the broadening of the scope of the doctrine of implied powers. The objectives are mentioned without any link to specific objectives of an internal legal basis and it should be kept in mind that Article 21 TEU expresses a general list of objectives of the Union's external actions.

What is very interesting here is the fact that the Member States totally ignored *Opinion 1/2003*. The Opinion warrants that the inclusion of common rules regulating the position of third country nationals should, by virtue of interpretation, also generate exclusive competence of the Union in the corresponding field. Moreover, they overlooked the argument that the unity of the common market and the uniform application of Community law should also be considered as a ground for establishing exclusive external competence of the Union.

The provisions regarding implied powers were copied from the Constitutional Treaty because they are constitutionally very important, especially because they warrant one of the aspects of the Union’s sovereignty. It will therefore be for the European Union itself to decide when it has an external competence, and the only body which has jurisdiction to review such a decision is the European Court of Justice, which again is a European Union institution. The provisions clearly give the European Union a right to establish its own external competence by passing a legislative act providing for such a competence. Therefore, Article 3(2) TFEU is another provision giving the European Union some degree of *Kompetenz-Kompetenz* for external action.<sup>752</sup>

In this chapter we could observe the development of the external implied powers of the European Union. It started with the *ERTA* case. It was a difficult beginning because the new doctrine was not very welcomed by the Member States and the Council. But eventually they accepted it and the ECJ felt empowered to push the doctrine forward and, because of a broadening of the scope of exclusivity of external powers, declared a more controversial *Opinion 1/76*. The scope of implied powers in the frames of *ERTA* and *Opinion 1/76* became the subject of discussions and judicial reinterpretation in the 1990s, when eventually a narrow version of the doctrine triumphed. But it was not the end of the progress of the doctrine. The new kick came this time from the Member States, not from the Court. They attempted to codify implied powers in the Constitution for Europe and finally codified it in the Lisbon Treaty that is the primary law of the EU today. The importance of it is not really connected with any particularly broad scope of the doctrine offered in the Treaty, but with the fact that the judicial doctrine was accepted and rooted in the highest law of the Union. The Member States decide to include the doctrine created and promoted by the court in its

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<sup>751</sup> S Hindelang, N Maydell, ‘The EU’s Common Investment Policy – Connecting the Dots’, in Marc Bungenberg, Joern Griebel, Steffen Hindelang (eds), *International Investment Law and EU Law* (European Yearbook of International Economic Law 2011)

<sup>752</sup> Tobias Lock, ‘Why is the European Union not a State- Some Critical Remarks’ (2009) 5 *European Community Law Review* 407



basic laws. It proves the evolution of the attitude of the Member States towards implied powers. Something that was seen as a dangerous tool of accelerating integration in a non-democratic way became commonly accepted as an integral instrument of the proper functioning of the Union.

## 2. The Flexibility Clause

Before the Lisbon Treaty, Article 308 was the only place where the doctrine of implied powers was formally stated in a piece of primary law. Nevertheless, the scope of this Article has never been very clear and its interpretation provoked discussion between scholars and tensions between the Member States and the Council. The Article reads as follows:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Weiler described the potential scope thereof with such words: „... it became virtually impossible to find any activity which could not be brought within the ‘objectives of the Treaty’“. <sup>753</sup> These objectives can be understood very extensively, bearing in mind the provisions on achievement of a common market or ever-close Union of people. On the other hand, some people would say that the requirement of unanimity is a threshold that would stop the unforeseen and unexpected development of Community competences. <sup>754</sup>

Schütze distinguished two readings of the clause. The first one is conservative:

What are the objectives of the European Community? The Treaty did not clearly define what its ‘objectives’ are. Its opening provisions refer to the—similar but not identical—concepts of ‘tasks’ and ‘activities’. One influential current in the European law literature during the 1970s suggested that Article 308 could only be used to fill gaps inside those areas in which the Community had already been given a *specific* competence. Outside the expressly enumerated fields, it was impossible to assume the existence of an ‘objective’ since the Community legislator was not meant to regulate those areas in the first place. According to this view, Article 308’s scope was to find a limit in the jurisdictional boundaries set by the ‘activities’ of the Community—a position which linked the notion of ‘objective’ in Article 308 to the areas listed in Article 3 EC. A gap in the Treaty could be identified only by comparing the extent of the specific legal entitlements *within* a policy field and the *specific* aims of the Community policy within that area. <sup>755</sup>

The second reading is definitely more flexible and presents a broad version of the clause:

A second academic camp favoured a much wider application of Article 308. This position was premised on a two-layered understanding of the enumeration principle, which draws on a

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<sup>753</sup> Weiler (n 547) 2445

<sup>754</sup> But Dashwood, based on his experience working in the Council Secretariat, does not agree: ‘The ignoble answer is that there all kinds of bribing and coercing delegations in a minority of one or two ‘[in the Council of Ministers] on a matter to which the unanimity rule applies’ (Dashwood *The Limits* (n 176) 124)

<sup>755</sup> Schütze (n 1003) 136-137

conceptual distinction between *jurisdiction* and *competence*. Article 308 could be used to fill any gap between the Treaty's *aims* and its *powers*. The perhaps most comprehensive manifesto of this expansionist rationale argued that Article 308 was 'designed to bridge the discrepancy between the Community's jurisdiction—as defined by its objectives—and a partial or complete absence of powers for their realisation'. The provision would create a 'gap-less system of competences for achieving all Community objectives'. The Community's jurisdiction and its competence would, thus, coincide. Wherever a matter fell into the scope of the Treaty, the Community would have a legislative competence—at least a subsidiary one under Article 308 EC. The Community's competence was the sum of its objectives.

Which of the two views would the European Court prefer? What were the 'objectives' and what was the jurisdictional frame around the European Community? Ever since *Massey-Ferguson*, there has been no doubt that the European Court would qualify the 'activities' of the Community in Article 3 EC as objectives for the purposes of Article 308. But would Article 308 stop there? The constitutional practice of the European legal order soon disappointed such minimalist hopes. By the end of the 1970s, Article 308 had been allowed to tap into the global objectives of the Community set out in Article 2 EC. Ever since, conceptual limits to the Community's competence became hard to identify. If the Community could act to promote—for example—closer relations between the States, such a competence would be devoid of internal boundaries as all *common* legislation will, by definition, diminish legislative disparities and thereby increase the legal proximity between the Member States.<sup>756</sup>

Article 308 argues that the theory of norm conflict can provide a conceptual framework for clearer understanding and delimitation of competence in the EU, especially by articulating the significance of the *lex generalis-lex specialis* distinction in the context of a competing competence claim.<sup>757</sup> Some 700 legislative measures were adopted under this Article up to 2002<sup>758</sup> and both the ECJ and the Council tended to use the *lex generalis* of Article 308, even in the absence of the *lex specialis* regulating a correspondent competence norm. Article 308 became an easy tool for the European institutions to create new agencies. In many cases, using the *lex generalis* of Article 308 was simply easier than finding a particular *lex specialis* in the Treaty that would justify creation of an agency. What is more, sometimes there was no specific *lex specialis* and Article 308 was the only legal basis for establishing independent agencies.<sup>759</sup>

Some scholars, however, claim that Article 308 is a hindrance to recognize the existence of the doctrine of implied powers.<sup>760</sup> They argue that the lack of explicit powers, which is the typical situation for the application of the implied powers doctrine, is first of all a situation that activates Article 308. They cannot agree on the existence of the judicial doctrine of implied powers because it would scale down the scope of Article 308 and limit the number of situations where unanimity was required. Even more, by acknowledgment of the doctrine they would annihilate the *effete utile* of the provision. These scholars believe that Article

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<sup>756</sup> Ibid Gerard Conway,

<sup>757</sup> Gerard Conway, 'Conflicts of Competence in EU Law and the Legal Reasoning of the ECJ (2010) German Law Journal 966

<sup>758</sup> Grainne de Burca, Bruno de Witte, *The Delimitation of Powers between the EU and the Member States* (Oxford University Press 2002) 217

<sup>759</sup> Deirdre Curtin, Ramses Vessel (eds), *Good Governance and the European Union* (Intersentia 2005)

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<sup>760</sup> E.g., HJ Rabe, *Das Verordnungsrecht der Europäischen Wirtschaftsgemeinschaft* (Hamburg 1963)

308 is enough to ensure the necessary flexibility for the functioning of the Community, and it was expected to replace the doctrine of implied powers. Rebe claimed that Article 308 was the implied powers theory. He stated that this provision “means to canalize the implied powers competence” and it was the “sweeping clause of the Treaty”.<sup>761</sup>

The Court referred to Article 308 already in *ERTA* case, in the part where it mentioned the external competences flowing from the provisions of the Treaties. If the conditions provided in Article 308 are fulfilled, it follows that competence to act in the field may be implied in the Community by using Article 308 as the legal basis. This was known in the Community jargon as the residual powers clause. The Court interpreted the condition of the “necessity for the functioning of the common market” extremely broadly, thereby allowing an expansion of the existing competences.<sup>762</sup> The revisions of the Treaty (SEA, Maastricht, Amsterdam, Nice) then accepted such expansions by creating corresponding legal bases.<sup>763</sup>

Article 308 was used as a basis to establish competences in external relations and much more: for such diverse objectives as environment, consumer protection and development cooperation (up to SEA), and for technical assistance to third countries (up to the Nice Treaty).<sup>764</sup> Thus, the experience of Article 308 TEC (formerly Article 235 EC and once known as *la petite révision*), which is sometimes linked with other Treaty Articles, is that the power it offers has been used extensively over a diverse range of matters.<sup>765</sup> In addition to filling in gaps in the Treaty, some quite substantial policy and regulatory measures have been developed and adopted where the “Treaty has not provided the necessary powers” - for example, the creation of a Community trademark and the European company, establishing a Community action program in the field of civil protection, and creating a rapid-reaction mechanism (humanitarian aid).<sup>766</sup> This is why Article 308 formed a basis for repeated and forceful critiques of the ECJ, for not more carefully scrutinizing the activities of Community political decision-makers, and not controlling these institutions’ attempts at infringing the vertical competence in the Community. The historical broadening of the scope of the Treaty enhanced the number of available legal bases for internal and external action. Invoking the residual powers clause became more and more troublesome to justify.<sup>767</sup> This became especially obvious after the Maastricht Treaty. The Commission, for instance, has limited its

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<sup>761</sup> *ibid* 152-157. But Bartlik claims that Rebe contradicts himself, because Article 308 cannot at the same time be a ‘sweeping clause’ and include the implied powers theory. The sweeping clause was the prerequisite for the emergence of implied powers, but did not provide for any implied powers themselves. (Bartlik (n 559) 63)

<sup>762</sup> Dashwood suggests that the term ‘internal market’ should be preferred in Article 235 (than 308) EEC to the “notoriously open-textured concept” of a common market (Dashwood (n 176) 123).

<sup>763</sup> LS Rossi, ‘Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and the Member States?’, in Andrea Biondi, Piet Eeckhout, *EU Law after Lisbon* (Oxford 2012)

<sup>764</sup> Alan Dashwood (n 176) 123

<sup>765</sup> See *The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC*. A working document prepared by the Swedish Institute for European Policy Studies and submitted to the Convention Working Group V. Working, Document 19

<sup>766</sup> Council Regulation No 1103/97 [1997] OJ L162/1, Council Regulation No 40/94 [1994] OJ L349/83, Council Regulation No 2157/2001 [2001] OJ L294/1, Council Decision of 9 December 1999 [1999] OJ L327/53, Council Regulation No 381/2001 [2001] OJ L57/5,

<sup>767</sup> See AM Arnulf, ‘Left to its own devices? Opinion 2/94 and the Protection of Fundamental Rights in the European Union’, in Dashwood & Hillion (n 552) 71

employment of Article 308 since the introduction of the SEA. Previously, it used to invoke this provision quite frequently as a way of avoiding squabbles about legal bases and EU competence, since nearly everything could fall under Article 308.<sup>768</sup>

In general, the way Article 308 has been used shows us a somewhat cyclical development. At the very beginning, the Council was rather restrained in using it, and its main area of application was in the common agriculture policy. This all changed in 1972, when the Paris Summit showed a clear preference for the use of Article 308 (then Article 235) in achievement of the Economic and Monetary Union and the development of complementary policies.<sup>769</sup> The need to use it scaled down in 1987, when the SEA affirmed various new specific powers for the Community.<sup>770</sup> This process continued with the Maastricht Treaty.<sup>771</sup> In other words, this kind of primary law development was parallel to the process of express limitations of the use of Article 308.<sup>772</sup>

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<sup>768</sup> Emiliou, 'The Internal Legislative Powers of the European Union', in N Emiliou, D O'Keeffe (eds), *Legal Aspects of Integration in the European Union* (Kluwer Law International 1997) 505

<sup>769</sup> Usher described this feeling of freedom in employing Article 308 with these words: „[T]hose responsible for drafting Community environmental legislation appear to have found their own route for solving this dilemma. By about 1980, as exemplified in Council Directive 80/68 on the protection of ground water against pollution by certain dangerous substances, the recitals justify making use of [Article 308] on the grounds of the necessity for Community action in the sphere of the environmental protection and improvement of the 'quality of life', a phrase which is found neither in the recitals to the Treaty nor in its general introductory provisions ... Nevertheless, over the years, the phrase the 'raising of the standard of living' was linked to improving the 'quality of life' and by the time this Directive was adopted it could be stated that legislation was justified in terms of [Article 308] on the basis that it improved the quality of life, as if that were a Treaty objective.“ (JA Usher, *The Gradual Widening of European Community Policy on the Basis of Articles 100 and 235 of the EEC Treaty* (Nomos 1988) 32–3)

<sup>770</sup> 'After the entry into force of the SEA, the Council started to use Article 235 in fields subject to the new cooperation procedure, jointly with other legal bases for harmonization in the Internal Market (Article 10A EEC). The addition of the two different procedures (unanimity and consultation of the European Parliament, plus qualified majority and cooperation) created a procedure in which unanimity combined with cooperation: this had the result politically of making the opinion of the European Parliament useless (as the cooperation procedure imposed unanimity for the acts not accepted by the Parliament). For that reason, after the Single European Act the litigation about the legal bases grew impressively, propelled by the Commission that supported the position of the European Parliament, still lacking at the time an active *locus standi* before the Court of Justice.

The attitude of the Court regarding the use of the flexibility clause then became more restrictive. The ECJ established that the provision on implied powers is merely residual, and therefore the institutions can only use it when no other basis covers the subject; but in any case a double basis cannot form the prerogatives of a European institution. As new competences were introduced along with several revisions of the founding Treaties, there was progressively less room for Article 235“. (LS Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and the Member States?', in Biondi & Eeckhout (n 759) 103)

<sup>771</sup> From 1958 to 1972, during the first phase of the Community's existence, Art. 308 was used on average a mere five times a year. This rose, however, from 1972 to 1986 to an average of 27 times a year, and from 1987 to 1993, to 30 times a year. (G Berrett, *Final Impact: The Treaty of Lisbon and the Final Provisions of the Treaty Establishing the European Community and the Treaty on European Union* (DEI Working Papers 2008)

<sup>772</sup> Articles 98 and 150-152 introduced new restrictions in amending specific fields. The Edinburgh European Council concluded that on the basis of those Articles the use of Article 308 is excluded (Bull. EC 12-1992 points 1.15).

The condition that the Treaty has not “provided the necessary powers“ was also problematic. The Court ruled that the mere fact that there is one, more specific, provision in the Treaty that provides a power to make recommendations does not preclude the use of Article 308 to enact binding measures.<sup>773</sup> This could be significant as regards, for instance, the democratic character of the Union. In that kind of situation, where a specific provision of the Treaty was argued to afford the European Parliament - the representative of the peoples of the Union - a greater role in the legislative process, the Court was very scrupulous in examining justifiability of use of Article 308.<sup>774</sup> As long as there is no proper decision-making, or at least co-decision making, for the European Parliament in Article 308 procedure, fundamental decisions should be taken using the amendment procedure of Article 48 TEU. Moreover, the Court was ready to annul legislative measures that could have been adopted by a qualified majority, to avoid employing a more controversial Article 308. The Court preferred the least controversial, more democratic tool.<sup>775</sup>

The Court ruled on the scope of the Community competences in light of Article 308 in *Opinion 2/94*. It concluded that Article 308 cannot widen the scope of Community powers beyond the framework created by the Treaties. Nor could it be used for the amendments of the Treaty without following the necessary amendment procedure.<sup>776</sup> It is noteworthy that despite these words of the Court, there was “widespread concern, in particular amongst the German *Länder*, that this article was used by the Council as a basis for the surreptitious erosion of Member State powers.”<sup>777</sup>

## **2.1. Comparison with judicial implied powers**

From a methodological point of view, implied powers are a result of a teleological interpretation of explicit powers in the Treaty, but are not original powers themselves. Article 308, on the other hand, is an independent competence. Those two differ as well when it comes to their objectives. While the first one serves as a completion of existing explicit competences, Article 308 requires that other powers are not available.

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<sup>773</sup> Case 8/73 *Hauptzollamt Bremerhaven v Massey-Fergusson* [1973] ECR 897

<sup>774</sup> Case 45/86 *Commission v Council* [1987] ECR 1493, Case C-350-92 *Spain v Council* [1995] ECR I-1985  
*European Parliament v Council* [1996] I-1689

<sup>775</sup> In the case of commercial policy, the Court referred to Article 133. See controversies between the Council and the Commission in: Case 45/86 [1987] ECR 1493, Case 165/87 *Commission v Council* [1988] ECR 5545, Case C-295/90 *European Parliament v Council* [1992] ECR-4193

<sup>776</sup> In this case, the Court limited the possible scope of the Community powers. But it can hardly be considered a case of judicial self-restraint. The Court was motivated - as is emphasized by commentators - by the wish to avoid subjecting itself to the authority of another country, namely ECtHR.

<sup>777</sup> Grainne de Brúca, Bruno de Witte, ‘The Delimitation of Powers Between the EU and its Member States’, in AM Arnull, Daniel Wincott, *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 216

More precisely, Article 308 grants the power to act when an action of the Community is necessary to attain, in the course of operation of the common market, one of the objectives of the Communities; but this power is lacking, there is a *lacuna*. Consequently, alongside the existing powers a new one is created. In turn, application of the theory of implied powers can be observed only in relation to existing powers. Only Article 308 can fill a gap when there is no competence of the Community to fulfill the obligation of a necessary action. The doctrine of implied powers cannot do that. It can only support conferred powers of Community institutions embodying the principle of effectiveness, meaning that without these powers the conferred powers would not play their role, the role foreseen by the treaty-makers. The theory of implied powers looks potentially less “dangerous” for the development of new, unforeseen, competences of the Communities than Article 308. The judicial implied powers are “attached” powers, Article 308 gives space for autonomous powers. Judicial implied powers are necessary to attain the objectives for which the main specific power was intended, and the catalog of these specific powers has been carefully defined by the Treaties. The test of necessity of Article 308 is therefore broader than the one for judicial implied powers because it relates to all objectives of the Community. It can be used as a legal basis in new areas of the Community’s action. This is why Frid states that the field of application of Article 308 is comparable to that of the broad approach to implied powers and it is broader than the field of application of the narrow approach to implied powers.<sup>778</sup> In fact, she continues, the narrow approach has generally been adopted because Article 308 provided for the broad approach.<sup>779</sup>

Article 308 made the whole construction of the Union more flexible and enabled adapting fast to the changing political and economic circumstances. However, it should always be read in conjunction with Article 5. The latter reflects the Member States’ will to restrict the Community competences and to persevere their role as the masters of the Treaty. Article 308 softens this aspiration and continually actualizes the Union in a pragmatic manner. This makes the Union special among the multinational polities<sup>780</sup> and is one of the key sources of its permanent development.

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<sup>778</sup> On the broad and narrow approach see IV 4.1.

<sup>779</sup> Frid (n 582) 91. Then the author incorrectly identifies the implied powers with the external action only.

<sup>780</sup> It is worth mentioning that some organizations explicitly prohibit other competences than those conferred in the constitutive documents. The Organization of American States (OAS) is an example of the state-dominant approach. Article 1 of the OAS Charter (originally adopted in 1948) states: ‘The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency. / The Organization of American States has no powers other than those expressly conferred upon it by this Chapter, none of those provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States.’ Thus, it explicitly limits the powers of the organization to those expressly conferred upon it. The second paragraph protects the member states’ powers in two ways: by confining the organization to those powers expressly attributed by the states and by prohibiting interventions in the internal affairs of the members. The obvious contrast between the wide scope of goals from the first paragraph and very narrow scope of competences has resulted in many amendments of the Charter.

## 2.2. The Lisbon Treaty

The role of Article 308 was debated with great care during the work of the Convention on the Future of Europe. There were even voices to delete this Article from the new text. Nevertheless, the Working Group on Complementary Competences in its final report came to the conclusion that it was an “important provision of constitutional significance” and it should be retained with amendments proposed “to provide a necessary flexibility”.<sup>781</sup> The proposed modifications were:

1. An enhanced role of the European Parliament in the adoption of measures under Article 308, either through assent procedure or otherwise,
2. New express Treaty bases should be created for certain areas in which repeated use of Article 308 has been observed (such as energy policy or intellectual property),
3. The material and procedural conditions should be updated, taking account of the essential dimension of *Opinion 2/94*, and to rule out the possibility of harmonization, so that measures under Article 308 would have to be taken under the framework of the common market, EMU, or the implementation of other policies or activates listed in Articles 3 and 4 of the Treaty.

What is more, the ex-ante judicial control by the Court was proposed. This was supposed to be similar to the Article 300(6) advisory opinion procedure. Finally, the Working Group suggested that the measures taken under Article 308 should be capable of repeal by a qualified majority. The two last proposals are the most interesting, since they contain control mechanisms. They point out that there was some degree of distrust towards Article 308. Nevertheless, it proves as well that the Member States put faith in the Court. Not only did they want to confirm in the Treaty the judicial decisions, but they also proposed a mechanism that would empower the Court and give it more possibilities as regards deciding on the issue of the separation of powers. The ex-ante control did not appear in the final version of the Constitutional Treaty, but all the other modifications were followed.

Finally, the Article was modified and as Article 352(1) it appears in the Lisbon Treaty:

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

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But the process of amending the charter is difficult and slow. (See ND White, *The Law of International Organizations* (Juris 2005) 73)

<sup>781</sup> CONV 375/1/02



Article 352 applies to a more extensive set of problems than its precursor, which applied only when it was necessary to realize Community objectives set out in the Treaty. After the absorption of the Community into the Union, the flexibility clause was to realize Union objectives. The mix of the new coverage of Article 352, the latitude with which it had been interpreted, and the extensive way it had been employed, brought in consequence the introduction of a number of constraints. We can point out two procedural ones here: the European Parliament was granted a veto which required that all proposals based on this provision be brought to the attention of national parliaments for them to consider whether these comply with the subsidiary principle. The provision on the role of the national parliaments fills the gap left by the past treaties. It connects the flexibility clause with the principle of subsidiary and proportionality, allowing a certain degree of control for national parliaments when the EU competences are expanded without a revision of the treaties.

An additional two paragraphs were added, as proposed in the former Treaty revision:

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Article 352(4) repeats the statement from Article 2 that the Union has no power in the field of Common Foreign and Security Policy. Nevertheless, it is worth mentioning that many areas of CFSP are governed by the Treaty, so it has power to harmonize in them. Article 352 cannot be used either in fields like industry, protection of human health, tourism or education. Still, the area covered by Article 352 is wide. Declaration 41 to the Lisbon Treaty states that the objectives pursued by this article and mentioned in that provision refer to the objectives in what is now Article 3(2), (3), and (5) TEU:

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Looking at this list, one may conclude that Article 352 covers a very wide and diverse area of competences, because the objectives listed in the just-mentioned Articles include such open-ended terms as social justice or intergenerational equality. It is hard to imagine an area of competence that would not be covered by them. To limit possible attempts of using Article 352 to expand the Union powers, the Member States rooted *Opinion 2/94* in Declaration 42 to send a clear message to the Union institutions to use this provision with great caution.

The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 308 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.

This could be called a paradox that the Lisbon Treaty, on the one hand, increased the list of objectives and, on the other, foreseen handbrake mechanisms. So is the Union going to expand significantly its competences using the flexibility clause? It is not very likely, bearing in mind the following facts: 1) the several limitations that appear in the Treaty's text concerning the deployment of the flexibility clause, 2) the existence of a variety of alternative legal bases for legislation, and 3) the case law concerning the limited circumstances in which Article 352 may be deployed.

In 2010 the European Council adopted an even more restrictive approach towards the flexible clause.<sup>782</sup> The Council opted for the simplified revision procedure<sup>783</sup> with respect to the procedure envisaged by Article 352 TFEU in order to adopt a new stability mechanism.<sup>784</sup>

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<sup>782</sup> Decision of the European Council of 16-17 December 2010.

<sup>783</sup> Article 48. The Treaty of Lisbon creates a simplified procedure for the amendment of policies and internal actions of the EU. The objective is to facilitate the building of Europe in these two areas. Such a procedure allows for the convening of a European Convention and an Intergovernmental Conference to be avoided. However, the competences of the EU may not be extended by means of a simplified revision procedure. Any Member State, the European Commission and the Parliament may submit to the European Council proposals for revising the provisions of Part Three of the Treaty on the Functioning of the European Union relating to internal policies and action. The European Council adopts unanimously a decision to amend all or part of these provisions after consulting the European Parliament and the Commission. This decision enters into force after approval by the Member States. This revision procedure cannot be used to extend the competences conferred on the Union.

<sup>784</sup> The European Council decided that some limited amendments of the EU Treaties are necessary in order to establish a permanent crisis management mechanism for the Eurozone. Herman Van Rompuy and the European Commission were mandated with preparing proposals for such a crisis mechanism – which would provide emergency lending in the event of a sovereign-debt crisis. The European Stability Mechanism amendment, for its part, used the simplified revision procedure.

The German Lisbon judgement is worth mentioning here (Judgement of 30 June 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08). On 30 June 2009, the German Federal Constitutional Court delivered its judgment on the compatibility of the Treaty of Lisbon with German Basic Law. While the court found the Lisbon Treaty constitutional as such, it declared the accompanying statute regarding the involvement of the national legislature in EU decision making to be unconstitutional. The court ordered the statute to be amended, so as to equip the legislature with greater powers, before

We can say that Article 352 contains some essentialities of the doctrine of implied powers. It should be deployed where the explicit powers of the Union are not sufficient to regulate the effectiveness of the organization well enough, to fulfill its statutory obligations, or to perform its functions. It was created as a codification of the judicial doctrine of implied powers, developed after *ERTA*. But is it really the codification of the judicial doctrine? It is hard to agree. First of all, it is not a complete codification; it is not a codification of all implied powers. As we saw, the judicial doctrine of implied powers was rooted in two other Articles of the Lisbon Treaty. Only those who believe that this European “sweeping clause” exclusively represents implied powers in the EU may try to defend the thesis that Article 352 is the full codification of the doctrine. But as we saw, judicial implied powers exist and still play a major role in the EU legal system. Article 352 provides for new, independent powers when the existing ones are not sufficient. And the implied powers are tightly connected with the existing powers. The latter ones are sine qua non conditions of implied powers. If there is a completely new power needed to reach objectives of the Treaty, Article 352 should be used. This Article is important because with it there is no necessity for creating new powers under the judicial doctrine of implied powers. Thus, the broadest formulation was taken away from the judicial doctrine mechanism; it was codified in the Treaties and, therefore, the Court cannot be accused of creating a doctrine that allows for finding the competences based only on the Treaty objectives. It limits the scope of application of the doctrine, as created by judges, which can only have positive results because it should decrease criticism of the doctrine.

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the German instrument of ratification could be deposited. The court also rules on Article 352: ‘In the light of the non-specificity of possible cases of application of the flexibility clause, by constitutional law its use requires the ratification by the German Bundestag and the Bundesrat on the basis of Article 23(1) second and third sentence of the Basic Law’. Therefore, for Germany the new Council’s preference is less favorable than the former approach towards Article 352. Following the Lisbon judgment of the Federal Constitutional Court, the German government must be preliminary authorized by the parliament in a case of constitutional importance before voting in the Council the adoption of the EU act based on Article 352. In an ordinary (or special) revision procedure, the government negotiates and the parliament ratifies. (See F Kiiver, ‘The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU’ (2010) 16 *European Law Journal* 578

## 3. Internal implied powers

### 3.1. First attempts

Before the Court took the landmark *ERTA* decision, it had already had something to say about the implied powers. These decisions are not so well known and are normally omitted when discussing the doctrine, both because they do not touch upon the issue of external competences of the Community and because the doctrine of implied powers in the European context is, in general, reduced to the international agreements.

The Court spoke about the implied powers as far back as 1954 in the *Fédéchar* case. At issue was whether the High Authority, which was back then the Community's executive body, could fix prices as part of the recognized power to fix the market. The High Authority pretended to reduce the Community subsidies for Belgium coal where the production costs and the coal price were higher than anywhere else in the Community. *Fédération Charbonnière de Belgique* was the applicant and rejected this claim on the grounds that the High Authority's powers were specifically enumerated in the ESCS Treaty. Also, in the absence of any provision expressly enabling this institution to impose the fixed coal prices, such a power could not be deduced from an extensive interpretation of the Treaty. The Court, however, argued differently. It explained that:

[W]ithout having recourse to a wide interpretation it is possible to apply a rule of interpretation generally accepted in both international and national law, according to which the rules laid down by an international treaty or a law presuppose the rules without which that treaty or law would have no meaning or could not be reasonably and usefully applied. Furthermore, under the terms of Article 8 of the Treaty it shall be the duty of the High Authority to ensure that the objectives set out in that Treaty are attained in accordance with the provisions thereof. It must be concluded from that provision, which is guiding principle of the powers of the High Authority defined in Chapter I of the Treaty, that it enjoys a certain independence in determining the implementing measures necessary for the attainment of the objectives referred to in the Treaty or in the Convention which forms an integral part thereof. As, in the instance, it is necessary to achieve the aim of Article 26 of the Convention, the High Authority has the power, if not the duty, to adopt - within the limits laid down by that provision - measures to reduce the prices of Belgian coal.<sup>785</sup>

This means that an indisputably existing power cannot effectively be exercised without spanning a matter that is not mentioned, or not explicitly mentioned in the provision conferring that power. Hence, in this understanding implied powers mostly take the form of a tacit annex to explicit powers.<sup>786</sup> This is different from the typical understanding of implied

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<sup>785</sup> Case 8/55 *Fédéchar* [1956] ECR 292

<sup>786</sup> Armin von Bogdandy, Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 282

powers in the external context, which construes the doctrine of implied powers as a counter-concept to the doctrine of attributed powers rather than as an integral part of it.<sup>787</sup>

In *Fédéchar* the Court construed implied powers in a narrow manner, reducing them such that they resulted in “essential importance” for making one of the Treaty provisions operative yet keeping within the limits of Community jurisdiction. Here, the Court admitted that there are certain limits that the implied powers cannot cross. The Court did not talk about any kind of “reserved area” of the Member States, but it *de facto* recognized them, namely in such a way that in the field of transport there was no basis for the Community legislation.<sup>788</sup>

Magdalena Martínez claims that the Court took its decision only because of the Member States reluctance of the implied powers.<sup>789</sup>

In *Italian Government v. The High Authority*<sup>790</sup> the Court was inclined to consider the doctrine of the *Fédéchar* case, but it found that in the specific situation the factors invoked (“general economic policy”, “the basic principle of the Treaty”) did not permit any implication. The case was about whether the High Authority had powers in the transport sector considering the publication of pricelists and conditions of sale.<sup>791</sup> The Court adopted the same attitude in *The Netherlands Government v. The High Authority*.<sup>792</sup>

These two Member States went before the Court for the first time to express their discord to a prospective enlargement of the Community competences outside the Treaty provisions. The Italian and Dutch governments argued that the implied powers the High Authority demanded equaled infringement of the principle of attribution. The Court, by legitimating the Community action which violated the domain of Member States’ exclusive competences, would be compromising the vertical balance of powers within the Community.<sup>793</sup> The Court annulled the decision of the High Authority.<sup>794</sup>

In these cases the Court went one step away from confirming the applicability of the doctrine of implied powers within the EEC: it declared that the implied powers may be deduced not only by implication from specific provisions of the Treaty but also by its general structure.<sup>795</sup> This argument is well known from the *ERTA* case. Furthermore, it is worth

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<sup>787</sup> Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2003) ch 2

<sup>788</sup> In contrast to the ICJ, which never admitted that the use of implied powers might infringe the ‘domaine réservé’ of the United Nations’ Member States (this possibility was rejected even on a theoretical level). See Magdalena Martínez, *National Sovereignty and International Organizations* (Kluwer 1996)

<sup>789</sup> *ibid*

<sup>790</sup> Case 20/59 [1960] ECR 325

<sup>791</sup> ‘Neither the working nor the general structure of the Treaty gives the High Authority implied legislative power with regard to the publication of transport tariffs.’ (*ibid* 2)

<sup>792</sup> Case 25/59 [1960] ECR 355

<sup>793</sup> Case 20/59 (n 787) 330-331

<sup>794</sup> Decision 18/59

<sup>795</sup> Accordingly Case 20/59 (n 787) 361 and Case 25/59 (n 789) 371

noting that the Court used here the method of developing its doctrine while at the same time solving the case at hand, where it agreed with the position of the Member States.<sup>796</sup>

McMahon commented on this series of cases with the following words:

It will be noticed that the Court here is formulating a limited and severely circumscribed doctrine of implied powers. There is no attempt to impute a new power to the Organization. Powers will be only implied to implement a power already expressed in the Treaty and then only to achieve the limited purpose of the express power and to permit it a reasonable and useful application. In two recent cases (20/59 and 25/59) the Court has again referred to the above view and it is submitted that the attitude of the Court is to be welcomed. Subject to and within the above limitations, the doctrine of implied powers will always be necessary for the effective functioning of any international organization.<sup>797</sup>

The Court also spoke of the implied internal powers in the *Camera Care* case.<sup>798</sup> The question here was whether the Commission can take interim measures under Regulation No. 17, which did not provide for such measures.<sup>799</sup> Warner AG argued that this was a reason why they should not be allowed to do this, and concluded that the Commission had no inherent power as a competition authority, since that role was created by secondary legislation and such bodies do not have inherent powers. He also rejected implied powers on the basis that the EC Treaty expressly empowered the Council, under Article 87 (now Article 83) EC, to adopt the measures necessary to implement the EC competition rules. Nevertheless, the Court held that in some circumstances interim measures may be necessary and that Regulation No. 17 does not exclude them. As a consequence, the Court ruled that the Commission's right to take decisions comprises successive stages, so that a decision finding that there is an infringement may be preceded by any preparatory measure which might appear necessary at any given moment. Interim measures "are indispensable for the effective exercise of its functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to bring to an end infringements which it has found to exist".<sup>800</sup> In addition, the Commission has been expressly granted the power to order interim measures by specific regulations, such as Regulation (EC) 659/1999 on the application of rules on State aid control and Regulation (EEC) 3975/87 on the application of competition rules to the air transport sector. Thus, the power to take decisions implies the power to take interim measures.<sup>801</sup>

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<sup>796</sup> Cf *Van Gend, Costa v ENEL*

<sup>797</sup> JF McMahon, 'The Court of the European Communities Judicial Interpretation and International Organization' (1961) 37 *British Year Book of International Law*.320, 342

<sup>798</sup> Case 792/79 *Camera Care Ltd v Commission* [1980] ECR 130, 131

<sup>799</sup> The applicant, Camera Care, brought a complaint against Hasselblad and Victor Hasselblad A/B, claiming that the termination by Hasselblad of the supply agreement which had existed between the parties until then and the refusal to supply photographic equipment and spare parts made it impossible to obtain cameras or spare parts from other intermediaries and, consequently, its sale and repair business was in jeopardy. Camera Care asked the Commission to adopt interim measures, but its petition was rejected on the grounds that there was no certitude that such power was granted to the Commission by Regulation 17/62.

<sup>800</sup> Case 792/79 (n 795) 18

<sup>801</sup> *ibid* 119

Price regulations and interim measures were the first internal implied powers the ECJ granted using its doctrine. These cases show us that implied powers in the EU cannot be limited to international agreements. These first attempts were rather narrow but they also show us that not all proposals of new internal powers for the Community were approved by the Court. Member States used the judicial mechanism to fight against expansive attempts of the Commission, and they were successful. They will fight even more forcefully in another case that touched upon the most sensitive aspects of their statehood, which we will see in the forthcoming sections.

### **3.2. Migration policies**

After the first attempts that were examples of a very narrow use of the doctrine of implied powers, in 1987 the Court adopted a wider formulation thereof in the area of internal policy.

The Commission made a decision pursuant to Article 118 which established a prior communication and consultation process in relation to migration policies affecting workers from non-EC countries. The Member States were to inform the Commission and other Member States of their draft measures concerning entry, residence, equality of treatment, and the integration of such workers into the social and cultural life of the country. After notification to the Commission of such draft measures there would then be consultation with the Commission and other Member States. Article 118, which concerned collaboration in the social field, did not expressly give the Commission power to make binding decisions. In other words, the provision gave the Commission a task, but did not foresee any legislative powers. The decision was challenged by some Member States.

The Court ruled:

...[I]t must be considered whether the second paragraph of Article 118, which provides that the Commission is to act, *inter alia*, by arranging consultations, gives it the power to adopt a binding decision with a view to the arrangement of such consultations.

In that connection it must be emphasized that where an Article of the EEC Treaty (...) confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task. Accordingly, the second paragraph of Article 118 must be interpreted as conferring on the Commission all the powers which are necessary in order to arrange the consultations. In order to perform that task of arranging consultation the Commission must necessarily be able to require the Member States to notify essential information, in the first place to identify the problems and in the second place in order to pinpoint the possible guidelines for any future joint action on the part of the Member States; likewise it must be able to require them to take part in consultation.<sup>802</sup>

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<sup>802</sup> Cases 281, 283-285, 287/85 *Germany v Commission* [1987] ECR 3207, 27-28

The Court held that whenever a provision of the Treaty confers a specific task on the Commission, this provision must also be regarded as conferring necessary powers thereon in order to carry out the tasks. This judgment potentially has a very important meaning since the Treaty confers various tasks on the Commission, including some very wide-ranging ones such as that of ensuring that the provisions of the Treaty are applied.<sup>803</sup> However, the judgment has not been widely applied.<sup>804</sup>

An example of when the Commission tried to make use of this doctrine, but did not, was in case C-327/91 *France v. Commission*. In 1991, the Commission and the Government of the United States entered into an agreement to coordinate and cooperate in the application of their competition laws. While the agreement did not require any changes in the competition laws of either the US or the Community, it did call for improved coordination in enforcement, through consultation, exchange of information and notification of measures - particularly in circumstances where important interests of the US would be affected by the enforcement activities of the EC authorities, or vice versa. The Commission had not asked the Council for a negotiating brief under Article 228(1) EEC and insisted that it had the power to conclude this agreement without the involvement of the Council. France asked for an annulment of the agreement under Article 173(1) EEC, alleging that the Commission was not competent to conclude the contested agreement.

The Commission's final argument against France's plea was:

...[That] its power to conclude international agreements is all the more clear-cut in the present case, since the EEC Treaty has conferred on it specific powers in the field of competition. Under Article 89 of the Treaty and Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty<sup>805</sup>, the Commission is entrusted with the task of ensuring the application of the principles laid down in Articles 85 and 86 of the EEC Treaty and the application of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 14).<sup>806</sup>

The Court rejected this argument, ruling that even though the Commission has the power internally to take individual decisions applying the rules of competition (a field covered by the Agreement), internal power will not as such alter the allocation of powers between the Community institutions with regard to the conclusion of international agreements, which is determined by Article 228 of the Treaty.<sup>807</sup>

### **3.3. New Agencies**

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<sup>803</sup> Hartley (n 598) 105

<sup>804</sup> *ibid.* Hartley points at case C-327/91 *France v Commission*.

<sup>805</sup> OJ, English Special Edition 1959-1962, 87

<sup>806</sup> Case 327/91 *France v Commission* [1994] I-3641, 40

<sup>807</sup> *ibid* 41



The Treaty of Rome did not provide any specific legal basis to create agencies. In Article 4 thereof, the four institutions are listed and it is stated that “each Institution shall act within the limits of the powers conferred upon it by this Treaty”. This was sometimes interpreted as a prohibition to create additional institutions.<sup>808</sup> Nevertheless, new bodies have been created and the basis for that was Article 308.<sup>809</sup> This was the case for 12 out of 23 agencies.<sup>810</sup> This legal basis brings two limitations, as is known from the former analysis of Article 308. First, Article 308 cannot be used to change the institutional structure of the Community and alter the balance of powers. Second, it may not be applied if other Treaty articles are applicable. The former limit is of particular meaning because it sees to the nature of powers delegated to the agencies and determines that agency powers must not encroach upon those of the Treaty institutions. The second limit encroaches on the general residual character of Article 308.<sup>811</sup>

The first exception was noted in 1990, when the European Environmental Agency was established on the basis of Article 130s (then Article 175). The crucial difference between the *lex specialis* of Article 130s and the implied power of Article 308 was the procedure. The *lex specialis* path provides for co-decision - in principle, qualified majority voting in the Council - whereas Article 308 requires a Commission proposal along with unanimous voting in the Council and EP consultations. Therefore, the choice of the legal basis and procedure may influence the final result of the legal act. This first example of departure from the *lex generalis* path<sup>812</sup> while creating agency raised questions as to whether this would be possible again in the future. Obviously, the EP saw the possibility of using the *lex specialis* path as a chance for empowerment and gaining influence in the decision-making process. It was asked if the Regulation on the European Agency for the Evaluation of Medicinal Products could be amended on the basis of Article 95 instead of Article 308.<sup>813</sup> Answering that, the Commission came up with a note on inserting specific legal bases into the EC Treaty for establishing “decentralized agencies forming a separate legal entity”. What was meant

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<sup>808</sup> K Lenaerts, ‘Regulating the regulatory process: ‘delegation of powers’ in the European Community’ (1993) 18 Eu.L. Rev 23

<sup>809</sup> Sometimes together with other legal bases. E.g. Article 308 was cited together with Article 284 EC, which deals with the collection of information, in the Regulation establishing the European Monitoring Centre for Racism and Xenophobia (Council Regulation 1035/97/EC of 2 June 1997).

<sup>810</sup> CEDEFOP, EUROFOUND, ETF, EMCDDA, EMEA, OHIM, EU-OSHA, CPVO, CdT, FRA, EAR and GSA (S Andoura, P Timmerman, ‘Governance of the EU. The Reform debate and the EU Agencies Reignited’ (2008) 19 EPIN Working Papers 7

<sup>811</sup> ‘The (alleged) absence of *lex specialis* provision does not mean that Article 308 EC can be used automatically. The Court in its ECHR opinion, concerning the competence of the Community to accede to the Human Rights Convention, made this clear. This general legal basis should *itself* confer the requisite powers on the Council to create independent bodies, having legal personality, and a life of their own. This question has not been discussed very thoroughly in the legal literature. Usually it is simply assumed that Article 308 EC may be used because a more specific Treaty base does not exist, and a primary purpose of the agency in question is, one way or the other, related to one or more of the objectives/activities of the Community, these days listed in Articles 2 and 3 of the EC Treaty. This is in line with the idea that Article 308 can be used for all ‘unforeseen cases’, despite the Court’s ‘warnings’ in *Opinion 2/94*.’ (Ronald van Ooik, ‘The Growing Importance of the Agencies in the EU: Shifting Governance and the Institutional Balance’, in DM Curtin, RA Vessel (eds), *Good Governance and the European Union: Concept, Implications and Applications* (Intersentia 2005) 129)

<sup>812</sup> See III.2

<sup>813</sup> See MEP question in OJ C 310/91

by that was that before treaty amendment only the Article 308 conferred the requisite powers on the Council.<sup>814</sup>

More recently, new agencies are predominantly created on the basis of specific Treaty provisions, e.g. creation of the European Space Agency was based on Article 80(2).<sup>815</sup> The internal market clause of Article 95 provides for the adoption of Community-wide rules which improve the internal market by a qualified majority in the Council, and in co-decision with the Parliament. The Commission saw it as a suitable tool for the establishment of new bodies in a number of cases, like the European Medicine Agency or the European Chemicals Agency.

This tendency was challenged in *Case C-217/04, United Kingdom v. European Parliament and Council of the European Union*.<sup>816</sup> The United Kingdom was seeking for annulment of Regulation (EC) No. 460/2004 of the European Parliament and of the Council establishing the European Network and Information Security Agency (ENISA) on the basis of Article 95.<sup>817</sup> In support of it, the UK submitted that Article 95 does not provide an appropriate legal basis for the adoption of that regulation. The power conferred on the Community legislature by Article 95 EC is the power to harmonize national laws and not one which is aimed at setting up community bodies and conferring tasks upon such bodies.<sup>818</sup> Nevertheless, the UK was not objecting to the creation of the agency in general. It acknowledged that it does serve a desirable purpose, namely the establishment by the Community of its own center of expertise in the field of network and information security. However, it came to the conclusion that the regulation should have been based on Article 308.<sup>819</sup>

Advocate General Kokott stated that Regulation 460/2004 should be annulled.<sup>820</sup> She acknowledged that ENISA may have some value for the approximation of law, but it was not sufficient to predict whether this harmonization will happen and what form it would take. Article 95 cannot be read as permitting all measures for the elimination of obstacles in the internal market.<sup>821</sup>

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<sup>814</sup> Note on Article 309 EC (Brussels, 22 February 2000, confer 4711/00. In the Treaty of Nice, however, such a legal basis for setting up 'decentralized agencies' cannot be found (Ronald van Ooik 130).

<sup>815</sup> Andoura & Timmerman (n 807) 7

Relying on specific provision, the Commission can limit the mandate of the agency to the scope of the specific Treaty provisions, whereas under Article 308 the Council possesses extensive powers to determine the action to be undertaken by the Community (Ellen Vos, 'European Administrative Reform and Agencies' (2000) 51 EUI Working Papers <[http://www.peacepalacelibrary.nl/ebooks/files/00\\_51.pdf](http://www.peacepalacelibrary.nl/ebooks/files/00_51.pdf)> accessed on 15 April 2014).

<sup>816</sup> *Case C-217/04 United Kingdom v European Parliament and Council of the European Union* [2006] I-3771

<sup>817</sup> OJ 2004 L 77, 1

<sup>818</sup> *Case C-217/04* (n 813) 11

<sup>819</sup> *ibid* 21

<sup>820</sup> Opinion of AG Kokott, C-217/04, 22 September 2005.

<sup>821</sup> Case 217/04 was of three groundbreaking judgments delivered by the Court concerning the scope of Article 95, namely *Case C-66/04 Smoke Flavorings* [2005] ECR I-10553, *Case C-436/03 SCE* [2006] ECR I-3733 and the *ENISA* case. These judgments address for the very first time the limits of the "measures of the approximation" of the laws of the Member States pursuant to Article 95. They established crucial guidelines for the application of this very important Treaty provision.

The Court held that:

It must be added in that regard that nothing in the wording of Article 95 EC implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate.

It must be emphasized, however, that the tasks conferred on such a body must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States. Such is the case in particular where the Community body thus established provides services to national authorities and/or operators which affect the homogenous implementation of harmonising instruments and which are likely to facilitate their application.<sup>822</sup>

Then it concluded that ENISA was correctly established on the basis of the internal market clause. The judgment confirmed that community agencies which contribute to the proper functioning of the market can be established on the basis of Article 95, even when their powers are non-regulatory in nature.

It looks like the debate over the proper bases for establishment of new agencies is closed. Article 308 and the theory of implied powers was a good tool at the very beginning when there was no other Treaty rationale. The European institutions did not oppose this choice because it was needed for the effective operation of the Community. The academic opposition was modest. This example shows in the best way possible that the doctrine of implied powers may be used to develop integration without being controversial. The Member States and other actors did not oppose deploying the doctrine to create new agencies because they saw it was necessary for the proper functioning of the Community. The establishment of new bodies was recognized as necessary to attain Community objectives. The agencies were not seen as bodies endangering the internal balance or competences of any of the actors. They are important as they carry out administrative functions, enabling the Commission to concentrate on policy-making. The agencies help to deal with the bureaucratic workload, which is bigger every time, and contribute to the smooth functioning of the Union. However, when the idea of agencies was rooted at the European legal and political level, the Commission started using *legis speciales* as the legal basis for new bodies and took the substantive objectives and tasks of the agencies as a main criterion for choosing the legal basis. This choice had one additional advantage: it required the co-decision procedure, and thus it got more support from the Council and the Parliament. It is also considered more democratic.

Summing up, the theory of implied powers opened the door for the establishment of the agencies, and when this competence became commonly accepted it was given a new (substantive) basis that allowed for a more flexible procedure that fits the Union better.

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<sup>822</sup> Case 217/04 *United Kingdom v European Parliament and Council of the European Union* [2006] ECR I-11573

### **3.4. The Criminal law**

In February 2000 the European Council was working on adopting a “third pillar” framework decision on combating environmental crime, based on Article 34(2)(b) EU in conjunction with Articles 29 and 31(e) EU. This framework decision aimed to harmonize certain aspects of environmental criminal law. However, before it was adopted, the Commission proposed a directive on the protection of the environment through criminal law. This proposal was based on Article 175 EC. Both documents had similar aim and content but the two institutions could not agree on the form of the legal act. The Commission eventually declared that if the Council were to adopt a framework decision, it would commence proceedings before the Court of Justice.<sup>823</sup> The Council questioned the Commission’s competence in this area and the framework decision was formally adopted on January 2003.<sup>824</sup> The framework decision, based on Articles 29, 31(e) and 34(2)(b) EU, lays down a number of environmental offenses in respect to which Member States are required to prescribe criminal penalties,<sup>825</sup> that must be effective, proportionate and dissuasive, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition.<sup>826</sup> The Commission, supported by the Parliament,<sup>827</sup> commenced proceedings and asked the Court to annul the framework decision.

The case turned out to be about the question of whether the proposed measures could have been adopted through a directive or not. Measures which could be adopted through a directive (first pillar) could not be adopted through a framework decision (third pillar) and vice versa.<sup>828</sup> Therefore, because of basic procedural differences between these two pillars, the choice of the legal basis for a measure is of crucial importance. If the Commission was right, then the co-decision procedure (Article 251) would have been applied, instead of the unanimity requirement and the restrictions on the Parliament’s role. Additionally, the directive can have direct effect, whereby in the case of framework decisions the citizens can take no legal action, if the Member States fail to transpose the act.

The settled case law shows that the choice of the legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the

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<sup>823</sup> S White, ‘Harmonisation of criminal law under the first pillar’ (2006) 31 *European Law Review*. 81, 82

<sup>824</sup> Framework Decision 2003/80/JHA

<sup>825</sup> Articles 2 and 3

<sup>826</sup> Article 5

<sup>827</sup> It called the Council to use the framework decision as a measure to complement the directive that would take effect in relation to protection of the environment through criminal law solely in respect of judicial cooperation and to refrain from adopting the framework decision before adoption of the proposed directive (para 13 of the judgment).

<sup>828</sup> Article 47 and Article 29(1) EU provide that nothing in the Treaty on the EU is to affect the EC Treaty.

aim and the content of the measure.<sup>829</sup> An act must be founded on a sole legal basis,<sup>830</sup> unless it pursues several objectives at the same time which are indissociably linked and equally important. In the case at hand, the choice was between Article 34 (proposed by the Council) and Article 175 (the Commission). The former covers police and judicial cooperation and the latter environmental issues. Neither of these falls under the first pillar. Both should be employed to punish the polluters, which was the aim of the directive/framework decision.

Advocate General Colomer stated in his opinion that this legal dispute is a far-reaching issue, as the choice between two proposed interpretations entails totally different legal consequences. If the community could have the power to approximate national criminal laws, it would, in more general terms, imply the application of the Community method to the detriment of the intergovernmental rules foreseen in Title VI EU.<sup>831</sup>

The Commission claimed that unless it inserted criminal penalties into laws to protect the environment through a directive, the Community cross-border pollution would stay ineffective. The Commission stated that criminal law is not considered as a Community policy, but it has to be used as a means to ensure the effectiveness of the environmental policy:

the Community legislature is competent, under Article 175 EC, to require the Member States to prescribe criminal penalties for infringements of community environmental protection legislation if it takes the view that that is a necessary means of ensuring that the legislation is effective. The harmonisation of national criminal laws, in particular of the constituent elements of environmental offences to which criminal penalties attach, is designed to be an aid to the Community policy in question<sup>832</sup>

The Commission also invoked the principles of loyal cooperation, effectiveness and equivalence. What is more, it relies on two former directives which require the Member States to introduce penalties which are necessarily criminal in nature, although that qualification has not been expressly employed.<sup>833</sup> Eventually, the Commission used the argument of alleging abuse of process, stating that the Council chose the form of a framework decision basing on considerations of expediency, since the proposed directive had failed to obtain the majority required for its adoption because the majority of Member States had refused to recognize that the Community had the necessary powers to require the Member States to prescribe criminal penalties for environmental offenses.<sup>834</sup>

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<sup>829</sup> The Court referred to Case C-300/89 *Commission v Council "Titanium dioxide"* [1991] ECR I-2867, para 10 and Case C-336/00 *Huber* [2002] ECR-2867, 30

<sup>830</sup> Court ruled in C-491/01 [2002] I-11453, 94

<sup>831</sup> Case C-176/03 [2005] ECR I-7879, 2 and 4

<sup>832</sup> Case 217/04 (n 819) 19

<sup>833</sup> *ibid* 20-21. Article 14 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering and Articles 1 to 3 of Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorized entry, transit and residence.

<sup>834</sup> *ibid* 24

The Council argues that, given the absence of an explicit provision on criminal law, the Community does not have the power mentioned, because the Member States did not envisage harmonization measures regarding criminal measures.<sup>835</sup> Eleven (of the then fifteen) Member States supported the Council's position<sup>836</sup> and disputed that "not only is there no express conferral of power" to the Community to impose criminal sanctions under the Treaties, "but, given the considerable significance of criminal law for sanctions under European treaties, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it."<sup>837</sup>

The Court found out that the aim of the framework decision was the protection of the environment. In reference to Articles 3 and 6 EC, and settled case law, it concluded that this protection is one of the essential objectives of the Community.<sup>838</sup> Consequently, the Court established the framework to contain a list of particularly serious environmental offenses, which the Member States were to punish by criminal penalties which entail partial harmonization of criminal laws.<sup>839</sup> The content of the framework decision related to the environment and environmental law, but also contained criminal law.

The Court confirmed that neither criminal law nor the rules of criminal procedure fall within the Community competence. Nevertheless:

[T]he last mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.<sup>840</sup>

Thus, the Court ruled that the Community could be competent to legislate in matters of criminal law. It suggested that for the criminal penalties to be effective, persuasive and dissuasive the framework decision is not enough.<sup>841</sup> And it concluded the judgment with such words:

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<sup>835</sup> *ibid* 20-21

<sup>836</sup> The only exception was the Netherlands. It acknowledges that the Community may require the Member States to provide for criminal sanctions, provided that the penalty is inseparably linked to the relevant substantive Community provisions and that it can actually be shown that imposing penalties under criminal law in that way is necessary for the achievement of the objectives of the Treaty in the area concerned. But in the case at hand, the Netherlands considers that the penalties foreseen are not inseparably linked to the environmental provisions of the Community. Thus, the harmonization of criminal law in this field can only be operated from the third pillar. (*ibid* 36)

<sup>837</sup> *ibid* 27

<sup>838</sup> *ibid* 46, 41. The Court referred to Case C-240/83, Case C-302/86 and Case C-213/96.

<sup>839</sup> *ibid* 47

<sup>840</sup> *ibid* 48

<sup>841</sup> *ibid* 49

It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.<sup>842</sup>

The framework decision was consequently annulled. It is interesting that the Court went even further than the proposals of Advocate General Colomer, who recommended to annul only Articles 1 to 4, Article 5(1) - with the exception of the reference to sanctions involving the deprivation of liberty and extradition - Article 6 and Article 7(1) of the framework decision.

The Court basically awarded the Community an implied powers competence.<sup>843</sup> If only the subject matter falls within the Community law, the power to draft criminal provisions falls within Community law as well, given that the provisions are necessary to ensure effectiveness of implementation of the subject matter. The Community for the first time gained the power to harmonize criminal laws of the Member States. This landmark decision was introduced without being extensively motivated.<sup>844</sup> The only justification for the Court's finding was the principle of effectiveness regarding the subject matter of the act concerned. The Court, in the words of White, extended the boundaries of Community law, for the sake of the effectiveness of its policies.<sup>845</sup>

The judgment had fundamental consequences for the Member States. Because of the qualified majority voting in the case of directives, a Member State that would oppose the adoption of a directive aimed at harmonization of a certain criminal offense would still have to introduce it. The Commission could decide to initiate infringement procedures against those Member States that did not comply with Community legislation and the Court could eventually declare non-compliance with the directive, and even impose a lump sum or penalty payment. The Court granted the Commission a new and powerful competence in the area of criminal justice. The exclusive right of the Member States was taken away. This decision was widely discussed and criticized across the continent. It made the Danish Prime Minister denounce the process as an example of a *gouvernement des juges*.<sup>846</sup> Some other commentators observed that for the first time in legal history, a Member State government will no longer have a sovereign right to decide what constitutes a crime and what the punishment should be.<sup>847</sup>

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<sup>842</sup> *ibid* 51

<sup>843</sup> Differently, Michele Dougan claims that this case is a manifestation of derived powers—inherent in every legal basis under the Treaties, and dependent only upon the existence of first-order substantive provisions, together with the need for greater effectiveness in the latter's domestic enforcement. (Michele Dougan, 'From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of the Union Law', in Marise Cremona (ed), *Compliance and the enforcement of EU Law* (Oxford University Press 2012) 74)

<sup>844</sup> V Murschetz called it even ominous and deluded (V Murschetz, 'The Future of Criminal Law within the European Union- Union Law or Community Law Competence', (2007) 38 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 151

<sup>845</sup> White (n 820) 86

<sup>846</sup> JF Castillo García, 'The Power of the European Community to Impose Criminal Penalties' (2005) 3 EIASCOPE 30

<sup>847</sup> *ibid*

The Commission adopted a communication to explain the conclusions drawn from the judgment, which included a list of instruments affected by the implications of the judgment, and suggested proposals on how to correct the situation with regard to the texts which were not adopted on the proper legal basis.<sup>848</sup> Apart from the annulled framework decision, the Commission identified seven more decisions that have been taken on erroneous legal bases and proposed that an agreement on replacing them with directives would be reached soon with the Parliament and the Council. Also it has been indicated that the Commission will apply a broad understanding of the judgment, allowing it not only to push Member States to apply criminal sanctions, but also to set the scale of sanctions.<sup>849</sup>

Later, in 2007, the Court issued its judgment in the *Ship-Source Pollution* case.<sup>850</sup> The Court recalled the principles laid down in its judgment concerning case C-176/03. It reaffirmed the EC legislature's competency to require Member States to adopt criminal penalties for serious environmental violations.<sup>851</sup>

Although it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective.<sup>852</sup>

The Court, however, clarified it:

By contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence.<sup>853</sup>

In other words, the EC legislature was not competent to determine in concrete terms the nature and level of the foreseen criminal penalties. Thus, in this case the Court declined to

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<sup>848</sup> Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgement of 13 September 2005. COM (2005) 583 final/2.

<sup>849</sup> Verena Murschetz, 'The Future of Criminal Law within the European Union- Union Law or Community Law Competence?' (2007) VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 145, 152

<sup>850</sup> C-440/05 *Commission v Council* [2007] ECR I-9097. The Council had adopted a framework decision based on Title VI of the EU Treaty on police and judicial cooperation in criminal matters. This was aimed at strengthening the criminal framework for the enforcement of the law against ship-source pollution by introducing an obligation for Member States to establish effective, proportionate and dissuasive criminal penalties (2005/667/JHA Council Framework Decision (12.07.2005) for the Enforcement of the Law against Ship-Source Pollution). The framework decision also establishes the type and level of criminal penalties to be applied, depending on the damage caused by the infringements. The Commission brought an action against the Council, considering that the framework decision had not been adopted on the correct legal basis and that Article 47 EU had thereby been infringed. The Commission sought annulment of the Framework Decision.

<sup>851</sup> The Court found that the provisions laid down in the Framework Decision relative to this issue related to conduct which was likely to cause particularly serious environmental damage as a result, in this case, of the infringement of the Community rules on maritime safety. The Court analyzed the scope of Article 80(2) EC (relating to the specific domain of maritime transport) and concluded that the Community had competence to adopt all measures to improve maritime transport safety.

<sup>852</sup> C-440/05 (n 847) 66 (citation omitted)

<sup>853</sup> *ibid* 70



extend this implied power to allow the EC legislature to stipulate specific requirements on the type and level of criminal penalties.<sup>854</sup> The Community may oblige Member States to provide for common criminal penalties in order to protect the environment, and is even competent to oblige them to criminalize certain serious violations of environmental laws, but the type and level of criminal sanction basically depends on the Member States.

This last judgment of the Court was definitely the most important in terms of deployment of the doctrine of implied powers in internal affairs. The Court created a completely new legal situation. It acted against the Member States and used the doctrine to broaden the scope of Community power in the neuralgic sphere of criminal law. The Court deprived the Member State from their exclusive competence in a sphere that was considered fundamental regarding their sovereignty. What is more, this judgment affects not only Community environmental policy but also all the areas where harmonization of national criminal laws will be essential for their effectiveness or for the proper functioning of the four freedoms. The Court acted rigidly, being led by the principle of effectiveness. It considered the main principles of the Community and revolutionized the system to be sure they are fulfilled, regardless of the reaction of the “masters of the Treaties“. The Court was very confident that the doctrine of implied powers is a substantial and undisputed pillar of Community law and as such can even be used to take controversial decisions. This was very controversial, because in this case we did not deal with a situation where a question was simply not regulated by the Treaty. Instead, the Court had to face the pillarization of the Treaty law, as it was obvious that the Member States did not want certain issues to fall within the Community pillar at the time of making the Treaty. The Member States brought judicial cooperation in criminal matters under its own title in the Maastricht Treaty and expressly conferred criminal matters on the EU and not the Community. In this case it was very likely that the Court consciously went against the will of the Treaty-makers.<sup>855</sup> The Court’s confidence looks even more glaring, considering how the decision was not very motivated.

The Court chose its fast-track integration over the option favored by the Member States. Nevertheless, there was no political counter-reaction of the Member States against this judgment. What is more, the Constitutional Treaty proposed to merge the first and third pillar into a single legal entity. New legal instruments (European laws and European framework laws) and a co-decision procedure would have applied to both areas. Article III-271(2) included changes in criminal legislation, namely that European framework laws may approximate national criminal laws if this proves essential to ensure the effective

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<sup>854</sup> Martin Hedemann-Robinson, ‘Analysis: The EU and Environmental Crime, The Impact of the ECJ’s Judgment on Framework Decision 2005/667 on Ship-Source Pollution’ (2008) 20 JEL 279, 5-8

<sup>855</sup> ‘This newly awarded Community competence faces another criticism. In general, meetings of the Council are arranged by subject matter, with different ministers attending from the Member States. Therefore, framework decisions establishing criminal conduct within the third pillar are drafted by the Council of Ministers of Justice, who are as such authorities competent in drafting criminal laws. On the other hand, when drafting a directive dealing with one of the Community subject matters such as environment, the Council is composed of the Ministers responsible for the specific subject matter within the Member States. As a consequence, a directive establishing criminal responsibilities for pollution will not be drafted by competent authorities in the field of justice, but by authorities competent in the field of environmental issues, the Secretaries of State for the Environment.’ (Murschetz (n 846) 153)

implementation of the Union policy. Finally, the Lisbon Treaty practically copied the corresponding articles from the Constitutional Treaty; therefore it has abolished the third pillar. Through Article 83 EU, decision-making on criminal sanctions is brought within the “normal” legislative procedures of the Union. Therefore, the Lisbon Treaty would grant the very competency denied in the *Ship-Source Pollution*, limiting the sovereign power of the Member States to regulate the criminal matters, e.g. to define types of crimes and to establish penalties. The power of governments was restrained and the competence of the European Parliament was extended. The former framework decisions were replaced by directives.

Article 83(2) TFEU provides as follows:

If the approximation of criminal laws and regulations of the member states proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76 [TFEU on the special power of groups of Member States to make their own legislative proposals].

The Court’s implied powers’ decision was again accepted by the Treaty-makers and codified in the Treaty.<sup>856</sup>

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<sup>856</sup> ‘After all, we seem here to have a provision which not only affirms the underlying point of principle (that such harmonization falls squarely within the Union’s competence) but also expresses a clear will on the part of member states to replace the previous era of institutional wrangling and judicial fumbling with a carefully defined legal basis to govern future Union action in this field (Article 83(2)).

In particular, Article 83(2) TFEU confirms that ‘effectiveness’ (here defined by reference to a threshold of ‘essential’ criminalization) still provides the primary trigger for Union competence over the adoption of criminal sanctions.” (Dougan (n 840)).

## 4. Conclusions

The detailed analysis of practically all the cases where the European Court of Justice has developed the doctrine of implied powers allows us to draw a few conclusions. The first type of conclusion is related to the development of the doctrine as such. Through the years the doctrine has changed. Now it is not the same doctrine as it was in the 1970s when *ERTA* was decided. The following decades showed us that the Court was able to declare new implied powers. Some were broad, others narrow. We will divide implied powers in the EU into a few categories that will serve us later in reflection over European federalism. Historical analysis allows us to group the powers and point out periods of development, from *ERTA* to the codification in the Lisbon Treaty. This study shows us also that the Court was permanently working with the Commission and the Parliament, and against the Member States and the Council, to push the doctrine forward. The particular periods of development of implied powers are tightly connected with the times of political strength or weakness of the Court's partners and opponents. All in all, we will be able to conclude that the ECJ followed its pro-integrationist, federalist agenda all the time. In the second part of this chapter we will reflect on the relations between implied powers in the European Union and European federalism. Some implied powers granted by the ECJ are an important component for creating a more federal polity. To make the picture complete, we will finish this chapter by addressing a question about the potentially troublesome relation - from the federalist perspective - between the implied powers and subsidiarity, and the implied powers and the so-called democratic deficit in the European Union.

### ***4.1. Division of implied powers***

As we can observe, the notion "implied powers" covers in the European context a wide range of issues. The cases discussed in this chapter vary from one another and are not homogeneous. We can see that some got more academic attention than others and some were more controversial than others. Why is that? What is the main difference? What role did the legal bases they were created upon play in that? I will suggest to group them in categories and to analyze closer the role the appropriate classifications have played in the European integration and the potential they have in the discussion over the current form of the Union.

The discussion on the diverse forms of implied powers should start with a partition that has been already proposed and accepted in the legal literature. Hartley suggests the division of the doctrine of implied powers into two formulations: a narrow and a wide one.

According to the narrower formulation, the existence of a given power implies also the existence of any other power which is reasonably necessary for the exercise of the former; according to the wide formulation, the existence of a given objective or function implies the existence of any power reasonably necessary to attain it.<sup>857</sup>

The narrower approach relies on the idea of necessity and the implied power must be considered to exist, essentially, in virtue of the express powers. Inversely, the wider approach is much more open-ended, since it refers to reasonableness of achievement of objectives/purposes and therefore raises questions on its scope. The idea of *reasonableness* seems to be central in the definition of the wide formulation. It has been reflected in more detail in the American jurisprudence. Ely noted that reasonableness as a constitutional standard is empty, in that (good) reasons and the good exercise of reason can only connect premises with conclusions but cannot justify the values implicit in the premises.<sup>858</sup> And what happens when the premises are very general and capacious, which the notion “ever-closer Union” is? This situation leaves ample room for the creativity of the development of implied powers.

White explains the difference between the two formulations as follows:

While the narrow implied powers approach is very much in keeping with the Realist/Positivist tradition of seeing the organization as a servant and not the master, it will be seen that there is a significant divide between narrow and wide implied powers, the latter coming close to the criticized doctrine of inherent powers. In the doctrines of wide implied powers and inherent powers the organization’s objects and purposes set the limits to growth along with any prohibitions put in the constitutive treaty that are meant to stop the organization from undertaking certain activities, most significantly those that infringe upon the competences of the Member States. The reserved domain clauses of organizations that are meant to protect the member States from intrusive activities of organizations show that States, in creating organizations, are perfectly aware that the servant has the potential to become the master. The level of respect that organizations have shown to these clauses sheds light on the shifting balance that exist between the wills of the member States and the will of organization.<sup>859</sup>

It can be concluded from what has been said that the narrow formulation points to the rule of law, accountability and loyalty, whereas the broad approach is founded on output legitimacy.<sup>860</sup> However, Conway observed that “the connection with output legitimacy is suggestive only: the qualification of ‘reasonable’, given broad premises, says little about the content of the implied powers that might result, and claim to output legitimacy would thus be contestable.”<sup>861</sup>

This distinction can be a baseline for my proposal. I would like to distinguish, in the first instance, the doctrine of implied powers based on Article 352 LT (ex 308, ex 325) from the

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<sup>857</sup> Hartley (n 598) 106

<sup>858</sup> John Ely, *Democracy and Distrust* (Harvard University Press 1980) 56-60

<sup>859</sup> White (n 820) 72

<sup>860</sup> Gerard Conway, ‘Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ’ (2010) 11 German Law Journal 966

<sup>861</sup> *ibid*

implied powers based on specific provisions of the Treaty. At first glance the flexibility clause looks different than the rest of the doctrine of implied powers. It is based on a specific Treaty provision that was codified in the Treaty before the Court announced its ERTA principle and even before *Fédéchar* was decided, i.e. before the term “implied powers” became famous among European lawyers.

The flexibility clause was foreseen by the treaty-makers. They wanted to introduce a mechanism that would allow the Community to adjust its competences to its objectives. The Community got a powerful tool that was always used where the Treaty did not provide necessary powers. As we saw, this tool was deployed very frequently. In addition to filling in the gaps in the Treaty, some substantial policy and regulatory measures have been developed and adopted where the "Treaty has not provided the necessary powers", e.g. establishing a Community action programme in the field of civil protection, and creating a rapid-reaction mechanism. All the European institutions read this Article very extensively and it became impossible to find an activity that would not be covered by this clause. Even the high condition of unanimity in the Council was not an obstacle.

On the other hand, we have the implied powers that were not based on the flexibility clause - ones that were not powers granted by the Treaty when necessary. These were only found by the Court thanks to the way of interpretation employed by the justices. I would like to call them supportive implied powers: supportive because they helped the European institutions to carry out the task of reaching goals of the Community. They were all reaffirmed by the case law. They were all a product of the negation of a strict understanding of the doctrine of conferred powers. They were all based on some specific provisions of the Treaty. They were all created to attain the objectives for which the specific powers were intended, regardless if those objectives were from the area of commerce or criminal law, internal or external relations.

Furthermore, I would like to propose to divide this group into two subcategories. The first one I call the properly functioning implied powers. Those are the implied powers that serve exactly the proper functioning of the Community, and are narrow in scope. They only make other provisions operative and do not try to extend the powers of the Community. We can even say that they are a consequence of logic. *If the Community can do more, it can also do less.* This applied for instance in the *Camera case*, where the Court ruled that the competence to take decisions comprises successive stages, and therefore the institution has the right to exercise these stages. Some actions are simply indispensable for other actions. They were founded without much controversy: the Court simply confirmed that the Community has the power to exercise constituent parts of the explicitly expressed competences.

The other subcategory here is effectiveness reinforcing implied powers. These are not a logical consequence of the existing competences. They are not inextricably linked with them, and are not indispensable for the functioning of the Community, even if some institutions claim they are. The Community could still exist and exercise its functions without these implied powers. Their foundation is the effectiveness of the Community action. They are not directed at conserving the Community as it is, reaching- just at survival level- only the

minimum goals limited by theories of international organizations. They are oriented at optimization, reaching goals at the most efficient level possible. They are a consequence of teleological and systemic interpretation of treaties. Without them, the Community could still act and play its basic role, especially with the pre-emption principle. And if we followed the strict approach towards the doctrine of conferred powers, the Community would have to act without this kind of implied powers. The Court had a choice and it chose at one time to reject the strict version of the theory of conferred powers. Following the more flexible theory, it could opt for effectiveness reinforcing of implied powers.

We can see this even in the examples where the Court was arguing the most pervasively on the need for these kinds of implied powers. In *Opinion 1/76* the Court laid down that a mere internal regulation would not be effective and granted an implied power to conclude an international agreement. If the Court had adopted the position of the strict doctrine of conferred powers, the Community would have had to deal with the situation with internal measures and the member states would have signed an agreement with Switzerland. According to the pre-emption principle, this agreement would be inferior to the Community law; thus there could be no legal conflict. The agreement would still be effective. The Court made a different preference though. The preference was given to the effectiveness, more precisely to reinforced effectiveness, or full effectiveness. The Court decided that it would be more effective to declare the implied powers. This probably also made it easier for the whole process at hand and contributed to the European integration. The Court took its choice to avoid future conflicts between the Community law and Member States' law. A preference for implied powers could save the Community from legal disputes over the same problem a couple of months later. It clearly shows, once more, that the Court used teleological and systematic interpretation to reach the goal it favored.

The same conclusion can be reached in the case of implied powers in the area of criminal law. This was a very controversial decision and the effect of preferences of the Court.

In the face of that, we can ask ourselves the question of whether the flexibility clause is really a codification of implied powers codification, or whether it offers a different legal category that should not be mixed up with implied powers. As we can see in the previous paragraphs, different authors present different opinions on this point. Some totally equate Article 352 with the implied powers doctrine while some believe they should be separated, since the flexibility clause represents a methodologically distinct concept.

I believe we should accept that the flexibility clause represents one of the versions of implied powers. As explained above, implied powers have a wide spectrum. From the point of view of the Member States' sovereignty, the flexibility clause was created to cover the most controversial and most risky corner of this spectrum. What makes it controversial is the fact that the clause is independent and can fulfill the gap when any other legal basis is lacking. The flexible clause relies on outcome-based legitimacy and it exists to facilitate reaching the Community objectives. It is an implied power because the particular powers were not foreseen in the Treaty and at the same time they could be very far-reaching. This is the reason why the powers were codified. New powers, based exclusively on Community objectives, could not be accepted by the Member States. If the Court had decided to grant

new independent competences based solely on the Community objectives, this would have been called blatant judicial activism and would have met strong opposition of the Member States. Constituting a Treaty base for this kind of flexibility mechanism, the treaty-makers cut the ground from under the Member States' feet. They not only protected the idea of "planned crisis management" but also, by adding Article 235, assured the doctrine of implied powers as such. The flexibility clause gives the green light from the masters of the treaty to the most contestable element of the implied powers doctrine. Rebe argues that if both the judicial doctrine of implied powers and the flexibility clause should be applicable in Community law, [then] Article 308 should be read "... the EC Treaty has not provided necessary explicit or implicit powers". I support this understanding<sup>862</sup> Article 308 can only be applied when the action of the Community is necessary to attain an objective of the Community and the Treaty does not provide for necessary explicit or implicit powers. The flexibility clause left for judicial discovery and development only a less dangerous part of implied powers; this means a part where they are tightly connected with existing provisions and particular tasks of the Community. Therefore, the Court can be held responsible only for developing the narrow approach of implied powers.

Moreover, it is important to stress the division between the implied external powers and implied internal powers. As can be concluded from all of the above, this division is at stake within the *effectiveness reinforcing implied powers*. This is because all of the known examples of external implied powers belong to this category. They were not based on Article 308 and they were all controversial, based on the principle of effectiveness, and the Community could have functioned well without them being announced.

This division is mostly important from a methodological point of view and for the completeness of the picture. In the European context the implied powers are equated by most authors with the external ones. The vast majority of articles on implied powers in the EU are on *in foro interno in foro externo principle*. This is a mistake. We cannot limit the scope of implied powers to the external ones. They comprise only one and a very specific category of implied powers. By focusing only on those, we eliminate from our perspective all the flexibility clause implied powers and proper functioning implied powers. And from a different angle - we ignore all the cases of extraordinary importance for the internal constitutional design of the Union, like awarding competences in the criminal area. To be able to reflect on implied powers and their links with the federal system, we have to look globally, seeing all the formulations and the shades of the doctrine.

For the following part of the analysis, the most crucial will be *effectiveness reinforcing implied powers* and *flexibility clause implied powers*, since they concern new community competences linked with the Court's preferences and teleological interpretation. They changed the constitutional pattern of the Union and accelerated the integration.

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<sup>862</sup> Rebe (n 578) 155. However, Dörr claims that implied powers are part of the powers that Article 308 refers to. And this means that the existing implied powers can exclude the applicability of Article 308. (Oliver Dörr, 'Die Entwicklung der ungeschriebenen Außenkompetenzen der EG (1996) 7 EuZw 39, 40 and 69)

## 4.1. The Court and the other actors

When deciding in the cases that dealt with implied powers, the Court always had to face disparate arguments from disparate institutions. The answers were never easy and obvious and the Court had to conclude from powerful legal arguments and in various political circumstances. The whole development of the doctrine can be divided into a few stages that show how the doctrine evolved from the beginning until now.

### 1. Creation.

The Court announced as early as 1954, with *Fédéchar*, that a very narrow version of implied powers was possible. But we should start our analysis with the landmark ERTA case, not because it is the best-known case from this area, but because it was the first from the *effectiveness reinforcing implied powers*. In ERTA, the Court opted for implied powers, therefore it opted against the strict theory of conferred powers. The Court agreed with the Commission and against the Council. But since the doctrine of implied powers deals with the vertical balance of powers rather than the horizontal one, the real losers in the case were the Member States. The Court not only presented the doctrine of implied powers - it framed a broad scope of the exclusiveness thereof. The Community could now cover externally every field that had been covered internally. The Community gained a new and potentially powerful competence in external relations, which was not foreseen by the treaty-makers. ERTA was a fundamental decision for the constitutional design of the Community, laid down without the Member States' consent.

### 2. Solidification

In the next decision, *Kramer*, the Court confirmed its founding from ERTA. Again, it supported the Commission and disagreed with the Council and three Member States.

### 3. Pushing forward

When the Court felt comfortable with the established doctrine, it could advance it. It allowed the creation of implied external powers, even in the absence of internal legislation. In *Opinion 1/76* the Court used very ambiguous language. This vagueness provoked a discussion over the issue of full parallelism and whether implied powers can be exclusive even when the area has not been previously covered by Community law. At the same time, the Court ruled in the *migration cases*.<sup>863</sup>

After *Kramer* there was a period when political actors accepted the doctrine of external implied powers as a part of *aquis communiraire*.

### 4. Constraint

*Opinion 2/94* brings constraint in developing the doctrine. It was preceded by *Opinion 2/92* and *Opinion 1/94* which were rather redundant. This opinion left the final decision to the

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<sup>863</sup> Cases 281, 283-5, 287/85 *Germany v Commission* [1987] ECR I-3203



Member States and did not grant the implied powers to the Community. Although it would not be hard to imagine that, the Court had decided conversely. The opinion limited both the judicial doctrine and the flexibility clause. Furthermore, the *Open Skies* cases established the need for much more detailed scrutiny of the scope of the internal measures to imply powers.

#### 5. Codification in the Constitutional Treaty.

Codification as regards external powers was not very clear; it confused the existence and the nature of implied powers. It looks like a step back from the explicit summary of the doctrine in *Open Skies*.

#### 6. Re-invention.

*Opinion 1/03* was a surprising one. First of all, it was delivered just after the collapse of the constitutional project. The Court did not take into consideration the codification proposal laid down in the Constitutional Treaty but re-developed its own doctrine. It did this in a broad and more sovereignty-encroaching way than its original version.

At the same time, the criminal cases arose. The Court took one of its most controversial decisions, acting against the Member States and being aware that it could provoke forceful feedback. The Court deliberately invaded a critical sphere of state sovereignty.

#### 7. Codification in Lisbon Treaty.

External implied powers were a repetition from the Constitutional Treaty. Depillarization of the Community law reaffirmed the new competences in the criminal area.

The judicial doctrine of implied powers went a long way. This journey was not only long but also very fast. It took only some forty years from the creation of the doctrine of implied powers to its codification in the Lisbon Treaty. The doctrine found its own role very quickly and established a strong position in Community law. It became accepted also by those who opposed it at the very beginning, and the battle over the existence of the implied powers changed into a battle over its scope. The whole development of the doctrine was progressive; the doctrine was constantly growing in importance in the Community. Even the periods of judicial restraint did not stop this process; they were only periodic corrections of a long-term trend. This trend was eventually appreciated by the Member States who saw it necessary to include this judicial doctrine in the highest law of the Union. The implied powers helped to create a more flexible Union, a Union able to adjust its own competences according to the changing social-political and economic circumstances.

## **4.2. The Court's agenda**

Nowadays, affirmation that ECJ decision-making is very strategic and has become less and less controversial, even among international lawyers. The Court's preferences regarding how Community law should be interpreted often differ from those of the Member State affected by ECJ decisions.<sup>864</sup> The Court clearly had its integrationist agenda. Consequently, it followed its agenda only when it could. We can see from the development of the doctrine that European integration was the force that drove the Court from the very beginning. When it announced the doctrine in the *ERTA* case, it sided with the integrationist Commission and chose the concept of Community powers that allowed pushing the integration forward. What other choices did it have then?

The Court had two additional alternatives. It could opt for the strict doctrine of conferred powers or opt for full preference of Community competence over the Member States' competence. The latter option is purely theoretical and could not happen. The Union was still a young organization, looking for its identity, and even the most pro-integrationist politicians would not introduce truly federal instruments so quickly. For the Court, which was building its positions, such a step would have meant squandering its legitimacy and authority.

But the strict theory of conferred powers was definitely an option that the Court had to consider. Why? Because it was the one proposed by the Council. It contends that the Community has only powers that have been conferred on it. This conclusion was in accordance with the predominant theory of international organizations. An international organization has only the powers conferred on its institutions by the Treaties. Powers not conferred remain with the Member States. This option was also favored by Advocate General Lamothe, who said that "it appears clear from the general scheme of the Treaty of Rome that its authors intended strictly to limit the community's authority in external matters to the cases which they expressly laid down".<sup>865</sup>

If the Court had sided with the Council, there would have been no external competences of the Community. Consequently, all the internal effectiveness reinforcing implied powers would not be granted. There would be room only for properly functioning implied powers.

Would that kill the European integration and European project as such? No, it would not. Would that slow down the integration and preserve the Community as a typical international organization? Most likely; if the Court had followed the strict theory of conferred powers, the changes in the Community would have come much later. The external

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<sup>864</sup> See 'The European Court's actions in transforming the EC's legal system were extremely controversial. The ECJ based its provocative interpretations on the 'special' and 'original' nature of the Treaty of Rome... [T]he whole idea that the Treaty of Rome created a 'new legal order of international law' was really nothing more than an assertion of the European Court. The Court's radical jurisprudence had to be accepted by national judiciaries and national governments in order for the 'new legal order' to become a reality. Yet both had significant reasons to reject the Court's edicts.' Also: 'The ECJ, member states, and national courts had different interpretive preferences, because they had competing interests. The ECJ preferred its own interpretation because it had an interest in promoting European integration and facilitating the effectiveness of the legal process.' (Karen Alter, *Establishing the Supremacy of the European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 2, 37)

<sup>865</sup> *ERTA* (n 533), opinion of AG Lamothe

competence would have depended solely on the Treaty amendment and that was hard to imagine at that time. Consequently, other changes that were an aftermath of the acceptance of the doctrine of implied powers would have come much later. The Community would have been preserved as an international organization, unable to adapt to new circumstances and needs dictated by the dynamic situation of the second half of the twentieth century.

The preference for the strict theory of conferred powers was, especially back in the 1970s, natural for a great number of lawyers and decision-makers in the Member States. Supremacy and the direct effect of the Community had been already announced, but the Community was still seen as a property of the Member States. The European Community was rather a *sui generis* international organization than a *sui generis* federation. And for such an organization, relying on conferred powers seemed to be the only legitimate choice. Nevertheless, we can point at two arguments that undercut this mainstay of thinking. Firstly, there is the fact that the principle of conferred powers was not even codified in the Treaty, as opposed to many other international organizations. Secondly, there was the flexibility clause that made an explicit breach in the orthodox theory of conferred powers.

Thus the Court chose the middle way, a pragmatic one. The Court placed itself in the middle of European integration; it understood its role as the *European* Court of Justice in the process of effectuating the Treaty objectives.<sup>866</sup> It represented the Community as an entity and not as the Member States in sum. The Court clearly wanted to accelerate the integration and was using the principle of effectiveness as a main tool. It had an agenda that was driven by the objective of an “ever closer Union”. Nevertheless, it had to use an adequately planned strategy to follow the agenda. Thus, it could not speed it up too much, as it needed to protect its own authority and use this authority in the future.

We can see how the strategy worked by looking at the above-listed stages of development of the doctrine of implied powers. They prove to us that the Court became one of the actors on the European scene.<sup>867</sup> It took part in a long-term battle over the shape of the Union, together with the Council, the Commission, the Member States and other subnational and supranational actors. Its agenda made it one of the political actors.<sup>868</sup> And its judicial powers

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<sup>866</sup> Karen Alter claims that the Court influenced the political process and played a few roles: (1) it was a medium through which interests can pursue individual and group agendas, (2) it was the provider of ideas (The ECJ influenced the policy-making process by writing its decisions provocatively.), (3) it provoked political responses (also from the interest groups and Member States, by generating a principle that was seen as politically unappealing and implying that the Court would apply this principle to rule national laws incompatible with EC law). (Karen Alter, *The European Court's Political Power* (Oxford University Press 2009) 156-58)

<sup>867</sup> The judgments were political in nature and guided not by political considerations but by what the ECJ perceives as intent of the Treaties. (Andrew Green, *Political Integration by Jurisprudence. The Work of the Court of Justice of the European Communities in European Political Integration* (AW Sijthoff 1969) 472)

<sup>868</sup> Cf. Karen Alter claims that one of the most significant factors that influenced and empowered the integration and the ECJ was the litigation strategy, the ECJ links with national courts, and -more generally - the self-interest of European law movements. The lower courts were the motor of the integration, since they saw that the litigation strategy as regards EC law gave them an advantage over the supreme higher courts in the polities. (Alter *The European Court's Political Power* (n 863))

and its task to “ensure that in interpretation and application of this Treaty the law is observed” made it a very powerful actor.

As an actor, it knew that the development of its agenda rigidly depends on the agenda and potency of other actors. They all try to generate outcomes that they prefer in ongoing interactions. The Court announced the landmark *ERTA* decision in 1971, just some six/seven years after *Costa v. ENEL*, *Van Gend*, *Van Duyn*, and *Stauder*.<sup>869</sup> In the 1960s and 1970s, the Court was expanding its role and developed a substantial set of legal doctrines that was crucial for the progress of the integration, deciding on issues traditionally reserved for the Member States. These decisions mark the transformation of the ECJ from just a mere institution of the Community into something new and dynamic with a clear understanding of its particular role.<sup>870</sup> The Member States accepted that role and complied with its decisions. The importance of this period can be shown with the statement of the President of ECJ Iglesias on the occasion of its 50 years’ anniversary:

We recognize how by its judgments the community judiciary has over the years brought to light the fundamental principles which were implicit in the wording and the structure of the founding treaties and by giving judicial expression to those principles has defined the characteristic features of the community legal orders.<sup>871</sup>

At that time, the Court was creating the *new legal order* of the Community. It facilitated the moving of some sovereign rights from the Member States to the Community.<sup>872</sup> Some judgments of the era were labeled as revolutionary.<sup>873</sup>

After *Costa* and *Van Gend* we should also mention *Internationale Handelgesellschaft*<sup>874</sup> here. The ECJ ruled that not even a fundamental principle of national constitutional law could be invoked to challenge the supremacy of directly applicable Community law. This is a case “typical of a period when, after the autonomous, supranational framework of Community law had been established, it had to be endowed with the principles inherent in the rule of law.”<sup>875</sup> This decision was another step forward in the constitutionalization of the Treaty. In 1974 *Nold*<sup>876</sup> was decided and an autonomous system of protection of fundamental rights began to be built in the Community. The ECJ stated that the Court is “bound to draw inspiration from constitutional traditions common to the Member States, and it cannot

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<sup>869</sup> These two decision, according to Antoine Vauchez, “appear today as the de facto Constitution of Europe encapsulating in themselves all the successive development of EU polity” (Antoine Vauchez, “Integration-through-Law’ Contribution to a Socio-history of EU. Political Commonsense’ (2008) 10 EUI Working Papers)

<sup>870</sup> Tamm (n 4) 25

<sup>871</sup> President Carlos Rodriguez Iglesias in the Annual Report 2002.

<sup>872</sup> On the interaction between the ECJ and the Commission in the first years of the Community, between *Van Gend* and *ERTA*, see Eric Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 A.J.I.L. 1

<sup>873</sup> Morten Rasmussen, ‘From *Costa v ENEL* to the Treaties of Rome—a brief history of a legal Revolution’, in: Miguel Maduro, Loïc Azoulaï L (eds), *The past and the future of EU law* (Hart Publishing 2010) 69–86

<sup>874</sup> Case C-11/70 1974 [ECR] 1125

<sup>875</sup> JN Cunha Rodrigues, ‘The incorporation of fundamental rights in the community legal Order, in Maduro & Azoulaï (n 870) 89–97

<sup>876</sup> Case 4/73 *J Nold, Kohlen- und Baustoffgrosshandlung v the Commision* [1974] ECR 491

therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.”<sup>877</sup>

Why did the Member States comply? We can definitely say it was a good time for the integration. Those opinions emerged as irreplaceable pillars of the European Community's legal order, because previous political and legal integration projects were either blocked or fell in collision with political circumstances. Political actors in the Member States in general supported the integration as such, even if officially they had to protect the idea of full sovereignty, since that was what their voters expected.<sup>878</sup> The political interest of all the actors and difficult ways of Treaty amendments gave the Court confidence to step forward.<sup>879</sup>

I would agree with the political power perspective on the integration that argues that national governments from the EU Member States have not been passive and unwilling victims of European legal integration; where the ECJ has been an activist, the member governments have supported this.<sup>880</sup> From this perspective, the Member States have given the ECJ autonomy to increase the effectiveness of the incomplete contracts the governments have signed with each other. They have delegated a particular authority to the ECJ, which is to carry out certain functions that the state cannot itself execute. As Garrett argues, “member governments could, if they so chose, either ignore ECJ decisions or amend the legal order through multilateral action. The fact that governments have done neither to any important degree thus implies that the extant order serves their interests.”<sup>881</sup> He explains that sometimes it was in the interest of a government to lose a case in the ECJ,

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<sup>877</sup> Ibid 13

<sup>878</sup> Rasmussen acknowledges that judicial activism may well be a ‘social good’ as long as it agrees with the wishes of the majority of the Member States, but the ECJ activism in the 1960s and the 1970s must get a negative mark, since it was guided by the Court’s own rigid policy preferences and went far beyond textual interpretation. (Rasmussen, *On Law and Policy* 8, 12)

<sup>879</sup> As Alter noted: “Indeed most evidence indicates that politicians did not support the transformation of the ECJ legal system, and that legal integration proceeded despite the intention and desire of national politicians. As Joseph Weiler has pointed out, the largest advances in EC legal doctrine as both national and the EC level occurred at the same time that Member States were scaling back the supra-national pretensions of the Treaty of Rome, and re-asserting national prerogatives. Indeed when the issue of the national courts enforcing EC law first emerged in front of the ECJ, representatives of the Member States argued strongly against any interpretation which would allow national courts to evaluate the compatibility of EC law with national law. In the 1970s, while politicians were blocking attempts to create a common market, the ECJ’s doctrine of EC law supremacy was making significant advances within national legal systems. With politicians actively rejecting supranationalism, it is hard to argue that they actually supported an institutional transformation which greatly empowered a supra-national EC institution at the expense of national sovereignty.” (Karen Alter, ‘Who are the Masters of the Treaty?: European Governments and the European Court of Justice’ (1988) 52 INTERNATIONAL ORGANIZATIONS 121, 129-30)

<sup>880</sup> Cf. Anne-Marie Burley, Walter Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ (1993) 47 INTERNATIONAL ORGANIZATIONS 41; Walter Mattli, Anne-Marie Slaughter, ‘Law and Politics in the European Union: A Reply to Garrett’ (1995) 49 INTERNATIONAL ORGANIZATIONS 183; Anne-Marie Slaughter, Alec Stone, Joseph Weiler, *The European Court of Justice and National Courts*; Eric Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 Am.J.Int’l.L. 1; Joseph Weiler, ‘The Transformation of Europe’ (1991) 100 Yale L.J. 2403

<sup>881</sup> Geoffrey Garrett, ‘The Politics of Legal Integration in the European Union’, in Mette Eilstrup-Sangiovanni, *Debates on European Integration: A Reader* (Houndsmills 2006) 253-254

because the benefits of such a loss were on a big, European scale.<sup>882</sup> The Member States chose a rational behavior that profited them in the long run.<sup>883</sup>

Consequently, I disagree with the legal autonomy perspective that claims that “national governments paid insufficient attention to the Court’s behavior during the 1960s and 1970s when the Court developed a powerful set of legal doctrines and co-opted the support of domestic courts for them.”<sup>884</sup>

Both perspectives agree on one common assumption: namely, that the ECJ is a strategic actor that is sensitive to the preferences of EU member governments.

The political approach explains only how the Court was empowered. But it must be added that the Court has not always follow the will of the governments. It used its authority and sovereignty also to rule against the Member States. It also made use of this time to strengthen its position by offering more power to the national courts and making it appear that its own authority flows from these courts.<sup>885</sup> It had the support of the Commission and supranational actors too. The Court played its role of motor of the integration in a time of political impotence. At the early stage, the legal changes were necessary to push forward the integration. The new competences in external and internal areas could give a new impulse to the integration and optimize the benefits for the Community created by the circumstances. Granting new competences was possible only by the Treaty amendments or doctrine of implied powers. Because at that time amending the Treaty was the “nuclear option - exceedingly effective, but difficult to use - and (...) therefore relatively ineffective”,<sup>886</sup> the doctrine was the only real option. The era when the Court laid down its

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<sup>882</sup> Though of course some Euro-skeptical Member States’ heads of government were against the ECJ’s agenda in principle. Margaret Thatcher said of the Court in 1993 that it has ‘greatly extended the powers of the centralized institutions against the nation state’ and that it is ‘busy reinterpreting so many things to give itself and the Community more power at our expense’. (Arnulf (n ) 3)

<sup>883</sup> Garrett’s analysis suggests that “Member States established the ECJ as a “means to solve problems of incomplete contracting and monitoring compliance with EU obligations, and they rationally accepted ECJ jurisprudence, even when rulings went against them, because of their longer term interest in the enforcement of EU law.” (Mark A. Pollack, ‘Theorizing EU Policy-Making’, in William Wallace, Mark Pollack (eds) *Policy-Making in the European Union* (Oxford University Press 2005, 5<sup>th</sup> ed) 35

<sup>884</sup> Geoffrey Garrett, Daniel Keleman, Heiner Schulz, ‘The European Court of Justice, National Governments, and Legal Integration in the European Union’ (1998) 52 INTERNATIONAL ORGANIZATIONS 149

In contrast to the “political power” approach, the “legal autonomy” perspective is founded upon the neo-functional school of thought in regional integration theory. The theory of neo-functionalism emerged in the mid 1950s; it is a theory of regional integration in a process by which countries remove barriers to free trade. Neo-functionalism was developed by Eernst Haas who first brought the theory in 1958 in his work ‘The Uniting of Europe: Political, Social and Economic Forces 1950-1957’ (Cini 2004, p 81). Neo-functionalism reformulates the functionalist principles in the context of regional institutions, while functionalists view integration as an unpreventable result of development which imposes more functions on the states and pushes them to cooperation with international functional institutions. Eventually abandoned by Haas himself, neo-functionalism ultimately failed to reflect the reality of European integration; in particular, its conception of integration as a linear, incremental process failed to account for the setbacks of the mid-1970s to the mid-1980s.

<sup>885</sup> Anne-Marie Burley and Walter Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’ in Eilstrup-Sangiovanni (n 877) 241

<sup>886</sup> Pollack (n 880) 40.

fundamental constitutional decisions was at a point when many euro-implicated legal actors were disappointed with the process and were losing hope while observing the inter-state crisis in Brussels. The enthusiasm of the founding years of integration was gone. Even the basic mission of harmonization of national legislations was experiencing its first setbacks.<sup>887</sup> Many disagreements and crises developed between the Member States in the early 1960s and prevented the fast-track political integration of the Community institutions so expected by the federalist oriented minds.<sup>888</sup> The year of 1965 brought the empty chair crisis.<sup>889</sup> Just before the *ERTA* decision the Community failed to immediately implement the Werner Plan of 1970 that precisely outlined the path toward monetary union and a common currency over the decade of the 1970s.<sup>890</sup> In 1973, Norwegians decided to stay outside the Community.

The best way for the Court to further this agenda is through the gradual extension of case law. The Court used the period of Eurosclerosis<sup>891</sup> to root the doctrine of implied powers, which happened over a decade of perceived stagnation in European integration. Just as in the previous period, during this time of political stagnation the ECJ took some very important decisions for European integration. It is sufficient to list the most important ones to understand the ECJ's strategy: *Dassonville* (recognition of the direct effect of Article 119 of the Treaty of Rome on equal pay),<sup>892</sup> *Simmenthal* (another recognition of the principle of supremacy even when it comes to national legislation adopted at a later date than the Treaties),<sup>893</sup> *Cassis de Dijon* (establishment of the so-called principle of mutual recognition),<sup>894</sup> *CILFIT* (definition of the duty for national courts to bring preliminary questions concerning Community law before the Court of Justice with instructions concerning the way in which EU law should be the interpreter),<sup>895</sup> *Les Verts* (inclusion of the European Parliament in the constitutional framework and reference to the Treaty as "the

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<sup>887</sup> Vauchez (n 866) 6

<sup>888</sup> Failures of the Fouchet plan of 1961-62 and the Hallstein proposal of 1965, the most significant initiatives to revive the integration. In 1963 the British application was rejected.

<sup>889</sup> In July 1965, Charles De Gaulle boycotted European institutions due to issues he had regarding new political proposals by the European Commission on CAP. He disagreed with the Parliament's new role, the Commission's strength, the shift towards supranationalism, and the budget proposals for financing the CAP. De Gaulle made it a condition that majority voting with a right to veto must exist if France was to participate in the European Community. When de Gaulle was not granted a more intergovernmental Commission, or voting and veto rights, the French representative left the Council of Ministers. This situation was not resolved until the Luxembourg Compromise in January 1966

<sup>890</sup> Jurgen Elvert suggests a tripartite division of the European integration process from 1952 to the present day. The first phase is called 'phase of impementation' from the ECSC's foundation to the first enlargement in 1973. The second phase is identified as the „phase of reconciliation“; it lasts until the Treaty of Maastricht in 1993. The third phase is one of 'Europeanization'. (Jurgen Elvert, 'The Institutional Paradox: How Crises Have Reinforced European Integration', in Ludger Kuhnhart, *Crises in European Integration: Challenge and Response, 1945-2005* (Berghahn Books 2009) 51)

<sup>891</sup> A term introduced by German economist Herbert Giersch referring to the political and economic stagnation in the 1970s and early 1980s in the European Community.

<sup>892</sup> Case 43/75 *Defrenne v Sabena* [1976] ECR 455

<sup>893</sup> Case 106/77 *Amministrazione Delle Finanze dello Stato v Simmenthal Spa* [1978] ECR 1871

<sup>894</sup> Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung* [1979] ECR 649

<sup>895</sup> Case C-283/81 [1982] ECR 3415

basic constitutional charter'' of the Community),<sup>896</sup> *Wachauf*<sup>897</sup> and *ERT*<sup>898</sup> (both on the human rights regime in the Community).<sup>899</sup>

The Court used this time to reaffirm the external implied powers, even trying to propose some more pro-integrationist readings of the theory (*Opinion 1/76*), and declared important implied powers in the internal sphere of the Community. However, it did not create any groundbreaking decisions as regards the doctrine. This period is also characterized by a particular increase of competence of the EU with Article 235 of the Rome Treaty.

The Court's tactics is reminiscent of its earlier fundamental decisions when it was establishing the most significant principles of the Community law, with the principle of supremacy as the main example. In *Costa v. ENEL*, when it was not going to overturn the nationalization of the Italian energy industry on the basis of a §3 challenge, there was nothing for the government in Rome to respond to, given that no change in domestic policy was required. The Court established a new principle but the Member State did not lose and did not protest. The ECJ used this to establish a new doctrine as a general principle but suggested that it was subject to various qualifications, including that it was not applicable in the case at hand.<sup>900</sup>

The next period in the development of the doctrine I distinguish was the constraint symbolized by *Opinions 1/94, 2/91* and especially *Opinion 2/94*. They were closely connected with the political situation in the Community. The political stagnation ended with the SEA. The signature of the SEA treaty marked the start of an upward surge that culminated in the establishment of the European Central Bank (ECB) and the single currency. The Treaty of the Single European Act relaunches dynamics of European integration by abolishing all barriers relevant to the movement of products (the single market) and financial services and by providing freedom for the establishment of credit institutions (the European financial area). The Member States were strengthened and took the initiative in

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<sup>896</sup> Case C-294/83 [1986] ECR 1339

<sup>897</sup> Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Fortswirtschaft* [1989] ECR 2609

<sup>898</sup> Case C-260/89 *Elliniki Radiophonia Tileòrassi et. v Dimotiki Etairia Pliroforissis et al* [1991] ECR I-2925

<sup>899</sup> At that time we could observe a political reaction in Europe that could be compared with the Roosevelt's Court packing plan. After the *Sheep Meat* dispute, President Valéry Giscard d'Estaing suggested that the Member States should jointly constrain the ability of the ECJ to make 'illegal decisions'. He suggested a reform that would give the four biggest MSs an additional judge on the ECJ. (Rasmussen *European Court* (n 31) 340)

<sup>900</sup> See Geoffrey Garrett, Daniel Keleman, Heiner Schultz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52 *IO* 149, 150-51 ('[T]he greater the domestic costs of an ECJ ruling to a litigant government, the lesser the likelihood that the government will abide by an ECJ decision that adversely affects its interests... [T]he greater the activism of the ECJ and the greater the likelihood that responses by litigant governments will move from individual noncompliance to coordinated retaliation...')

Also: 'A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reasons why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.' (Hartley (n 598) 78-79)



the integration.<sup>901</sup> The SEA was followed by the Maastricht Treaty. The latter embodies a determination on the part of the Member States to limit the Court. It was excluded from two of the three pillars and a number of specific articles were drafted to prevent judicial manipulation. The Treaty also codified the principle of conferred powers. Article 5 (1) of the EC Treaty states that “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This explicitly established in the Treaty text the principle of the European Community’s conferred powers some 35 years after its foundation. It was a clear sign for the Court to constrain.

The Court entered into an era of moderation. In *Opinion 1/94* the Court opted for judicial self-restraint. It respected the existing differences between the exercise of the powers granted to the Community for the realization of its objectives and the process established by the Treaty for alerting its framework of powers. In *Opinion 2/94* the Court not only concluded that no Treaty provision conferred on the community the right to conclude international convention in the field of human rights or to enact rules in this field, but also announced that Article 308 could not be used since it would have meant a substantial change in the community system. The Court recommended an amendment by the Member States.

The ECJ’s moderation was observed not only in the scope of the doctrine of implied powers but, in general, in the case law from Luxembourg.<sup>902</sup>

The next shift in the Court’s tactics converged with the crisis in the European Union after the collapse of the constitutional project. The negative results of the French referendum on 29 May and the Dutch referendum on 1 June 2005 made it virtually impossible for the Constitutional Treaty to come into force. The June European Council declared a kind of cooling-off period, a time of reflection that symbolized the weakness of the integration and the lack of ambitious vision for the future. It resulted in a drastic shrinking of public support for the European project in many Member States. A Eurobarometer survey of July 2005 produced rather devastating outcomes: only 46% of all EU citizens expressed their confidence in the Commission, and only 52% in the Parliament.<sup>903</sup>

In these circumstances the Court took the initiative and developed the doctrine forcefully. Not only did it ignore the codification of the external implied powers and reinterpret the case law in a more sovereignty-encroaching way, but also it forcefully interfered in one of the most sensitive spheres of Member States’ internal competence. The Court felt so confident vis-à-vis nerveless national governments that it used the doctrine to conquer an

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<sup>901</sup> Moravcsik tested his supranational institutionalism and intergovernmental institutionalism as two broad explanations for development of the integration on empirical evidence relating to the SEA (Andrew Moravcsik, ‘Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community’ (1991) 45 INTERNATIONAL ORGANIZATIONS 19, 45-48)

<sup>902</sup> E.g. Case C-327/91 [1994] ECR I-3641, Case C-109/91 [1993] ECR I-4879, Case C-262/88 [1990] I-1944, Case C-[1997] ECR I-0000, Case C-167/94 [1995] ECR I-1025. See more in Rasmussen *European Court* (n 33) 294, note 588.

<sup>903</sup> It was more of a crisis of European public mind, as compared with the crisis of European elites of the 1960s. (Elvert (n 887) 56)

important field of criminal law for the Community. It did not even feel it had to justify itself accurately.

Eventually, the controversial judicial decisions were codified in the Lisbon Treaty.

The ECJ played the very important role of moderator between the actors participating in the debate over the powers in the European Union. It placed itself in the middle of the debate by playing an active role in it. The Court facilitated the discussion but at the same time it sided with one of the parties. The Court took its Treaty position very seriously as a Community body, not an intergovernmental one, responsible for the integration. It favored the solutions that were better from the standpoint of the development of the integration, of building a closer union of the peoples of Europe. In this task it still had to keep its standards of a judicial body rooted in the continental system, and take good care of its own position that could be undermined by the opponents of a stronger Union, especially the Member States. This equilibrium was maintained by the Court according to the changing political situation inside the Union. The Court detected perfectly the relation between the actors and because of this was able to adjust its agenda. Nevertheless, this agenda was always progressive and pushed the Union forward, closer to a federal model.

### ***4.3. Implied powers and federalism***

One of the goals of this dissertation is to contribute to the scholarship regarding federalism in the European Union. This task is supposed to be done not directly, but from the angle of the doctrine of implied powers. The main conclusions as regards this objective will be presented in Chapter IV, but here I would like to reflect on the relation between implied powers and some issues that are tightly connected with the idea of federalism and integration. I decided to focus on two, namely the principle of subsidiarity and the problem of democratic deficit. The relations between implied powers and those issues stand out a mile. What is more, those relations look problematic on the surface. Subsidiarity seems to go directly against the line of the doctrine of implied powers. Someone may say that subsidiarity is a kind of anti-implied power, since it asks to take decisions at the lowest level possible, avoiding those at the central European level. Implied powers also look like being a perfect embodiment of the democratic deficit problem. The Lisbon Treaty confirms three principles of democratic governance in Europe: democratic equality, representative democracy and participatory democracy. Therefore implied powers should be seen as being against democratic mechanisms, since they favor judicial control over the EU government and take the decision-making process further away from the people. If it really is so, if the doctrine of implied powers was against the principle of subsidiarity and embeds the democratic deficit problem, it would be hard to claim that the doctrine contributes to building a federal system in Europe. In this section I will show this is not the case.

### 4.3.1. Implied powers and subsidiarity

Analyzing the doctrine of implied powers, it would be valuable to ponder the relationship between implied powers and other basic principles of European constitutionalism. From this perspective, the most interesting should be the evaluation of differences and similarities between implied powers and the principle of subsidiarity. That is because, at first glance, those two look contrasting. Implied powers were created to broaden the scope of the Community competences and the principle of subsidiarity embodies the willingness to stop the spur of growth of Community powers at the expense of the Member States. Lebeck wrote that there are inevitable conflicts between subsidiarity and the need for effective supranational coordination, an issue which has partly been resolved through the use of implied powers.<sup>904</sup> Thus, are these two doctrines compatible? Can a sole legal system manage a situation when central institutions design and perform new competences when necessary and the constitutive document opts for the realization of tasks on the lowest level possible? Is it possible to find a balance between the two, or perhaps one of the theories is supreme? An additional complication might be the fact that subsidiary is laid down in the primary legislation and implied powers have existed as codified both in the Treaty and judicial doctrine.

Subsidiarity was introduced in the Maastricht Treaty, and was intended to limit the expansion of the Community's competences. The pre-Lisbon formulation was contained in Article 5 EC:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far 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.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

The requirement in the first paragraph of Article 5 affirmed that the Community only has competence within the areas in which it has been given power. The subsidiarity principle had three components: the Community was to take action only if the objectives of that action could not be sufficiently achieved by the Member States; the Community could better achieve the action, because of its scale or effects; and if the Community did take action, then this should not go beyond what was necessary to achieve the Treaty objectives. The first two components entailed what the Commission called a test of comparative efficiency, which determines whether it was better for an action to be taken by the Community or the Member States, while the third part of the formulation brought in a

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<sup>904</sup> Carl Lebeck, 'Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties' (2008) *Journal of Transnational Law and Policy* 303, 313

proportionality test.<sup>905</sup> The 1993 Inter-institutional Agreement on Procedures for Implementing the Principle of Subsidiarity required all three Community institutions to respect the principle when devising new legislation. This was repeated in the Protocol on the Application of the Principles of Subsidiarity and Proportionality that is attached to the Amsterdam Treaty, which set out in more detail the subsidiarity calculus.<sup>906</sup>

The subsidiarity principle has been retained in the Lisbon Treaty. It distinguishes between the existence of competence and the use of such competence, the latter being determined by subsidiarity and proportionality. The principles are embodied in Article 5(3)–(4) TEU.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The Protocol on the Application of the Principles of Subsidiarity and Proportionality<sup>907</sup> should be read in conjunction with the Protocol on the Role of National Parliaments in the EU.<sup>908</sup>

The Subsidiarity Protocol only applies to draft legislative acts.<sup>909</sup> Thus, the subsidiarity principle is applied before the act is adopted. The Protocol imposes an obligation on the Commission to consult widely before proposing legislative acts. In particular, the Commission must provide a detailed statement concerning the proposed legislation, which must contain some assessment of the financial impact of the proposals, and there should be qualitative and, wherever possible, quantitative indicators to substantiate the conclusion that the objective can be better attained at a Union level.<sup>910</sup> Furthermore, the Commission must submit an annual report on the application of subsidiarity to the European Council, the European Parliament, the Council, and to national parliaments.

To return to the main issue, the principle of subsidiarity is conditional upon the necessity requirement. The Community cannot take an action if the said action can be efficiently

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<sup>905</sup> Commission Communication to the Council and the European Parliament, Bull EC 10–1992, 116

<sup>906</sup> Grainne de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', Jean Monnet Working Paper 7/1999, <<http://www.jeanmonnetprogram.org>> accessed on 15 April 2014

<sup>907</sup> Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality

<sup>908</sup> Protocol (No 1) On the Role of National Parliaments in the European Union

<sup>909</sup> Subsidiarity and Proportionality Protocol (n 94) Art 3. Consequently, it does not cover delegated or implementing acts.

<sup>910</sup> Art. 5

achieved by the Member States. The requirement of necessity has always been the precondition of the implied powers doctrine. Without a link between the expressed Treaty powers or the Treaty objectives and proposed implied powers, it was impossible to employ the doctrine. Now, after the introduction of the subsidiarity principle, necessity became a requirement for all Union actions. The fact that the subsidiarity test has to be conducted before the act is adopted eliminates the danger of illegitimacy of implied powers. All the acts proposed have to pass this test, also those containing implied powers. We can even say that the threshold of necessity for implied powers is higher than in the subsidiarity principle. Thus, every implied power passes the test of necessity and simultaneously fulfills the subsidiarity requirements. Or from another angle, each implied power passes first the necessity test required by the subsidiarity principle and then the implied powers necessity test. Anyhow, these two doctrines do not contradict and are perfectly fine to conciliate. In other words: subsidiarity (together with proportionality) is a factor that should be embedded into the test of necessity of implied powers. Both the subsidiarity and implied powers' theories underline the limited powers of the Union. They draw attention to the effectiveness of the Union while achieving without expanding the central competences.

Bermann characterized the principle of subsidiarity as follows:

The principle of subsidiarity does not, for example, seek to challenge the direct applicability, direct effect, or supremacy of Community law, or any of the prerogatives of the Court of Justice. It does not quarrel with the notion of implied powers or with Community preemption, provided the use is fair. Since subsidiarity deals with the exercise of legislative self-restraint within the constitutional sphere of federal power, enumerating federal powers as such does not help; the Maastricht Treaty predictably reaffirmed the enumeration principle, requiring the Community to "act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." Subsidiarity asks a quite different question, namely whether the powers that do fall within the Community sphere should in fact be exercised. By the same token, expressly reserving to the States all powers not delegated to the federal government, as does the U.S. Tenth Amendment, simply begs the question. Subsidiarity challenges none of these notions, but it is not satisfied by any of them either. It starts off precisely where the conventional tools of constitutional federalism leave off and where legislative politics is ordinarily thought to begin.<sup>911</sup>

A nuance that shall be noted here is the difference between effectiveness and efficiency. The subsidiarity test is more of an efficiency test, meaning that it requires a comparative evaluation of costs and benefits at each level. The efficiency test often favored Community action to ensure the general uniformity of European law that was significant for attainment of a common market.

The principle of subsidiarity applies only in the situation of shared competences. If a proposed measure relates to an area of exclusive competence, the Community may take action regardless of the principle of subsidiarity. The problem was that before the Lisbon Treaty there was no simple criterion for determining the scope of the exclusive competence, since the Treaty was not framed in those terms. The Commission interpreted Community

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<sup>911</sup> George Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94 Columbia Law Review 331

exclusive powers in a very broad way that commentators disagreed on.<sup>912</sup> The scope of the exclusive powers was subsequently determined in the process of judicial interpretation and the Court seems to have implicitly adopted the broad view. It is noteworthy that cases crucial for the development of the doctrine of implied powers also had to deal with defining the scope of the exclusive competences of the Community. As we can see above, the discussion on the external implied powers was intertwining with that of the exclusivity thereof. It started with the *ERTA* case, where the Court ruled that once the Community had drawn up a specific (here: transport) policy, the Member States are deprived of a competence to make rules which could affect such policy. More generally, once the Community has taken action, it has exclusive competence in the area and can act without regard to subsidiarity.

The most important novelty in the Lisbon Treaty is the fact that subsidiarity and implied powers became explicitly connected to each other and a system of control was introduced. The Treaty of Lisbon innovates by associating national parliaments closely with the monitoring of the principle of subsidiarity. According to the new rules, the Commission must send all legislative proposals concurrently to the national parliaments and the Union institutions. The national parliaments must also be provided both with legislative resolutions of the European Parliament and with positions adopted by the Council.<sup>913</sup> National parliaments now exercise twofold monitoring:

- They have a right to object when legislation is drafted. They can thus dismiss a legislative proposal before the Commission, if they consider that the principle of subsidiarity has not been observed;<sup>914</sup>
- Through their Member State, they may contest a legislative act before the Court if they consider that the principle of subsidiarity has not been observed.

The first-mentioned tool is the so-called “early warning system“. National parliaments have to act collectively to defend their interests. The effects of these actions are limited though, because they were not granted veto powers. They were only given a power to impose a more stringent justification requirement on the European Commission, and there is no way to enforce that requirement in the face of a defiant Commission. A side effect of the procedure of protection of subsidiarity is that it increases the transparency of deliberations, albeit in a limited manner.<sup>915</sup> It should be remembered that in the same reform the Parliament gained veto powers, instead of the very limited right of consultation, which was a

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<sup>912</sup> See AG Toth, ‘A Legal Analysis of Subsidiarity’, in D O’Keeffe, PM Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery, 1994) 39–40

<sup>913</sup> Subsidiarity and Proportionality Protocol (n 94) Art 4

<sup>914</sup> This triggers a two-stage procedure: 1. if one third of national parliaments consider that the proposal is not in line with subsidiarity, the Commission will have to re-examine it and decide whether to maintain, adjust or withdraw it 2. if a majority of national parliaments agrees with the objection but the Commission decides to maintain its proposal anyway, the Commission will have to explain its reasons, and it will be up to the European Parliament and the Council to decide whether or not to continue the legislative procedure.

<sup>915</sup> Lebeck (n 901) 341

significant step forward towards transparency and inclusion of more actors in the legislative process.

Furthermore, national parliaments also have the possibility to participate in an *ex post* subsidiarity control, as Article 8 of Protocol No 2 states:

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national parliament or a Chamber thereof.

But in fact there is not much room left for *ex post* judicial review of EU legal acts based on compliance with subsidiarity.<sup>916</sup> In the case law of the ECJ, subsidiarity has been only “of little value as a standard of scrutiny”.<sup>917</sup> The principle of subsidiarity has been pleaded in a number of cases, but so far without success.<sup>918</sup> It is submitted, though, that the attitude of the ECJ towards the principle may change under the Lisbon Treaty, since it clearly defines areas of exclusive and shared competences.

#### 4.3.2. Democratic deficit

A big problem with the doctrine of implied power might be its connection with the issue of the democratic deficit in the European Union. At first glance, the doctrine looks like an additional argument for those who blame the EU for being counter-democratic and want a union where more depends on the people and their representatives instead of the bureaucracy and clerks not elected by people and not accountable to the people. Is it really so?

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<sup>916</sup> Simona Constantin, ‘Rethinking Subsidiarity and the Balance of Powers in the EU in light of the Lisbon Treaty and Beyond’ (2008) 4 CYELP 151, 164

<sup>917</sup> C Ritzer, M Ruttloff and K Linhart, ‘How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control’ (2006) 7 German Law Journal 760

<sup>918</sup> ‘The European Court of Justice has shown no interest in giving subsidiarity the importance as a constitutional principle which its prominence in the constitutional scheme of things would seem to merit. This seems to represent more than benign neglect, or bewilderment as to how subsidiarity is intended to work: it seems to represent a judicial policy of minimizing recourse to subsidiarity as a basis for judicial review’ (Wyatt, p. 4) Contrary: On closer inspection, subsidiarity has in fact taken hold more forcefully as a legal principle than is frequently assumed. To a large extent, any confusion or doubt on this point is due to the fact that the Court’s core subsidiarity test has developed under a different heading of review. Subsidiarity has conditioned the Court’s approach to scrutinizing the Union legislature’s use of Article 114 TFEU as a legal basis to enact EU legislation. The requirement for an appropriate legal basis to support any action by the Union legislature follows from the principle of conferral in Article 5(2) TEU noted above. (T Harsley, ‘Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?’ (2011) 48 Common Market Law Review 1417, 1421) The main cases where the ECJ ruled on the subsidiarity principle were: Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419; Case C-491/01 *British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453, Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-518/08 *Fundación Gala-Salvador Dalí*, judgment of the Court (Third Chamber) of 15 April 2010 (nyr).

The democratic deficit is a concept invoked principally in the argument that the European Union and its various bodies suffer from a lack of democracy and seem inaccessible to the ordinary citizen because their method of operating is too complex. The term was initially used to criticize the transfer of legislative powers from national governments to the Council of Ministers of the EU. European integration has meant an increase in executive power and a decrease in national parliamentary control.

The deficit can be seen as a consequence of a non-defined form of the Union. The Union is described most often as an interim stage between an international organization and a federation. We can agree that it is something more than a mere international organization and is leaning towards a federal-like model. But still, most of the forms of decision-making within the Union are well known from international organizations. The Union is a specific case where the theories on democracy, which have been associated before only with a modern state and the concept of sovereignty, are used to describe a polity that is not a state (yet). Thus, for all those who wish to see the Union as a federation there is not enough democracy. The idea is that the further integration, the way towards a more federal state, must be linked with democratization and all forms of non-democratic procedures should be eliminated.

The Maastricht, Amsterdam and Nice Treaties contributed to improving the democratic legitimacy of the institutional system by reinforcing the powers of Parliament with regard to the appointment and control of the Commission and successively extending the scope of the co-decision procedure. The Treaty of Lisbon keeps on walking on the same path, defining for the first time the democratic foundations of the Union, which are based on three principles: democratic equality, representative democracy and participatory democracy. It strengthens the powers of the Parliament on legislative and budgetary matters and enables it to carry out more effective political control of the European Commission through the procedure of appointing the President of the Commission. Furthermore, it strives to increase citizen participation in the democratic life of the Union by creating a citizens' right of initiative and by recognizing the importance of dialogue between the European institutions and civil society.

The European Court of Justice is recognized as a part of the democratic problem. The role of the Court is huge in the Union, as it is seen as breaking the balance of powers in the current EU as well as the separation of powers in an ideal of democracy. It is said to be unusually powerful (by European standards). The Court is accused of judicial activism: it not only applies pre-existing law but also creates new laws and interprets Treaty provisions contrary to or entirely outside of the apparent ordinary meaning of the legislation. It took the most prominent decisions in the process of constitutionalization of the Community. Many of its judgments are far reaching and of a political nature. The Court's activism is accused of widening the democratic deficit gap, by lacking accountability and legitimacy and by promoting treaty alien legislation.<sup>919</sup>

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<sup>919</sup> In an ideal democratic system the decisions should be made as close to the citizen as possible. According to many, this requirement is not fulfilled in the case of the ECJ decisions. They claim that the judges are hardly accountable to anyone and that the identification with their decisions is very low. The



Democracy requires that the key decisions for functioning of the polity are made by political bodies that are directly elected and open for deliberation over preferences and values. From this perspective we could say that implied powers substantiated democratic deficit, as defined here. The decision-making process in the EU was based on the will of the Council of Europe, i.e. the national governments that are not accountable collectively for their decisions. Additionally, the constitutionally most important decisions were laid down by the Court, which is not an elected body but rather a group of wise men *tucked away in a fairytale Duchy of Luxembourg*.<sup>920</sup> The fact that the Court has read into the Treaties a broad conferral of powers would suggest that democracy in the Member State governments is not enough in the Union as a polity, as the Court to some extent is exercising the power to determine the jurisdiction of other EU institutions and is able to attribute to the EU greater powers than the Member States intended.

Nevertheless, it is noteworthy that all the case law as regards implied powers was accepted by the Member States. Even if there was some kind of opposition at the very beginning, it petered out. As we can observe, most of the governments were supporting the party opposing the new implied powers for the Community (basically, the Council); some governments were protesting loudly against the judgments. Nevertheless, the Member States accepted the new legal order established by the Court. The argument that the case law alienated the treaties from the will of their authors is only half true. It is correct that sometimes the Court's interpretation, using the doctrine of implied powers, was far from what could be expected from the masters of the treaties. But it is a specificity of a new type of multinational polity. The Union needed changes to develop satisfactorily and to be able to address all the problems according to the circumstances. The treaty amendment procedure is long and complicated; therefore the Court was using the instruments available to adjust the legislation to the new situation. The crucial fact here is that all the changes proposed by the Court were accepted by the Member States in the form of treaty provisions. The

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Luxembourg judges are not elected and are not controlled by national parliaments. What is more, the unelected judges can create laws that have priority over some laws made by the democratically elected legislative bodies. In other words, the ECJ is an institution which is overly powerful and has a very weak indirect democratic accountability. (C Hauss, *Comparative Politics: Domestic Responses to Global Challenges* (Cengage Learning 2008); Mark Pollack, 'The European Union's Democratic Deficit: Diagnoses, Prognoses, and Reforms', Temple University Department of Political Science - Working Paper Series 2009).

Those problems are characteristic not only for the ECJ but also for courts in general (and also other agencies, where we can observe a delegation of state functions to non-majoritarian bodies. See Morvcsik (n 898) 606-607). Judicial legitimacy is always indirect. It does not vary very much from the legitimacy of high courts in the Member States. Courts require independence to fulfill their functions, especially in the continental system. Their legitimacy relies on the values and principles it protects, including human rights. The courts are guarantors of democracy.

Of course the situation of the ECJ, as compared with national courts, is different because it is a supranational court. And the situation of multi-level judicial bodies will always be more complicated than that of state courts concerning the democratic deficit. Nevertheless, it must be pointed out that there are some procedural, substantial and – finally - legal constraints for the ECJ authority. It has limited powers and is bound by the fundamental values and the will of Treaty makers, which can potentially punish its blatant departure from their expectations. The ECJ has been constrained by democratic and fundamental principles, especially since the adoption of the Lisbon Treaty.

(See eg Pippa Norris, *Democratic Deficit* (Cambridge University Press 2011)

<sup>920</sup> Stein *Lawyers Judges* (n 869) 1

Member States, for instance, incorporated the doctrine of parallelism or accepted what was at the time a ground-breaking decision on the criminal competences of the Union. The changes were all confirmed by the highest authority of the Union and ratified in a complicated procedure that demands a very high threshold of acceptance. The Court was a kind of legislative *avant-garde* that was able to react on the spot, and the Member States rooted those decisions collectively in those special and rare moments of treaty-making.

What is more, the implied powers procedure was changing to become more democratic in itself. We could see that in the previous part of this dissertation with the example of the flexibility clause. Both European and national parliaments are involved now in the process of decision-making. It increases the (political) accountability of the process. The obligation of circulation of the drafts between the Commission and the national parliaments increases the transparency. The new system of control can be more effective because the national parliaments are more interested in restraining the integration than the Court was.<sup>921</sup>

One should see implied powers in the Community not as an instrument that preserved democracy deficit but a tool that allowed the Community to work in a dynamic situation. Implied powers were based on the idea of a “planned crisis management” and were used and confirmed in situations when they were really needed. Lebeck claims that:

[t]o certain extent, one may argue that the creation of a clause of implied powers which provides flexibility can be seen as a way to strengthen the outcome-based legitimacy of the EU. However, that may of course happen at the expense of procedural legitimacy, as well at the expense of stability of constitutional structures, both in the EC/EU itself, and indirectly in the legal orders of the member states.<sup>922</sup>

Implied powers were one of many possibilities for the Community to survive and grow in a time of political inability to move. Implied powers were not counter-democratic, they were based on Treaty provisions that left more space for the institutions that were not directly chosen to act.<sup>923</sup> All in all, the discussion over implied powers and their codification contributed to the process of democratization of the Union.

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<sup>921</sup> Lebeck adds that the implied powers created a “constitutional deficit” as well that intensified the democratic deficit: “The constitutional deficit is an effect of the need for effectiveness, combined with of the institutional design aimed at retaining control of the member states. ... [I]mplied powers can be seen as a way to cope with the inherent paradox of functional integration. That can also be seen in the manner in which the ECJ has sought to manage the application of implied powers: by extending the use of explicitly delegated powers as much as possible, while at the same time, accepting the continuous expansion of the EC competencies through implied powers. The total effect has been to expand the powers of the EC/EU with clear support by national executives, but without clear support in the treaties. That has deepened the democratic deficit, while also creating a constitutional deficit, without addressing the issue on whether there is any need for a basis of legitimacy other than the consent of member states to the EU. Likewise, the chosen model has also excluded effective accountability and democratic control of the Council.” (Lebeck (n) 311)

<sup>922</sup> *ibid* 326

<sup>923</sup> From a legal instrumentalist perspective, the European Council is a perfectly democratic institution because it is supported by the democratically appointed national governments.

## IV. CONCLUSION

This dissertation focuses on powers. More precisely on powers in federal polities. Because federations are usually considered to be the perfect form of a federal polity, a model that all other federal polities are compared with, a model that is the final result of a process of federalization or integration, the main point of reference for this dissertation was the federal system of government. Powers in a federation are probably the most important and most problematic issue. The definition of a federation cited in the first chapter told us that there is only one factor that constitutes this form of government: “vertical power-sharing across different levels of governance (center-region) and, at the same time, the integration of different territorial and socio-economic units with cultural and ethnic groups in one single polity.”<sup>924</sup> The definition suggests that federalism denotes both a system where the power is shared between the central government and the sub-units and the vertical organization of the national government. In a classic federation, the central government has its own powers and they bind territorially on the whole area of a federation, everywhere in the constituent units. The federal power may extend rights and obligations on individuals in each regional unit. In a looser form of integration, like in a confederation, we talk about a body integrating other units and its laws are binding on sovereigns. Therefore, the laws of a confederation have to be transformed into internally binding legislation by each of the units in order to be binding on the citizens and states' judicial systems. Consequently, when a state fails to carry out the instruction of a confederation, this confederation may take action only against the government of particular states and their particular bodies. In a federal system the authority of the central unit prevails in case of conflict with regional units. The paths of control are top-down, instead of bottom-up, as they happen in looser forms. This difference is usually visible in the legislative institutions of both types of union, since a confederation has only one chamber, where all units are represented, whereas a federation has two chambers: one chosen to represent the units and another that represents all the citizens.

In a compound state the crucial question is what this scope of central power is. In the case of the United States the answer is easier, because there is only one short Constitution. The United States has the following express federal powers: regulating interstate commerce; coining money, regulating currency, setting standards of weights and measures; declaring war; raising and maintaining an army and navy; making treaties and conducting foreign policy; establishing post offices; control of the District of Columbia; and federal Courts.

The Constitution also explicitly denies some powers to the federal government: the writ of habeas corpus cannot be suspended except in cases of rebellion or invasion, when deemed necessary for national safety. No bill of attainder or ex post facto law can be passed.

On the other hand, exclusive competences of the EU are less diverse and of a more economic character. They include: a customs union; establishment of the competition rules

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<sup>924</sup> See I.3

necessary for the functioning of the internal market; a monetary policy for the Member States whose currency is the euro; conservation of marine biological resources under the common fisheries policy; a common commercial policy; and concluding international agreements, when their conclusion is required by a legislative act of the EU or when their conclusion is necessary to enable the EU to exercise its internal competence, insofar as their conclusion may affect common rules or alter their scope.

Both unions also have a wide catalog of express powers shared between the central government and the regional units.

But this dissertation focused on another category of powers - implied powers. These powers have special meaning for the discussion of the place of a certain polity on the diagram of the forms of government. Why? Implied powers are powers that are neither expressly stated in the law nor expressly named in a constitution, but instead are implied by the government's need to carry out all of its functions. Implied powers are special because they are created alongside the process of developing a polity. They are not given once and forever but are a reaction to the current situation and needs of the central government to make the polity functional and effective. The existence of implied powers means that central government is independent not only for enacting concrete regulations but also in framing new powers, auxiliary to those named in the supreme law of the polity. In the doctrine of implied powers, central government goes beyond the typical act of exercising enumerated powers: it pockets some authority not expressly foreseen for it. They seem to be more complex than expressed powers. Their role in the system of government of any compound polity is complicated and hard to comprehend; therefore they need a deeper analysis to be placed correctly among other powers, so that their significance in the constitutional law is neither demonized nor underestimated.

## 1. Division of powers and development over time

The main conclusions that come from the analysis of the development of the doctrine of implied powers in both polities are twofold. The first one is the fact that implied powers exist in both polities and the path of development was very similar in the European Union and the United States. In both cases we track similar periods of development that came one after another, mirroring different periods of the development of the polities. The other conclusion is that one type of implication does not exist. The implied powers can and should be divided into some categories based on their source, but mostly based on their function in the polity. Different implied powers are typical for different polities and the existence of one particular kind of implied power can tell us a lot about the system of government. We saw that some implied powers are typical for federations, whereas other implied powers can be spotted in all kinds of compound polities, including international organizations

### 1.1. Development over time

Regardless of the fact that both polities had very different starting points and were created to fulfill different objectives, we can observe a similar development of the doctrine of implied powers over time. We can distinguish parallel phases in the development of the doctrine.

#### 1. Creation

In both polities, the doctrine of implied powers was announced by the highest courts. The courts at the very beginning saw the doctrine of implied powers as a key constitutional instrument, necessary to add as a component of the system of government in the new-born polities. In both situations it was a controversial decision that provoked endless discussions on two levels: the central units and the sub-units. Both *ERTA*<sup>925</sup> and *McCulloch*<sup>926</sup> met opposition and were not immediately accepted. The doctrine was also connected with the fact that the courts did not opt for a narrow version of implied powers in those cases, but framed it to give new broad competences to the central units. It was significant that the doctrine was in both cases created at the very beginning of the existence of the new

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<sup>925</sup> Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263

<sup>926</sup> *McCulloch v Maryland* 17 US 316 (1819)

compound polities. In the case of the USA it was only forty-two years after the country declared independence and just over thirty years after it adopted its federal constitution. In the case of the European Community the speed was even faster, if we bear in mind that implied powers in the broad version became part of the European law less than twenty years after the European Coal and Steel Community was born, which is only twenty-six years after the end of the Second World War. The courts use the fact that the dividing lines between the layers of government in their polities were not completely determined and the doctrine of implied powers played an important role in defining the power of the federal and state governments. Implied powers decisions were bold and showed the determination of the courts in enhancing federal characteristics of the unions. *McCulloch* is doubtlessly a milestone decision in the development of American federalism; *ERTA* was a landmark decision of creative judicial integration. Those decisions opened up the constitutions of the polities. Apparently the catalog of competences of the central government was not absolutely closed. *McCulloch* and *ERTA* proved that the central governments also have some additional powers not mentioned in the higher acts of the polities. Those governments gained a very powerful tool of creating and recreating new powers; these were connected with some already existing ones and with the goals of the corresponding polities in order to make the polities more effective and their constituting acts more functional. These tasks were very broad and could potentially have had consequences which are dangerous for the Member States, for their authority and sovereignty.

## 2. Solidification

The courts used opportunities soon after the creation of implied powers to ground the doctrine in the unions. In the next decision, *Kramer*,<sup>927</sup> the ECJ confirmed its foundations in *ERTA*. In the USA this phase lasted much longer and was more diversified, which was connected with the Civil War and the complicated issue of state rights that the conflict and its result brought. Nevertheless, in the period of solidification the doctrine of implied powers became a part of constitutional tradition in the United States. For example, in *Legal Tender Cases*<sup>928</sup> the Supreme Court argued legal issuance of paper money to finance the war was necessary and proper to borrowing money to fund the government.

## 3. Pushing forward

After solidification, both polities experienced acceleration of the doctrine of implied powers. While in the European Communities the doctrine was accepted as an integral part of the

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<sup>927</sup> Joined Cases 3, 4, and 6/76 *Cornelis Kramer and others* [1976] ECR 1279

<sup>928</sup> *Knox v Lee* 79 US 457 (1870, Wall), *Parker v Davis* 79 U.S. 457 (1871), *Juilliard v Greenman* 110 US 421 (1884)

acquis communautaire, the ECJ in *Opinion 1/76*<sup>929</sup> used very ambiguous language to allow exclusive implied external powers even in the absence of internal legislation. (In *ERTA* and *Kramer* the external implied powers were granted because the internal legislation in the area had already been adopted.) It was a huge step forward because it removed the anchors of expressed Treaty provisions that previously limited the Commission in extensive creation of implied powers. Moreover, at the same time the ECJ held that whenever the EC Treaty confers a specific task on the Commission, it implicitly grants the Commission powers that are indispensable in order to carry out that task. Those powers include legislative powers. The change was even more obvious in the USA, where this period lasted from 1937 to 1995. The implied powers there became an instrument of empowering the federal government, shifting from dual federalism to cooperative federalism. Since Roosevelt's time, the Necessary and Proper Clause has usually been paired with the Commerce Clause to expand the powers of the national government. Cases such as *United States v. Wrightwood Dairy Co.*,<sup>930</sup> *Wickard v. Filburn*<sup>931</sup> and others were decided and used expansive reading and means-to-end logic to create new powers of the Union. The Necessary and Proper Clause, independently or paired with other clauses, was used to expand federal power to limits not known before. The doctrine of implied powers was to blame for the expansion of the Congressional powers. Sometimes it was a very clear, expressed, legal basis of the judicial decisions, sometimes it was hidden behind the Commerce Clause, but it was implicitly applied as a reference to goals of the Commerce Clause. New competences were founded because the Court linked the doctrine of implied powers with commerce, even where the link between the commerce and the case at hand was really scarce. But this duet 'sponsored' five years of an almost unlimited expansion of powers of Congress at the expense of the states.

#### 4. Constraint

After the fat years for the development of implied powers, there were the lean years. The courts started a process of restraining themselves. They radically limited the granting of new powers to the central units. The courts opted for granting more decisive power for the constitutive units. Something akin to a counteraction for the (too) fast development of implied powers arose and dominated political and judicial thinking. Generally speaking, it was prevalent between the 1990s and early 2000s. In the EU, *Opinion 2/92*<sup>932</sup> and *Opinion 1/94*<sup>933</sup> were rather redundant, but *Opinion 2/94*<sup>934</sup> brought a clear constraint. This opinion left the final decision to the Member States and did not grant the implied powers to the

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<sup>929</sup> *Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741

<sup>930</sup> 315 US 110 (1942)

<sup>931</sup> 317 US 111 (1942)

<sup>932</sup> *Opinion 2/92 re Third Revised Decision of the OECD on national treatment* [1995] ECR I-521

<sup>933</sup> *Opinion 1/94 WTO* [1994] ECR I-5267

<sup>934</sup> *Opinion 2/94 Accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759

Community. Though it would not be hard to imagine that, the Court had decided conversely in this very case. The opinion limited both the judicial doctrine and the flexibility clause. Furthermore, the *Open Skies* cases<sup>935</sup> established the need for much more detailed scrutiny of the scope of the internal measures to imply powers. In the USA, *Lopez*<sup>936</sup> in 1995 was the first case in more than 50 years where the Court limited Congress's ever-growing commerce power. The Court did not agree that the power of authorizing handguns was not an implied power derived from the Commerce Clause. In *Printz*,<sup>937</sup> focus was paid on the scope of state sovereignty. It stands for the proposition that, even within its enumerated powers, Congress cannot impose duties on state legislative and executive branches. This tendency was confirmed in *United States v. Morrison*.<sup>938</sup> The Supreme Court proved it was serious about enforcing Article I's enumerated powers scheme and limited itself in granting new implied powers.

In both polities the constraint was connected with fact that the anti-federal/anti-integration forces grew strong. In the case of the United States it was the so-called conservative revival that shifted public opinion onto the right side of the political scene and elevated Nixon and Reagan with their state rights and court limiting agenda to the White House. In the case of the European Union it was the enforcement of the Member States in the early 1990s when the Single European Act and the Amsterdam Treaty were ratified, giving back the political initiative regarding integration of the states.

## 5. Stabilization

After two periods of very strong tendencies concerning the direction of development of the doctrine of implied powers – the first one being the uneasy proliferation of central powers, when they were hard to accept for conservative politicians and regional units, and the other the cumbersome curbing of implied powers that constrict the capacities of functioning and further development of the central unions - a time of stabilization came. In both polities the time of stabilization was actually a victory of the pro-integrationist forces. It was a negation of the previous period and coming back on track of the development of the doctrine of implied powers. That final period confirms that implied powers are important for the development of the compound polities and are needed for correct functioning thereof. They show us that the times of constraint were only a periodic correction of a trend forced by political circumstances. The self-limitation of the courts was a move that could have been expected (as a realignment) after years of controversial development of both the doctrine and central powers in general. This previous period made possible a deeper reflection on the doctrine and its revision in the near future.

In the European Union, there was an attempt to codify implied powers in the Constitutional

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<sup>935</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98

<sup>936</sup> *United States v Lopez* 514 US 549 (1995)

<sup>937</sup> *Printz v United States* 521 US 898 (1997)

<sup>938</sup> 529 US 598 (2000)



Treaty. Even though this was not very clear and still provoked many questions regarding the relation between the existence and exclusivity of implied powers, it cannot be underestimated that the implied powers were expected to be regulated in the so-called Constitution for Europe. After the collapse of the just mentioned treaty, the Court re-developed its own doctrine in *Opinion 1/03*.<sup>939</sup> It did this in a broad and more sovereignty-encroaching way than in its original version. The Court meant the broadening of possibilities for the establishment of exclusive competence under the guise of unity of the Common Market and the uniform application of Community law. Also, at the same time the ECJ took one of the most controversial decisions in its history, i.e., granting implied powers in the criminal law area. The ECJ invaded a very crucial part of the sovereignty of the Member States on purpose, but it was sure of its own arguments and once more a broad reading of the doctrine in the Union prevailed. On the other side of the Atlantic, the Supreme Court held in *Gonzales v. Raich*<sup>940</sup> that Congress may regulate intrastate activity where the behavior, in the aggregate, can impact interstate commerce. It held that the Commerce Clause gave Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary. Consequently, the Supreme Court saw this power as an implied power. The Court came back to its logic and saw the power to regulate cultivation and use of marijuana as necessary and proper to reach the goals of the Commerce Clause. This judicial trend continued with the *United States v. Comstock*<sup>941</sup> and *Obamacare*<sup>942</sup> cases. This line of cases again granted implied powers to the federal government. The United States came back on the path of the growth of federal competences (and this is where my analysis ends; this is where we stand now).

The development of the doctrine was very similar in both polities. It started with a controversial discovery of the doctrine by the highest courts in the polity, then a slow process of solidification that was supposed to root the doctrine in the legal culture and convince other actors that it is a normal principle of law in the polity, and an important principle for correct growth thereof. When that happened, when the enemies of the doctrine had other possibilities to attack implied powers but accepted the existence thereof, the Court was able to get a move on. It found new implied powers that were connected with a legal text in a very loose way. Implied powers became for many a symbol of uncontrolled development of the scope of authority of the central units of the polities without democratic consent of the constituencies of their regional units. When this wave broke, the opponents of fast-track development went on the offensive - the judicial doctrine of implied powers had to stop its development. It not only had to be a defensible position: we could observe a regress. The successes on the line of implied powers were erased by new judicial readings. Even if many observers thought that it was a new long-term trend, it was not so. The constraint ended and the doctrine of implied powers came back on the judicial agenda strong and sharply outlined. It now develops as an important component of the constitutional case law of both polities. It is an instrument of maintenance for proper functioning of the polities but also of expansion of central governments in both polities. The

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<sup>939</sup> *Opinion 1/03 Lugano Convention* [2006] ECR I-1145

<sup>940</sup> 545 US 1 (2005)

<sup>941</sup> *United States v Comstock* 560 US 126 (2010)

<sup>942</sup> *National Federation of Independent Business v Sebelius*, 567 US\_\_\_ (2012)

latter has of course different reasons and objectives in each of the two polities. In the case of the EU it is part of the integration strategy. The development of the central government is equated with building a stronger union and is seen as a process of federalization. In the case of the USA, but also the EU, this is a trend connected with globalization and the necessity of retention of the position of the United States on the global arena. All governments - federal and regional (but also local, which is not within the scope of this dissertation) - play a greater role in the lives of their citizens; expectations about what kinds of services and rights people want from government have changed; and relations between different levels of governments have become more complex. New world trends, especially economic ones, provoke centralization, since only the big and well-organized polities are able to lead in the world. New challenges that come from inside and outside the polities impose stronger bureaucracy and an apparatus of control. This trend happens very fast and mechanisms of constitutional amendments do not keep up. Implied powers are an important instrument to manage and build stronger polities beyond time-absorbing and difficult, sometimes impossible, democratic/constitutional processes.

## 1.2. Different implied powers

Basing on a proposal of division of implied powers suggested in Chapter III, I would like to present a categorization of implied powers in general. At first glance we can see that the division between codified and uncodified implied powers has some importance in the European context but does not exist in the American context. In Europe, some implied powers are based on a specific Treaty provision (Article 352 LT). It has been codified in the Treaty before the Court announced its *ERTA* principle or even decided in *Fédéchar*.<sup>943</sup> The flexibility clause was foreseen by the treaty-makers. They wanted to introduce a mechanism that would allow the Community to adjust its competences to its objectives. It is equivalent to the Necessary and Proper Clause in the US Constitution. Both provisions were foreseen to fill the gaps in the highest, constitutional or treaty, law. The lawgivers surmised that the documents they were designing could cover all the situations and that a special lifeboat provision was needed. The central governments would not be able to govern well, to reach the specific objectives indicated by the Framers without a margin of freedom in acting. The Framers knew that even though they expected limited central governments, the rigorous limitation of powers of the central units equated strictly with the conferred powers, could not be productive and would stop the functioning of the polity. Implied powers provisions meant some trust that the Framers gave to the new created polities. This confidence denoted that the Framers foresaw some role and responsibility of the organs of the new polities in the process of self-development. Without those clauses the new polities would be forced to administer at the lowest possible level, therefore uselessly.

We can see that Article 352 LT is similar to the Necessary and Proper Clause, but also slightly different. The latter reads:

The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The European flexibility clause on the other hand states:

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

The first similarity we can notice is the fact that both speak about the necessity. Implied powers have to be necessary for the central units in the polities. Only the US Constitution mentions that implied powers must also be proper. Does this mean that European implied powers do not have to be proper in the American meaning of that term? It should be remembered that the term "proper" establishes external limits on congressional authority.

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<sup>943</sup> *Case 8/55 Fédération charbonnière de Belgique (Fédéchar) v High Authority* [1954-56] ECR 245

The law must be within the jurisdiction of Congress, meaning it must be in accordance with the principle of separation of powers, the principle of federalism and the basic rights of the people. We should agree that European implied powers must be proper in the meaning of that definition. It was not mentioned expressly because it results from other Treaty provisions and general principles of European law.<sup>944</sup> It should be remembered that the reading of "properness" in the US Constitution is connected with a broad reading of "necessity", the Marshallian one. This meaning would be different if the Madisonian reading of the term "necessary" had been accepted. The "propriety" is a brake that is supposed to cut down too expansive a reading of the "necessity". In other words, the "necessity" in the American Constitution has a more far-reaching meaning; it allows for more than the "necessity" in the European Treaty. The wide meaning of the term in the US Constitution is reduced internally, in the same provision, by the word "propriety", whereas in Europe it is reduced externally, by other provisions in the EU Treaty.<sup>945</sup> In other words, the fact that in the EU Treaty there is only one adjective listed does not mean that it is much broader than its American homologue: it is limited by other provisions of the Treaty.

Thus, in both cases, the construction that does not equate "necessary" with "absolutely necessary" was accepted. This reading allows a more sophisticated and expansive reading of the clause.

On the other hand, the US Constitution allows implying powers "for carrying into Execution the foregoing Powers", whereas the EU Treaty speaks of "attain[ing] one of the objectives set out in the Treaties. The European clause seems to be much wider because objectives are more capacious than powers." Congress's powers are very restricted in the US Constitution. The Framers saw the new government as one of very limited competences, therefore they named them all in Article I. Conversely, the objectives of the European Union are extremely diverse and comprehensive. Although Title I of Part I of the Constitutional Treaty is called "Definition and objectives of the Union", it is impossible to find therein any precise definition of the European Union that lists its characteristic features. The definition is provided indirectly in the first eight Articles, which concern the establishment of the Union, the Union's values and objectives, fundamental freedoms and non-discrimination, relations between the Union and the Member States, Union law, legal personality and the symbols of the Union. Title II of Part I contains provisions relating to fundamental rights (Article I-9) and citizenship (Article I-10). According to this difference, the implied powers doctrine in the European Union should be much more developed and used by the Commission more extensively than by Congress in the US. The analysis of the case law proved to us that this is not entirely true. The US Supreme Court paired the clause - including its broad ends and goals - with the Commerce Clause, and was able to find in the Necessary and Proper Clause

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<sup>944</sup> Articles 3, 4 and 6 of TFEU distinguish between three types of competence and draw up a (non-exhaustive) list of the fields concerned in each case. The exercise of Union competences is subject to three fundamental principles which appear in Article 5 of the Treaty on the EU: the principle of conferral, the principle of proportionality, and the principle of subsidiarity.

<sup>945</sup> All the brakes that should be read together with the "necessity" from the European treaties should be found in other provisions of the Treaty, according to the legal culture of the Union. Together, these equal "properness", as known from the Necessary and Proper Clause.

all the other types of powers it needed to justify its vision of the federal authority. On the other hand the European Court of Justice was not fully free in creating new powers as it wished according to its vision of development of the federal system in the EU; it was restricted by the political situation in the Union and its need to act as a neutral organ.

The European clause also contains specific rules for the adoption of implied powers. This is connected with the fact that central powers of the Union are still a sensitive matter and the Member States wish to control the legislative process, not to totally lose control over the competences of the Union. The Union is not a completely finished federation: the Member States still claim to be the only masters of the Treaty and the Union, the exclusive creators of the EU competences, and therefore some legislative limitations are understandable. The Court cannot be granted a general unlimited competence to create all implied powers it pleases. It cannot be forgotten that implied powers are powers beyond the catalog of those agreed by the Member States in a complicated treaty-making process that requires multiple super majorities on a national and intergovernmental level. The Member States do not want to lose any additional competences in an easier procedure, especially not in a procedure that is fully under control of one of the organs of the Union (like the ECJ is).<sup>946</sup>

But if we compared only implied powers based on the special flexibility clause in both provisions, the picture would not be complete. In the EU many implied powers, including the most controversial ones, were not based on the specific clause. They were a consequence of the ECJ teleological interpretation of the Treaty. They helped the European institutions in carrying out the task of reaching goals of the Community. They were all reaffirmed by the case law. They were all the product of a negation of strict understanding of the doctrine of conferred powers. I call them supportive implied powers, because they helped the European institutions to carry out the task of reaching the goals of the Community. The ECJ went one step further than the US Supreme Court: it created implied powers beyond the Treaty clause. This means that the ECJ saw the doctrine as an extraordinary tool for maintaining the adequate development of the integration and federalization.

But those implied powers do not exist in the US constitutional culture. In the American context, all implied powers are based on the Necessary and Proper Clause. Therefore, from a comparative angle there is no sense in dividing the European implied powers into two groups. Comparing European codified implied powers with American codified implied powers will not give a complete picture, since it would eliminate judicial implied powers which are crucial for European law (I would say they are even more important than the codified ones, since the most important implied powers that transformed the polity were declared this way.) In the comparative part of the dissertation, the European implied powers will be treated as one group, both codified and uncodified, and as a group they will be compared with their American homologue.

The division that is really important is the one between properly functioning implied powers

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<sup>946</sup> See Cases 2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09, decision of 30 June 2009, preliminary English translation provided by the Bundesverfassungsgericht at <[http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html)> accessed 20 March 2014

and effectiveness reinforcing implied powers. The first group only makes other provisions operative and does not try to extend the powers of the Community. They do not attempt to transform the system of government. The latter are not inextricably linked with existing competences, and are not indispensable for the functioning of the Community. Their foundation is the effectiveness of the polity. They are oriented on optimization, reaching goals at the most efficient level possible. From the comparative angle it is not important on what base, textual or extra-textual, the implied powers were created. What matters is the outcome and the way the implied powers were transforming the polity. Why this division is important from the federalism perspective, I will explain later in this chapter.

To sum up, in both the United States and the European Union we can observe implied powers. These powers can be easily compared. They play a very similar role in both polities: they facilitate functionality and the effectiveness thereof. In both, we can distinguish the same categories of implied powers that play the same role in the development of the corresponding polities. Without implied powers they would neither be able to react to the changing circumstances, and to adjust to some extent the functioning government, nor to reach expected goals within the general constitutional framework. Implied powers are fit for their purpose, as the constitutional practice shows. The doctrine was accepted on both sides of the Atlantic and new powers were granted to the central levels of government, at the expense of the subunits. The path leading to total acceptance, as we know it today, was similar in both polities. They both went through similar periods of extending and narrowing down the scope of implied powers that were influenced by external political, economic and social circumstances. Finally, we can observe in both polities that, even having in mind the periods of restraint, the general tendency is a permanent growth of scope of implied powers, and a constant increase of the importance of the doctrine in the constitutional theory and practice.

## 2. Implied powers and federalism

Implied powers are typical for compound polities. But the relation that is interesting for us in this dissertation is the one between implied powers and federations. Implied powers should be seen as an instrument contributing to the formation of federations and shifting balance of powers within federations without formal constitutional amendments. With the doctrine of implied powers, a particular form/version of federalism can be established in a polity that is already a federation. Federations vary; relations between the federal government and the subunits can be very different and particular implied powers can indicate a preference for strong central government versus weaker subunits or vice versa. Implied powers influence these relations. In other words, the federal government can be created stronger or weaker depending on the variant of the doctrine that dominates within the judiciary. What is more, it can even be argued that the existence of some types of implied powers is characteristic only for federations.

The existence of implied powers makes it possible for the central government to take part in a dynamic process of defining competences of a federation. The central government is granted new competences according to its political situation. This is not the case in a type of federation where a constitution enumerates powers of the regional units, leaving all the rest to the central government. Such a model of a compound polity equals a very strong and centralized federation. It is beyond the interest of this dissertation because this form of government is easy to classify using the traditional diagram of possible forms of governments. And more specifically, both the European Union and the United States present the opposite idea of dividing powers between two levels, the enumeration of powers of central government.

Implied powers shift the constitutional relations between the central and regional government. Where the doctrine exists, it can no longer be claimed that the constitution belongs exclusively to the regional units. What is more, it cannot be claimed any longer that the sovereignty belongs exclusively to the regional units. With implied powers, the central government itself actualizes the powers necessary to exercise its functions. It is easy to point at situations of conflict in different polities between the regional units and central governments over newly granted implied powers. The implied powers, as has been shown, are the fruit of a permanent disagreement over the system of government in a compound polity and of bargaining between different actors. Moreover, these conflicts - described in this dissertation - have not always ended in victory of the constitutive units. On the contrary, implied powers were sometimes granted to the polities regardless of forceful protests of the subunits. Subunits had to give up their authority many times in that long-term conflict. In a looser form of a compound polity - when all the decisions are taken unanimously - this kind of resistance would lead to a breach of an agreement constituting a polity. Another consideration unthinkable in a non-federal polity is the fact that in a case of conflict the implied powers were granted by a special court and were accepted and implemented by the constituent units. In a looser form of a compound polity, subunits would not follow decisions of one of the bodies of the polity if these were not in accordance with the will of all the constituting units.

To sum up, the situation whereby the supreme law of a polity (a constitution or a treaty) contains a clause that allows the central government to make additional laws to carry into execution powers enumerated in the supreme law seems to indicate to us a federal system of government. Such a clause can be found in the constitution of the United States and the European Treaty (in every Treaty since the Treaty of Rome. and has been codified in the highest legal acts in a special procedure. The clause was foreseen by the constituting bodies, which wanted to introduce a mechanism that would allow the polity to adjust its competences to its objectives. The polity got a powerful tool that was always used where the supreme act did not provide necessary powers. But the EU goes one step further. Implied powers were found there which did not have a reference to the flexibility clause of the Treaty. The European Court of Justice has founded some powers that were not granted by the Treaty because of necessity. They were founded by the Court by way of interpretation employed by the justices and were based on purposive reading of some specific provisions of the Treaty. Thus, we can conclude that the pro-integrationist actors in the Community were even more determined to use the doctrine of implied powers as a tool of integration and federalization. They created implied powers beyond the Treaty clause because implied powers seemed to be the only instrument that guaranteed the effectiveness of the polity in a time of political impotence. The ECJ took the risk of discovering implied powers based only on the doctrine of implied powers known from other polities and based them on its own methods of interpretation, beyond the flexibility clause. It was politically risky but it was worth it because other actors permitted it. They were created to attain the objectives for which the specific powers were intended. These implied powers were used as an excuse, as a justification for broadening the scope of central authority. The fact that some powers were implied even outside the framework of the special constitutional clause gives them even more of a federal nature. For example, as we could observe in Chapter I, foreign affairs were considered to be part of the federal competence. When the ECJ granted the Community more powers on the international scene, it intentionally awarded it with an additional competence typical for a federal state. The Member States did not empower Brussels in the area of foreign policy, a classic central power of a federation, but the Court did. This situation means that the federal/central bodies, in such cases the Court, felt empowered to created new competences for the polity without any permission of or agreement with the constituent states. The central body was shaping the form of central government itself.

I am not saying that existence of implied powers is a condition *sine qua non* of every federation. They are not. Some federations do not have any equivalent of the sweeping clause in their constitutions, e.g. Germany. Also, the fact that a polity accepted and developed the doctrine of implied powers does not mean that this polity is a federation. But the fact that a polity accepted and developed the doctrine of implied powers brings it closer to a classic federal model. Implied powers are something typical for a federal system, and if these were developed in a compound polity we can say that there must have been an agreement for giving the polity this federal feature. This agreement could have been silent. The agreement does not mean that the constituent units took an *expressis verbis* decision of granting some extra powers to the central units, nor a decision to grant a general competence to create powers whenever needed to make full use of other expressed powers. This agreement could have been approved simply by accepting the status quo. The



constituent units could accept a situation by not intervening, by not forcing the central units to give up on the new implied powers. In a more complex situation, this agreement would be predated by approval of the new powers by one other central body. In general, this body would have a judicial specificity, since it has an impartial character and/or seems apolitical. This confirmation makes it harder for the constituent units to forcefully protest against the new powers, since they would have to face also the authority and position of this judicial body. But again, such acceptance, with or without judicial confirmation, is impossible to imagine in a looser form of a compound state. In the looser model of compound polity, the states would not accept the new situation simply because they would not have to - because they were too strong, dominant in the compound polity, able to respond forcefully, punishing the organs but also destroying them. Because of that, a conflict between the central unit and the states is not even possible. The states are absolute masters of the treaties and control the organizations; therefore there is no space for conflict of this kind.

Of course, someone could raise the counterargument that there are organizations that developed a doctrine of implied powers yet are definitely are not federations. The doctrine of implied powers has played a crucial role in the development of the law of the international organization. One example that was already presented is the United Nations.

At a glance, the development of implied powers in an international organization looks peculiar. International organizations can only work on the basis of their legal powers. Therefore, international organizations can exercise only the powers that their founders granted them in their constituent instrument - they can act according to the powers which have been attributed or expressed in various forms. But the necessity of the proper development of organizations and successful achievement of their objectives sometimes requires that they acquire special subsidiary powers. The dynamic situation in the outside world could indispose proper functioning of the organization. The United Nations introduced implied powers in its advisory opinion of 1928 on Interpretation of the *Greco-Turkish Agreement of December 1st, 1926*.<sup>947</sup> The opinion itself and the dissent of Justice Green Hackworth started a legal discussion about the form of implied powers in the UN but the existence thereof became a fact. Does the fact that implied powers exist in such a loose form of organization of inter-state life as an international organization contradict the statement that implied powers are typical for federations? Not really, when we bear in mind that different kinds of implied powers exist.

## **2.1. Implied powers typical for federations**

In the previous section of this chapter I suggested a division of implied powers.<sup>948</sup> Now we will see the link between this division and federalism. I distinguished, in the first instance,

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<sup>947</sup> [1928] Publ PCIJ, Series B, no 16

<sup>948</sup> See p 228-31

between the doctrine of implied powers based on Article 352 LT (ex 308, ex 325) and the implied powers based on specific provisions of the Treaty. The flexibility clause was foreseen by the treaty-makers. They wanted to introduce a mechanism that would allow the Community to adjust its competences to its objectives. The Community got a powerful tool that was always used there where the Treaty did not provide necessary powers. In addition to filling in gaps in the Treaty, some substantial policy and regulatory measures have been developed and adopted where the "Treaty has not provided the necessary powers". Further, I suggested that there are implied powers that were not based on the flexibility clause, that were not powers granted by the Treaty when necessary. They were found by the Court only thanks to the way of interpretation employed by the justices. I called them supportive implied powers - supportive because they helped the European institutions to carry out the task of reaching goals of the Community. They were created to attain the objectives of some specific powers.

Later, I suggested dividing implied powers into two subcategories. The first one was called properly functioning implied powers. These have a narrow application. They only make other provisions operative and do not try to extend the powers of the Community. I concluded that they are a consequence of logic. They were founded without much controversy: the Court simply confirmed that the Community has the power to exercise constituent parts of the explicitly expressed competences. We can contrast them to what I called effectiveness reinforcing implied powers. They are not a logical consequence of the existing competences. They are not inextricably linked with them, and are not indispensable for the functioning of the Community. Their foundation is the effectiveness of the Community action. They are oriented toward optimization, reaching goals on the most efficient level possible. They are a consequence of theological and systemic interpretation of the treaties.

This systematization was suggested after analyzing the doctrine of implied powers in the European Union, but it could be generalized and offered as a universal division of all implied powers.

For the current discussion on the implied powers in international organizations, the most important division is the one between proper functioning implied powers and effectiveness reinforcing implied powers. I claim that implied powers found in the United Nations are exclusively proper functioning implied powers. Of course, implied powers in international organizations are the result of the principle of effectiveness, as has been applied by the International Court of Justice. The principle of effectiveness was used in order to give effect to the provisions in accordance with the intention of the states and in accordance with the rules of international law. Institutional organs have justified implied powers as being ancillary to the powers which are expressly authorized or needed to assure the "effectiveness" of authorized action. This is similar to what happened in the *Greeko-Turkish Agreement*, where the Agreement did not identify the party or parties entitled to resort to arbitration. The Court, however, decided: "from the very silence of the article on that point, it is possible and natural to deduce that the power to refer a matter to the arbitrator rests with the mixed

commission when the body finds itself confronted with the questions of nature indicated."<sup>949</sup> This understanding of the doctrine has been rooted in the UN. Implied powers in the UN are usually described as created because of "functional necessity"; they are essential in carrying out explicitly conferred powers. These powers are not controversial, they are necessary, and the parties can agree (or do not protest) against them forcefully, at least not beyond normal, diplomatic forms of discontent accepted in international relations. In an organization like the United Nations a lack of protest means that a new power was the fruit of a consensus; all the members agreed that it is necessary. This doctrine is commonly accepted and the ICJ expressly confirmed the functional theory in its advisory opinion of 1996, where it held that "[i]t is generally accepted that international organizations can exercise such powers, known as implied powers."<sup>950</sup>

Consequently, the implied powers that are characteristic of a federation are the effectiveness reinforcing implied powers, which are not typical for international organizations. They can exist where full consensus between parties is not needed, where even some protests by constituent units are possible. These powers exist without unanimity, which is characteristic for international organizations or confederations. Granted by the organizations itself, their organs. Such controversial implied powers can only be observed in federal polities. These powers are applied not merely to justify powers deemed "essential" for carrying out explicitly conferred powers but also to permit achievement of expansive charter "purposes". When an organization is able to add new powers to its own catalog, when it reaches the level of development when it decides itself about its own functioning, it is a clear sign of federalization. Effectiveness reinforcing implied powers allow the organization to evolve and adjust to the current circumstances and to fast-changing economic or social factors. Its organs are now responsible not only for keeping the organization alive but also for taking part in the responsibility for the direction of its development by trying to reach the objectives in the best way achievable, not just by the lowest common denominator. Therefore, the organization itself can argue with the constitutive units and offer solutions - implied powers - that the constitutive units do not agree on. Effectiveness reinforcing implied powers reaffirm shared sovereignty, a crucial characteristic of federations.<sup>951</sup>

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<sup>949</sup> *Greeko-Turkish Agreement* (n 150) 20

<sup>950</sup> Advisory Opinion of 8 July 1996 - General List No. 95 "*Legality of the Threat or Use of Nuclear Weapons*" 25

<sup>951</sup> This may look similar to the Kompetenz-Kompetenz issue (the ability of the arbitrary tribunal to rule on the question of whether it has jurisdiction). But the problem of Kompetenz-Kompetenz concerns the question of which court decides the boundaries of the Union's legislative competence: the ECJ with a view to the uniform application of Community law, or national constitutional courts with reference to the overriding requirements of national constitutional law and to the terms of national accession to the EU ratified by national parliaments. (Gunnar Beck, 'The Problem of Kompetenz-Kompetenz: A Conflict Between Right and Right in Which There Is No Praetor' (2005) 30 *European Law Review*. 42) On the other hand, the doctrine of implied powers touches upon the issue of creating new powers based on the principle of effectiveness and the flexibility clause but it is not about a conflict of competence between national and international/federal courts. The national courts are not involved in the process of granting (or not) implied powers. Implied powers are not seen as part of the Kompetenz-Kompetenz issue, but are part of a regular interpretation, even if both issues are part of a wider concern and debate the expansion, expressly and/or implicitly, of the existing range of the EU's competences.

## 2.2. The key actors in the debate over implied powers

We can see in both the European and American contexts that the homologue organs or groups were supporting new implied powers and other homologue organs and groups were against them during the whole time of the development of the doctrine. In the European Union, from the very beginning the Member States were trying to stop the expansion of competences of the Community. They were guarding their own sovereignty and wanted to keep the competences at the national level. They were often supported by the European Council that comprises the heads of state or government of the EU Member States and therefore is seen as an advocate of national interests in the Union. On the other hand, the European Commission has always been in favor of implied powers. The Commission also consists of one member per Member State, but members are bound to represent the interests of the EU as a whole rather than their home state.

The European Commission has been a key actor in the supranational European Community system, following the proposal of Robert Schuman.<sup>952</sup> It was established as "the only body paid to think European", to represent the spirit of integration.<sup>953</sup> The Commission is the guardian of the Treaties and of the "acquis communautaire". The original treaties gave the Commission specific functions, notably as an advocate of the common interests of the Member States, an initiator of common positions, and an objective arbiter between national interests. Nevertheless, in any dispute over the Commission's relation vis-à-vis the Member States (intergovernmentalism, neo-functionalism, etc.)<sup>954</sup>, we can agree that the Commission played an extraordinary role in European integration and it took the lead in some parts of the process (e.g. creation of the single market). The European Commission is known as the defender of the Union in many conflicts with the Member States. One of the recent examples was the European Monetary Union, where some of the Member States were trying to maintain their national influence in the international field by treating the external

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Some authors state that the doctrine of implied powers is "to some degree" within the scope of the Kompetenz-Kompetenz problem. Tobias Lock criticizes Bundesverfassungsgericht for overlooking the codification of the doctrine of implied powers in its famous decision of 30 June 2009 on the Treaty of Lisbon (Cases 2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09, decision of 30 June 2009, preliminary English translation provided by the Bundesverfassungsgericht at <[http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html)> accessed 20 March 2014). "The provisions clearly give the European Union a right to establish its own external competence by passing a legislative act providing for such a competence. Therefore, Article 3(2) TFEU is another provision giving the European Union some degree of Kompetenz-Kompetenz for external action. Why this provision escaped the scrutiny of the Bundesverfassungsgericht is not clear, but it is certainly striking." (Tobias Lock, 'Why the European Union is Not a State. Some Critical Remarks' (2009) 5 EuConst Law Review 407, 415)

<sup>952</sup> *The Schuman Declaration* (9 May 1950). < <http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/>> accessed 18 March 2014

<sup>953</sup> 'Interview with European Commission Secretary-General Catherine Day' EurActiv 25 September 2006 < <http://www.euractiv.com/future-eu/interview-european-commission-secretary-general-catherine-day/article-158149>> accessed 18 March 2014

<sup>954</sup> See footnote 881

aspects of EMU not as a “matter of common concern”.<sup>955</sup>

Also, the European Parliament supported the Commission in its continued support for the implied powers. The EP is another body that seems to be very favorable towards European integration. It represents European citizens and its development symbolizes the development towards more democratic Union of people in Europe.

Consequently, we can see the battle over implied powers in the European Union as a fight between two camps. One embodied the concept of Europe as Member States, a looser form of integration, a sui generis confederation or a specific version of international organization. This camp represents the interests of the Member States and their sovereignty and consists of the Member States themselves. It argues that the Union cannot legislate beyond the boundaries expressly drawn up in the Treaty; it cannot do anything other than what the treaty parties allow it to do. The other camp represents federal forces. It gathers those institutions that not only protect the organization but also feel responsible for its future. This camp tries to speed up the integration so that it can respond to new challenges and fully use new opportunities. This camp consists of the European Commission and the European Parliament. The fact that we are talking about the successful story of the development of the doctrine of implied powers in the EU means that the federal camp beat the camp of Member State rights in that field.

In the United States the dividing line between the two camps was drawn differently, because the first line of conflict was not between the states and the federal government, but politically between federalists and anti-federalists. It did not separate the two groups from each other: one was composed of the states and the Senate, which is the body representing the states; the other group was the President, the federal government, and the House of Representatives, which represents the union, the federation. The division between the representation of the states and the central/federal unit was very clear in the European context, although of course this division existed. For instance, *McCulloch* was an aftermath of a conflict between the federal government and the state of Maryland. Congress chartered the Second Bank of the United States. Branches were established in many states, including one in Baltimore, Maryland. In 1818 the General Assembly of Maryland passed an act entitled "an act to impose a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the legislature". In the Supreme Court the Government was arguing for constitutionality of the Bank and Maryland against constitutionality. A similar conflict was observed in *Gilman v. Philadelphia*.<sup>956</sup>

But in the cases where the the Necessary and Proper Clause was paired with the Commerce Clause, it was the US government that was arguing in favor of the implied powers and states were not involved in the process. And those cases established the majority of the important implied powers, as shown in this dissertation. I argue that this is connected with the fact that for a long time these cases were seen as the Commerce Clause cases, not implied

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<sup>955</sup> See Andrew Scott, 'Does Economic Union Require a Fiscal Union?', in Niamh Nic Shuighne, Lorraine W Gormley, *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford 2012)

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<sup>956</sup> 70 US (3 Wall) 713

powers cases. And the Court was hiding the link with the Necessary and Proper Clause.<sup>957</sup> The Court's analysis ignored the question of whether or not federal regulation of local economic activities was itself an exercise of the specifically enumerated power to regulate interstate commerce. Instead, the regulation of local activities was viewed as an available means to achieve the legitimate objective contained in the Commerce Clause. In that situation the Court took an easier role as the final guardian of the Constitution and simply interpreted the Commerce Clause. Because of the importance of the Necessary and Proper Clause, its potential danger for states' rights was limited or even eliminated - states were not involved in the judicial process. Of course, there were some exceptions. In cases that were dealing with politically hot topics, some states filed briefs for one of the parties. For example, in *Gonzalez v. Raich*<sup>958</sup> the governments of California, Maryland, and Washington filed briefs supporting Raich. Also, the attorney generals of Alabama, Louisiana, and Mississippi filed a brief supporting Raich on the grounds of states' rights. On the other hand, the Government was present and argued forcefully to grant itself new implied powers.

Nevertheless, the most visible division between the two camps is the one between federalists and anti-federalists. In the American context, the support for federalism is connected with political views and consequently with political affiliation. From the very beginning this division was clear. Members of the Federalist Party from the start of American statehood advocated implied powers. On the other hand, members of the Democratic-Republican Party were strongly against them.<sup>959</sup> The federalists supported Hamilton's vision of a strong centralized government with a sound financial base. Realization of their program culminated with the laws and policies established by Federalist lawmakers from 1789 to 1801, which emphasized the federal character of the proposed Union. Hamilton, who was the leader of the party, argued that a strong central government was essential to the unity of the new nation.<sup>960</sup> His administration secured the transition from the provisional national government established during the Independence War - which continued under the Articles of Confederation - to the intricate system of checks and balances contemplated by the US Constitution. The Democratic-Republicans favored states' rights and a strict interpretation of the Constitution. They believed that a powerful central government posed a threat to individual liberties. Jeffersonians, as they were called, viewed the United States more as a confederation of sovereign entities woven together by a common interest. In their views on implied powers, this apportionment was very obvious from the beginning. We had already seen it in the bank case.<sup>961</sup> The bank proposal was passionately opposed by James Madison, who argued that the bank was not "necessary and proper". He found the preamble of the bank bill diffuse and ductile, and therefore could not agree on giving Congress the authority to grant it as he felt it was against the principles of enumerated powers and limited

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<sup>957</sup> See pp 93-94

<sup>958</sup> 545 US 1 (2005)

<sup>959</sup> Stephen Krason, *The Transformation of the American Democratic Republic* (Transaction Publishers 2012) 36-38

<sup>960</sup> John Chester Miller, *Alexander Hamilton and the Growth of the New Nation* (Transaction Publishers 2004) 141

<sup>961</sup> William C di Giacomantonio and others (eds), *Documentary History of the First Federal Congress 4 March 1789-3 March 1791*, Vol. 14. Debates in the House of Representatives: Third Session, December 1790-March 1791 (The Johns Hopkins University Press 1996)

government. On the other hand, Hamilton and other supporters of the bank argued that it was justified as incidental to the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"<sup>962</sup> and the power "[t]o borrow money on the credit of the United States."<sup>963</sup> Madison was a father of the Democratic-Republican Party and Hamilton was a leader of the Federalist Party.

After the collapse of the Federalist Party and the disintegration of the Democratic-Republican Party, the Democratic Party and the Republican Party were created. They inherited the dichotomy regarding federalism and state rights. This disparity is present until the present day. It was most visible in the twentieth century. The New Deal showed the Democratic preference for strong central government and implied powers. The federal government had never before been involved in so many diverse social projects because the power to regulate in these policy areas until then had been seen as belonging exclusively to the states. Republicans, in contrast, connected conservative and libertarian views with protection of state rights and vivid opposition against the frequent use of implied powers to alter federal powers. This attitude can be exemplified by the Reagan administration and his conservative revolution that halted the post-New Deal tendencies. As president, Ronald Reagan was very doctrinaire when it came to his theory of federalism grounded in the Tenth Amendment to the US Constitution, which reserves all powers not delegated to the national government to either the states or the people. New federalism was supposed be an antidote for centralization that served to dig a gap between citizens and the government.<sup>964</sup>

This explains why in the USA neither the House of Representatives nor the White House are automatic supporters of implied powers. They do not mirror the European Commission in this area. In the United States the position towards implied powers presented by the administration depends on the political views and political membership. The House and the government can both back or combat the implied powers. The discussion about federalism in the USA is on a different political level. The shape of federalism, along with nuances about distribution of powers and areas of competence, is a fundamental part of the political program of both major parties. The United States is already a federation and the only battle now concerns details of the federal system. In contrast, the European Union is not a classic federation and the political parties are not using the federal argument in their political agenda. Not yet. Two major political groups in the European Parliament, the Christian democrats and the social democrats which together hold over 65% of seats and technically always govern in a big coalition, do not accelerate the federalization of Europe. The real, deep differences in this field are between smaller groups: pro-federal greens and liberals on one side and Euro-sceptical conservatives and the radical left on the other sides. But those groups are too small to set the tone for the debate. (Also, the party system and the European Parliamentarians are not strong enough to take control over the discussion about the shape of form of the European government.) For that reason, the clear dividing line is between the Member States and the Council on the one hand and the Commission and the

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<sup>962</sup> US Constitution at I, §8, cl 1

<sup>963</sup> US Constituion st I, §8, cl 2

<sup>964</sup> See II.5

Parliament on the other. It is somehow similar to the dividing line in the early years of the United States. The two EU organs that were created not to represent the states took this mission to their hearts, and are not only protecting the Union from any anti-integrationist sentiments but are also taking care of its development and federalization. As a counterreaction to this, the Member States and the representatives of their governments in the Union, known as the Council, are trying to slow down this process.

### **2.3. Courts as federators**

That being said, it is high time to turn to one last actor that played an invaluable role in the process of formation and development of the doctrine of implied powers: the judiciary. As I showed in two previous chapters, both supreme courts were in the foreground during the battle over implied powers. They took the initiative and assumed command in the process. They took over what is known as political activity and are associated with so-called political branches of government.

The ECJ became a federal Court and clearly its role model was the Supreme Court of the United States. The full picture of the development of the doctrine of implied powers could be seen not only as a process of federalization of the Union, but also as the federalization of the ECJ. They both happened at the same as logical consequences of each other. The Court supported the doctrine of implied power and by doing that it advocated a more federal European Union. But also, by bringing on new federal instruments and pushing forward a federal model, the ECJ sustained itself as a federal and constitutional court.

The Court was empowered by the fact that the Member States accepted the decisions of the Court as regards implied powers. This acceptance was one of the crucial issues that made the ECJ strong as an element of the constitutional jigsaw in Europe - strong enough to announce a new doctrine that was clearly going against the sovereignty of the Member States and speeding up the integration when it was not required by the masters of the Treaty. The Court used its authority and specific style to support the Commission. This can be explained by the example of the *ERTA* case. The *ERTA* decision was of outstanding importance for Community law. The Court used its teleological approach to increase the effectiveness of the European law and – indirectly - to accelerate the Integration. The style the ECJ presented was commonly used in the interpretation of constitutions. Traditional treaty interpretation includes the principle that the encroachment by the treaty on the sovereignty of the nation-state should be as little as possible.<sup>965</sup> The judgment was openly pro-integration. It was criticized by scholars; for example it was called bold and creative by Hjalte Rasmussen.<sup>966</sup> As noted earlier, disputes reportedly broke out regarding the *ERTA*-

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<sup>965</sup> See CF Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005) chap 2

<sup>966</sup> On Law and Policy 76



principle between the Commission and the Council, and several years passed before the Council members familiarized themselves sufficiently with that constitutional principle, making a frictionless application of it eventually possible. The Commission represented the position that in the *ERTA* case the power was vested in the Community and only the Community could take action. On the other hand, the Council was trying to convince the Court that in this case the authority had never been transferred to the Community and it still belonged to the Member States. The adoption of this principle has even encountered some opposition in national foreign ministries.<sup>967</sup>

Nevertheless, the *ERTA* case was a stupendous success of the pro-integration camp. The implied powers were eventually accepted by the Member States. The Court rooted its position as an independent judicial and apolitical body that uses its authority for the well-being of the Union. The Member States could not (sometimes did not want to) counteract and overthrow the new doctrine. It was one more opinion of the Court from that period of brisk development of judicial law in the Community, when bold pro-European case law triumphed. The Union in general was clearing its path towards a more federal government. And the whole development of the doctrine inaugurates that path. The Member States never dared to use their legal or political mechanism with the most powerful one - Treaty amendment - to chasten the Court. The Member States accepted the position of the Court and the doctrine of its implied powers. The Court's rulings were respected by all the parties to the Treaty, regardless of their negative opinion about the ruling. The Member States "lost full control" over the Community. The Court presented itself not as a mere guardian of the Treaty (if a guardian may be mere), but as a new master of the Treaty. The acceptance of the doctrine of implied powers, in spite of the fact that the doctrine eroded state sovereignty of the Member States and in spite of the fact that the Member governments were passionately fighting against the implied powers in the court room and showed their dissatisfaction after the doctrine was announced, proves to us that the Community became a common project of many actors. The Member States lost the monopoly for projecting the agenda for the integration. The Court became one of the new designers that took responsibility for the Community. The development of the doctrine of implied powers proves that the ECJ became a federal court, not merely an international organization court. And this fact had great consequences for other supranational organs of the Union.

The acceptance of the doctrine of implied powers was therefore part of the silent constitutional revolution in the European Union. More or less at the same time, the Court invented the direct effect and supremacy of the European law. Member States would never have intended to endow the Treaty with those principles; nonetheless, they were willing to follow them. In consequence, the ECJ got the characteristics typical for a constitutional court and started to be seen as one. It is important to mention here that the Supreme Court of the United States had also acquired its position as a constitutional court. This was not foreseen as such by the Founders. It formed itself the basis for the exercise of judicial review in the United States under Article III of the Constitution in *Marbury v. Madison*.

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<sup>967</sup> See footnote 593

### 2.3.1. Court strategies

The history of the development of the doctrine of implied powers shows that both courts had strong strategies over the years. It would be a big mistake to believe that the courts were acting from case to case without seeing a greater picture, without placing their judgments on the greater agenda of shaping federalism in their polities. Because of clear differences between the polities, those strategies were very diverse.

The European Court of Justice developed its strategy according to the fact that the European Community was a federation *in statu nascendi*. The political model of the union was ambiguous. The Court knew that the final result of the process, or at least a big part of it, depended on the Court itself. But the Court did not work in a vacuum. It worked in a specific atmosphere of enthusiasm during the first years of the integration. Also, the Treaty itself determined the Court's strategy by making it responsible for "ensur[ing] that in the interpretation and application of the Treaty the law is observed".<sup>968</sup> The Court took its role as a guardian of the Treaty very seriously and became a heroic protector of the progression and prosperity of the entire European project. This large-scale objective of the Court was found in the lofty objectives of the Treaty of Rome. For instance, the Court promised to keep the prospect of an "ever closer union among the peoples of Europe".<sup>969</sup> The Court started acting as the "conscience" of the people of Europe.

As explained above, the Court used the opportunity given by the doctrine of implied powers to foster its position of a federal court, but it also used the doctrine of implied powers to federalize the Community. Again, this agenda had been very clear since *ERTA*. When the Court announced the doctrine in the *ERTA* case, it sided with the integrationist Commission and chose the concept of Community powers that allowed it to push the integration forward. The Court placed itself in the middle of the integration, playing with implied powers to reach its goal. The Court was willing to speed up the integration and was using the principle of effectiveness as a central tool. The mechanism of granting implied powers served as both a legal and legal-philosophical basis for implying the effectiveness principle, and thus the Union was federalized by making use of the doctrine as such. In addition, specific areas that were changed were of high federal importance. What is more, the Court was consequent in its pro-European use of implied powers. It used them in many areas and established new competences in both external policy and internal affairs. In other words, it was judicial federalization on two levels - on a level of constitutional principles and on a level of competences. To put it simply: not only the mere fact of implying powers federalized Europe but also specific spheres in which the ECJ chose to imply powers. Probably the clearest examples of this plan were the criminal cases. The Court was very confident that the doctrine of implied powers is a substantial and undisputed fragment of Community law and as such can even be used to take controversial decisions. The Court basically awarded the Community an implied powers competence in the area considered the most neuralgic from the perspective of national sovereignty. If just the subject matter falls within the Community

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<sup>968</sup> Article 19 TEU

<sup>969</sup> Preamble TEU

law, the power to draft criminal provisions falls within Community law as well, given that they are necessary to ensure effectiveness of implementation of the subject matter. The Community for the first time gained the power to harmonize criminal laws of the Member States. In this case, the Court had to face the pillarization of the Treaty law, where it was obvious that the Member States did not want certain issues to fall within the Community pillar at the time of making the Treaty.<sup>970</sup>

The Court's strategy is not visible because of its style and method of work. The Courts make the change as invisible as possible. They hide the change behind the *à la français* judgements.<sup>971</sup> The implied powers are always presented as a logical consequence of other enumerated powers. Necessity is treated as an unambiguous term that does not need any evaluation before being applied. Even though it is a notion from an extra-textual catalog and requires value-based evaluation, the ECJ exercises it as a truly objective notion that does not need any value assessment. The ECJ does not parade the doctrine of implied powers as a mechanism of progressing the federalization. It uses special rhetoric that is supposed to make the audience believe it is a simple syllogistic interpretation of law, required by the Treaties. Just as here in the *Kramer* opinion:

19/20. To establish in a particular case whether the Community has authority to enter into international commitments, regard must be had to the whole scheme of community law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the acts of accession and from measures adopted, within the framework of those provisions, by the Community institutions.

33. (...) In these circumstances it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea.<sup>972</sup>

The implied external competence of the Community was still a very controversial matter at the European level, which fired up debates between politicians and scholars, but the Court did not leave any space for doubts. According to the justices, the competences to enter into international commitments, even if absent in the text, were part of the constitutional law of the Community. It was a logical implication of the reading of other provisions and measures. As in the case of the ERTA judgment, the power to conclude international agreements was based not only on the relevant Treaty provisions but also on secondary law. Only by ensuring the possibility of concluding international agreements could effective conservation be provided. To provide for fish conservation only in territorial waters and without cooperation with non-Member States would not make sense from a biological point of view, so the decision was founded on neutral science, or common sense.<sup>973</sup> The effectiveness principle became the natural basis for stating that the Community also has external powers. In the case of criminal powers, the Court introduced fundamental implied powers without even

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<sup>970</sup> See p 198

<sup>971</sup> Rosenfeld (n 45)

<sup>972</sup> *Kramer* (n 601) para 19, 20, 33

<sup>973</sup> *Kramer* (n 601)

justifying the decision extensively in its opinion. The exclusive right of the Member States was taken away and the ECJ did not bother elaborating the issue of a proper legal basis for the criminal competences of the Union, basing it instead only on the principle of effectiveness regarding the subject matter of the act concerned.

The latter example shows that the consequent strategy of the Courts brings results. Eventually, the Lisbon Treaty practically copied corresponding articles from the Constitutional Treaty, abolishing the third pillar. Through the new Article 83 EU, decision-making on criminal sanctions is brought within the “normal” legislative procedures of the Union. Nevertheless, there was no political counter-reaction of the Member States against this judgment. The sovereign power of the Member States to regulate the criminal matters was breached. A very controversial Court decision was accepted by the Member States. As we saw, the GATT cases also had a legislative epilogue, positive for the Court and its strategy. The Member States decided to amend the Treaty, adding Article 133. Similarly, under the precise rule of the Court in *Opinion 2/94*, it needed a Treaty amendment for the Community (of the time) to accede to the ECHR as an outcome of the absence of an explicit competence. This amendment was forwarded and a specific provision was entered in the Lisbon Treaty. The Lisbon Treaty also codified external implied powers as such. The Member States technically internalized the judicial doctrine. It was an especially important change since it entrenched a competence significant from the perspective of the discussion of the shared sovereignty of the Union. It will therefore be for the European Union itself to decide when it has an external competence, and the only body which has jurisdiction to review such a decision is the European Court of Justice, which again is a European Union institution. The provisions clearly give the European Union a right to establish its own external competence by passing a legislative act that provides for such a competence. The ECJ is definitely a successful player in the game, since it has changed the European Union step by step from a mere regional organization into a polity that is discussed as a new form of federation. The Court chose its fast-track integration over the option favored by the Member States and clearly it was a good decision.

But this quite successful story would not be possible if the Court had not had a strategy as regards other players in that game. Earlier in this chapter we identified positions of other actors, but what tactics did the ECJ take towards them? As we saw, in the discussion on implied powers, the Court was an arbiter between the Member States/the Council and the Commission/the Parliament. But since it was not a simple arbiter, a mere judge in this conflict, in order to offer proper action it had to understand the strength of particular organs at any particular time and the relations between them. Each Court opinion that formed the doctrine of implied powers was a result of the power calculation inside the Union made by the justices. Every shift of power resulted in a shift in the doctrine, in terms of speed of development and depth of implied powers. The Court always had to look ahead and plan the development of the doctrine more globally in the context of the evolution of the Union as a long-term political project. The ECJ announced the doctrine of implied powers at a perfect time. The idea of European integration was still very fresh and attractive but national political actors were impotent. Integration projects were either blocked or failed in collision with political circumstances. As early as 1954, with the *Fédéchar* case, the Court announced that a very narrow version of implied powers was possible. But the first instance of

effectiveness reinforcing implied powers comes from 1971. The Court presented a broad scope of the exclusiveness of implied powers. The Community could now cover externally every field that had been covered internally. Actors in general supported the integration as such, even if they had to officially protect the idea of full sovereignty before their citizens. This was a time of many disagreements and the empty chair policy, and failure of the first plan of a monetary union. The political interest of all the actors and the difficult ways of the Treaty amendments gave the Court confidence to step forward. It was convenient for some governments to lose a case in the ECJ, since they supported deeper integration but did not want to pay the political price for difficult decisions in their home countries. The Court then used the period of Eurosclerosis (over a ten-year-long stagnation period in European integration) to root the doctrine of implied powers. The Court used this period to reaffirm the external implied powers, and even tried to propose some more pro-integrationist readings of the theory (*Opinion 1/76*); however, these could hardly be called revolutionary. It also declared important implied powers in the internal sphere of the Community. When the Member States became stronger and took the initiative in the integration process symbolized by the Single European Act, the Court had to react. It stepped back and did not compete with the Member States in the sphere of Union competences. It did not provoke them, it did not seek confrontation. The Treaty of the Single European Act gave a new impulse to the European integration. It was followed by the Maastricht Treaty, where the Court's role was supposed to be limited according to the will of some of the Member States. Also, the principle of conferred powers was announced. The most symbolic Court decision of that era is *Opinion 1/94*, which was nothing more than a declaration of self-restraint. Later, in *Opinion 2/94* the Court not only concluded that no Treaty provision conferred on the Community rights to conclude international convention in the field of human rights or to enact rules in this field, but also announced that Article 308 could not be used since it would have meant a substantial change in the community system. The Court recommended an amendment by the Member States. The Court identified the time when it had to be more careful with its activism, remembering that its position relies on its apoliticalness.<sup>974</sup> An open battle against this political branch, which at the time was empowered and showed its determination, could harm the Court for good and, in the long-term perspective, eviscerate its integrationist plan. The ECJ recuperated its vigor after the political crisis connected with the collapse of the Constitutional Treaty. The Court took the initiative and developed the doctrine with new energy. Not only did it ignore the codification of the external implied powers and reinterpret the case law in a more sovereignty-encroaching way, but it also

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<sup>974</sup> 'As Martin Shapiro argues, all judges must ultimately rely on the consent of the parties to accept their decisions. To gain consent, judges try to appear as neutral arbiters of the dispute (Shapiro 1981: 17). By appearing neutral, by crafting compromise positions, and by appealing to norms that resonated with the general public (such as the liberal ethos of protecting individual rights), judges build legitimacy for the legal process and gain popular support for the idea that judges have a right to displace laws created by democratic means. Walter Murphy put it this way:

People, it would seem, are more ready to accept unpleasant decisions which appear to be the ineluctable result of rigorously logical deductions from 'the law,' than they are rulings which are frankly a medley of legal principle, personal preferences, and educated guesses as to what is best for society.'

(Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003) 45, citing Walter Murphy, *Elements of Judicial Strategy* (Chicago University Press 1964))

forcefully interfered in one of the most sensitive spheres of Member States' internal competence, namely the criminal law. The whole odyssey of implied powers finished with codification in the Lisbon Treaty.<sup>975</sup>

In the European Union the doctrine of implied powers was developed by the Court. It consisted of forty years of interplay between the Court and other actors, the Member States, the Commission, the Council and the European Parliament. The Court had to be very careful not to undermine its own position, not to provoke the Member States, still *de jure* masters of the Treaty from acting against the doctrine and the direction of development of the Union offered by the Court. It was a direction of slow, step-by-step changes of the Union. It was slow, but faster than the one suggested by the Member States. It consequently gave more implied powers to the Union, broadening the scope of European legislation. By facilitating this process, the Court altered the ownership relations inside the Union. The Union changed its owner with every step taken by the Court. The Court became a *de facto* owner of the Union - a co-owner, to be precise. The masters of the Treaty were not the only masters of the Union anymore. The position of the latter was acquired by the Union organs, with a special role for the Court and the Commission, the motors of the development of implied powers. And the masters of the Treaty eventually codified the doctrine in the highest law of the Union, according to the Court's suggestion.

However, the process in the USA was completely different. In the Supreme Court there was no pro-integrationist agenda of the Court, because there was no need for that. The USA had been created as a federal state at the beginning, when the Constitution was enacted. Of course, the USA in 1787 and now are two very different countries. The United States federation was born after the failure of the Articles of Confederation, with the purpose of stabilizing and defending the original thirteen states. In the new Constitution a new government was created, with a composition and function that were typical for a modern sovereign state. The new polity was seen as essential if the colonies were to become a partner with Europeans. "Join or Die" were the only alternatives. Nevertheless, the central government was not immediately effective. Alexis de Tocqueville observed in 1830s that it was not entirely clear which powers the federal government could exercise vis-à-vis the states.<sup>976</sup> The Court used the first years only for cementing the ideas of a federal state and a federal judiciary. The creation of the doctrine of implied powers was one of the ground-breaking discoveries of the Supreme Court in the formative era of the USA, but the further use and judicial development of implied powers was very different than that in the EU. The USA had been a federation since the ratification of the Constitution; this matter of the form of government was settled very early on, so the only question was about the form of federalism. Implied powers were used to establish the boundary between powers of the states and those of the national government. The Court had a decisive voice as regards this boundary. Nevertheless, the line of conflict between the supporters of weaker and stronger central governments was not only vertical, between the states and the Congress, it was also first and foremost political, between supporters of more and less powerful governments.

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<sup>975</sup> See III.1.11

<sup>976</sup> Alexis de Tocqueville, *Democracy in America* (The Project Gutenberg Ebook) <<http://www.gutenberg.org/files/815/815-h/815-h.htm>> Chap 8, part 1, accessed 19 March 2014

The form of a federal state was the main subject of discussion, first between federalists and anti-federalists, then later between federalists and democratic-republicans, and eventually between republicans and democrats, especially some wings of both parties. One group was always fighting for a stronger central government and the other was protecting the state rights. As we could see earlier in this chapter, and in Chapter I, this conflict had been present since the discussion about the independence and the constitutional frames thereof started.<sup>977</sup> The conflict between Hamilton and Jefferson could be a personification of its first stage. Also, the fact that the implied powers appeared on the American legal horizon was connected with the extraordinary position of Chief Justice Marshall in the formative years of the USA. A loyal Federalist, Marshall saw in the Constitution an instrument of national unity and federal power, and the guarantee of the security of private property. He viewed the Constitution on the one hand as a precise act setting forth specific authority, and on the other hand as a living instrument that should be generously interpreted so as to give the national government the means to act effectively within its limited sphere. This discussion continued through the entire history of the United States. It was part of the electoral programs of candidates for the highest positions in the country. Some of them were trying to shift the form of federalism, however high the cost might have been. The most important shifts in the twentieth century happened in the 1930s and 1970s. President Roosevelt offered a dramatic shift to a strong national government. The federal government had never before been involved in such undertakings because until this time the power to regulate in these policy areas had been seen as belonging exclusively to the states. The national government was forced to cooperate with all levels of government to implement the New Deal policies. A counterrevolution against this broad form of federalism came with Nixon, and especially Reagan. The latter stated that it was not the federal government that founded and established the states, but rather the states that established the national government. Reagan started a reform of federalism by scaling back government intervention at all levels. He was very bound to his theory of federalism that was grounded in the Tenth Amendment, which reserves to the states or to the people all powers not delegated to the national government. Consequently, the idea of federalism - understood as support for the state rights and limited government - is associated with conservatism, and therefore the GOP. The opposite proposal of a strong central government is the territory of the Democrats, US liberals.

The fact that the main political parties strongly disagree about the form of federalism results in the fact that the judicial power often has the final word. Judicial review has enforced substantial limits on federal authority by striking down federal laws deemed to be outside the scope of Congress' enumerated powers under Article I of the US Constitution. Frequently, the judiciary has also constrained state power by invalidating state laws as violations of constitutional rights. As a consequence, the Supreme Court has promoted both state autonomy and strong federal government at different times; on balance, it has strengthened the former at the expense of the latter.

What made the Court work that way and become one of the most powerful actors in the process of shaping US federalism is not only the fact that the United States is a federation

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<sup>977</sup> See III.4.2

according to the Constitution, but also that the specific construction of the federal government is so different than that in Europe. The judiciary is sometimes called the third branch of government. This designation is the result of the federal court system having been outlined in Article III of the Constitution. The three-part structure of federal government results in what is called the separation of powers. The three branches are said to be both independent and interdependent. But in reality, the separate branches are probably more mixed than individual. In the United States the Court is seen as a political actor. As a political actor it co-influences the constitutional law. It is recognized as one of the bodies that are responsible for shaping the constitutional law and balancing federalism. On the other hand, in Europe, the courts in general, and the ECJ in particular, are still very often seen as apolitical, not involved in governmental responsibilities, and representing only a legal voice of wisdom, free from political influences.

Martin Shapiro presented his vision of political jurisprudence back in 1964. He claimed that some judicial decisions are motivated more by politics than by unbiased judgment. He noted that "[t]he core of political jurisprudence is a vision of courts as political agencies and judges as political actors."<sup>978</sup> Shapiro advocates that judges are not machines but are influenced and swayed by the political system and by their own personal beliefs of how the law should be decided.

The constitutional law is the most openly political of all the areas of law. The Supreme Court and its constitutional decisions have consistently played a significant and often highly controversial role in American political history. *Marbury v. Madison*,<sup>979</sup> *Dred Scott*,<sup>980</sup> the sick chicken, steel seizure and school desegregation cases are the very stuff of politics. While the notion of an independent judiciary may have been carried further in the USA than anywhere else, the central place of the Supreme Court on the American political scene has kept us from equating independence with apoliticism or defining independence in terms of an isolated sphere of competence only peripherally related to public affairs.<sup>981</sup>

The judiciary is not only one of the branches of government; it has a very strong political position. The judicial review mechanism makes it a very powerful actor. It is called a third legislator - one which acts more like a law giver than a court. The Supreme Court will hear cases or controversies of the highest political value, actual live disputes that make the nation become agitated over and passionate about the political class. The Supreme Court's use of substantive due process brought charges of "judicial activism", or the means of determining whether laws would meet constitutional muster.

If the Court has so much political power, the issue of who nominates the justices is important. As we know, they are not elected by the people. Those nine persons who carry incredible power over American politics and society do not have strong democratic legitimacy. The President of the United States appoints justices "by and with the advice and consent of the Senate". Of course the presidents nominate candidates who share their political views. Of course their opinion about federalism matters. The presidents nominating

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<sup>978</sup> Martin Shapiro, 'Political Jurisprudence' (1964) 52 Kentucky Law Journal 294

<sup>979</sup> 5 US 137 (1803)

<sup>980</sup> *Dred Scott v Sandford* 60 US 393 (1857)

<sup>981</sup> Shapiro (n 975)



a new justice influence one of three branches of government for a long time, since the Constitution provides that justices "shall hold their offices during good behavior" (unless appointed during a Senate recess). The term "good behavior" is understood such that justices may serve for the remainder of their lives, unless they are impeached and convicted by Congress, resign or retire. Sometimes presidents are lucky and can nominate many justices and change the majority quickly. This happened during the conservative revival of Nixon and Reagan. The former appointed four justices, the latter three, and elevated William Rehnquist to succeed Warren Burger as Chief Justice. All the nominations were supposed to be an antidote to the progressive Warren court. However, in the second part of the twentieth century liberal presidents had less luck with opportunities to appoint new justices. Jimmy Carter is the only President to complete at least one term in office without making a nomination to the Court during his presidency. Bill Clinton's nomination of Ruth Ginsburg was the first by a Democratic president since President Lyndon Johnson's controversial and failed nomination of Abe Fortas to be Chief Justice of the United States Supreme Court in 1968.

William Brennan used to ask his law clerks a question: What is the most important law at the Supreme Court? Freedom of speech? Equal protection? Separation of powers? No, the answer was: the law of five! With five votes, you can do anything in the Court.<sup>982</sup> The majority in the Court was able to change the binding version of federalism. They used the doctrine of implied powers to reach their broader constitutional objectives. New majorities shifted the doctrine from more government-friendly to more state-friendly or vice versa. The cooperative federalism of the 1940s, 1950s and 1960s was possible, thanks to the new progressive majority of justices in the Supreme Court,<sup>983</sup> just as the rising of the New Federalism was possible thanks to the new conservative majority. New federalism was born from the opposition of tendencies to expand Congress's competences, as a reaction to post-New Deal reforms and the Warren court. Nixon won the presidency in part by promising to rein in the liberalism of the Court. But he was unfortunate to nominate Warren E. Burger to succeed Warren. The new Chief Justice was in some respects even more progressive than ever (e.g. *Sullivan*,<sup>984</sup> *Roe v. Wade*<sup>985</sup>). With Reagan in the White House, conservative views found important new sponsors in Washington, DC. The newly appointed justices were supposed be anti-Warren. Rehnquist became Chief Justice because he was known from his passionate critiques of the previous courts. He was the only justice, joined by Byron R. White (who was appointed by Kennedy) to dissent in *Roe v. Wade*. He was seen as anti-Burger and was supposed to guarantee a departure far away from the idea of a strong central government.

Rehnquist was active in the Republican Party and served as a legal advisor under Kitchel to

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<sup>982</sup> Jeffrey Toobin, *The Nine* (Anchor Books 2008) 99

<sup>983</sup> The majority was composed of many excellent liberal justices such as William J. Brennan, Jr., William O. Douglas, Hugo Black, Felix Frankfurter, and John Marshall Harlan II. The first one was Warren's friend and the strategist responsible for pushing the law in more liberal directions. The New Deal majority also expanded powers of the Congress.

<sup>984</sup> *New York Times Co v Sullivan* 376 US 254 (1964)

<sup>985</sup> 410 US 113 (1973)

Goldwater's campaign.<sup>986</sup> This shows to what extent the appointees to the Supreme Court are involved in politics, and how a seat on the bench can be seen as one of the highest political posts. Of course, he was not the only one. Chief Justice Warren was the former governor of California, appointed by Eisenhower. When Bill Clinton got his first opportunity to appoint a judge, after Byron White resigned, he was sure he was not looking for a judge, he was looking for a politician, "someone who will move people, who will persuade the others to join them", just like Warren. His first choice was Mario Cuomo, the governor of New York, then George Mitchell, the Senate majority leader, then Bruce Rabitt, a former governor of Arizona...<sup>987</sup>

This explains why the Supreme Court has no uniform strategy as regards the doctrine of implied powers. It is divided because Congress is divided, and the political spectrum in general. The Court's opinion in this matter is an opinion of the current majority. Five justices are able to make a dramatic move and expand powers of Congress to limits not known ever before, or conversely to limit them tightly, keeping as close as possible to the powers expressly delegated in the Constitution. Presidents appointing new justices influence those changes. New appointments should be designed to support the White House's view on federalism. And they do. A clear political plan and subsequent nominations of justices from one political side of the spectrum influence constitutional revision, and consequently the political system, without the need for constitutional amendments. Republican presidents promoted justices who judicially constrain with regard to the implied powers, while Democrats were aiming to find those who would be positive about broadening the scope of implied powers. Some of the changes come fast, if the administration is lucky, some come slower. The majority in the Supreme Court is usually a reflection of the majority of voters, moved in time. A new host of the White House could never count on a dramatic constitutional rearrangement of the doctrine of implied powers immediately after the elections. Judicial revolutions are always moved in time, depending on the tenure of justice.

Also, the style of the Court asserts the intellectual foundation for every change. The polyphonic and dialogical style gives voice also to the justices who do not belong to a majority at the time. Justices can concur or dissent. Their arguments can form a base for the future shifts. In the case of the doctrine of implied powers this tactic was very obvious. In 1980 Justice O'Connor, a first appointee of Reagan, joined by Chief Justice Rehnquist and Justice Powell, dissented:

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." (...) It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the commerce power. [A]nd the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce.<sup>988</sup>

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<sup>986</sup> Toobin 166

<sup>987</sup> *ibid* chap 5

<sup>988</sup> *Garcia* (n 389) 584

O'Connor's claim was contrary to the prevailing doctrine, i.e. that the congressional means must be "appropriate" and "consist with the letter and spirit of the constitution", not only plainly adapted to legitimate ends. Also in the *SAMTA*<sup>989</sup> case, Justice O'Connor in her dissent made the point that the spirit of the constitution "concerns for state autonomy" and, consequently, the exercise of the Necessary and Proper Clause should be understood to be subject to federalism's constraints. This was a sign that the conservative justices saw the Necessary and Proper Clause as a source of negative tendencies in American federalism and an indicator that a new conservative majority in the Court would go in a different direction.

On the other hand, during the New Federalism era the liberal judges were consequently offering constitutional interpretations that supported broad implied powers. For example, in the groundbreaking *Lopez* opinion in a dissent joined by Justices Stevens, Souter and Ginsburg, Justice Breyer argues that the Gun-Free School Zones Act falls within the Commerce Clause power in the sense that this has been interpreted by the Court for the past half century. The Commerce Clause included the power to regulate local activities as long as those "significantly affect" interstate commerce. Breyer uses the linguistic equilibristics known from the past era, which investigates the fundamental connection between the regulated activity and interstate commerce and has traditionally been the province of Congress. He then argues that in the new information economy, a well-educated citizenry is necessary for competitive development and thriving commerce. Given what he describes as these "obvious" links, the only remaining question for Breyer is whether the effect of school violence on interstate commerce is "substantial". His answer is that the "extent of the gun-related violence problem," the "extent of the resulting negative effect on classroom learning," and the "extent of the consequent negative commercial effects" clearly indicate a substantial threat to commerce.<sup>990</sup> Similarly, in *Printz* Justice John Paul Stevens argued that the majority opinion misinterpreted Congress's power under the Constitution. He suggests that the Commerce Clause of the Constitution, which gives the Federal government the right to regulate handgun sales, can be coupled with the Necessary and Proper Clause, giving Congress the power to pass whatever laws are necessary and proper to carry out its previously enumerated power.<sup>991</sup>

The supreme courts of the polities had the decisive voice regarding the doctrine of implied powers. Their strong position in the system of government made them the final judge in the dispute over the binding version of the doctrine. And, just like any other judge, they had to listen to both parties before deciding. One party was supporting the strong central government; the other one was in favor of strong subunits. This is true for both polities. The composition of the parties in each polity was different. In the case of the European Union, the dividing line between the parties was horizontal: the EU institutions that, according to the Treaties, were responsible for the progress and well-being of the Community - namely the Council and the Parliament - were on one side, while the Member States and the representation of their government, in the form of the Council, were on the other. In the United States the line goes more across the central government and the state constituencies,

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<sup>989</sup> *ibid*

<sup>990</sup> *Lopez* (n 409) Breyer dissenting

<sup>991</sup> *Printz* (n 421) Stevens dissenting

because it is political. Put simply, it was a case of federalist against antifederalists, or Democrats against Republicans. Those differences also influenced the strategies both courts have. The European Court of Justice took the difficult role of being a permanent supporter of the European integration, and visualizing the goal of building a better union. The ECJ has never gotten off track; it has successively promoted integration and federalization through the doctrine of implied power. To do so, it has had to react to the power shift inside the Union, especially the rise of political power of the Member States. The situation of the Supreme Court is different. The strategy regarding the implied powers does not belong to the Supreme Court as an institution, as it belongs to the changing majority. A conservative majority has always had an agenda of limiting the scope of implied powers and, consequently, the scope of authority of the federal government, whereas the liberal majority was pushing forward in the opposite direction. Nevertheless, in both courts a strategy towards the implied powers existed. And the decisions that shaped the doctrine were not announced in a vacuum, but were seen as pieces of a bigger picture drawn by the justices.<sup>992</sup>

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<sup>992</sup> The development of the doctrine of implied powers can be analyzed from the perspective of the development of the federal system as such. Over the decades the internal vertical balance of powers in the USA was a derivative of many political factors. Nevertheless, we can observe a trend of a constant growth of the competences of the federal government. This constant trend was sometimes corrected according to the political will of the governing majority. Whenever the central government was increasing fast, there was a time of holding up and delaying this process. Different types of federalism were coming one after another in a pattern: stronger federal government – weaker federal government – stronger federal. The doctrine of implied powers was changing concurrently. It was representative for the whole system of government. What is interesting is that the same pattern was observed in the European Union. The periods of a faster, or deeper, integration were intermingled with those of a slower integration. And again, the doctrine of implied powers was developed concurrently. The European Union developed itself in the same sinusoidal way as the United States. Even though the EU has not been a complete federation, its model of development was mirroring the federal one of the USA. The interplay of internal forces - on both national and central levels - is reminiscent of the conflict between the supporters and enemies of strong federal government in the USA.

### 3. Federalism in the European Union

As pointed out in Chapter I, federalism represents a concept of government where the sovereignty is divided between central governing authority and sub-units. It neither proves one particular concept of relations between those two levels of government nor does it go as far as describing relations between particular branches of the government - it only claims that the power should be split. Nevertheless, there are some characteristics of a federation that can be used to distinguish this form of organization of a state from looser ones:

- Division of powers between the central government and the regional units. (Either the Constitution states what powers the federal authority has and leaves the remainder to the regional units, or it states what powers the federating units possess and leaves the remainder to the federal authority. By joining the federation, the regional units, or constituent communities, yield a large part of their sovereignty to the federal authority and became only semi-autonomous. Both have independent agents that exercise power over the citizens.)<sup>993</sup>
  - A written Constitution. (A consequence of seeing the federation as a covenant or partnership between both levels of authority. Usually, it is a rigid act that protects the federation from frequent changes.)
  - Supremacy of the Constitution. (It is the highest law of the land. No federal or regional authority can act against the Constitution.)
  - Special Judiciary. (Created to protect the supremacy of the Constitution. It also adjudicates disputes regarding the Constitution, especially those between the central government and the regional units. This special court is vested with powers of declaring any law *ultra vires* if it is at variance with the articles of the supreme law of the land, the Constitution).
- <sup>1.</sup> Double citizenship. (Every citizen of a federation is at the same time a citizen of the federation as such and the regional unit.)<sup>994</sup>

We can try to position both the United States and the European Union in a diagram of possible systems of governments, having in mind diverse forms of compound states, the

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<sup>993</sup> See I.6

<sup>994</sup> See e.g. Ronald Watts, 'Federalism, Federal Political Systems, and Federations', (1998) 1 Annual Review of Political Science 117; Ferran Rejujo, 'Federalism in Plurinational Societies: Rethinking the Ties between Catalonia, Spain, and the European Union', in Dimitros Karmis, Wayne Norman, *Theories of Federalism: A Reader* (Palgrave AmMillan 2005); Michael Burgess, *Comparing Federalism* (Routledge 2006); Kyle Scott, *Federalism. A Normative Theory and its Practical Relevance* (Continuum 2011), Micheal Burgess, G Alan Tarr, *Constitutional Dynamics in Federal Systems. Sub-National Perspectives* (McGill-Queen's University Press 2012).

relations between their apparatus, and the possible composition of sovereignty. Obviously, this diagram eliminates unitary states since there can be no claims whatsoever that the USA or EU represent a unitary form of government. The theoretical diagram should position “international organization” as the loosest form of a compound polity at one extreme and a full federation as the most perfect form of a compound polity at the other extreme.<sup>995</sup> As predicted, this task will not be complicated in the case of the USA, but will provoke many problems in terms of the EU.

The United States of America is an encyclopedic example of a federation. What is more, it is the oldest surviving federation in the World. On our diagram, the USA is the model of a full federation (this model was created through the description of the American system of government). The federation is made up of fifty states. In the USA, sovereignty is shared and every US American is both a citizen of the republic and of the state. The US Constitution never mentions the term “federal system”; it sets out different types of powers that can be classified as the powers of the national government, the powers of the states and prohibited powers. The first group consists of both expressed and implied powers, as well as the special category of inherent powers.<sup>996</sup>

The core idea of American federalism is that two levels of government (national and state) exercise power separately and directly on the people at the same time. Federalism is a central principle of the Constitution, but the balance of power between the state and national governments was not defined exactly at the Constitutional Convention of 1787. Even though the USA has been a federation ever since,<sup>997</sup> the shape of the federation has not stayed unchanged for all these decades. Changes in law made both by political branches and the judicial one were forming particular spheres of American federalism. Amendments to the Constitution after the Civil War, together with the general political climate, entrenched the status in which the states were legally subject to the final dictates of the national government. The years following the Civil War brought the triumph of dual federalism. The doctrine runs short with the Roosevelt administration...<sup>998</sup>

As mentioned earlier, political scientists have described a few forms of federalism that could be observed through the decades of development of American constitutionalism. In the twentieth century, American federalism experienced important changes that empowered

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<sup>995</sup> The unitary state has a single constitution for the entire state, a general system of laws, and a unified system of bodies of state power. The sovereignty is not divided; the full sovereignty belongs to the state. A unitary state is divided into administrative and territorial units, such as departments, regions, and districts, but they are not sovereign whatsoever. Those subnational units are created and abolished and their powers may be broadened and narrowed by the central government.

<sup>996</sup> See II

<sup>997</sup> The only attempt at recreating a confederation was during the Civil War era when southern slavestates created the Confederate States of America. They argued that the US Constitution was a compact allowing the states to leave the union whenever they wish so. The Constitution of the Confederacy acknowledged the sovereignty of each unit but did not express a right to secession.

<sup>998</sup> Sometimes more models of federalism are distinguished in the 20<sup>th</sup> century: President Johnson's creative federalism (1961-1969), President Nixon's new fiscal federalism (1969-1977), President Carter's partnership federalism (1977-1981), President Reagan's new regulatory federalism (1981-1989), President Bush's coercive federalism (1989-1993) or President Clinton's reinventing federalism (1993-2001).

the federal government. The era since 1937 (New Deal) is characterized by cooperative federalism. Its most significant factor is close cooperation between the national and state authorities in resolving common problems. Sometimes the metaphor of a marble cake is used to describe this pattern of interactions within the American federation - it is not a layer cake, but two types of cakes are intermingled and every bite contains both flavors. Furthermore, Terry Stanford coined the term picket-fence federalism to portray even greater expansion of the national power started in the 1960s, where vertical pickets represent the various programs and policies in which each level of government is involved.<sup>999</sup> Members of government at each level cooperate to develop the policy represented by each picket.<sup>1000</sup> There can be no doubt that the USA is a federation in real life, not only on paper.<sup>1001</sup>

In the European case, the situation is not easy enough to allow a simple labeling of the form of the government. Instead, it requires a description of links and connections between the units and the central power, analysis of the different efforts of classifying them, and agreement on one common name.

Some people still keep on calling the European Union an international organization. This was definitely correct at the beginning of the integration. The European Coal and Steel Community, the European Economic Community and EURATOM were international organizations created by some of the states of the Old Continent to deal with concrete aspects of post-war European economy at the intergovernmental level. But this option seems to be really outdated, especially after the Maastricht Treaty. In 1993 the European Union was finally formally established. The European citizenship was created and European citizens gained the right to vote in local elections in the country of their residence. There are seven European governing institutions: the European Parliament, the Council of the European Union, the European Commission, the European Council, the European Central Bank, the Court of Justice of the European Union, and the European Court of Auditors. The first is composed of deputies elected directly by the European citizens; deputies work there in all-European political fractions. Legislation made at the central (the Union) level accounts for the majority of all laws introduced in the Member States. Since 2009, the office of a permanent president of the EU has existed. Common diplomacy (External Action Service) has

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<sup>999</sup> Barbara Bardes, Mack Shelley, Steffen Schmidt, *American Government and Politics Today: The Essentials 2008* (Wadsworth 2008) 93

<sup>1000</sup> See e.g. DS Wright, 'Policy shifts in the politics and administration of intergovernmental relations, 1930s-1990s'. *Annals of the American Academy of Political and Social Science*, 1990

<sup>1001</sup> Has the United States always been a federation? The first constituting act of the independent American state, the Articles of Confederation and Perpetual Union (1777) founded the new country as a confederation. The states (former colonies) retained their sovereignty. *Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled*, Article 2 says. The fear of a powerful central government led to the establishment of a weak union of states. Under the Articles, thirteen states established in 1781 a common government. It was called the Congress of the Confederation and it was a unicameral assembly of the so-called ambassadors, in which each state had one voice. Each year, members of the Congress were supposed to choose a chamber president, but the position of the president of the United States was not foreseen. Competences of the national government were very limited: they included for example foreign policy and coinage, but lacked an independent source of revenue and the necessary executive service to enforce government decisions throughout the land. The situation changed with ratification of the Constitution of 1787.

been recently established. The EU enjoys broader and broader competences. Its exclusive competences include a customs union; establishing the competition rules necessary for the functioning of the internal market; a monetary policy for the Member States whose currency is the euro; part of the common fisheries policy; and the common commercial policy. Furthermore, *the Union has exclusive competence to make directives and conclude international agreements when provided for in a Union legislative act.* In fields of agriculture, environment, consumer protection, transport, energy, and many others, the EU shares its competences with its members. In many of the areas, the member states cannot exercise their competences if the Union decides to do so. What is more, the Union can carry out actions to support, coordinate or supplement Member States' actions in industry, culture, health and education (supporting competences).

So how can we categorize this kind of polity? What can be found in the specialized literature is a referenceto the European Union as a confederation.<sup>1002</sup> The above-mentioned definition of this system made by Forsyth can be recalled.<sup>1003</sup> He claims - let me repeat - that a confederation is an intermediary stage between inter-state relations and normal intrastate relations. When a group of states binds themselves with a union closer than that of an international organization, though the states are still not ready to become one new state, they choose a form of confederation. These states are in a kind of transitional period that can lead to a closer union.<sup>1004</sup> This is somehow an open definition, more general and capacious than that of a classical confederation.<sup>1005</sup> It is quite obvious for me that the European Union has surpassed the definition of confederation, that it is already something more than that. But what? Is the EU already a federation?

A look at sovereignty in Europe is not of any help. Of course European Member States would claim, at least vis-à-vis their electorate, that they are the only possessor of the sovereignty and the EU is only a product of their will. On the other hand, a principle of supremacy of European law is commonly accepted, even if this confirmation was not immediate and did not appear without prior protests of national governments and supreme courts.<sup>1006</sup> The latter in particular were supporting the idea that national constitutions are the only law that can be described as the highest in terms of binding the people and the authorities. Robert Keohane writes:

States that are members of the European Union have broken sharply with the classical tradition of state sovereignty. Sovereignty is pooled, in the sense that, in many areas, states' legal authority over internal and external affairs is transferred to the Community as a whole, authorizing action through procedures not involving state vetoes. Britain and France have not, however, given up their vetoes in the Security Council, so one cannot say that their attachment to pooled sovereignty is perfect. Even though each successive treaty expanding the EU's powers requires unanimous consent, law that is binding on the states of the Union can be made without such unanimous agreement. State sovereignty is also limited by the

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<sup>1002</sup> See DN Chrysochoou, *Theorizing European Integration* (Routledge 2009, 2nd ed)

<sup>1003</sup> Murray Forsyth, *Unions of States: the Theory and Practice of Confederation* (Leicester University Press 1981)

<sup>1004</sup> *ibid*

<sup>1005</sup> See I.6

<sup>1006</sup> See JHH Weiler, *The Constitution of Europe* (Harvard University Press 1999)



supremacy and direct effect of European law.<sup>1007</sup>

The European situation is even more peculiar because the EU does not make grand claims for sovereignty for itself. Then again, on issues fundamental for the development of the EU, like trade, Brussels behaves a lot like a sovereign state defending vigorously European *raison d'état*.

It would be an abuse to call the EU an American-style federation. Even the most pro-integrationist politicians would not agree with this statement. They would be in accord that it should be a federation one day, that this should be a political goal on the agenda of the decision makers. Joschka Fischer claims that we are still on the way of building a federation and it can be finalized only when sovereignty will be clearly divided between the Union and the member states.<sup>1008</sup>

As Spinelli put it, we will know if the European Union is a federation only when the process of integration is finished, not during the process. It was repeated in a way in 1993 by John Pinder, who acknowledged that it will be possible to know if the progress of the EU has included measures leading to the federation only when it is completed. He claims that these kinds of measures can be a key out only when "a federal element is put in place or strengthened, provided that it can be held to pave the way for further steps, or at least not to present an obstacle to them" - this is reminiscent of Spinelli's critiques of Monnet's scenario for the integration, where the first steps were easy to achieve, the further ones not so. Nevertheless, the history of the European project shows that integration works like a self-powering mechanism. It is a gradual process where some achievements provoke new postulates. Pinder suggests that this process can lead to a federation. Pinder's theory is known as neo-federalism.<sup>1009</sup>

This kind of theoretical overview shows us how the European Union links federalisation and integration. The latter is a term from a world of international relations, whereas the former touches matters of organization of state governments. Analyzing federalism using the tools and methodology of international relations open up to us brand new perspectives in theoretical discourse. Mixing both realms allows us to get a fuller picture of the EU. The very special position of the EU makes it an interesting object of studies, especially with the application of both of the classic methods that can be used in the case of a federation like Germany or the USA, those proposed in a debate between realists/neorealists and liberal/neoliberal institutionalists, or others. According to Elazar, the focus on the EU shows that the old paradigm for distinguishing international relations and other forms of political science is today much less up-to-date. The boundaries between international relations and comparative political science become fuzzy. Elazar also claims that a new concept of

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<sup>1007</sup> Robert Keohane, 'Ironies of Sovereignty: the European Union and the United States' (2002) 40 *Journal of Common Market Studies* 748

<sup>1008</sup> Joschka Fischer, 'From Confederation to Federation' speech given at Humbolt University in Berlin, 12 May 2000 < [http://fedtrust.co.uk/uploads/Essays/Essay\\_8.pdf](http://fedtrust.co.uk/uploads/Essays/Essay_8.pdf) > accessed 19 March 2014

<sup>1009</sup> John Pinder, 'European Community and Nation-State: a Case for Neofederalism' (1985) 62 *International Affairs* 41

federalism requires changes in understanding sovereignty and federation itself, because the old vision cannot encapture the new, much more complex, realities. Elazar believes that the new European model not only buries the gap between intrastate and infrastate relations, but it also supplements the theoretical gap between confederations and federations.<sup>1010</sup> European style federalism can challenge the predominant political and economic model of the USA. The European way can become a new model that will be followed by other polities on their path of integration. The US federalism was the first modern one, but this does not mean that it fits all other compound polities whose federalism is still *in statu nascendi*.

Both the United States and the European Union are today what we call federal polities. In the eighteenth century, British colonies decided to drag themselves away from the Crown and to continue their life as free states. From the very beginning, they chose to go through this new chapter together: firstly in a form of confederation, later as a federation. They did not discover an original idea. The founding fathers of the USA were culling firmly from European intellectuals. The idea of covenant present in the Constitution of the USA is copied from the Protestant theories of the organization of society, from ideas on the organization of government from philosophers like Locke and Rousseau. The United States has been a role model of a federation for decades. In the twentieth century, after a catastrophic period of two world wars, the Europeans started to look for peace and wellbeing in the federal formula. The process at the beginning was far from what some people would like to call the United States of Europe. Even if the European Communities were evolving very fast, getting more and more attributes of a federation, today the Union is still not like the USA. Some people say the EU is a confederation, while others would argue that it is almost a federation. The European Union found its own way. The situation of federalizing Europe was completely different than the one known from America. The EU is now a union of twenty-eight Member States, uniting more than half a billion citizens coming from very different historical, political and religious backgrounds, and using twenty-four official languages, speaking even more. European states exercise an innovative method of sharing their sovereignty. Without announcing the thesis of sovereignty of the Union, they practice it *de facto*. It has been based upon the same philosophical foundations as the USA, but the outcome is different. It must be different. It would be naïve to expect that the EU reached exactly the same outcome as the United States. Maybe this is already a twenty-first century version of a federation? Or maybe we should still wait to brand it this way. One thing is obvious to me: both unions constitute a form of federal polity, both were groundbreaking at the time of formation and changed the way of thinking about the organization of governance. This is a good enough reason to try to compare them. What is more, both were created in a complex and long-lasting process that did not end at the moment of ratification of their founding acts. It was only a starting point that set the process in motion, engaging multiple actors.

### ***3.1. Implied powers as a tool to measure federalism in the EU***

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<sup>1010</sup> Daniel Elazar, *Federal-type Solutions and European Integration* (University Press of America 1995) 449

As proven above, answering the question of whether the European Union is a federation or not is not possible. However, it is possible to compare some characteristics of a federation with those of the European Union. More specifically, for the purpose of this research the European Union was not compared with some virtual and abstract federation, but with the oldest and most successful federation in the world, namely the USA. By comparing some characteristics of both polities we could see if they developed some mechanism and/or organs in the same way. If it is true that a particular characteristic is identical or similar in both polities, we can conclude that their political form of organization is more similar. More precisely, if there is an organ and/or mechanism in the United States that forms an important part of the federal system and such organ and/or mechanism is also created in the European Union, we could claim that the latter has an important characteristic of a federation. Of course, one characteristic of a federation will not allow us to conclude that the EU is a federation, but it will move it closer to the classic, or American, federalism in the diagram of possible systems of government. Such a comparison, albeit very limited in scope, makes sense in a situation where the European Union already has many characteristics of a federation but not all of them, in a situation where there are many voices regarding the position of the Union in this diagram. The study of small steps makes much more sense in a situation in which analysis of the full picture has failed so many times already. Answering whether a small sample of European government is typical for a federal system is more meaningful for the general debate than another overall and abstract discussion on the system as whole. Delivering a detailed study of one of the puzzles of the governmental jigsaw will help other scholars to complete the picture. Reflecting on an important feature of federalism in the European context will be beneficial for those who try to look at and examine the EU in a more holistic way.

The real way to contribute in the current discussion on the form of organization of the European Union is to analyze small segments of its constitutional system. Some constitutional principles of the European Union have been examined in the light of their importance for federalization of the EU, for example subsidiarity.

The constitutionalization of the principle of subsidiarity came at a time, when the European Community resolutely continued its path away from decisional intergovernmentalism. With the political safeguard of federalism in the Council loosened, a new constitutional principle was searched for to protect the Member States from the dangers of overcentralisation. As a constitutional principle, subsidiarity was designed to safeguard legislative space for the Member States by restricting European legislation to situations, where “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”.

(...) The Lisbon arrangements may also be called upon the Court to reinforce the judicial control of subsidiarity. (...) A strengthened judicial commitment towards substantive subsidiarity will not mean revolutionary change. European constitutionalism has already made a commitment in that direction. Instead of leaving the federal philosophy to the *political* safeguards of federalism alone, the European legal order has already accepted *substantive* limits on the European legislator in the form of complementary competences.<sup>1011</sup>

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<sup>1011</sup> Robert Schutze, ‘Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism’ (2009) 68

Those small segments were also objects of comparison between the European Union and the United States. For example, Alex Mills wrote:

The transformation in the character of the conflict of laws in the European Union, from national to European law, and from private to public law, is every bit as radical as the U.S. conflict of laws revolution, but with the opposite effect. In the European Union, conflict of laws rules *support* subsidiarity, by ordering the diversity of Member State laws, diminishing the need for harmonized federal private law. In the United States, the conflict of laws is predominantly viewed as *subject to* the centrifugal forces of subsidiarity, a matter where the diversity of state laws is inherently valued. In the face of a perception of excessive legal centralization, federal conflict of laws rules have been increasingly embraced in the European Union as part of the solution, while in the United States they have been rejected as part of the problem. This contrast is all the more striking when put in the context of the similarity in the general treatment of private law in each system, and the common recognition of the role of ideas of subsidiarity in striking a federal balance.

While the world is no doubt "shrinking" under the influence of globalization, making international and interstate disputes (and thus conflict of laws issues) more frequent, when it comes to understanding the complex relationship between subsidiarity, private law and the conflict of laws, it seems the North Atlantic has never looked wider. At the same time, however, it seems that the potential benefits of looking comparatively across it, in both directions, have never been greater.<sup>1012</sup>

Those small segments can be of a less theoretical kind. They can be real working mechanisms, policies or institutions. The Union's external competence or taxation powers can serve as examples. They were analyzed in the context of European federalism, since the power to represent the polity on the international level and the power to tax and distribute are quintessential hallmarks of federalism. But such comparison can be drawn also from a field like agriculture, which is less obvious from the federalism perspective:

The CAP, however [as compared with US federal agricultural program], is the Community's principal common policy. In 1993, 48.8% of the Community's budget was spent on some aspect of the CAP, yet only 2.6% of the Member States' GDP is attributable to agriculture. The Community investment is small in monetary terms only because the Community budget is small. But, if the test of "federalism" is preoccupation with the regulation of a particular market sector, then the EC would appear to win the "federalism" race hands down in the field of agriculture.<sup>1013</sup>

The segments I compared in this paper are the federal competences (the first of the above-mentioned characteristics of a federation). Of course the suggested focus was even narrower, namely the implied powers.

From that perspective, the European Union has federal characteristics. The European Union accepted and developed the doctrine of implied powers which brings it closer to a classical

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Cambridge Law Journal 535-6, citing Article 5(2) EC.

<sup>1012</sup> Alex Mills, 'Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws' (2010) 32 University of Pennsylvania Journal of International Law 370

<sup>1013</sup> Thomas C Fischer, 'Federalism' in the European Community and the United States: a Rose by any other Name' (1993) 17 Fordham International Law Journal 402

federal model. It is crucial to underline that in the EU we can observe the effectiveness reinforcing implied powers and it was concluded that those can be found exclusively in federations, since they justify powers deemed “essential” for carrying out explicitly conferred powers while also permitting achievement of expansive charter “purposes”.

Once again, the existence of these powers does not mean that the European Union is a federation. But detailed study of the development of implied powers in the European Union proves to us clearly that the implied powers themselves, along with the process of their creation and transformation, were very similar to those observed in the United States. Therefore, in this particular segment of study of EU constitutional law - namely that of the competences, or more precisely of implied powers - we can certainly conclude that the EU has typical federal features. This statement can contribute to the general studies of the system of government of the European Union; it can be an additional factor in the general discussion over the federalism in Europe.

## 4. Transforming polities

The US Supreme Court and the European Court of Justice did much more than merely offer their communities a new doctrine. They also did more than change the law: they transformed the polities. This is especially clear in the case of the European Union. When the ECJ started its long process of arranging the doctrine of implied powers, the Community was a totally different form of compound polity than now. The Court started its task at a time when the integration was still in its infancy. It was a political experiment without precedent. The European founding fathers were peering at the United States and its successful history as a true federal country. They saw integration as a way to create a supranational mechanism that could bring the post-war continent peace and prosperity. They had the vision but they did not have enough determination, political will or political power to make their dream come true. They were limited by the Member States and constituencies thereof. As a consequence, the Community existed as some special form of international organization, far from a federal model. But the European Court of Justice did not have the same political limitations as the European statesmen and the supranational motors of integration - mostly the Commission - had. The Court, working in a longer time perspective not limited by electoral terms, was consequent in constructing itself according to its Treaty role of an ultimate guard of the treaties. It accepted also the hard task of being a truly European institution that was co-responsible for the development of the European project, so that it would unite the peoples of Europe and organize the life of European states in a way that would ensure full success inside the Community for fortifying its position as a global actor.

The Court consequently transformed the polity. Its judicial opinions were a purposeful agenda of change. The Court was creating a new federal polity whereby the doctrine of implied powers became one of the key tools in this exercise. The justices knew that the effectiveness reinforcing implied powers is typical for a federal polity. They were consequently implying new powers for extending the area of competences of the Community and entrenching the federal doctrine. After over 40 years of development of the doctrine, the Union is definitely a more federal polity. The doctrine of implied powers became fully rooted in the European legal and political system. Some ECJ opinions had direct transmission to the legal acts. Member States of the EU accepted the creation of a supranational legal mechanism that was not provided in the treaties. Member States, which were initially very skeptical towards the doctrine and the invasion to their exclusive powers, accepted the fact that the Union needs the doctrine to exist and respond properly to the always-changing circumstances for a beneficial development of the Union, and that the latter would eventually translate into improvement in the quality of life for the Union citizens. The most obvious example of that practice was the codification of the doctrine in the Treaty. The Member States accepted this federal feature of the Union and internalized it

in the highest act of the polity.<sup>1014</sup>

This moment can be seen as symbolic for this transition, though not as an end - the Union is still a very dynamic construct. The new federal legal instrument became canonical within the *aquis communitaire*. The Union became more of a common responsibility of both Member States and the central institutions rather than a product of the Member States' will only. This new legal situation produced a new distribution of legal powers. The Union was from then on able to regulate itself in cases where the Treaty fails to provide an expressly proper mechanism. The Union gained a general competence for making the Treaty effective and the central organs got the power to define the level of this effectiveness.

The development of the doctrine of implied powers in the EU is an example of integration through judicial law. It can be easily compared with a similar process that happened with the free movement of goods. This process was described by Miguels Maduro.

European integration not only challenges national constitutions (...) it challenges constitutional law itself. It assumes a constitution without a traditional political community defined and proposed by that constitution (...) European integration also challenges the legal

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<sup>1014</sup> Another example of a court transforming a polity: In *The Transformation of American Law*, Morton Horwitz extensively analyzes the changing policies in the courts. Horwitz attempts to show that, despite the best efforts of generations of legal historians to ignore the truth, law is essentially politics, actively made by lawmakers, including the judiciary. This last body was the main force in increasing the integration of the American economy. It led a sweeping reform of the common law. *For seventy or eighty years after the American Revolution, the major direction of common law policy reflected the overthrow of eighteenth century pre-commercial and anti-developmental common law values. As political and economic power shifted to merchant and entrepreneurial groups in the post revolutionary period, they began to forge an alliance with the legal profession to advance their own interests through a transformation of the legal system.* The transformation was completed around 1850. It gave men of commerce and industry an advantage over less powerful groups, like workers and farmers. The new doctrine created not only a new distribution of economic power, but also of political power. ('[It] reflected the great Shift in economic and political power, from aristocratic government of the eighteenth and early nineteenth centuries to the admission of the middle classes into the corridors of power during the fourth decade of the last century. A variety of different social currents carrying the political and economic demands of the new rulers reached confluence in the demand for law of Weber's logically, formally rational sort.' (WJ Chambliss, RB Seidman, *Law, Order, and Power* (Addison-Wesley 1971) 130-131). Horwitz interweaves Marxist and Weberian themes into a coherent account of the relations between substantive law, modes of judicial discourse and the economy in eighteenth to nineteenth century America. (RB Ferguson, 'The Horwitz Thesis and Common Law Discourse in England' (1983) 3 *Oxford Journal of Legal Studies* 34, 34-41. See also: Wythe Holt, 'Morton Horwitz and Transformation of American Legal History' (1982) 23 *William & Marry Law Review* 663.) Horwitz used the railroad cases to prove his thesis. One of the ways to facilitate transformation of the polity was to accept the corporations as analogous to partnership. The background of this approach lies behind the 1886 Supreme Court's famous, but little-understood, *Santa Clara County* decision. (*Santa Clara County v Southern Pacific Railroad* 118 US 394) *Santa Clara* is significant because the Supreme Court recognized for the first time that the corporation was itself a person. Thus, they could not be punished for expressing their rights in a corporate form because that would deprive of them these constitutionally recognized rights. The corporations gained protection of their property against the state regulation. Thus the Supreme Court altered the relations between social actors and transformed the polity. (Morton Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press 1977)

monopoly of States and the hierarchical organization of the law (in which constitutional law is still conceived of as the 'higher law').<sup>1015</sup>

The jurisprudence of the ECJ on the principle of free movement of goods under Art. 30 of the EC Treaty provides the setting for a discussion about dynamic processes in the European polity in *We the Court: The European Court of Justice and the European Economic Constitution*. Maduro analyzes the interpretation given to Article 30 by the ECJ from the perspective of "integration through law" and the notion of "market integration".<sup>1016</sup> Maduro reads the evolution of the ECJ's rulings from *Dassonville*<sup>1017</sup> to *Cassis de Dijon*<sup>1018</sup> to *Keck*<sup>1019</sup> as creating space for developing an economic constitution<sup>1020</sup> for the European single market along the lines of European tradition.<sup>1021</sup> In the new polity, "European law empowers the individual, thus it promotes the change of social order towards greater emphasis on the inclusion of the individual into society through activation instead of protection".<sup>1022</sup> He concludes that the ECJ has engaged in a special sort of "European majoritarian activism" that intends to supply a deregulatory effect and bring about harmonization of national rules.<sup>1023</sup>

The role of the ECJ also confirms the fact that the judiciary, especially the one at the highest level in a polity, must be seen as one of the active actors in a political process. Those who believe that the judiciary is an apolitical actor that does not have its own preferences and agenda are wrong. This criticism does not hold when confronted with the one of implied powers in the EU. The ECJ was the central actor of this process. The Court played its role as a moderator of the process of integration and federalization of the European law, and consequently the European Union as such. The ECJ took on the traditional role of the political branches of government and used its impotence to act and transform the polity in the direction it believed it was defined in the Treaty. The Court was active but did not practice judicial activism; it realized the objectives of the Union approved by the original masters of the Treaty.

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<sup>1015</sup> Miguel Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1996) 175.

<sup>1016</sup> Maduro's research is focused on the European Community but, on many occasions, it compares it with the processes observed in the United States. He concluded that the situation in Europe differs from that if the USA in its stronger political regulation of the economy, contrasting with America's tradition of a liberal economy.

<sup>1017</sup> Case 8/74 [1974] ECR-837

<sup>1018</sup> Case 120/78 [1976] ECR-649

<sup>1019</sup> Cases 367-268/91 [1993] ECR I-6097

<sup>1020</sup> The European Economic Constitution (EEC) is concerned with the relationship of the Community to its Member States in defining the reach of the four freedoms (free movement of goods, persons, services, and capital) and thereby limiting the inherent state powers of regulation in evaluating its own powers of harmonization, and in establishing citizens' rights.

<sup>1021</sup> Maduro *We the Court* (n 1012) 7-34. The main characteristic of the first decision is that it allowed establishment of a European market economy without excessive (those who would have crossed the border of a simple political guarantee for equal opportunities and free market) political intervention. The second decision showed that the liberties of the market might be interdependent of fundamental requirements of public order and the protection of the consumer. This opens the door for the ECJ, inspired by the Community or Member States, for political regulations defining the market. It was even wider after *Keck*.

<sup>1022</sup> R Münch, 'Constructing a European Society by Jurisdiction' (2008) 14 *European Law Journal* 539

<sup>1023</sup> The author's main criticism, in this respect, is the absence of a wider political debate on the consequences of the Court's judicial activism.



The development of the doctrine of implied powers was of course different in the United States. But *prima facie* we can observe that the ECJ played a similar role to that of the US Supreme Court. Both courts actively determined their own functions. Both secured their own position among other institutions in their polities. Finally, both became symbols of powerful and active institutions, examples for other courts in the world. The courts were engaged in the process of delimiting the text of the founding documents of their polities. Klaus Gulman claims that the Court of Justice has been given tasks of such complexity and importance that its functions might well be compared to those of the US Supreme Court.<sup>1024</sup> He adds:

The great importance the jurisprudence of that tribunal has had, not only for the development of law in a narrow sense but also for the development of society in general, is well known. The same is true with regard to the criticism—sometimes violent—that is leveled against the Supreme Court for its alleged lack of respect for the principle of judicial self-restraint. This criticism is not unlike that leveled against the Court of Justice.<sup>1025</sup>

The doctrine of implied powers proves that those complex tasks required complex responses. Effective functioning of the European Union demanded legal mechanisms known from the United States. The doctrine of implied powers was a crucial one of those mechanisms. Marshall had already argued that the Framers afforded Congress the ability to select the most appropriate means for accomplishing particular objectives. This interpretation has been present in American constitutional law since the very beginning and has impacted the functioning of the United States. Its success as the first modern federation was connected strongly with the rich and sagacious legacy of the Marshall court. The doctrine of implied powers was a part of it and the ECJ must have known that. The European justices must have been aware of the importance of the doctrine and decided to choose the same solution for their own problems with a newly established polity. The ECJ became an interpreter of a developing legal system and therefore played a similar role to the one of the US Supreme Court in the formative years of the United States. The problems inherent in the American federal system and resolved by the Supreme Court provide “lessons for those of us who have to interpret and apply the treaties which founded the European Communities”.<sup>1026</sup>

In both polities, the implied powers were placed at the center of the debate over federalism - avowedly in the United States, and without too much noise in Europe. Having accepted the fact, as the USA concluded in the Tenth Amendment, that any expansion of central authority demises the reserved powers of regional units, implied powers tip the balance within the polity. Both courts used implied powers to mark new lines between central and regional units.

The implied powers are a mighty political tool. Back in 1959, Noel Dowling described the trend towards treating the distribution of powers between the nation and the states as an

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<sup>1024</sup> Claus Gulmann, ‘Methods of Interpretation of the European Court of Justice’ 24 *Scandinavian Studies in Law* (1980) 19

<sup>1025</sup> *ibid*

<sup>1026</sup> Mackenzie Stuart, ‘Problems of the EC: Transatlantic Parallels’ (1987) 36 *The International and Comparative Law Quarterly* 183

essentially political question.<sup>1027</sup> Because the process happens in the USA overtly, the place of this line that vertically divides the authority is a subject of vivid discussion, both inside and outside the courts. Because every judicial decision regarding implied powers not only has big consequences for the functioning of the government but sometimes brings important social changes as well, since the democratic majorities sometimes vary between the states and that at the national level. Also, politicians, scholars, and activists take positions on the reading of the Necessary and Proper Clause. Their stand is often influenced by current politics and hot topics of the times. They use their preferred version of the doctrine to justify their opinion on particular legislations or lack thereof. The complete picture of the debate consists of judicial opinions and non-judicial writings. The fact that extensive materials have existed at the highest level since the beginning of American statehood, on the basis of merits supporting both sides of the conflict, facilitates this discourse. *McCulloch* established some rules for further discussion that are binding even today. The current debate on federalism in America can be reduced to the arguments presented in that landmark case from the nineteenth century. The commentators still use that opinion as a starting point of their elucidations. In the European Union the situation is diametrically different. The only discussion on the doctrine of implied powers happens in the ECJ. There is no constant discussion on the scope of the powers; this topic does not nourish the imagination of politicians or commentators. The ECJ is not confronted with divided public opinion and numerous writings that deliver new arguments and would help the ECJ to form its opinions. There is no public question to the ECJ judges about their opinion about implied powers before their appointment; the issue does not appear in electoral campaigns. The judicial opinions, influenced only by the parties in particular cases, are the only important writings on the implied powers in the European context. The ECJ reinterprets its own words and determines concepts, notions, rules and ideas that make up the doctrine. Thus, the ECJ has more responsibility but also more power for changing any aspect of the doctrine.

Since the beginning, the biggest difference between those two polities was the question of sovereignty. As Goldstein noted, the early history of four “multi-state, federated systems” surveys the extent of state-level resistance to central authority and analyzes its causes. She notes that the Member States of the EU accepted the creation of a supranational legal order that was not provided in the treaties. Sporadic defiance proved that the ECJ successfully “transformed the EC into a nascent federal polity”.<sup>1028</sup> In contrast, in the United States the supreme power of the federal law was guaranteed by the Constitution. The ECJ knew that effective integration is not possible without offering a new form of sovereignty in Europe. Keeping the philosophy of full Member States' sovereignty would have been an obstacle in the Court's path of creating a fully functional polity. Implied powers offered a new political situation of co-responsibility for the Union. With the fully developed doctrine of implied powers, where the Commission is able to grant itself new competences, the sovereignty will also be redefined. It is symbolic that it was in *McCulloch* that Chief Justice Marshall declared the federal version of sovereignty. He argued that the United States sovereignty is a

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<sup>1027</sup> Noel T Dowling, *Cases on Constitutional Law* (Foundation Press 1959, 6th ed) preface at XIV

<sup>1028</sup> LF Goldstein, *Constituting Federal Sovereignty: the European Union in Comparative Context* (John Hopkins University Press, 2001), 16-17

derivative of the people's will and not the states' sovereignty. This statement could not have been made when *ERTA* was published. The earthquake that the *ERTA* opinion provoked in the European Union was massive and hard to compare with many others. The aftershocks can still be observed. They are a foundation of the European Union as we know it today and form an undisputed base for the future development of the Union. If one day the European Union sovereignty is declared and derived from the European people's will, the roots of that decision will date back to *ERTA*.

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